Protecting the confidentiality of communications in medical litigation: Is the common law enough?

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1. Introduction

The law has long recognised the sensitivity of communications made within the context of professional relationships. It has recognised that persons communicate information to professionals for limited purposes in order to benefit more fully from services offered by them. Accordingly, an equitable doctrine has evolved to protect confidences arising from such relationships. Equity has restrained breaches of confidence in circumstances where a confidant knew or ought to have known that information was communicated to him or her on a confidential basis. At the forefront of the relationships protected is that of the health professional and his or her patient.

However, it was an invariable consequence of the paramountcy of the administration of justice that confidentiality would be displaced at common law where the confidant was in possession of information relevant to the resolution of a legal dispute. In such circumstances, he or she would be obliged to make available to parties to litigation any relevant documents through the discovery process or otherwise reveal the information during the course of oral evidence. Needless to say, where the confider was a party to the litigation, he or she would have no immunity from disclosure. Little was done in order to limit the extent or mode of disclosure of information which was deemed to be relevant to an issue.

In this context, the Victorian legislature enacted a number of statutory provisions which immunised from disclosure (even to a court) confidences to health professionals. These provisions reflected a desire to reverse the court's insistence that all relevant information be available in aid of dispute resolution, in so far as it impinged upon medical relationships. However, the usefulness of these provisions must now be questioned, for the common law has evolved to such an extent that the court has become more willing to use the mechanisms available to it for limiting the extent and modes

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of information disclosure by parties to confidential communications. These mechanisms give the court great flexibility to tailor orders for discovery so as to satisfy the requirements of justice, while preserving the equitable obligation of confidence. In this respect, the legislation has been superseded.

This paper traces the developments which have led to this situation. We begin with an examination of the principles of trial, which include the requirement that proceedings be in open court and that all relevant evidence be made available. The means by which information necessary for the preparation of a trial can be obtained are discussed. We then go on to deal with confidentiality concerns arising in respect of personal information communicated to health professionals and the mechanisms by which the court is able to limit the extent and mode of information disclosure. The law relating to confidentiality (in its various forms) is discussed. Finally, an example is given of how the court has become more adept at protecting confidentiality, especially since the advent of AIDS litigation.

2. Principles of trial

It is first proposed that we examine the general principles by which trials are conducted by the courts, so as to gain an appreciation of the once extraordinary nature of procedures which may be employed to keep from disclosure information relevant to the resolution of a contested issue.

The rule that trials, whether before a judge and jury or a judge sitting alone, are to be conducted in public was robustly expounded by the House of Lords in *Scott v. Scott*,[1] where Earl Loreburn stated that the 'inveterate rule is that justice shall be administered in open Court'.[2] This rule has the consequence that the courts will be open to all those who wish to attend and that the evidence will be tendered and witnesses examined in public view.[3] The rationale for such a rule has been said to lie in the democratic nature of our society.[4] Although made by Parliament, laws are administered by the courts and it is fundamental that their administration be open to

1 [1913] AC 417.

2 Id at 445. See also *McPherson v. McPherson* [1936] AC 177; *Russell v. Russell* (1976) 134 CLR 495 at 520; *Raybos Australia Pty Ltd v. Jones* (1985) 2 NSWLR 47 at 52-58; and *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v. Local Court of NSW* (1991) 26 NSWLR 131 at 140.

3 *Attorney-General (UK) v. Leveller Magazine Ltd* [1979] AC 440 at 449-50.

4 Fisher, L., 'Through the camera lens: when justice is not seen to be done' (1995) 69 *Australian Law Journal* 477 at 478.

public scrutiny in order to ensure that they are fairly interpreted and applied.[5] Thus, in *Russell v. Russell*[6] Gibbs J stated that the 'fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials'.[7]

It is axiomatic that, in order for justice to be done, both the courts and parties to litigation should have before them all relevant evidence. Parties will not, therefore, be permitted to deliberately withhold evidence. 'Every exception to this rule must run the risk that because of the withholding of relevant facts, justice between the parties may not be achieved'.[8] In order to achieve more perfect justice, courts have, in modern times, sought to ensure that all information relevant to matters in contention is available to opposing parties quickly after the close of pleadings.[9] Sir John Donaldson MR commented upon this change in judicial attitude in *Naylor v. Preston Area Health Authority*.[10] His Lordship said that:

> [W]e have moved far and fast from a procedure whereby tactical considerations which did not have any relation to the achievement of justice were allowed to carry weight... [N]owadays the general rule is that, whilst a party is entitled to privacy in seeking out the "cards" for his hand, once he has put his hand together, litigation is to be conducted with all cards face up on the table. Furthermore, most of the cards have to be put down well before hearing.[11]

The reasons for pursuing such a policy are obvious. With all necessary information before them, the parties will be able to better appreciate the issues in dispute and to assess the relative strengths and weaknesses of their cases. This may motivate them to consider the alternatives to litigation at an early stage and, perhaps, to come to a mutually agreeable settlement. Such is in accord with the

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5 *Attorney-General (UK) v. Leveller Magazine Ltd* [1979] AC 440 at 450, per Lord Diplock.

6 (1976) 134 CLR 495.

7 Id at 520.

8 *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 223, per Lord Hailsham. See also at 242, where Lord Edmund-Davies says that 'it is in the public interest that the search for truth should, in general, be unfettered'.

9 See Ligertwood, A. 1993, *Australian Evidence*, 2nd edn, Butterworths, Sydney, 39. Furthermore, there are now procedures by which limited forms of discovery are available before proceedings for substantive relief have even commenced! These procedures will be discussed below.

10 [1987] 1 WLR 958.

11 Id at 967.

public interest, which 'demands that justice be provided as swiftly and economically as possible'.[12]

A concomitant of the requirement that all the cards be on the table is that the courts have refused to permit the parties to withhold information from each other merely on the basis that such information was communicated in confidence or is of a personal or embarrassing nature. Good reason is required for non-disclosure. The general rule was explained by Dixon J in *McGuiness v. Attorney-General of Victoria*,[13] where he said that:

> [T]he law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering truth in the interests of justice on the one hand and, on the other, the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be special privilege, ... an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.[14]

Any attempt to unlawfully withhold evidence from the court or from other parties to litigation may constitute a contempt of court.[15]

3. Mechanisms for accessing information

With the above principles in mind, we turn to consider briefly the mechanisms by which parties to litigation are able to gain access to information which may assist in the preparation of their cases. These mechanisms are principally discovery and interrogatories.[16] The rules concerning them may differ from state to state but the discussion is merely intended to outline to the reader some of the possibilities. Therefore, the discussion must be limited to the Victorian rules.

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12 Ibid. See also at 973, per Glidewell LJ and 975-6, per Sir Frederick Lawton.

13 (1940) 63 CLR 73.

14 Id at 102-3. Approved by the House of Lords in *British Steel v. Granada Television* [1981] AC 1096. See also *Science Research Council v. Nassé* [1980] AC 1028 at 1067, per Lord Wilberforce and 1072, per Lord Salmon.

15 As to the nature of which, see *Re Dunn; re Aspinall* [1906] VLR 493.

16 This paper is essentially concerned with pre-trial procedure. Issues similar to those which will be discussed arise at the trial stage in regard to the production of documents under subpoena and through the examination of witnesses.

Discovery

Discovery is a process whereby each of the parties to litigation is obliged to draw up a list of documents which are relevant to the proceedings and which are in their possession, custody or power,[17] for service upon the other. Following the exchange of lists of documents, the parties must make available for inspection all those documents which are listed with the exception of those for which a privilege is claimed or other objection taken. The process of giving discovery is subject to the control of the court, which will rule on objections and enforce duties to disclose and allow for inspection.[18]

In Victoria, the general provisions regarding discovery and inspection of documents are found in Order 29 of the *Supreme Court Rules*.[19] Rule 29.02(1) reads as follows:

> Where the pleadings between the parties are closed, any of those parties may, by notice for discovery served on any other of those parties, require the party served to make discovery of all documents which are or have been in his possession relating to any questions raised by the pleadings.

In the vast majority of cases, the exchange of documents will take place without the involvement of the court, which will have before it only those documents which are tendered as evidence.[20]

There is an obvious potential for abuse in the discovery process and this is well-recognised by the courts. Apart from being susceptible to the creation of delays and to otherwise frustrating an opposing party, the process may be abused if documents are utilised for purposes extraneous to the resolution of the dispute.[21] A number of restraints may be employed to reduce these risks. First, it is an implied rule that documents obtained through discovery are only to be used in furtherance of, and for the purposes of, the action in which they are disclosed.[22] Secondly, the court has available to it

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17 Hereafter, the terms 'possession', 'custody' and 'power' will be referred to more compendiously as 'possession'.

18 See Simpson, S., Bailey, D. and Evans, E. 1990, *Discovery and Interrogatories*, 2nd edn, Butterworths, Sydney, 1-4 & 10-12.

19 *Rules of the Supreme Court of the State of Victoria 1986* (Vic.). All rules and orders hereinafter referred to shall be of these rules, unless otherwise specified.

20 See, in the American context, Marcus, R., 'The Discovery Confidentiality Controversy' [1991] 3 *University of Illinois Law Review* 457 at 468; and Miller, A., 'Confidentiality, Protective Orders and Public Access to the Courts' (1991) 105 *Harvard Law Review* 428 at 440.

21 See Miller, id at 438.

22 *Riddick v. Thames Board Mills Ltd* [1977] QB 881; *Harman v. Secretary of State for the Home Department* [1983] 1 AC 280. See also Simpson *et al*, fn. 18 at 79-80. The implied undertaking is owed to the court. The court will not

an inherent discretion allowing it to make orders limiting the persons to whom documents will be disclosed and the extent of the information to be disclosed (these will be considered below.) Finally, by r. 29.05, the court may make an order limiting the scope of discovery or dispensing with it altogether. The latter variant of the order is only likely to be made in exceptional cases.

Novel discovery procedures

So much for the traditional form of discovery. New procedures have been introduced whereby discovery can be had prior to the commencement of a proceeding for substantive relief. For our purposes, the most relevant of these procedures are those which allow for discovery from a prospective defendant (r. 32.05) or from a non-party (r. 32.07).

Rule 32.05 gives the court a discretion to make orders for discovery in circumstances where (a) it is reasonably believed that the applicant has or may have a right to obtain relief from an ascertained person, (b) although he or she has not been able to procure sufficient information to decide definitely whether or not to commence action (despite reasonable inquiry), and (c) it is likely that the prospective defendant has in his or her possession (or has previously possessed) documents relating to the issue. Rule 32.07 gives to the court a discretion to order discovery from a non-party who is likely to possess (or to have previously possessed) documents relating to any question in the proceeding. Non-party discovery is only likely to be given in circumstances where it is probable that access to the documents in question will aid the applicant's case and yet the information contained therein is unavailable from any other source.[23]

Together, these rules broaden considerably the circumstances in which discovery can be made and also the purposes for which it can be made.[24] So much was explained by Murphy J in *Clarkson v. Director of Public Prosecutions*:[25]

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release or modify it except in special circumstances and where no injustice will result to the party giving discovery: *Crest Homes PLC v. Marks* [1987] AC 829; *Holpitt Pty Ltd v. Varimus Pty Ltd* (1991) 103 ALR 684, per Burchett J; *Sofilas v. Cable Sands (WA) Pty Ltd* (1993) 9 WAR 196, per Murray J. For a review of this area of law, see Bailey, D., 'Implied Undertakings' (1994) 68 *Law Institute Journal* 692.

23 *Keviris Pty Ltd v. Capital Building Society*, (unrept., SC (Vic.), Kaye J, 9/12/88). Affirmed by Beach J in *ZZZ v. JX*, (unrept., SC (Vic.), 25/11/93).

24 See Williams, N. 1995, *Civil Procedure—Victoria* (Butterworths looseleaf service) at 3915-3940.

25 [1990] VR 745.

> [I]t seems to me that the new Rules require the court to put to one side in certain circumstances preconceived notions that fishing expeditions are not permissible. If the application is bona fide and the circumstances in the rules are shown to exist, then it is within the court's discretionary power to order discovery of a limited nature.[26]

The new rules may be of considerable concern to persons who are not themselves parties to medical litigation and about whom personal information is required in order to assist a plaintiff in establishing a cause of action. For example, information concerning the HIV status of blood donors and procedures used to screen them may be required in order to prove causation in a negligence action wherein it is alleged that the plaintiff contracted AIDS after receiving a transfusion of improperly tested blood. The plaintiff may wish to obtain documents directly from such persons under the third party discovery procedure.[27]

Medical reports

Special provision exists for the discovery of hospital and medical reports in proceedings in which a plaintiff has claimed damages for bodily injury.[28] Bodily injury, in this context, is defined as including any impairment of mental condition or any disease.[29] The procedure is available in addition to the other forms of discovery discussed above.

Under r.33.04(1), the defendant may request in writing that the plaintiff submit to a medical examination by an expert or experts. Such an examination may go beyond mere physical inspection and include subjecting the plaintiff to testing designed to assist in diagnosis.[30] Should the plaintiff unreasonably refuse to comply with the defendant's request, the court may stay the proceedings.[31] Once the examination has been completed, the defendant is obliged to obtain, as soon as practicable, a copy of the medical report compiled by the examiner.[32] A copy of this report must be served on each other party to the proceeding.[33] The defendant is also

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26 Id at 758.
27 See further discussion of this type of case below.
28 See generally, O.33.
29 Rule 1.13(1).
30 See *Stace v. Commonwealth of Australia* (1988) 49 SASR 492 and Williams, fn. 23 at 3966-7.
31 Rule 33.04(2).
32 Rule 33.06.
33 Rule 33.07(3).

obliged to serve copies of any other medical report in his or her possession.[34]

The rules also provide that a plaintiff must serve on each other party to the proceedings a copy of any medical reports which he or she intends to rely upon as evidence at trial.[35] Similarly, he or she must serve on the other parties any hospital reports which will be relied upon or the maker of which will be called on to give evidence at trial, where such a report is in his or her possession.[36] It is thus evident that a plaintiff bringing an action for damages for bodily injury will be required to compromise any desire to keep confidential information concerning himself or herself, unless reasonable cause can be shown for retaining confidentiality. The plaintiff will impliedly waive any right arising under the statutory doctor-patient privilege.[37]

Interrogation

Interrogation is a form of discovery which consists in written questions being served by one party to litigation upon the others, and answers being given by way of affidavit.[38] This procedure has advantages similar to those which attach to discovery and inspection of documents:

> Interrogatories assist in determining the extent of the dispute by narrowing the necessary proof of matters raised in the pleadings and by doing this at an early stage. They may also indicate the likely difficulties that parties will encounter in proving their cases.[39]

This form of discovery may assist a party having the onus of proof, in particular, to elicit information which he or she requires in order to establish a *prima facie* case for relief. For example, the plaintiff may have been involved in an accident of which he or she has no memory and regarding which no independent witnesses exist. Interrogatories will assume a critical importance in such a case.[40]

A party may be questioned about anything which is material to the advancement of the case of the interrogating party or destructive

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34 Ibid.
35 Rule 33.07(1).
36 Rule 33.07(2).
37 Sub-section 28(2) of the *Evidence Act 1958* (Vic.), discussed below. See McNicol, S. 1992, *Law of Privilege,* Law Book Co., Sydney, 351.
38 See O. 30.
39 Simpson, S. *et al,* fn. 18 at 4. See also judicial exposition in *Adams v. Dickeson* [1974] VR 77.
40 Id at 4-5.

of the case of the party interrogated.[41] Objections may be taken to questions on the ground of privilege or on some other ground.[42] As is the case with discovery as it relates to documents, there is the potential that the process of interrogation may be abused. An implied restraint upon the process exists in so far as it is technically a contempt of court for the interrogating party to disclose answers given by affidavit to persons unconnected with the proceeding.[43]

4. Confidentiality concerns in medical litigation

Having outlined the principal mechanisms available to the parties for obtaining information necessary for the preparation of their cases, it is apposite to consider concerns arising in respect of information disclosure in the medical litigation context.

Persons who have received medical advice or treatment naturally expect that information communicated to health professionals on the understanding that it is to remain confidential will be kept secret. The question arises whether the law should protect such information from disclosures required in the course of medical litigation. Before examining the mechanisms available to protect information, it is important to examine the reasons advocated for confidentiality. In the ensuing discussion, I will refer to the processes of discovery and inspection of documents and interrogation by the compendious term 'discovery'.

The limited purpose of communication

A compelling reason for respecting the confidentiality of communications springs from the fact that persons generally impart information about themselves to health professionals for a limited purpose. It is argued that the law should not place any obstacles in the way of free and frank discussion where it is of assistance in diagnosis and treatment[44] because there is a significant public interest in the promotion of personal health.[45] As we shall see below, the law has found the notion of a limited purpose a weighty consideration.

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41 *Plymouth Mutual Co-Operative and Industrial Society Ltd v. Traders' Publishing Association Ltd* [1906] 1 KB 403 at 416-17.

42 Rule 30.06(2).

43 *Ainsworth v. Hanrahan* (1991) 25 NSWLR 155.

44 See Laster, D., 'Breaches of Confidentiality and of Privacy by Misuse of Personal Information' (1989) 7 *Otago Law Review* 31 at 35.

45 See McNicol, fn. 37 at 341.

Fear of misuse

Persons prefer not to disclose information about themselves except where necessary, for fear that it may be misused. Information communicated to health professionals may reveal bodily or psychological infirmities which others need not know about and which knowledge could only be used to the detriment of the confider.[46] For example, the revelation that a person is suffering from AIDS or from some other communicable disease may lead to undeserved aspersions upon the character of the sufferer:

> Often this has to do with methods of contraction of that disease. In the case of AIDS, methods of contraction may include homosexual practices and intravenous drug use... .[47]

Uncontrolled dissemination

Related to the previously-mentioned anxiety is the concern that the disclosure of information, communicated in the course of medical advice or treatment, for the purposes of litigation will lead to an uncontrolled dissemination of that information in electronic or hard-copy form. Such dissemination could occur almost unnoticed given 'today's unparalleled capacity to record, retrieve and transfer data'.[48] Alternatively, dissemination could be quite a public affair, should the media decide that the case is of sufficient interest to report. Once again, such publicity may be unnecessary or unfair. Miller has warned that the law must not foster illegitimate voyeurism 'such as that aroused when a lawsuit involves a celebrity or titillating gossip'.[49]

5. The court discretion

We now turn to a discussion of the mechanisms which are available to the court should it agree that confidential information is worthy of protection. The court has an inherent discretion in regulating matters of procedure, exercisable to ensure the fair and economical disposition of trials. This discretion allows for the occasional waiver of, or alteration to, the rules of discovery in order to protect interests which may be compromised by unrestricted access to information. One commentator has observed that:

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46 See Lee, R., 'Disclosure of Medical Records: A Confidence Trick?' in Clarke, L. (ed.), 1990, *Confidentiality and the Law*, Lloyd's of London Press, London, 23.

47 Id at 40. See also *X v. Y* [1988] 2 All ER 648 at 653.

48 Miller, fn. 20 at 466.

49 Id at 475.

> Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods... [I]t is difficult to set limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for those needs are coincident with the needs of the court to fulfil judicial functions in the administration of justice.[50]

One limit upon the discretion of the court may be that it cannot, except when allowed by a specific common law or statutory rule, refuse to admit evidence which is both relevant and admissible.[51] There is some authority against this proposition,[52] but it is difficult to see how justice can be properly administered without this proviso. In *McAuliffe v. McAuliffe*[53] Blackburn J refused to disallow relevant and admissible evidence, objection to the tender of which was taken by a doctor on the basis that he had a moral obligation not to disclose what had been communicated to him or what he had decided or recorded about his patient. The court is able to protect the confidentiality of information in many ways which do not require resort to the complete exclusion of relevant evidence.[54]

Common law apart, the *Supreme Court Act 1986* (Vic.) also confers specific power upon the court to make orders directing that a proceeding (or any part of it) be heard in camera, or that only specified persons may be present in court at particular stages of the proceeding, or prohibiting the publication of any information derived from a proceeding where necessary for the administration of justice.[55]

The exercise of the court's discretion is open to appellate review. In *Naylor v. Preston Area Health Authority*[56] some

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50 Jacob, I., 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23 at 32-33.

51 *Re Buchanan* (1964) 65 SR (NSW) 9; *McAuliffe v. McAuliffe* (1973) 4 ACTR 9. See also Gillies, P. 1991, *Law of Evidence in Australia*, 2nd edn, Legal Books, Sydney, 22 and Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications* (May 1993) at 117-8.

52 See *Attorney General (UK) v. Mullholand* [1963] 2 QB 477, 489-90 at 492; *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 227. See also, Byrne, D. and Heydon, J. 1991, *Cross on Evidence*, 4th Aust edn, ¶ 25340 at 718.

53 (1973) 4 ACTR 9 at 10-11.

54 See below.

55 *Supreme Court Act 1986* (Vic.), ss. 18 & 19.

56 [1987] 1 WLR 958.

guidance as to the exercise of the discretion was given by Sir John Donaldson MR:

> The exercise of the discretion has to be approached on the basis of the philosophy that the basic objective is always the achievement of true justice, which takes account of the time, money and what can only be described as the anguish of uncertainty, as well as of a just outcome.[57]

There are several specific orders which the court may make in the exercise of its discretion. These orders may be utilised so as to limit the persons to whom, or the extent to which, confidential information may be disclosed in the course of medical litigation.

Confidentiality directions

One mechanism which the court commonly employs in protecting the confidentiality of information is the direction. The court uses directions to reinforce the implied duty of litigants to refrain from using information obtained in the course of a proceeding for purposes extraneous to the resolution of the matter in dispute.[58] They may be framed in a number of ways. The court may, for example, restrict the number of persons who are allowed access to discovered documents to those who are prepared to give an undertaking as to confidentiality.[59] Typically, access will be restricted to the parties, their legal representatives and experts who will be called to give evidence, although it is not unusual for an opposing party to be excluded.[60] Alternatively, the court may impose restrictions upon the mode of disclosure, for example, by limiting the distribution of copies of documents.[61] Orders such as these may be important in ensuring that justice is done between the parties, for litigants may otherwise be unwilling to resort to the courts for fear that information will be misused.[62]

Editing documents

It is also a common practice for the court to allow a party obliged to give discovery and inspection of documents to edit them in a

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57 Id at 968.

58 *Riddick v. Thames Board Mills* [1977] QB 881. See also Gurry, F. 1984, *Breach of Confidence*, Clarendon Press, New York, 460.

59 E.g. *Kimberley Mineral Holdings Ltd (in liq) v. McEwan* [1980] 1 NSWLR 210; *Warman International Ltd v. Envirotech Australia* (1986) 67 ALR 253.

60 Gurry, fn. 58 at 461-2.

61 *Church of Scientology v. Department of Health and Social Security* [1979] 1 WLR 723 and *Centri-Spray Corporation v. Cera International Ltd* [1979] FSR 175. See McNicol, fn. 37 at 41-3.

62 Miller, fn. 20 at 446.

fashion which conceals information which is not necessary to the disposition of the case.[63] Thus, in *GE Capital Corporate Finance Group Ltd v. Bankers Trust Co and Ors*[64] Dillon LJ remarked upon the 100 year history of the English High Court allowing the practice of covering over irrelevant parts of documents to be disclosed by way of discovery.[65] In respect of confidential communications, the court will not automatically sanction such editing.[66] Where allowed, though, this procedure has the advantage of making available an optimal amount of information without the revelation of confidential information.

Hearings in camera

In rare cases, the court may depart from the principle that hearings are to be conducted in public and close the court for the duration of the hearing or for some part of it.[67] Such will be the case when 'the paramount object of securing that justice is done would really be doubtful of attainment ...'[68] should the hearing be in open court. Malcolm CJ has commented that:

> It is only in wholly exceptional circumstances where the presence of the public or public knowledge of the proceedings is likely to defeat the paramount object of the court, which is to do justice according to law, that the courts are justified in proceeding in camera.[69]

The court will not accede to a request for an *in camera* hearing merely because a party or a witness has information which is of a sensitive or embarrassing nature.[70] However, an exception may be

63 *Sankey v. Whitlam* (1978) 142 CLR 1 at 109. See also Miller, id at 495.

64 [1995] 1 WLR 172. For a summary of the judgment, see Passmore, C. and Goodliffe, J., 'Partly privileged documents' (1994) 144 *New Law Journal* 1240. In respect of further case law, see Passmore, C. and Goodliffe, J., 'Discovery: redaction in action' (1995) 145 *New Law Journal* 313.

65 Id at 177.

66 See discussion below.

67 *Supreme Court Act 1986* (Vic.), s. 18. See *Re a Proposed Proceeding between 'TK' as plaintiff v. Australian Red Cross Society as defendants* (unrept., SC (Vic.), Young CJ, 4/8/89).

68 *Scott v. Scott* [1913] AC 417 at 442, per Lord Haldane. See also *R v. Lewes Prison, ex parte Doyle* [1917] 2 KB 254 at 271, per Viscount Reading CJ, and *Attorney-General (UK) v. Leveller Magazine Ltd* [1979] AC 440 at 464, per Lord Edmund-Davies.

69 *'TK' v. Australian Red Cross Society* (1989) 1 WAR 335 at 338, applying *R v. Chief Registrar of Friendly Societies; ex parte New Cross Building Society* [1984] QB 227.

70 *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) and Anor v. Local Court of NSW and Anor* (1992) 26 NSWLR 131. See also Williams, fn. 24 at 4852.

made in circumstances in which a party would otherwise be disinclined to seek relief[71] or a key witness would not be prepared to testify (even under pain of contempt).[72] No more of a hearing should be held *in camera* than is required in the interests of justice.[73]

Orders prohibiting publication

The court also has a discretion to order that evidence adduced before it be withheld from publication.[74] This is despite the fact that an entitlement to report on proceedings taking place in open court 'is a corollary of the access to the court of those members of the public who choose to attend'.[75] In *Bachich v. Australian Broadcasting Corporation*[76] Brownie J refused an application that a breach of confidence action be heard in closed court. However, upon satisfaction that a breach had occurred, his Honour made an order refusing publication of the subject matter of the breach.[77] An order prohibiting publication will only be made upon production to the court of some material by which it is able to conclude that such an order is reasonably necessary.[78]

Failure to comply with an order of the court may be a contempt. Sanctions for contempt of court include the imposition of fines or imprisonment for a fixed duration.[79] It is a rare occurrence, however, that a person will be jailed for contempt in this context.[80]

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71 *Scott v. Scott* [1913] AC 417 at 446.

72 *Jamieson v. Jamieson* (1913) 30 WN (NSW) 159.

73 See Seaman, P., *Civil Procedure: Western Australia* (1990) ¶ 34.0.2, cited in Law Reform Commission of Western Australia, fn. 51 at 22.

74 *Supreme Court Act 1986* (Vic.), s. 18. See also *Taylor v. Attorney-General (NZ)* [1975] 2 NZLR 675. *Cf. Raybos Australia Pty Ltd v. Jones* (1985) 2 NSWLR 47 at 55-7.

75 *Raybos Australia Pty Ltd v. Jones,* id at 55, per Kirby P.

76 (1992) 29 NSWLR 1 at 18.

77 Orders may extend as far as prohibiting the publication of the identity of a party, although the onus on a party seeking anonymity will be heavy: *Re 'TK', 'PB' and 'LS'* (1989) 1 WAR 335; *DM v. DT* (1994) *Australian Health and Medical Law Reporter* 31-434. See also Magnusson(a), R., 'Public Interest Immunity and the Confidentiality of Blood Donor Identity in AIDS Litigation' (1993) 8 *Australian Bar Review* 226 at 230 and Magnusson(b), R., 'Protecting Privacy and Confidentiality in the Age of HIV/AIDS' (Unpublished PhD Thesis, University of Melbourne (1993)) at 4-6.

78 *John Fairfax and Sons Ltd v. Police Tribunal of NSW* (1986) 5 NSWLR 465 at 477. See also Williams, fn. 24 at 4854.

79 *Attorney-General v. James* [1962] 2 QB 637.

80 Law Reform Commission of Western Australia, fn. 51 at 16.

6. Confidentiality legislation

Legislation exists in most Australian jurisdictions protecting the confidentiality of information communicated to health professionals (and their employing bodies) for the purposes of diagnosis and treatment. These provisions create rigid exceptions to the general requirement that all relevant evidence be before the court. This is despite the availability to the court of a number of mechanisms for protecting the confidentiality of information. It will be submitted that the provisions are part of an unsatisfactory legislative patchwork which merely denies the court flexibility to tailor discovery procedures to satisfy the various demands of litigants and parties to confidential communications.

First, however, some reference must be made to the protection given to confidential information by the common law. At a general level, there exists in Australia no common law right to 'privacy'. This was affirmed in *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor*[81] where Latham CJ commented that however 'desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists'.[82] So much was confirmed recently in the case of *Kaye v. Robertson and Another.*[83] The well-known actor Gordon Kaye had been severely injured while driving in a gale and had subsequently undergone extensive head surgery. A reporter interviewed Kaye in a hospital ward while he was in an unfit state and an injunction was sought to prevent the publication of the interview. It was held that no right to protection from the public gaze, as such, existed. In the course of his judgment, Leggatt LJ lamented that '[t]his right has so long been disregarded' and indicated that it could only be implemented now by the legislature.[84]

Generally speaking, no privilege in respect of doctor and patient communications exists at common law.[85] Thus, it was said by Lord Mansfield CJ in the early case of *The Duchess of Kingston*[86] that

81 (1937) 58 CLR 479.
82 Id at 496.
83 [1991] 18 FSR 62.
84 Id at 71. For a history of law reform proposals, see Richardson, M., 'Breach of Confidential, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law' (1994) 19 *MULR* 673 at 677-8.
85 *Wheeler v. Le Marchant* (1881) 17 Ch D 675 at 681, per Sir George Jessel MR; *Hunter v. Mann* [1974] QB 767; *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 244-5, per Lord Edmund-Davies; *O'Sullivan v. Herdmans Ltd* [1987] 1 WLR 1047. See also McNicol, fn. 37 at 339-40.
86 (1776) 20 State Tr 355.

the surgeon would be compelled to answer relevant questions concerning a patient during the course of a trial:

> If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour and of great indiscretion; but to give that information 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.[87]

The only protection which is afforded to doctor and patient communications by the common law is that which arises by way of the law of confidential communications (to be discussed below). It will be submitted that this protection is more suitable than that enshrined in the legislation.

In Victoria, the legislature has modified the common law by introducing a statutory doctor-patient privilege. Sub-section 28(2) of the *Evidence Act 1958* (Vic.) prohibits physicians or surgeons from disclosing 'in any civil suit or proceeding' any information reasonably necessary to practise or act which was acquired while attending the patient, unless the permission of the patient is first given. Similar provisions exist in Tasmania[88] and the Northern Territory[89]. The privilege only covers a narrow class of health professionals but extends to all information they have acquired, whether communicated directly by the patient or gained through observation (so long as that information was reasonably necessary to his or her professional function).[90] The privilege precludes the physician or surgeon not only from answering questions as a witness in court, but also from giving discovery of documents or answering interrogatories where protected information would be revealed.[91] However, it does not extend to the disclosure of information divulged to the doctor by another party to the proceedings where that information was obtained through that party's own medical examination of the patient[92] (as in the case of a

87 Quoted in McNicol, fn. 37 at 339-40. According to one commentator, the common law obligation is rarely discharged in practice: Gore, A., 'Interlocutory matters, medical records and medical examination' (1993) 4 *Australian Product Liability Reporter* 73 at 73.

88 *Evidence Act 1910* (Tas.), s. 96(2).

89 *Evidence Act 1939* (NT), s. 12(2).

90 *National Mutual Life Association (A/asia) Ltd v. Godrich* (1909) 10 CLR 1; *Hare v. Riley and Australian Mutual Provident Society* [1974] VR 577.

91 *Hare v. Riley,* ibid; *Elbourne v. Troon Pty Ltd* [1978] VR 171 at 176-7. See Simpson *et al,* fn. 18 at 193 and Williams, fn. 24 at 3858.

92 *Johnston v. Commonwealth of Australia* [1974] VR 638.

medical examination upon the plaintiff requested by the defendant pursuant to r. 33.04).[93]

The utility of s. 28(2) of the *Evidence Act 1958* (Vic.) is open to some doubt. First, as McNicol has noted, a patient will impliedly waive the right to statutory protection when initiating a claim for damages for personal injury.[94] Any medical or hospital reports upon which a plaintiff to such an action wishes to rely, must be served upon the other parties within 7 days of the matter being put down for trial.[95] Secondly, it is submitted that the statutory privilege creates an unnecessary obstacle to the adduction of evidence which may be critical to establishing the truth or falsity of matters and to the satisfactory determination of litigation. It goes too far in that it creates a blanket exception to the admission of evidence, despite the availability to the court of a host of protective orders exercisable via the law of confidential communications. Wigmore has argued that similar statutory privileges found in the United States do nothing more than suppress the truth — 'truth which ought to be disclosed and would never be suppressed for the sake of any inherent repugnancy in the medical facts involved'.[96]

The Law Reform Commission of Western Australia recently recognised that reliance upon the court discretion may be inadequate to protect confidential information required for the purposes of litigation. There is certainly no guarantee that a discretion will be exercised in the patient's favour - nor should there be. However, the Commission recommended against the enactment of a statutory privilege in respect of confidential communications:

> In the Commission's view, the public interest in the protection of confidential information in the hands of doctors does not outweigh the public interest in courts having all the relevant evidence available to them so as to justify the creation of a privilege.[97]

It recommended that the court be given a statutory discretion enabling it to excuse witnesses from answering questions or producing documents in court where to do so would be a breach of

93 Ibid.

94 McNicol, fn. 37 at 351. The Australian Law Reform Commission has recommended against the introduction of a privilege at the Commonwealth level: *Evidence*, Report No 38, (1987) at 116-7. There is no doctor-patient privilege in the recently introduced *Evidence Act 1995* (Cwlth).

95 Rule 33.07 and r. 33.08.

96 *Wigmore on Evidence*, 1961, McNaughton Rev, vol. XIII, 831.

97 Fn. 51 at 99.

confidence.[98] This is reflective of the view taken earlier by the Australian Law Reform Commission.[99] It is submitted, however, that a return to the common law position is the most preferable course for Victoria. There should be no discretion to refuse relevant and admissible evidence from adduction.

The problems attending s. 28(2) of the *Evidence Act 1958* (Vic.) are mirrored in other Victorian legislation which precludes the disclosure of confidential information during the course of civil proceedings. Section 141 of the *Health Services Act 1988* (Vic.) prohibits health service providers from disclosing information which could identify a patient where that information was acquired in the course of employment by an enumerated body,[100] unless otherwise authorised by legislation. As the section lays down a code, no disclosure can be made upon either the implied consent of the patient or as part of a public interest defence to an alleged breach of the equitable duty of confidence.[101] A similar provision can be found in section 120A of the *Mental Health Act 1986* (Vic.), which prohibits providers of psychiatric services from disclosing any information which could identify a patient where that information was acquired by a person to whom the section applies.

In *PQ v. Australian Red Cross Society*[102] questions were put to a Dr Vaughan which required him to give evidence regarding four patients who were named in files obtained from the Geelong Hospital, where Dr Vaughan was employed. It was possible that the information required could have led to the identification of the patients concerned. McGarvie J interpreted section 141(2) as having the practical result that 'a person is not entitled to give any item of acquired information if from the whole of the acquired information which is given the patient could be identified'.[103] Therefore, it was held that Dr Vaughan was precluded from answering the questions - he could only have discussed the files by reason of information acquired while an employee of the Hospital. In the course of reviewing the operation of the legislation, his Honour came to the conclusion that it is:

98 Id at 129-30.
99 Australian Law Reform Commission, fn. 92 at 116-7.
100 Namely, (a) a public hospital or denominational hospital; (b) a private hospital; (c) a nursing home; (d) a day procedure centre; or (e) a community health centre.
101 Magnusson (b), fn. 77 at 496.
102 [1992] 1 VR 19.
103 Id at 29.

> basic to the policy which underlies s. 141 of the *Health Services Act 1988* and also which underlies s. 28(2) of the *Evidence Act 1958*, that the purpose is to prevent information being revealed which could be embarrassing, to say the least, to the patient in question.[104]

If protection of persons from embarrassment is the purpose of those enactments, then it is submitted that the legislation is misguided. It elevates above the administration of justice even the most irrational of desires to withhold from disclosure information which may be critical to the proof of matters in dispute in medical litigation. It goes so far as to undermine the judicial process. Yet, such legislation is unnecessary in so far as the extent of disclosure of confidential information can be limited via the exercise of the court's discretion in upholding the law of confidential communications.

3. The common law of confidentiality

General principles

Having reviewed the legislation applicable to the protection of confidential medical information, it is now apposite to turn to the common law of confidential communications. It has already been seen that the common law provides no general right to privacy. However, there is a body of law which protects, to some extent, the confidentiality of personal information where that information is communicated for a limited purpose within a relationship of trust and candour.

The ancient Hippocratic oath forbids medical practitioners from divulging patient-medico confidences. This oath finds its modern expression in the Declaration of Geneva — 'I will respect the secrets which are confided to me, even after the patient has died'.[105] The Australian Medical Association has recently issued a Code of Ethics, exhorting the medical practitioner to:

> In general, keep confidential information derived from your patient, or from a colleague regarding your patient, and divulge it only with the patient's permission, except when a court demands.[106]

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104 Ibid.

105 Neave, M., 'AIDS — Confidentiality and the Duty to Warn' (1987) 9 *University of Tasmania Law Review* 1 at 10.

106 Australian Medical Association, 1992, *Code of Ethics*. See also, The Royal Australian and New Zealand College of Psychiatrists, 1992, *Code of Ethics*.

The common law of confidential communications reinforces this ethical obligation, whilst stopping short of breaching the institution of a doctor-patient privilege.

The jurisdictional basis of the common law has been said to lie in various sources. An obligation of confidence may arise, for example, through either an express or implied contractual term.[107] Neave has suggested that a general obligation may be implied in all doctor-patient contracts as a result of 'ancient ethical duties' - obviously a reference to the requirements of the Hippocratic Oath - and patient expectations of confidentiality.[108] An action in contract will not, however, always be open. In the case of a plaintiff desiring to restrain a third party from releasing confidential information in circumstances where the third party knows or ought to know that information was originally communicated in confidence, contract will provide no basis for suit.[109]

Actions will most frequently be brought on the basis of an independent equitable obligation of confidence.[110] In *Moorgate Tobacco Co. Ltd v. Phillip Morris [No. 2]*[111] Deane J, on behalf of the High Court of Australia, stated that such an obligation may arise in circumstances in, or through, which information was communicated as a matter of conscience.[112] The court will ask whether it would be fair for a confidant to disclose information given the relations between the parties and the need said to justify disclosure.[113]

The reasons for which a person may desire to keep medial communications confidential have already been considered. However, the law does not extend its sanctions to all communications intended to be treated as such. Courts have been more willing to find an obligation arising as a matter of conscience within the context of particular relationships, especially

107 *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* (1948) 65 RPC 203; The *Spycatcher case* [1990] 1 AC 109. See Gurry, fn. 58 at 28-35.

108 Neave, fn. 103 at 11-12.

109 Gurry, fn. 58 at 35-45.

110 *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* (1948) 65 RPC 203; *Moorgate Tobacco Co. Ltd v. Phillip Morris Ltd [No 2]* (1984) 156 CLR 414 at 438, per Deane J; *Corrs Pavey Whiting and Byrne v. Collector of Customs (Vic.) and Anor* (1987) 74 ALR 428 at 447, per Gummow J.

111 (1984) 156 CLR 414.

112 Id at 438.

113 Magnusson (b), fn. 77 at 211 where the writer states: 'The equitable duty cannot be used to secure the paramountcy of a confider's interests, but only as a standard of good conscience, which depends upon the court's assessment of the equities adhering to the original communication of information by the confider, or its acquisition by the receiving party.'

professional relationships. These are relationships of trust, and it has always been equity's concern to ensure that parties occupying positions of dominance do not abuse their positions by, for example, misusing personal information.[114] These relationships need not be strictly fiduciary in nature, but there are obvious parallels between the law of fiduciary obligations and the law of confidence.[115] Equitable protection for personal communications reflects, not only the concern that positions of dominance may be abused, but also that professional services may not be effectively rendered without a full and frank disclosure of all relevant information.[116] It is the policy of the law to foster professional relationships and it therefore allows communications arising from them a wide measure of protection.[117] Protection may also be extended to certain non-professional relationships.[118]

Elements of breach

The elements which need to be proved in order to establish a breach of confidence have been conveniently set out by Gummow J in *Corrs Pavey Whiting and Byrne v. Collector of Customs (Vic.) and Anor*,[119] and will be dealt with *seriatim*.

(i) Definition of confidential information

The first element requires little comment. In order for a court to frame an order prohibiting or limiting the disclosure of information it will be necessary that the plaintiff is able to specify the particular information which is said to have been confidentially

114 *Seager v. Copydex Ltd* [1967] 1 WLR 923 at 931. See Wilson, W., 'Privacy, Confidence and Press Freedom: A Study in Judicial Activism' (1990) 53 *Modern Law Review* 43 at 54.

115 Meagher, R., Gummow, W. and Lehane, J. 1992, *Equity: Doctrines and Remedies*, 3rd edn, Butterworths, Sydney, 870, where the learned authors state that the 'better view is that the equitable duty of confidence has now sufficiently developed to be regarded as occupying a specific field of its own ... .'

116 Laster, D., 'Commonalities Between Breach of Confidence and Privacy' (1990) 14 *New Zealand Universities Law Review* 144 at 155.

117 Finn, P., 'Confidentiality and the Public Interest' (1984) 58 *Australian Law Journal* 497 at 502.

118 Such as marital or de facto relationships: *Duchess of Argyll v. Duke of Argyll and Ors* [1967] Ch 302; *Stephens v. Avery* [1988] 2 All ER 477 at 482; *Moorgate Tobacco Co. Ltd v. Phillip Morris Ltd [No.2]* (1984) 156 CLR 414 at 438.

119 (1987) 74 ALR 428 at 437.

communicated so that the order is capable of observance.[120] The information must not be merely trivial in nature.[121]

(ii) Confidential nature

The second element is the requirement that the information be in fact confidential in nature. In *Attorney-General v. Observer Ltd and Ors* (the *'Spycatcher case'*)[122] Lord Goff stated that:

> [T]he principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no general application to it.[123]

It is essential to the appreciation of what constitutes confidential information to understand that 'confidentiality' is a relative and not an absolute term.[124] It is not necessary that, apart from the confider, the confidant be the only repository of the information communicated. Gurry identifies two aspects to confidentiality: the information must be within the knowledge of a limited number of persons only (and not accessible to all those who desire it) and must retain that degree of confidentiality in respect of the whole or part of its subject matter.[125] These principles are well-illustrated by the facts of *G v. Day*,[126] where G communicated certain information to the police on the understanding that his identity would be confidential. His identity was, however, of considerable interest to the media because an expensive investigation had followed upon receipt of the informant's information which led to the exhumation of a grave. The exhumation revealed that his information had been incorrect. The informant's name was published twice by a Sydney television station, yet Yeldham J granted an injunction to restrain further publication because he found that G had a real interest in keeping the information confidential (in order to secure his safety),

120 *Amway Corp. v. Eurway International Ltd* [1974] RPC 82; *Carindale Country Club Estate Pty Ltd v. Astill and Ors* (1993) 115 ALR 112 at 120, per Drummond J.

121 *Coco v. A.N. Clark (Engineers) Ltd* [1969] RPC 41 at 48, per Megarry J; *Corrs Pavey Whiting and Byrne v. Collector of Customs (Vic.) and Anor* (1987) 74 ALR 428 at 450, per Gummow J.

122 [1990] 1 AC 109.

123 Id at 282.

124 Gurry, fn. 58 at 73.

125 Id at 74-77.

126 [1982] 1 NSWLR 24.

while the public would have little real interest in knowing his actual name (he being an ordinary person of no notoriety). Relative confidentiality remained because the television broadcasts had been of a transitory nature to a limited number of persons.[127]

A court will be required to examine the question whether confidentiality exists or existed at three junctures: (a) at the time of communication of the information by the confider, so as to determine whether there was any meaningful obligation upon the confidant not to disclose the information; (b) at the time of the alleged breach, in order to ascertain whether the confidant had been expressly or impliedly released from the obligation; and (c) at the time when court action is required, in order to determine the appropriate remedy.[128]

(iii) Obligation of confidence

The third element in an action for breach of confidence is that the confidential information must have been received by the confidant or third party in such circumstances as to import an obligation of confidence. In *Smith Kline and French Laboratories (Australia) Ltd and Ors v. Secretary, Department of Community Services and Health*[129] Gummow J accepted a submission that it is not sufficient to bind the conscience of the defendant to prove that information was communicated for a limited purpose only. There must be either actual or constructive knowledge by the defendant of the limitation:

> I accept the general thesis of the learned author [i.e. Dr Gurry] that equity may impose an obligation of confidence upon a defendant having regard not only to what the defendant knew, but to what he ought to have known in all the circumstances.[130]

There must be, at least, an implicit understanding between the parties. The test is an objective one, to be adjudged from the circumstances of the case. In circumstances where the defendant does not satisfy the knowledge requirement, 'it is difficult to see on what footing equity should intervene to bind his conscience'.[131]

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127 A similar example is to be found in *Wigginton v. Brisbane TV Ltd (Receivers and Managers appointed) and Ors* (1992) 25 IPR 58. In that case, White J came to the conclusion that the facts failed to reveal 'a situation of seeking to protect information now freely available so that it would be a futility to let the injunctions remain': at 64. As observed in *Franchi v. Franchi* [1967] RPC 149, 'relative secrecy remains': at 153. See also Laster, fn. 115 at 150-1.

128 Laster, id at 145.

129 (1990) 95 ALR 87 at 110.

130 Id at 111.

131 Id at 110. Lord Goff was, therefore, wrong to say in the *Spycatcher case*

The doctor-patient relationship is a relationship which intrinsically imports an obligation of confidence in respect of information communicated for the purposes of treatment and advice.[132] This obligation is quite wide. For example, where medical treatment is sought at a body such as a hospital, there is to be implied, on the part of the patient, an authorisation that his or her files are to be available to 'any doctor who in the course of employment is called upon to administer to the patient'.[133] Medical records will also be necessarily available to staff charged with their management and safekeeping (where a central information repository exists).[134] Also, all hospital employees with access to patient medical records are under a personal obligation of confidence to refrain from disclosing the information they have obtained in the course of their duties:

> [T]he confider will only have consented to the disclosure of information *within* the organisation, and for impliedly authorised purposes, that is ... for purposes connected with the treatment of that patient, and not for ... a purpose extraneous to the interests of the particular patient.[135]

An obligation of confidence may be imposed upon third parties where they have gained access to information surreptitiously, or through the known breach of a confidant's duty of confidence.[136] Gurry has argued that an obligation will also be imposed upon third parties who obtain information innocently — the issuance of a writ will be sufficient notice of confidentiality.[137] The law imposes

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[1990] 1 AC 109 that a person in the street would be bound by an obligation of confidence upon picking up 'an obviously confidential document ... wafted by an electric fan out of a window' (at 281) — unless there be property in the information. Confidentiality is not enforceable as against the whole world, in the way that rights extant in tangible forms of property are: Gurry, fn. 57 at 53-4. A proprietary analysis should therefore be eschewed. See discussion of Meagher, R. *et al*, fn. 114 at 877-80.

132 *Titan Group Pty Ltd v. Steriline Manufacturing Pty Ltd* (1990) 19 IPR 353 at 370, per O'Loughlin J. See Magnusson (b), fn. 77 at 274.

133 Macken, Moloney and McCarry, *The Common Law of Employment* (1978) at 47, adopted by Kelly J in *Slater v. Bissett and Anor* (1986) 85 FLR 118 at 122.

134 Ibid.

135 Ibid. Note that it must be acknowledged that there are severe practical problems for plaintiffs in ensuring that a multitude of hospital staff are diligent in keeping personal information which they have acquired in confidentiality. On this issue, see Hamblin, J., 'Health care: rights and responsibilities' (1992) 30 *Law Society Journal* 66 at 68.

136 *Prince Albert v. Strange* (1849) 1 Mac & G 25; *Duchess of Argyll v. Duke of Argyll* [1967] Ch 302; *Fraser v. Evans* [1969] 1 QB 349 at 361, per Lord Denning MR; and *G v. Day* [1982] 1 NSWLR 24 at 35, per Yeldham J.

137 Gurry, fn. 58 at 276-83. See also Laster, fn. 44 at 48.

obligations on third parties in order to ensure that confidences are not broken circuitously by collusion between the confidant and the other.[138] An obligation will only expire in law through release of the confidant's obligation by the express or implied consent of the confider or through the circumstance that the (formerly confidential) information has become available to the public.[139]

(iv) Actual or threatened breach

The fourth element in an action for breach of confidence is that there be an actual or threatened misuse of confidential information. Whether there has been an actual breach will be a question of fact requiring the establishment of three matters: (a) that the defendant disclosed the subject information to another person; (b) that the information was 'directly or indirectly obtained' from the confider and not already in the defendant's possession and;[140] (c) that the disclosure which took place was inconsistent with the purpose attaching to the original communication.[141] Where breach is threatened, the court will require that the plaintiff make out a prima facie case in the sense that 'there is the probability that at the trial [he/she] will be entitled to relief'.[142] Where such a case exists, the court will then go on to consider whether the balance of convenience favours the granting, or the withholding, of the interlocutory relief sought.[143]

Gummow J has taken the view that any breach of an obligation need not involve loss to the confider in order that a remedy may be had.[144] Equity will act to ensure that recipients of confidential information act in good faith and respect the confidences to which they have been entrusted:

> The plaintiff comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss.[145]

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138 The *Spycatcher case* [1990] 1 AC 109 at 268.

139 Gurry, fn. 58 at 241-55 and cases cited therein.

140 *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* (1948) 65 RPC 203 at 213.

141 Gurry, fn. 58 at 256-7.

142 *Beecham Group Ltd v. Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

143 Ibid. See also Tsaknis, L., 'The Jurisdictional Basis, Elements and Remedies in the Action for Breach of Confidence' (1993) 5 *Bond Law Review* 18 at 41-43.

144 *Smith Kline and French Laboratories (Australia) Ltd and Ors v. Secretary, Department of Community Services and Health* (1990) 95 ALR 87 at 126. See also *Ohio Oil Co. v. Sharp* 135 F 2d 303 (1943) and *X v. Y and Ors* [1988] 2 All ER 648 at 657.

145 Ibid.

This is consistent with the view that the breach of confidence action concerns matters *inter partes*: viz, the effect which misuse of information will have in respect of the relationship of confidence.[146] It is the policy of the law to foster particular relationships requiring trust and candour, not necessarily to promote economic interests.[147] In the *Spycatcher case*,[148] Lord Keith (with whom Lord Jauncey agreed) opined that:

> [A]s a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself.[149]

It is submitted that this is the preferable view and that there is no superadded requirement of detriment.

Litigation — the higher duty

It is trite law that an obligation of confidence will not itself absolve a recipient of confidential information from being required to disclose that information during the course of civil proceedings, where required in the interests of justice. Confidentiality is not, at common law, a separate head of privilege.[150] Therefore, the usual principle applies that all relevant and admissible evidence is to go before the court.[151] Any obligation of confidence will be displaced to the extent required in the proper administration of justice rather than extinguished altogether.[152]

That information was communicated in confidence may be relevant, however, in protecting an extrinsic 'public interest' which requires that the information be kept from disclosure during civil proceedings.[153] For example, in *D v. National Society for the*

146 Gurry, fn. 58 at 259-60.

147 Birks, P., 'A Lifelong Obligation of Confidence' (1989) 105 *Law Quarterly Review* 501 at 505-6.

148 [1990] 1 AC 109.

149 Id at 256.

150 *McGuiness v. Attorney-General of Victoria* (1940) 63 CLR 73; *Alfred Crompton Amusement Machines Ltd v. Customs and Excise Commissioners (No. 2)* [1974] AC 405; *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171; *Science Research Council v. Nasse* [1980] AC 1028.

151 See discussion above.

152 See references fn. 149 and *W v. Edgell* [1990] 1 Ch 359 at 419 per Bingham LJ.

153 *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 239, per Lord Simon, and 245, per Lord Edmund-Davies; *Ninness v. Graham* (1986) 86 FLR 138; *Aboriginal Sacred Sites Protection Authority v. Maurice and Ors* (1986) 65 ALR 247 at 271.

Prevention of Cruelty to Children (the 'NSPCC case')[154] the House of Lords held that the Society would not be required to disclose in proceedings the identity of an informant, who maliciously reported to it that the plaintiff's child had been ill-treated. Their Lordships accepted that there was a real risk that the Society's sources of information as to the mistreatment of children would dry up were the information to be released. The Society, as an organisation authorised to take proceedings for the welfare of children under an Act of Parliament, was covered by a public interest immunity, which entitled it to withhold from discovery documents disclosing the identity of the informant.

Even where there is no 'public interest' at stake, the court should be sensitive to obligations of confidence arising from the rendering of medical treatment or advice when making orders for discovery and interrogation. There are a number of things which the court can do.

First, the court should examine alternative means of obtaining the information required, so as not to impose upon a confidential relationship where it is unnecessary to do so. In *Science Research Council v. Nasse*[155] various discrimination claims were made by the plaintiffs, who failed to obtain promotions and so they sought access to a number of documents compiled by their supervisors in order to substantiate their claims. The employers were unwilling to give discovery of the reports relating to other employees and so the plaintiffs sought an order for discovery, which was granted. The House of Lords affirmed the decision of the court below setting aside the orders. Their Lordships recognised that the law of discovery was far reaching and involved an invasive procedure. Although documents which were relevant would be prima facie discoverable, the court retained a discretion to limit the form and availability of the information to be disclosed. The industrial tribunal did not exercise its discretion properly, in that it failed to examine the documents itself and made no inquiry as to any alternative methods of obtaining the information contained therein. Lord Wilberforce emphasised that 'where the court is impressed with the need to preserve confidentiality in a particular case, it will consider carefully whether the necessary information has been or can be obtained by other means ...'[156]

Secondly, the court should give consideration to the various mechanisms available to limit the extent of disclosure required.

154 [1978] AC 171.
155 [1979] 3 All ER 673.
156 Id at 680. See also at 695, per Lord Fraser.

These were discussed above. It may be desirable that a number of mechanisms be employed in particular fact situations. In this respect, the court can no longer discharge its responsibilities through an unsophisticated approach which allows only two possibilities: unexpurgated discovery or the maintenance of confidentiality. Discovery is a blunt instrument which requires tempering so as to ensure that the needs of all parties are respected — that information requirements in medical litigation are met whilst holding confidants to their obligations of confidence. This need not be a time consuming process. If the court's attitude is clear, there will be an incentive for the parties themselves to agree about the appropriate form and extent of disclosure via discovery.

It is submitted that there very rarely needs to be discovery such that all confidentiality is lost. Whilst the court must remain open and all relevant evidence must be brought before it, it can be creative in controlling the manner and extent of information disclosure. Confidential information should be disclosed in the least extensive manner consonant with the requirements of justice.[157] In so far as confidentiality must be compromised, a realistic view should be taken of the sensitivity of information communicated to health professionals on the basis that it will be used for the limited purpose of advice and treatment. The words of Wigmore should be kept in mind, that there is often little real repugnance in the information itself.[158]

4. Blood donor illustration

Having examined the basic principles involved in the discovery-confidentiality framework, it will be apposite to focus on two contrasting cases which illustrate their application. The cases concern blood transfusion patients who became infected with the AIDS virus and sought the identity of donors in order to prove negligence in the use of contaminated blood products.

The act of blood donation would seem to give rise to a common law relationship of confidence between the blood supplier (usually the Red Cross) and the donor. The act of inserting a needle for the withdrawal of blood is a medical procedure and following withdrawal, certain tests must be carried out in order to assess the blood's suitability for use. The information obtained by such

157 Laster has detected a trend, at least in New Zealand, of orders being made on a 'need to know' basis: fn. 115 at 160. See *R v. Birmingham City Council* [1983] 2 WLR 189 at 199, per Lord Brightman.

158 Wigmore, fn. 94 at 831.

testing is of a personal nature and may reveal that the donor is an AIDS sufferer or has some other medical condition.[159] A relationship of confidentiality is, at any rate, imposed by the provisions of the *Human Tissue Act 1982* (Vic.).[160]

The plaintiff seeking redress may require knowledge of blood donor identities and other personal information in order to prove either conclusively or on a balance of probabilities that infected blood was transfused, in breach of the medical duty of care. Whether the duty has been breached will depend, of course, upon a number of factors, including the state of knowledge at the time of the transfusion and the reasonableness of procedures taken to screen donors and test their blood.[161] 'Establishing a causal link between the plaintiff's infection and a particular donor is particularly important where the plaintiff could have become infected [with AIDS] in other ways'.[162]

In *AB v. Glasgow and West of Scotland Blood Transfusion Service*[163] an HIV-sufferer petitioned the Court of Session for disclosure of the identity of a donor of blood, whom he claimed to have been negligent in completing a medical history questionnaire, so as to facilitate his action in negligence against the transfusion service and to enable him to sue the donor directly. The petitioner sought disclosure for the limited purpose of litigation.[164] Upon certification by the Secretary of State for Scotland, the court was obliged to accept that disclosure of the donor's identity would 'put at risk the sufficiency of the national supply of donor blood'.[165] Lord Morison refused to grant relief on the ground that it was impossible to hold that a right to claim damages could prevail over a 'material risk' to the blood supply. This was despite his agreement 'that it is offensive to any notion of justice that persons should be deprived of the ability to claim damages from those by whose negligence they have been injured'.[166] No consideration was given to the use of procedures whereby the disclosure of the information could be limited by order of the court.

AB's case is a fairly graphic example of a court taking an 'all or nothing' approach to the discovery of information relevant (in this

159 Magnusson (a), fn. 77 at 234.
160 Section 45(1)(a). The statutory duty is, however, subject to court order: s. 45(3)(a).
161 Magnusson(a), fn. 77 at 227-8.
162 Id at 227.
163 (1989) 15 BMLR 91.
164 Id at 92.
165 Id at 93.
166 Ibid.

case vital) to the determination of the legal issues. It has very little to commend it.[167] A different approach was taken in the 1991 Victorian case of *BC (by her litigation guardian) v. Australian Red Cross Society*.[168] The plaintiff received a number of blood transfusions upon birth by caesarean section, following which she was diagnosed as suffering from the AIDS virus. She took proceedings by her next friend, claiming that the Red Cross and the Monash Medical Centre were negligent in failing to properly screen blood transfused. By process of elimination, the plaintiff was able to narrow down the likely source of her infection to a single donor, who was given the appellation 'D61'. The plaintiff sought D61's name, address, sex, age and occupation in order to obtain from D61 details of his or her medical history or, failing that, to determine from that information his or her AIDS risk category. The defendants refused to disclose the information.

It should be noted that neither s. 28(2) of the *Evidence Act 1958* (Vic.), creating a doctor-patient privilege, nor s. 141 of the *Health Services Act 1986* (Vic.), prohibiting the disclosure of medical information obtained by health service providers in the course of employment, were applicable. This was because the information obtained about D61 was not necessary to prescribe or act for him, in the former case, and because it was not obtained by a relevant body, in the latter case. However, other legislative provisions were relevant. Section 45(1)(a) of the *Human Tissue Act 1982* (Vic.) prohibited the disclosure of information which could identify a person from whose body tissue had been removed, except in pursuance of a court order or where otherwise required by law.[169] Cummins J read this section as contemplating the release of information concerning blood donors 'on a limited basis under judicial control'.[170] His Honour also had cause to examine s. 129 of the *Health Act 1958* (Vic.), making special provision for the disclosure of information in 'any matter relating to HIV'. Under sub-section (1) a number of orders are spelt out which a court or tribunal may make to protect the confidentiality of information, the release of which may have deleterious social or economic consequences.

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167 Grubb, A. and Pearl, D., 'Discovering the Identity of a Blood Donor' (1991) 141 *New Law Journal* 897 at 898.

168 (Unrept., SC (Vic.), Cummins J, 25/2/91).

169 Section 45(3)(a).

170 *BC*'s case, fn. 168 at 19.

Having established that the matter was one for his discretion, Cummins J commented that there were at stake competing interests. On the one hand:

> [B]eing the interests of justice particularly in the provision to this plaintiff of highly relevant matter and, generally, in the proper articulation and enforcement of rights and, on the other hand, particularly the interest of confidentiality and preservation of privacy and, generally, the public interest in the maintenance of a reliable, safe and sufficient supply of blood to persons in need.[171]

He placed great weight on the terrible nature of the plaintiff's affliction and that she would eventually die from it. Justice would not 'lightly contemplate' her rights in law being prejudiced by the mere circumstance that information obtained by the defendant was confidential.[172] However, it was argued that an extrinsic public interest existed in the maintenance of an adequate blood supply, which could have been threatened if potential donors were alerted to the possibility that information about them might subsequently be released in the context of investigation and suit.

Cummins J accepted that there was an important public interest in the maintenance of blood supplies. However, this interest was not so likely to be compromised by the release of the information that it should displace the plaintiff's interest in the administration of justice. His Honour was not convinced, on the material before him, 'that donors would be so affrightened by limited revelation under judicial control that the public interest in the supply of blood would be jeopardised'.[173] The court ordered that the information concerning D61 (comprising his or her name, address, sex, age and occupation) be provided to the plaintiff's legal representatives, who were not to disclose such information beyond the extent necessary for the purposes of litigation.[174] An appeal to the Appeal Division of the Supreme Court was dismissed.[175]

Obviously, *BC's case* exemplifies a more sophisticated and satisfactory resolution of the competing interests in the discovery-confidentiality framework. The main criticism from red light theorists would be that it compromises confidential relations which were entered into on the basis that confidentiality would be

171 Id at 12.
172 Id at 9.
173 Id at 19.
174 Id at 19-20
175 *Australian Red Cross Society v. BC (by her litigation guardian BD)*, (unrept., SC (Vic.), McGarvie & Gobbo JJ, 7/3/91).

absolute.[176] However, it is submitted that, to the extent that personal information was disclosed, such disclosure was necessary and in the aid of interests far more meritorious than the purportedly sensitive nature of the information. The information was to be disclosed according to a strict court edict which allowed use for a limited purpose and no other.

5. Conclusion

It is hoped that the blood donor illustration has demonstrated what has been the main thesis of this paper: that the usefulness of Victorian statutory provisions, enacted to immunise from disclosure confidences to health professionals, has become questionable. The common law has evolved to such an extent that the court is now readier to use the mechanisms available to it for limiting the extent and the modes of information disclosure by parties to confidential communications where that information is relevant to the resolution of a legal dispute. The legislation can only operate to frustrate the achievement of justice.

176 Pizer, J., 'The Public Interest Exception to the Breach of Confidence Action: Are the Lights About to Change?' (1994) 20 *Monash University Law Review* 67 at 99.