BALTIC INTERNATIONAL ACADEMY

Doctoral study program “Law”

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PROMOTIONAL WORK

Data confidentiality in the sphere of healthcare in the laws of the European states

Developed for obtaining a scientific doctoral degree (PhD) in the Fiedl of Law Science

Speciality – Law Science

Subfield – Civil Law

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Rīga, 2023

ABSTRACT

The topic of the promotional work: Data confidentiality in the sphere of healthcare in the laws of the European states. The promotional work consists of 3 chapters, the corollary, the list of proposed legislative amendments on the basis of the research, as well as the bibliography, containing 471 title: 13 titles for legislative acts, 123 titles for academic literature and 335 titles for court judgments.

The **first chapter** of the promotional work discusses the concept of patient's rights in the Republic of Latvia and the place of medical confidentiality in their scope, analyses the key judgments in the sphere of medical confidentiality, the relevant practice of the European Court of Human Rights in the sphere of medical confidentiality, as well as the legislative and jurisprudential development of medical liability in the Period of First Independence of Latvia (1918-40), as well as the issues arising from medical malpractice in that time period.

The **second chapter** describes the gist of the institute of medical confidentiality in its historical and contemporary perspective, analyzing the legislation and case law from different states. The chapter is subdivided into two subchapters – the first one discusses the institute of medical confidentiality as such, whereas the second deals with the patient's right to access (insight) to medical records, as one of the patient's rights. The second subchapter also discussed the issue of the reasons for the patient's legal interest in the insight to medical records, the most frequent reasons for refusal from the side of healthcare institutions, as well as various notable judgments relating to the topic.

The **third chapter** is a continuation of the second chapter, dealing with derivatives of medical confidentiality, which considers highly-sensitive personal data. The author designated such as data, which relate to the HIV-status of the patient, psychiatric records, sealed birth records of an adopted person, as well as non-recorded personal data, contained in biobanks (biorepositories). The first of the subchapters considers the issue of confidentiality of data relating to the patient's HIV-status and the disputes relating to the production of such information for the needs of proceedings, or lawsuits for its unauthorised disclosure. The second subchapter discusses the problem of the patient's right to insight into psychiatric records, whereas the third deals with the right to anonymous childbirth, upon which the biological forbearer of the adopted person has a right to remain anonymous, and the rights of the adopted person to gain insight to such birth records upon certain occasions. The latter (fourth) subchapter deals with the issue of confidentiality of non-recorded medical data contained in biobanks (biorepositories), and the problem of production of such data for the needs of administration of justice in various occasions.

The **corollary of the research** contains a discussion on the results of the promotional work, and provides a number of legislative proposals for the Law on The Rights of Patients.

Keywords: medical confidentiality, patient's rights, comparative law, medical law, protection of personal data.

Content

Introduction

Topicality of the research

Medical law is becoming one of the most topical and demanded branches of law owing to evolvement of progressive medical technologies and growing role of patient's self-determination in the process of medical treatment. Malpractice of medical practitioners and misuse of medical technologies frequently causes litigation, and the claim sums may be high, as damage to health is incomparable to damage to property. The protection of information concerning the patient is a dogmatic principle of medical law, which both protects the patient's health information and maintains the confidentiality in the medical profession and healthcare institutions. Otherwise, the trust that the patients possess in doctors and healthcare in general, could be betrayed. Latvian jurisprudence in respect with medical data protection has considerably increased. For instance, cases concerning patient's personal data revelation, issues of legitimate access to third parties, or a restriction of disclosure to the data subject is becoming more and more frequent in the jurisprudence of the Senate of Republic of Latvia (e.g. judgments No. 41/2020, SKA-166/2020, SKA 1062-13, SKC 13-8 to name a few) as well as the case law of the district and regional courts. In a more broad sense, medical confidentiality is a concordant element of the person's right to privacy and body integrity, which is also a subject of constitutional review (e.g. Judgment of the Constitutional Court of Republic of Latvia No. 2015-140103 – herein, in respect with biological samples). The emerging case law displays a wide variety of situations concerning medical data processing, legitimacy of patient data revelation, access of the data subject (i.e. the patient or his representatives), his right to control the storage of medical records (including the expungement of such data) and others, which frequently cause litigation between private parties, or between private and public parties. Since the Senate's recent rulings include litigation concerning related patient's rights (e.g. judgment No. SKA-790/2020 dealing with lack of informed consent), it is logic to conclude that the body of medical case law in the jurisprudence of the highest judiciary bodies is rapidly emerging.

Medical confidentiality is a paramount feature of medical profession in general, which is considerably affected by the evolvement of various digital technologies in the field of biomedicine, and subsequently, the malpractice and fraud related to them. Thus, the topicality of the subject is twofold: firstly, owing to quick emergence of the jurisprudence, which unfolds virtual gaps in the legislation (e.g. the Patient's Rights Law and the Personal Data Protection Law, as of the judgments of the Senate No. SKA-41/2020 and SKA-166/2020), and the lack of considerable legal scholarship in respect with patient's data confidentiality and its boundaries. The quick devolvement of medical jurisprudence in the European Court of Human Rights, which touches various angles of medical law involving medical data confidentiality, also calls for challenges in the field of medical law. Firstly,

the amount of medical malpractice lawsuits is rising not only in the Republic of Latvia, but in the whole Europe as well. It has to be borne in mind that the European Court of Human Rights is a court of last resort, and it adjudicates cases originating from the Council of Europe jurisdictions, where plaintiffs have lost their lawsuits, brought before the domestic courts. The cases like *L.H. v. Latvia* (2014) demonstrate that the Latvian legislation needs clarification and amendment concerning the processing of patient's personal data and its legitimate transfer to third parties, which was not once stressed by the Senate (judgments No. SKA-41/2020 and SKA-166/2020). A relatively recent case of *Rodina v. Latvia* (2020), adjudicated by the European Court, demonstrate that medical data may be illegitimately disclosed not only by doctors or other hospital personnel, but the representatives of mass-media as well (no matter how they obtained it), which also poses a challenge on the security of patient's personal data that may be obtained, maintained and disclosed by non-medical bodies.

The confidentiality of patient's data does not only concern security of medical records, but the patient's right to have certain control over them. For instance, many patients attempt to gain access to their medical records in order to seek evidence for a medical malpractice lawsuit. Ordinary medical records are contrasted with psychiatric ones, which may also be a subject of a prospective plaintiff's interest. Owing to the restricted nature of such medical data, many states require a court subpoena (or referred to as "diligence" in countries as Scotland and Australia) for such data to be disclosed to the patient or his legal representative. This issue has been topical for German case law since the 1970s, but is novel for the legal system of the Republic of Latvia (e.g. a recent judgment of the Regional Administrative Court in Riga dated December 2, 2020 featured a lawsuit to expunge the psychiatric records maintained in a mental asylum concerning a person, who had been on an inpatient treatment years before[1]) and shows that the patients are eager to control the medical information related to them stored in medical institutions. Moreover, the aforesaid judgments of the Senate of Latvia display that there is no uniformity concerning what should, and what should not be regarded as medical personal data, which obviously requires clarification. The patient's right to control the medical data that were once stored by hospitals and other medical institutions spreads substantially further. For instance, medical data are used in biomedical research, no matter if it concerns blood samples, or it requires a video recording of the patient's behavior[2]. Another example of fourth-generation rights is a right of a biological parent to remain anonymous in respect with his/her child, which is in collision with the person's right to know its origination. The national courts have demonstrated a versatile approach on the subject, while the European Court of Human Rights has attempted to reconcile the competing interests in *Godelli v. Italy* (2012). As we may see from the abovementioned notions, the patient's

[1] *Administratīvā apgabaltiesa*, 2020.gada 2. decembri, Lieta Nr. A420209619; Lietas arhīva Nr. AA43-0874-20/10
[2] For instance, see. Cour Trav. de Bruxelles, 23 mar. 1993, Tijdschrift voor gezondheidsrecht 1995, p. 296

data confidentiality is a considerably wider issue than it used to be before, encompassing various 4th-generation rights, which require firm legal regulation.

The aim of the research

The aim of the promotional work is to describe the legal institute of medical confidentiality, as an inalienable patient's rights, to discuss its derogations and derivatives in modern human rights law, which originate either from legislation, or from case law.

The structure of the research

The promotional work is planned to be performed in a three-chapter structure, which is subdivided into several subchapters. The court judgments and academic literature, including the comments concerning issues demanding the reader's additional attention, will be placed in the footnotes, accompanying the bottom of each page. The structure of the promotional work is expected to be the following:

In the *first* chapter, the author observed the place of medical confidentiality in the sphere of medical law, discussing the peculiarities of patient's rights and medical law in the Republic of Latvia, involving the institute of medical confidentiality in the system of patient's rights, the institute of medical confidentiality in public international law (i.e. in the case law of the European Court of Human Rights), the recent judgments of the Supreme Court of the Republic of Latvia, as well as the issues of medical liability in the First Period of Independence of the Republic of Latvia (1918-1940).

In the *second* chapter, the author wrote about medical confidentiality, as an institute of civil and criminal law, involving the history of medical confidentiality in various states. As the institute involved the patient's right to control his medical records by making an insight into them, the author conducted a research in respect with the patient's right to access to medical records, which constituted the second part of the second chapter of the promotional work.

The *third* chapter involves a research on the institute of medical confidentiality in the 4th generation of human rights, which includes the patient's right to access to psychiatric asylum records, the confidentiality of birth records of an adopted person and the right of biological parents to remain anonymous towards the ancestors, and the issues of confidentiality in respect with biorepositories (biobanks) in terms of the production of such data for the needs of court proceedings, as well as the peculiarities of safeguarding medical confidentiality in respect with HIV-status data, including donor-related data.

The *fourth* chapter, which is the concluding one, includes a list of legislative proposals to the Law on the Rights of Patients in respect with medical confidentiality, as well as a corollary of the promotional work, and a list of references, which includes the list of legislative acts, academic literature and court judgments.

The novelty of the research

The primordial and initial novelty of the research is reflected in the way of its assemblage on basis of court jurisprudence, which is a direct application of legislation by the judiciary, and is still not frequent within the Continental legal system; despite the courts firmly use judicial decisions as a source of law. Case law-based promotional works are more frequent in common law jurisdictions, but are usually bound to them and rarely incorporate civil law states. On the contrary, the author's promotional work is mainly founded upon the comparative jurisprudence of civil law jurisdictions. Next, quite a lot of attention is paid towards the emergence of medical law (including medical confidentiality law) in the legal system of the Republic of Latvia, which includes not only the contemporary period, but the period of the First Independence as well. This period rarely became a subject for legal scholarship, not even mentioning medical law as such – the archival documents show the legacy of medical law.

What is more, medical confidentiality is represented not only as a stable legal institute, but as a developing one – in its past, present and future by displaying the most modern issues of medical confidentiality developments, such as anonymous childbirth, genomic data and issues of access to restricted health records. Current trends of the European Court of Human Rights in respect with medical confidentiality are widely represented in the texts of the promotional work. Apart from the research originality, the author strives to present legislative proposals concerning medical confidentiality and publish leaflets with national medical jurisprudence, supplied with comments to promote the current trends of Latvian medical law.

The promotional work strives to show the patient's confidentiality as a right of the patient, upon which he may have a right to not only demand preserving his medical records in secret, but also have a right to control such medical data, access and demand the expungement of the medical records in cases prescribed by law. Confidentiality of medical records should be not merely assessed in a positivist view of an old criminal or civil law statute covering the issue of professional secrecy. The patient should not be regarded as mere object of treatment, but as a party in the bilateral legal relationships named "doctor/hospital – the patient", which also has his/her rights and obligations, and these go far beyond obtaining compensation in an ordinary civil lawsuit for basic malpractice committed by a doctor or a nurse, like it used to be decades ago.

The object and subject of the promotional work

The object of the promotional work are the legal relationships in the sphere of healthcare, that presuppose the processing of sensitive personal data, the wrongful disclosure of which could cause harm the patient and cause lawsuits against the hospitals.

The subject of the promotional work is the case law of the courts, which adjudicated cases on wrongful disclosure of patient's medical information.

Research questions

Herein, the author would like to set a number of questions, which are expected to constitute the main research questions of the promotional work.

1. Is the patient's right to preserve his data confidential a distinct right, or it is a mere obligation of a medical practitioner, or a medical institution, barely related to the patient and his rights, and what categories of information should be included in the term "medical data"?
2. Is the patient's right to control over his medical data (e.g. access, correction, or expungement of medical records) a real legal right, or it is a legal fiction owing to various restrictions?
3. Are there any specific categories of medical records, which are more sensitive, than ordinary medical records? If yes, what are they?

The methods of the research

The methodology of the PhD thesis involves a number of general-scientific methods, which are used to assemble the material of the thesis work upon the selected approach, grounded upon the analysis and generalization of case law. The cases, which constitute the primary source of the promotional work, are originating from civil law jurisdictions (geographically – Continental Europe), as well as occasionally from common law jurisdictions (England, Canada and United States). As it was agreed by the author of the promotional work and his scientific supervisor dr. iur, adv. Tatjana Jurkeviča, the judgments from common law jurisdictions were used in cases where there is no existing jurisprudence in civil law states, or they represent novel approaches, still not available in the civil law states.

The author is using the following research methods in his promotional work:

1. *Induction*: the author of the research aims to generalize and to elaborate the main principles concerning medical data revelations, assessment of legitimacy of it, the right to control medical data by patients etc., upon which the courts adjudicate the disputes, described in the promotional work. The generalization of Latvian court jurisprudence and the foreign and international jurisprudence in respect with issues of medical data and medical confidentiality is one of the main research methods applied throughout the induction.

2. *Comparative legal analysis*. This method is widely used by the author in the work, the concept of which is based on a comparison of the legal positions of the courts considering this or that legal issue. That is why the decisions of national courts have been chosen so that the facts of the cases and the court judgments can be compared with existing decisions of international courts (in this context, ECtHR decisions were mainly used) and the principles developed by the domestic courts of European states, effectively complemented the existing case law of the ECtHR and the ECJ in the texts, and could be used by these courts in newly-lodged lawsuits concerning the violations of medical confidentiality.

3. *Hermeneutic method*. Since the author pays a considerable attention to the analysis of the positions of courts and the description of decisions of international and national courts, it is apparent that the author uses this research method for interpreting court decisions. The description of the decisions of the ECtHR, the ECJ and decisions of national courts is usually carried out by applying the following scheme: description of the facts of the case, the position of parties of the proceedings (these are not always properly reported in some older case reports) and the court's judgment itself.

4. *Historical-legal method*. The author of the promotional work hallmarks the concordance of the historical development of each of the concepts described in the promotional work. This description is made by using some older jurisprudence, and occasionally, the legislation. The concept of each of the chapter includes a description of its historical development, and is based on then-day case-law.

5. *Analysis and synthesis*. The author conducts an analysis of the legal texts in order to determine the gist of medical confidentiality, as well as its main constituents, and to perform a synthesis of the case law in order to provide a synthesis of the overall principles of applying the principle of the patient's medical information.

6. *Deduction*. This method is used for discussing the categories of personal data, which fall under the term 'medical secret'. The second chapter brings a lengthy discussion on the categories of personal data which are covered by the legal institute of medical confidentiality, whereas the third chapter also focuses on the most sensitive types of medical personal data.

7. *Interpretation of legal norms*. This method is used in the scope of *teleological interpretation*, where the author uses the court jurisprudence for the explanation of the scope of legal norms, which relate to medical confidentiality: courts of higher instances frequently provide explanations for the purposes and scope of the application of laws, which may be also viewed in cases relating to patient's rights breaches, including medical confidentiality.

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3. Anatoliy A. Lytvynenko, The Application of Patient's Right to Informed Consent, Medical Confidentiality and Access to Medical Records upon the Example of Republic of Latvia (2021), 2021 Proceedings of the conference "Legal Problems of the Contemporary Transformation of Healthcare", Zaporizhzhia, Ukraine, 27-28 May 2021, p.p. 6-11
   Online: https://www.academia.edu/50323506/
4. Anatoliy A. Lytvynenko, Disclosure of Personal Data Maintained in Biobanks in Civil and Criminal Proceedings: an Example of Nordic States (2021), 2021 Proceedings of International scientific and practical conference "Legal Science, Legislation and Law Enforcement: Traditions and New European Approaches", Wroclawek, 9-10 July 2021, p. 198-202
   Online: https://www.academia.edu/50913115/
   DOI: https://doi.org/10.30525/978-9934-26-116-9-49
5. Anatoliy A. Lytvynenko, Senate Rules that Transfer of an In-patient's Health Data without his Consent to the State Police Violates Medical Confidentiality: Judgment SKA 41/2020 (2021), p. 139-146, 2021 XI International Scientific Conference "Time of challenges and opportunities: problems, solutions and prospects" on the 13th – 15th of May, 2021, Riga, p.p. 139-146
   Online: https://www.academia.edu/50942399/
6. Anatoliy A. Lytvynenko, Constitutional Dimensions of a Legitimate Disclosure of Biobank Data in Civil and Criminal Proceedings (2021), 2021 Proceedings of the International Conference „Constitutions and Constitutional Law in the World" (August 14, 2021, Center of American Studies at the Faculty of Law and Administration at the Adam Mickiewicz University, Poznan, Poland),
7. Anatoliy A. Lytvynenko, Revelations of the Patient's HIV-status Records: Comparative and International Court Practice, Proceedings of the conference "Medicine and Law: regulation and court practice", 28 October 2021, Nursultan, Astana Medical University, p.p. 138-142
   Online: https://www.academia.edu/63004236/

8. Anatoliy A. Lytvynenko, Medical law in the period of the First Independence of Latvia (1918 – 1940), Book of Proceedings of the 8th European Conference on Health Law (20-22 April 2022, Ghent, Belgium), Tom Goffin & Tom Balthazar (editors)., p.p. 51-65

1. The place of medical confidentiality in medical law. Peculiarities of the medical law in the Republic of Latvia

1.1. Overview of patient's rights in Latvia

Like the most jurisdictions of Eastern Europe, the patient's rights in Latvia are protected by the Patient's Rights Law, enacted in 2009[3]; separate aspects are also regulated by the Law on Medical Treatment[4]; the Civil and Criminal Procedure Code and the Personal Data Protection Law (relating to confidentiality of medical records). Medical law in Latvia is an increasingly emerging branch of law. The sources of it include: 1) legislation and codes; 2) case law of the Senate (Supreme Court of Latvia), occasionally the jurisprudence of lower courts; 3) the case law of European Court of Human Rights and the European Court of Justice; 4) international covenants relating to medical law where the Republic of Latvia is a signatory (e.g. Convention of Oviedo); 5) the judgments of the Constitutional Court (or the Satversme Court) of Latvia relating to medical law (for instance, the Court's 2016 judgment on the constitutionality of several provisions of the Law on the Establishment and Use of the National DNA Databases, or "DNA-Likums" in Latvian, as well as some provisions of the Cabinet Regulation No. 620)[5]. Gross negligence from the side of a medical practitioner, who caused a patient's death by his imprudence, is criminally punished, as ruled by the Senate of the Republic of Latvia in its 2002 judgment[6]. The main rights of the patient, upon the existing legislation and jurisprudence, include the following:

1. The right to maintain medical records confidential;
2. The right to be informed concerning the future treatment, requiring a medical (commonly, surgical) intervention, medical examination or test;
3. The right to access to the patient's medical records, as well as to control, or even expunge them[7];
4. The right to refuse treatment (still not clarified in case law, but safeguarded by statute), which is frequently referred to as a derivative of *informed consent*.

The main actual sources of medical law in Latvia are the Patient's Rights Law and the jurisprudence of the Senate, which has delivered three important judgments in 2020, notwithstanding the other cases, namely SKA-790/2020 (the doctor's obligation to inform the patient on all the

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[3] Pacientu tiesību likums, Latvijas Vēstnesis, 205, 30.12.2009

[4] Ārstniecības likums, Latvijas Vēstnesis, 167/168, 01.07.1997

[5] Latvijas Republikas Satversme tiesa, 2016. gada 12. maijā, lietā Nr.2015-14-0103 (*on the application of Lato Lapsa, petitioner*)

[6] Latvijas Republikas Augstākā tiesa, Senāta Krimināllietu departamenta, 2002. gada. 3 septembra, Lieta Nr. SKK – 01 – 253/02, Latvijas Vēstnesis Nr. 160 (05.11.2002)

[7] *A pret. Veselības ministrija*, Latvijas Republikas Augstākās tiesas, Senāta Administratīvo lietu departamenta, 2020 gada. 30.septembrī , Lieta Nr. A420260716, SKA-166/2020, para. 2.3-3; *Administratīvā apgabaltiesa*, 2020.gada 2. decembri, Lieta Nr. A420209619; Lietas arhīva Nr. AA43-0874-20/10, para 2-4.6

possible risks of the operation)[8]; SKA-166/2020 (expungement of blood samples of plaintiff's deceased father)[9]; and SKA-41/2020 (illegitimacy for a transfer of patient's medical records to the State Police, suspecting the patient had committed a crime – upon the own initiative of the medical institution's representatives)[10]. Lawsuits against Latvia in respect with medical malpractice were brought before the European Court of Human Rights. In 2014, the European Court of Human Rights ruled for plaintiff in *L.H. v. Latvia*, where plaintiff's medical data was sent to a governmental controlling body relating to a clinical episode of an unconsented tubal ligation[11]. In the same year, the said court ruled for plaintiff, who litigated against the state authorities for the actions of hospital personnel, who extracted the organs from the body of her deceased son for donation, who was critically injured in a car accident, and died later in the hospital; apparently, no consent was given neither from the side of the decedent, nor plaintiff as a member of immediate family[12]. Such lawsuits displayed that the national legislation in respect with medical law had its deficiencies, but the situation changed to better. However, the recent judgments of the Senate disclose that certain legislative provisions have either to be amended and clarified, or at least to be expounded by courts, when an appropriate lawsuit is brought before them.

The acting Patient's Rights Law, enacted in 2009, grants a number of so-called "informational rights" of the patient (to which I dedicated a conference paper[13]), are the following:

1) The right to keep his data confidential (Article 10 of the Law). The existing case law displays that the essence of medical confidentiality was very misty before the Senate ruled in the case No. SKA-41/2020. In that judgment, plaintiff filed an appeal in cassation against the decision of the lower court, which affirmed that the hospital representatives have correctly transferred his medical records to the State Police believing that plaintiff had committed a crime (before hospitalization, the plaintiff smoked marijuana, not concealing this fact to the medical staff). The Senate said that such transfer has no firm legal basis, as neither the Personal Data Protection Law specified such distinct obligation for medical practitioners, nor the Criminal Procedure code did not establish any criteria, upon which medical practitioners could assess when they could exercise their right to report on acts which could constitute a crime, nor did the Medical Treatment Law provide such obligation for medical staff, as the referred

[8] *A. pret. AS „EZRA-SK Rīgas slimnīca „BIKUR HOLIM""*, Senata Administratīvo lietu departamenta, 2020 g. 24 marta, Lieta Nr. A420172018, SKA – 790/2020, para. 12-14

[9] *A pret. Veselības ministrija*, Latvijas Republikas Augstākās tiesas, Senāta Administratīvo lietu departamenta, 2020 gada. 30.septembrī , Lieta Nr. A420260716, SKA-166/2020

[10] Latvijas Republikas Augstākā tiesa, Senāta Administratīvo lietu departamenta, 2020 g. 6 novembra, Lieta Nr. A420305915, SKA-41/2020, para. 11-19

[11] *L. H. v. Latvia*, App. No. 52019/07, Judgment of 29 April 2014, para. 5-14; 15-23

[12] *Petrova v. Latvia*, App. No. 4605/05, Judgment of 24 June 2014, para. 6-12; 13-26

[13] Lytvynenko, A.A. The Application of Patient's Right to Informed Consent, Medical Confidentiality and Access to Medical Records upon the Example of Republic of Latvia (2021), 2021 Proceedings of the conference "Legal Problems of the Contemporary Transformation of Healthcare", Zaporizhzhia, Ukraine, 27-28 May 2021, p.p. 6-11

provisions did not concern plaintiff's situation. The Senate hallmarked that the principle of medical confidentiality not only protects the privacy of the patient, but aimed to safeguard his trust in healthcare institutions, as such. Hadn't such a principle existed, said the Supreme Court, many patients would deter from seeking medical treatment. The judgment was reversed; this judgment is described in the chapter in detail below[14].

2) Section 9 of the Patient's Rights Law provides the right of the patient to have an insight into his medical records, including the right to its correction (Section 9.3), but the law does not specify such issue, as, for instance, the expungement of such medical records. Before the adoption of the law in 2009, the Senate has ruled on a case concerning the access to laboratory test examinations. In its 2008 judgment (SKC – 13), where plaintiff, being contracted with hepatitis C, which was first diagnosed in early 1998 (seemingly, he was affected with the disease several years before), got to know his diagnosis only in late 2002, and sued the hospital and a medical center to recover the medical expenses and loss of profit. The Senate held, that the term "treatment" in the Medical Treatment Law refers not only to treatment, but the diagnosis and the prevention of diseases; and thus, under Art. 14 of the Epidemiological Safety Law, the medical practitioner, who has suspicions that the person is affected by an infectious disease, has to inform this patient so that the latter could take measures to treat it[15]. The defendant's appeal in cassation was rejected.
3) Informed consent. Despite the said concept was elaborated in the national legal doctrine in the 1930s[16] the existing case reports did not provide a direct answer, whether some physician was ever punished for performing an operation without the patient's consent and not informing him concerning the potential consequences of such operation, or concerning the gist of the future medical procedures. A similar case occurred in the First Czechoslovak Republic in 1926[17], and Poland in 1937[18], though both of them are little known in medical law scholarship, which is historically more oriented on common law jurisdictions. The current Patient's Rights Law anchors informed consent in Art. 6 (1,2,3) of the law, though the body of case law in this respect is young. The physician's duty to inform the patient on future

[14] Latvijas Republikas Augstākās tiesas , Senata Administratīvo lietu departamenta, 2020 g. 6 novembra, Lieta Nr. A420305915, SKA-41/2020, para. 11-17

[15] *Māris D. pret BO VAS „Paula Stradiņa klīniskā universitātes slimnīca" un BO VAS „Iekšlietu ministrijas poliklīnika"*, Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta, 2008. gada 9.janvāra, Lietā Nr. SKC – 13, p. 2-3; 7-9, 10

[16] Jākobsons, A. Ārsta atbildība pēc 1933. g. sod. lik. 218. un 219. p. : Referāts., – Riga, 1936., p. 5-6; 8-17; K.V., Vai ārstam ir tiesība izdarīt dzīvību apdraudošas operācijas bez slimnieka vai viņa piederīgo piekrišanas un kāda ir viņa atbildība slimnieka nāves gadījumā. Jurists, Nr. 7 (01.10.1932). – Riga, 1932., p. 201-204

[17] *Nejvyšší soud Československé republiky*, Rozh. ze dne 12. ledna 1926, Rv 1413/25, Vážny (Civil Cases), Vol. 8, p. 44-46 [Čís. 5638]

[18] Wyrok Sądu Najwyższego z dnia 6 października 1937 r. (C II 885/37, Zb. Orz. 1938, z. 6, poz. 291, s. 713, str. 713-715) // Zbior Orzeczen Sądu Najwyższego, Orzeczenia Izby Cywilnej, Rok 1938, Zeszyt VI, Wydawnictwo Ministerstwa Sprawedliwosci. – Warszawa, 1938

treatment and its gist has been acknowledged by lower courts[19], as well as in the recent practice of the Senate. In the 2013 judgment (SKC-213/2013) concerning a confinement of a psychiatric patient in a mental asylum, the Senate hallmarked the following features of the legal nature of the patient's consent: 1) the treatment is lawful with the patient's consent except for involuntary treatment, where the imperative nature is marked; 2) the consent is conditional on basis of a) ability to express his will; b) the patient's awareness; c) the patient's voluntary nature; 3) consent is not a sufficient condition for treatment (when it cannot be performed only upon the patient's subjective will)[20]. In its 2020 judgment, SKA-790/2020, the Senate has affirmed that the duty of the physician to provide the patient will all necessary information that would ensure informed consent and the verification of contraindications does not fade in case the patient clearly indicated he desired to have this operation performed[21].

4) Informed refusal of treatment. Under Art. 6 (4) of the Patient's Rights Law, the patient has a right to forego treatment, or forego a certain method of treatment, not refusing it in general. The refusal has to be performed in writing. This right is still not properly represented in case law, and the scope of its application is not clear. For instance, could it be legal to let a person to refuse treatment in case the person will apparently decease, unless such treatment started? Could refusal of treatment be spread to an anticipated will of the patient not to continue life-supporting treatment? The Latvian law still does not have an answer for this. At the same time, provisions of Art. 6 of the Patient's Rights Law clearly establish that the doctors may act accordingly without the patient's consent in case of emergencies.

The legal institute of medical confidentiality is generally a very old one, but relatively novel for the legal system of Republic of Latvia. In judgment SKA 41/2020, the Senate emphasized, that the said principle has got a twofold nature: firstly, it is founded to protect the patient's privacy, and next, had such a principle not existed, the patients would withstand from asking for medical care, and the trust in the medical profession and healthcare system would be undermined[22]. In Latvian legal scholarship, data confidentiality and medical confidentiality have repeatedly became in the focus of legal scholars. Data confidentiality issues relating to electronic data protection, could be found in the work of the Latvian scholar Džena Andersone (2018)[23], where the author discussed the problems of protecting the personal data of the deceased people; transposing it to medical law, this arises the issue

[19] *Administratīvā rajona tiesa Rīgās tiesu nams*, 2017.gada 12.maijā, Lieta Nr. A420313316 (Lietas arhīva Nr. A42-00955-17/5), p. 10.1 – 10.4; *Vidzemes apgabaltiesas, Civillietu tiesas kolēģija*, 2018.gada 10.septembrī, Lietasarhīva Nr. CA-0212-18/14, p. 2-4

[20] G.D. pret Valsts sabiedrību ar ierobežotu atbildību „Strenču psihoneiroloģiskā slimnīca, Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta, 2013. gada 18. oktobra, Lieta Nr. 216/2013, p. 11 / para. 8.5

[21] *A. pret. AS „EZRA-SK Rīgas slimnīca „BIKUR HOLIM""*, Latvijas Republikas Augstākās tiesas, Senata Administratīvo lietu departamenta, 2020 g. 24 marta, Lieta Nr. A420172018, SKA – 790/2020, p. 9-10 / para. 12-13

[22] Latvijas Republikas Augstākās tiesas, Senāta Administratīvo lietu departamenta, 2020 g. 6 novembra, Lieta Nr. A420305915, SKA-41/2020, para. 11-17

[23] Andersone, D., *Mirušu cilvēku personas datu aizsardzība*, Socrates, 2018, Nr. 1 (10), p. 108-119

of the patient's right to control the use of his medical data after his demise, or the right of the patient's relatives to get access to such data, provided the legislation and the will of the patient allowed so (a good example of such concept is the 2016 judgment of the Belgian Court of Cassation[24]). The Latvian scholar Žaklīna Ieviņa (2022)[25] discussed an outstanding topic of anonymisation of personal data in relation to the General Data Protection Regulation[26] provisions; the given research was addressed in a general manner, and is of particular importance in the sphere of medical law – such as hospital record-keeping and the maintenance of personal data (including biological samples etc.) in biobanks, to which the Chapter 3.3. of the promotional work is dedicated in detail. The Latvian scholar Agnese Reine-Vītiņa (2019) provided an overview of the existing data protection legislation of the Republic of Latvia[27], whereas it should be denoted, that the processing of medical personal information in Latvia is also conducted on basis of the Data Protection Law.

Contemporary Latvian scholarship relating to medical law possesses a number of scientific articles and promotional works. For instance, the promotional work of Līga Mazure "*Pacienta griba un tās civiltiesiskā aizsardzība*" (Latvian University, 2011)[28] covered the issue of patient's will to undergo or to forego medical treatment, mainly dealing with the issue of patient's legal capacity, informed consent and the right to abstain from medical treatment. Another promotional work by Karina Palkova, "*Nepilngadīgo pacientu un Ārstniecības personu – Tiesisko attiecību problemātika ārstniecības procesā*" (Riga Stradins University, 2019)[29], concerned the legal aspects of minors' medical treatment, mainly from the view of international human rights law and administrative law, as well as certain aspects of civil law (i.e. guardianship and legal representation). The monograph "*Medicīnas tiesības*" ("Medical law"), authored by Santa Ašnevica-Slokenberga, Agnese Gusarova, Andrejs Vilks and Marina Selunska, published in 2015, also covered a number of issues of patient's confidentiality in the sphere of healthcare in Latvia[30]. All of the aforesaid scientific literature authored by Latvian legal scholars was used in the promotional work.

In fact, this notion exists for over a hundred years, probably being announced at the first time in France, in the case of Watelet and Dallet, when the Court of Cassation reiterated the trial court's decision, that the principle is enacted not only in protecting the privacy of patients and their families

[24] Christelle / Jean et S.A. A.G., Cour de Cassation (Belge), 1re Chambre, 14 mars. 2016, JLMB 2016/27 p. 1282
[25] Ieviņa, Ž., *Erasure and Anonymisation of Personal Data in Context of General Data Protection Regulation*, Socrates, 2022, Nr. 1 (22), p. 114-126
[26] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal of the European Union, 4.5.2016, L 119/1
[27] Reine-Vītiņa, A. *Personas datu aizsardzības mērķis untiesiskā regulējuma vēsturiskā attīstība*, Socrates, 2019, Nr. 1 (13), p. 104-109
[28] Mazure, L. 2011. Pacienta griba un tās civiltiesiskā aizsardzība: promocijas darbs. Rīga: Latvijas Universitāte.
[29] Palkova, K. 2019. Nepilngadīgo pacientu un Ārstniecības personu – Tiesisko attiecību problemātika ārstniecības procesā. Rīga Stradiņa Universitāte.
[30] Ašnevica-Slokenberga, S., Gusarova, A., Vilks, A., Selunska, M., Medicīnas tiesības. Riga: SIA Tiesu namu aģentūra, 2015, p. 349

from indiscreet revelations, but as the court held, the revelation of professional secrets would deprive the confidence in the professions (such as doctors and lawyers), which the society trusts and relies on[31]. The legislation of Latvia provides that patient data is to be processed and protected by the provisions regulating the protection of personal data (see Art. 10 (1) of the Patient's Rights Law), whereas several special provisions are contained in Art. 10 of the said law. Art. 10 (3) provides for the inhibition of disclosing information after the patient's death, unless (under Art. 10 (4)) the said information is provided to his legal representatives (provided by Art. 7 (1) of the said law) and under the circumstances, provided in Art. 10 (4)(1)-(2) of the said law, that is, either relating to the cause of death, or relating to medical treatment before his demise, or in case it may somehow affect the life or facilitate the deceased patient's legal representatives. The patient's information may be also transferred to several other institutions, as stipulated and provided under specific circumstances of the provisions of Art. 10 (5) (1)-(19) of the Patient's Rights Law[32]. There is no specific civil or penal liability directly in respect with revelations of medical confidentiality, though plaintiffs may apparently file lawsuits based upon the violation of the provisions of the data protection law and other legislative acts regulating the security of patient's medical information.

At the European level, the principle of legal analogy within the professional relationships that require a "veil" of confidentiality by using a parity like "*patient – physician*", "*lawyer – client*", "*bank – customer*" etc. was repeatedly used by national courts in older cases[33], and the European Court of Human Rights has confirmed a necessity for a substantial protection of professional communications and correspondence, like between lawyers and clients, as well as patients and physicians[34]. Medical data, among other personal data, upon the European Court, constitute a paramount concordance for the enjoyment of patient's right to privacy, protected by Art. 8 (1) of the European Convention of Human Rights[35]. The current European Court's jurisprudence has quite well-known judgments on client-solicitor privilege[36], as well as banking confidentiality[37], if not speaking about medical confidentiality. In more recent judgments, the European Court attributed a need for a strengthened

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[31] *Watelet et Dallet, gerant du journal Le Matin, C. Min. publ.*, Cour de Cass., Cham. Crim, 19 dec. 1885, Jurisprudence Royaume (Dalloz), Dall. Per. 1886 I 347, p. 347–348

[32] *Pacientu tiesību likums*, Latvijas Vēstnesis, 205, 30.12.2009

[33] See. for instance, *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461, 480-481 (opinion by Scrutton, L. J.). Citation: "Applying this principle to such knowledge of life as a judge is allowed to have, I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances. This duty equally applies in certain other confidential relations, such as counsel or solicitor and client, or doctor and patient."

[34] See., for instance, *Szuluk v. United Kingdom*, Judgment of 2 June 2009, App. 36936/05, §46-48

[35] *Z. v. Finland*, Judgment of 27 February 1997, App. No. 22009/93, §95

[36] *Michaud v. France*, App. No. 12323/11, Judgment of 6 December 2012, para. 118-119. Concerning the ECJ, see: *AM & S Europe Limited v. Commission of the European Communities*, Judgment of 18 May 1982, Case № 155/79, [1982] E.C.R. 1575, at p. 1607

[37] *M.N. & Others v. San Marino*, [2015] ECHR 661, App. № 28005/12, Judgment of 7 July 2015; *Brito Ferrinho Bexiga Villa-Nova v. Portugal*, [2015] ECHR 1049, App. № 69436/10, Judgment of 1 December 2015; *G.S.B. v. Switzerland*, [2015] ECHR 1122, App. № 28601/11, Judgment of 22 December 2015; *Sommer v. Germany*, [2017] ECHR 383, App. № 73607/12, Judgment of 27 April 2017

protection of lawyer-client communications[38]. In 2014, the European Court of Human Rights has laid down the judgment of *L.H. v. Latvia*, where the transfer of a woman's medical records to a center of assessing the quality of healthcare without her consent (the clinical episode featured a surgeon's malpractice by making an unauthorized tubal ligation) was found unlawful[39]. This decision has become quite an important precedent for the evolving body of medical law in the Republic of Latvia.

1.2 . Judgment of the European Court of Human Rights in L.H. v. Latvia (2014)

Plaintiff, a Latvian national, delivered a baby in a Cēsis hospital. A caesarian was conducted owing to complicated labor, consented by plaintiff. In the course of the said operation, the surgeon performed tubal ligation without plaintiff's consent, for which she sued the hospital for damages having prevailed in action in early 2006. In 2004, before the civil proceedings against the hospital had been commenced (as plaintiff attempted to rule out the dispute in an out-of-court order, having failed to resolve it in early 2005, subsequently instituting a civil action), the hospital director called a healthcare inspectorate body named *Medicīniskās aprūpes un darbspējas ekspertīzes kvalitātes kontroles inspekcija* (hereinafter MADEKKI) to evaluate the quality of treatment and care provided to plaintiff. The inspectorate instituted an administrative procedure, requiring plaintiff's medical records of 1996-2003, which were delivered. A MADEKKI representative later called plaintiff to receive comment on the aforesaid events, but was referred to her lawyer. Allegedly, this person had forewarned plaintiff from instituting the lawsuit and was said that it was plaintiff's fault she had been sterilized, which sounds at least strange. Then plaintiff's lawyer contacted MADEKKI asking for the reason of their inquiry. In early 2004 MADEKKI issued a report claiming that during plaintiff's care no laws were violated. Plaintiff's lawyer received an answer from MADEKKI where the inspectorate set out its position concerning the legal basis of the inquiry and wrote what the body has made during the inquiry. Next, plaintiff's lawyer instituted an administrative action against the said inspectorate claiming that 1) the inquiry was unlawful, as the aim was to gather respective evidence of the forthcoming litigation, which was beyond the office of the inspectorate; 2) the defendant inspectorate was blamed in acting unlawfully by requesting and receiving plaintiff's medical records, violating her right to privacy. In addition, the conclusive report was transferred to the said hospital, which, upon the counsel's claim, violated her right to privacy. Counsel requested the administrative court to annul the report, claiming it was erroneous[40]. The trial court dismissed her claim finding that the MADEKKI conclusions did not create rights or obligations for the plaintiff and so could not be regarded as an administrative act, dismissing the remainder as unfounded. The appeal was also unsuccessful, as the second-instance administrative court upheld the reasoning of the trial court

[38] *Michaud v. France*, App. No. 12323/11, Judgment of 6 December 2012, para. 118-119
[39] *L.H. v. Latvia*, App. No. 52019/07, Judgment of 29 April 2014, para. 5-14 (facts); 15-23; 34-39; 40-46; 47-53.
[40] *L.H. v. Latvia*, App. No. 52019/07, Judgment of 29 April 2014, para. 5-14.

emphasizing that the activity of the inspectorate in respect with healthcare was a legitimate reason to request and thus dispose the said medical records. Plaintiff impugned the judgment to the Supreme Court, which, after having examined the facts of the case and the argument of plaintiff, has decided to dismiss the claim. The highest court also found that the said report was not an "administrative act:. The arguments of the Senate were the following:

- The highest court found that the Medical Treatment Law (*Ārstniecības likums*) lodged the right to assess the diligence of medical care – not only after it has received a complaint from a patient, but also when a request for examination was given by a healthcare unit[41].
- The Senate did not deny that the gathering of medical records constituted an interference into privacy, but it augmented that the Convention left the states a wide margin of appreciation within balancing the right to privacy and public interest – i.e. the confidence of patients in medical profession and healthcare services in general.
- The court held that the Data Protection law (*Fizisko personu datu aizsardzības likums*)[42] contained exceptions allowing the inspectorate to gather and dispose medical records, thus finding for defendant[43].

Plaintiff decided to file and action to the European Court of Human Rights. The parties' positions are shortly laid down as follows:

Plaintiff (L.H.): The domestic law did not expressly authorize the MADEKKI to collect medical records without patient's consent. The-then acting legislation simply designated the hospital's discretion to dispense such data, plaintiff contended that the hospital had to decline MADEKKI's inquiry and not divulge any records. Statute of the inspectorate, claimed the plaintiff, approved by the Cabinet of Ministers that is not anyhow a legislative body, could not be recognized as 'law' as of Art. 8 (2) of the Convention. The only aim for gathering medical records was as stated above, the plaintiff claimed, was hardly compatible to protecting public health or the rights of others, as basically no threat to it was found. Plaintiff discarded defendant's position that the interference was insignificant, or not necessary in a democratic society[44]. Even if assuming that the inspectorate could strive for a legitimate aim, it could be performed in a less invasive manner, claimed plaintiff[45].

Defendant (Government): Firstly, defendant heavily relied upon the position of the Latvian Supreme Court, which had concluded that the aforesaid acts were in accordance with the law, claiming that the existing legislation allowed the MADEKKI inspectorate to gather and work with plaintiff's medical records. Defendant claimed that MADEKKI collected and examined the said records in order to assess the quality of medical care administered to plaintiff. If any malpractice was

[41] I.e. an institution providing healthcare.
[42] Acting 2000-2018, currently repealed by Fizisko personu datu apstrādes likums (No. 2018 / 132.1)
[43] *L.H. v. Latvia*, para. 15-23
[44] A typical test of the European Court of Human Rights since the 1970s.
[45] *L.H. v. Latvia*, para. 40-46

assured, said the defendant, it could have helped to avert similar situations in the future. On trial, the hospital director ascertained that the hospital requested the MADEKKI assessment to define whether the physician had committed a crime by performing tubal ligation without plaintiff's consent. Furthermore, defendant insisted that the interference into plaintiff's privacy was, as stated above, not a serious one[46].

Judgment. The court assessed the facts and declared that in order to be "*in compliance with the law"* it has to be within the concept of "rule of law" and enough precise and to provide adequate legal protection against highhandness. The Court doubted if the medical records collected in 2004 concerning 1997 events actually were aimed at "providing medical treatment" or "administering healthcare services" withing the meaning of a 2000s data privacy law, if the actual events took place in 1997. The Court noted that plaintiff was never informed that her treatment records were transferred to MADEKKI, adding that the defendant hospital never obtained any recommendations concerning improvement of services, but only the records on the physician's actions in the plaintiff's case. The Court also claimed not to conceive what functions MADEKKI were performing or what public interest did it "protect" by drawing the abovesaid report, and augmented that the Supreme Court of Latvia did not examine the proportionality of the interference, as it, upon the court report, had already been done by the legislature[47]. Concerning defendant's contention that MADEKKI collected the records to determine the physician's liability, the Court said that firstly, it was time-barred, as the statute of limitations was in any case exceeded and secondly, neither the hospital director, nor MADEKKI had legal authority to deal with the determination of conjectural penal liability of the physician. Concerning the role of MADEKKI in the said civil litigation, the defendant contended that the body could give independent expert advice. This was not discussed by the Supreme Court, and the European Court concluded that none of the cited legislative provisions could confirm that providing such advice in civil litigation is really one of the functions of MADEKKI. The scope of medical records, said the Court, were not limited by the law, and the amount of such medical records could not be claimed to be little – in fact, these were taken from three (!) medical institutions. What is more stunning, the justification for collecting medical records encompassing entries from 1997 to 2003 had never been examined at any stage within the domestic procedure, moreover, the Court found that the MADEKKI representatives collected the medical records without assessment of their relevance for achieving their goal whatsoever the data had been gathered. The Court found that the plaintiff's right to privacy had been violated, finding that domestic law lacked precision or contained legal safeguards from highhandedness in this sphere, or did possess a distinct limit of discretion of certain bodies and the means of its exercise[48].

[46] *L.H. v. Latvia*, para. 34-39
[47] *L.H. v. Latvia*, para. 47-53
[48] *L.H. v. Latvia*, para. 54-60

The judgment of *L.H. v. Latvia* has displayed that despite the acting domestic legislation on patient's rights (especially, informational rights) and data privacy is quite well-elaborated, the breaches of patient's rights, such as non-disclosure of the medical records (e.g. laboratory bloodtest examinations) to the person concerned[49], or non-providing the appropriate information concerning further treatment of the patient[50].

1.3 .Judgment of the Latvian Senate No. SKA 41/2020

The year 2020 was especially rich for Latvian medical law. In March 2020, the Senate ruled on a medical malpractice case declaring that the physician's obligation to provide the patient with all the necessary information, which would ensure informed consent, and to assess all indications and contraindications to it, does not fade in case the patient himself submits to it[51]. Then, in September 2020, the Senate ruled against the Ministry of Health's appeal in cassation concerning the illegitimacy of maintaining the blood samples of plaintiff's deceased father[52]. Now, in November 2020, the Senate gave a ruling on medical confidentiality and the exceptions to it.

Facts.

On December 22, 2014, plaintiff (referred as person "A") called the Emergency Medical Service to his home. A "roll-your-own" cigarette, being half-smoked, was found on the table of the plaintiff in his domicile. Plaintiff also said that he had previously smoked marijuana and smoked spice a few days before calling the emergency medical service. The plaintiff was subsequently hospitalized and treated, but his personal data (namely: his name, age, address and the diagnosis) were transferred to the State Police by the Emergency Medical Service representatives by telephone, as they considered that there was a suspicion of a criminal offense (namely, the use of narcotic or psychotropic substances). The plaintiff impugned the acts of the Emergency Medical Service (complaint rejected), and then complained to the Ministry of Health with the same result: his complaint concerning non-pecuniary damage caused by revelation of his personal data was rejected. Then, the plaintiff decided to apply to the court, and first-instance court, as well as the Administrative Regional Court dismissed his claim on the following grounds:

- The provisions of the Personal Data Protection Law (Section 10 (4) (1) and Section 11 (11)), as well as Section 369 (1) (3) of the Criminal Procedure Law provided that medical treatment institutions and medical practitioners have the right to inform authorities for diseases that

[49] *Māris D. pret BO VAS „Paula Stradiņa klīniskā universitātes slimnīca" un BO VAS „Iekšlietu ministrijas poliklīnika"*, Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta, 2008. gada 9.janvāra, Lietā Nr. SKC – 13, p. 7-9

[50] See. *Administratīvā rajona tiesa Rīgās tiesu nams*, 2017.gada 12.maijā, Lietas Nr. A420313316 (Lietas arhīva Nr. A42-00955-17/5), s. 10.1-10.4 – 13; *Vidzemes apgabaltiesas, Civillietu tiesas kolēģija*, 2018.gada 10.septembrī, Lietasarhīva Nr. CA-0212-18/14, p. 2-4.

[51] *A. pret. AS „EZRA-SK Rīgas slimnīca „BIKUR HOLIM""*, Senata Administratīvo lietu departamenta, 2020 g. 24 marta, Lieta Nr. A420172018, SKA – 790/2020, p. 9-10 (para. 12-14)

[52] SKA-166/2020, para. 15-17 and operative part.

could be caused by a criminal offense. It is not, generally speaking, *obligatory* (e.g., a good-old example would be the earlier case of *Simonsen* in the United States, where plaintiff sued a physician, who reported the hotel manager where plaintiff stayed concerning him after having diagnosed him with a contagious disease, likely syphilis – it was by the court to be a legitimate derogation of medical confidentiality[53]), but the said provisions of the Latvian legislation gave them such a right. On the other hand, said the court, "*it is the duty of the investigating authority to be able to assess the facts correctly, and to determine whether a criminal offense has been committed, whether an administrative offense has been committed or whether there is neither a criminal offense nor an administrative offense*."

- The plaintiff did not conceal drug consumption, providing this information to the doctors. Hence, the factual circumstances of the case indicated that an offence could have been committed – the acquisition and use of narcotics or psychotropic substances. Therefore, the actions of the said employees of the Emergency Medical Service were in accordance with the law.
- Another argument was announced concerning the fact that many young people in Latvia were poisoned with similar drugs in the 2010s, including some fatal instances. Thus, establishment of such facts could assist the State Police to detect and punish drug traffickers. Therefore, it is of public interest to protect the population from purchasing and using such substances. In this view, the public interest overrides the person's right to maintain medical confidentiality.

Appeal in cassation.

Plaintiff lodged an appeal in cassation against the aforementioned judgment, stating the following arguments:

- There was a conflict between the provisions of the Law on Patient's Rights and the Data Protection Law, which the regional court did not resolve or interpret.

- The court erroneously defined the aim for disclosure of the plaintiff's personal data. The employees of the Emergency Medical Service disclosed his records for the prosecution of plaintiff, but not, as the court had claimed previously, to eradicate the narcotic trafficking and so to prosecute others.

- The lower court did not manage to assess whether the purpose of disclosing personal data of the plaintiff could have been achieved by less restrictive, milder means. The regional court moved to discuss the public interest, but did not take into account the foreseen harm done to plaintiff by such revelations. Such practice, denotes the plaintiff in his appeal, would undermine the trust in medical institutions and their staff, which could make a prospective patient to avert from seeking treatment.

[53] *Simonsen v. Swenson*, 104 Neb. 224, 228-230; 177 N.W. 831, 832 (1920)

The explanations of the defendant underlined their acceptance of the regional court's position concerning the application of the abovementioned provisions of the Patient's Rights Law[54].

The Senate's judgment

Upon the facts of the dispute, the Senate established that the Emergency Treatment Service has given the plaintiff's personal data to the State Police, which would allow identifying the plaintiff. The Court turned to discuss the fundamentals of the right to privacy in Latvian law, considering that the right to privacy is a constitutionally-protected right (Art. 96 of the Satversme), and is established in the national case-law, and is also protected by the European Convention of Human Rights (Art. 8 (1)), covering quite a wide scope of the person's physical and social identity. At the same time, the right to privacy is not absolute and is subject to legitimate limitations, which are, however, quite few as well. The main dispute in the present case, denoted the Senate, is in the issue of whether there was a legal basis for the transfer of the plaintiff's personal data to the State Police, and consequently, a rather serious constraint of the plaintiff's right (and obviously expectation) of privacy.

Next, the Senate turned to the assessment of legitimacy of plaintiff's personal data processing. The Senate accentuated that Under Art. 11 (11) of the Personal Data Protection Law, the processing of sensitive personal data was permitted for the functions of public administration. Since the lower court found that the State Police is a public administration body whose duties include detection and prevention of crime, it concluded that the said body had a right to process such personal data. At the same time, the question was not whether the State Police could lawfully process the said data, but whether there was a legal basis for the Emergency Medical Service to transfer the plaintiff's data to the State Police. The Senate found that the regional court has not examined and has not established whether it was necessary for the said Emergency Medical Service to do so in order to perform any of its functions. Therefore, found the Senate, there were no grounds to conclude that there was a legal basis for processing the plaintiff's personal data this way under the abovementioned provisions. The Senate has established, that there was no necessity of transferring plaintiff's personal data to the State Police under the provisions of the Cabinet of Minister's Regulation no. 1480 "Regulations of the Emergency Medical Service", and found that Art. 11 (11) should not be considered as a norm on which such restriction of privacy has to be performed. Nor did the Senate find that the provisions allowing to process personal data for initially unforeseen purposes in the field of criminal law was a norm to allow processing plaintiff's data the way it was done[55]. The Court also reiterated the judgments of the Satversme Court and the European Court of Human Rights concerning the necessity in a sufficient legal basis for a possible restriction of a fundamental right (i.e. the right to privacy), and a necessity to define the bounds of the discretion of the competent authorities and ways of

[54] Latvijas Republikas Augstākās Tiesas Senāta Administratīvo lietu departamenta, 2020 g. 6 novembra, Lieta Nr. A420305915, SKA-41/2020, para. 2-3.3; 4-4.3; 5.
[55] SKA-41/2020, para. 6-11

implementation[56]. Thus, the Court found that the abovementioned provisions of the Personal Data Protection Law are not a sufficient legal basis for the impugned acts of the Emergency Medical Service.

The Senate emphasized that the provisions of the Personal Data Protection Law were not the only ones to allow processing of personal data, especially relating to somewhat similar situations of plaintiff's, but as we may see next, these are not actually the same. So, Article 56.1 of the Medical Treatment Law provided a substantial derogation from the right to privacy in respect with patient's health data: upon it, the medical institutions to provide information concerning the patient if only: 1) there is reason to believe that the patient has suffered from violence; 2) if there is reason to believe for the medical institution representatives that a minor patient has suffered from lack of proper care and supervision, or any other violation of children's rights. These provisions obviously do not fit into the plaintiff's situation. Therefore, the Senate said, that the reporting of such facts to the State Police protects patients themselves, not the interests of any third parties – thus, such an exception from confidentiality, finds the Senate, is justifiable and does not significantly contradict the dogmas of the medical profession[57]. The Senate went through the provisions of the Code of Criminal Procedure, namely Art. 369 (1) and Art. 369 (2) (3). In short, the said provisions allowing to submit information concerning acts which could constitute a crime, adhered to medical institutions and doctors, as it was mentioned in the code itself. But despite it created a right to do so, the situation with it was not so easy as it seemed to be. The provisions of the said code did not establish any criteria, according to which the medical institutions and their representatives could assess in which case they could exercise such a right. Unlike Art. 56.1 of the Medical Treatment Law, the provisions of Art. 369 (1) & (2) (3), there is no obligation to do so, but a right to do so. Therefore, the situation is different. But lodging the medical practitioners such a right, held the Senate, would be a "substantial departure" from the principle of medical confidentiality, and so, it is a significant restriction of the right to privacy. Now, let us see, what did the Senate say concerning the principles of medical confidentiality:

- Confidentiality is a key principle in the medical profession, dating back to the Hippocratic Oath;
- The obligation of confidentiality applies to all the information obtained by the medical practitioner during the treatment of the patient, and such information should be used only for the purposes of treatment.

[56] At para. 11, the Senate says: "Section 10, Paragraph four, Clause 1 of the Personal Data Protection Law does not set any restrictions on who, what data and to whom may be transferred in order to achieve the objectives referred to in the norm, thus it hardly restricts the freedom of action of the involved entities. If it were acknowledged that this norm determines the legal basis for the processing of personal data and it is the basis for the restriction of a person's right to private life, then it should be concluded that such a restriction does not comply with either the Satversme or the Convention."

[57] SKA 41/2020, para. 15

- The Senate reiterated the findings of the European Court of Human Rights, approving that the principle of medical confidentiality is not only aimed to protect the patient's right to privacy, but also to protect his confidence (in the sense of trust) in the medical profession and the healthcare system in general. Hadn't such principle existed, it would have deterred people from providing necessary medical information in order to receive appropriate healthcare, or prevented from receiving medical care.
- The principle of medical confidentiality obliges to restrain from transferring the medical data to any third party, even other medical practitioners unless the patient has consented to it, or such transfer is permitted under the law. Therefore, the duty of confidentiality is a professional duty of the physician (see also Cl. 2.3 of the Latvian Code of Ethics for Doctors).
- The Code of Criminal Procedure has been elaborated considering this issue. Under Art. 121 of the Code of Criminal Procedure, the medical institutions shall provide such information only upon a written request of the person conducting the proceedings. And the action of this legal norm in time commences *after* such written request was received[58].

The Senate went on to say that the legal norms derogating the fundamental human rights (i.e. the right to privacy) have to be precise and foreseen. The previously mentioned norm, said the Senate, does not clearly define the limits and implementation methods, which have to be used by medical treatment institutions. Creating such a right would contradict the one of the key principles of medical profession, said the Senate; moreover, there is no reason to believe that disclosing such information will always bring public benefit. The lower court believed it would, since it claimed that it would help to detect and trace drug traffickers etc., but the Senate said that the lower court did not consider the fact that such acts could undermine the confidence of the patients in healthcare institutions making them to refrain from seeking medical assistance, and hence endangering their health and lives. And such conduct harms the public interest: "*In particular, the risk of such harm increases, if the transfer of patient information to the State Police takes place on the basis of vaguely worded norms, the practice of which the patient cannot foresee*.". So, the Senate found that the norm did not comply with the requirements of clarity and predictability. Such norms, allowing the medical institutions to transfer the patient's data to the State Police upon their own initiative, emphasized the Senate, would substantially limit the scope of confidentiality, which could cause a mistrust in healthcare institutions, which could pose a risk on public health, and significantly contradict the basic principle of the medical profession.

Consequently, the Senate found that such interpretation could bring to a disproportionate derogation of right to privacy (in the sense of medical confidentiality). The Senate found that the said norm of the Criminal Procedure Code should not be considered as a legal basis for transferring the

[58] SKA 41/2020, para. 13-15

patient's data to the State Police at the medical institution's own initiative, augmenting that this norm only reflects more specific regulations (Art. 56 (1) of the Medical treatment Law) in a general way. The Senate concluded that it may be possible, "or even necessary" to extend the obligation of medical institutions and doctors (as specified in Art. 56 (1) of the Medical Treatment Law) to report facts concerning patients to the State Police upon certain circumstances. However, such regulation should be made with sufficient clarity, precision and to be proportionate with the basic principles of the medical profession (that is, confidentiality), and the Senate added that the case is not that atypical not to be foreseen by the legislator. The Senate concluded, that the regional court has incorrectly interpreted the Section 10 (4) and Section 11 (11) of the Personal Data Protection Law and Art. 369 (2) (3) as the ones allowing the Emergency Medical Service to transfer the plaintiff's personal data to the State Police. Therefore, the Senate quashed the judgment of the Administrative Regional Court and referred the case to the Administrative Regional Court for a new hearing[59].

The Senate has given an important judgment relating to medical confidentiality and its boundaries. Upon the Senate, each restriction of medical confidentiality should be precise, clear and compatible with the main principles of the medical profession, apparently confidentiality. The legislation of the Republic of Latvia, upon the Senate, necessitates clearer regulations as to the derogations of medical confidentiality. The topic of exceptions from the obligation of confidentiality is a separate one, demanding further research. The decision of the Senate, commented in the paper, should become a valuable precedent establishing the main principles of medical confidentiality and the derogations from it in compliance with both legislation and case law of the Republic of Latvia, the international human rights standards and the main principles of medical profession, which are apparently inalienable from medical law.

1.4. Breaches of Medical Confidentiality in International Law: jurisprudence of the European Court of Human Rights

Claims for unauthorized disclosure of health-related data are known for over 200 years. National-legal systems usually embrace such unlawful revelations as a violation of professional secrecy, imposing civil or criminal penalties, depending on jurisdiction. In case the liability is criminal, the prosecution may be commenced upon the initiative of the public prosecutor's office, or a complaint of the aggrieved party; civil (tort) claims for such revelations are more frequent for common-law jurisdictions, whereas in most of civil law jurisdictions, such revelation constitutes a minor crime, usually punished by a fine. The European Court of Human Rights, acting as a court of last resort, having jurisdiction over the European Convention of Human Rights signatories, adjudicated a number of cases dealing with an unauthorized disclosure of health data. Such involved

[59] SKA-41/2020, para. 16-19 and operative part.

disclosing an identity of a HIV-infected person (*Z v. Finland* (1997)) in a court report[60], negligent data management involving a HIV-positive nurse in a hospital (*I v. Finland* (2008)[61], or the publication of health-related facts of a private person in press (i.e. the judgments of *Biriuk v. Lithuania* (2008)[62] and *Rodina v. Latvia* (2020)[63]); publication of Francois Mitterrand's health information in a book "*Le Grande Secret*", terminated by an injunction, imposed by a national court in the case of *Societe Plon c. France* (2004)[64]; transfer of medical records between healthcare and administrative bodies to ascertain the physician's liability without the former's authorization in *L.H. v. Latvia* (2014); a dispute concerning the legitimacy of patient health data utilization for biomedical research in *Gillberg v. Sweden* (2012)[65]; a dispute relating to legitimacy of transferring medical data to insurance companies in *M.S. v. Sweden* (1997)[66], as well as a dispute concerning the legitimacy of inspecting the prisoner's correspondence with his counsel, which involved a multitude of sensitive medical information (*Szuluk v. United Kingdom* (2009)). Some other judgments, which do not involve the issue of medical confidentiality breaches directly, dealt with claims concerning expungement of criminal records, including fingerprints, which potentially relate to medical data as well (i.e. *S. & Marper v. United Kingdom* (2008)[67]; *Aycaguer v. France* (2017)[68]. The patient's right to access his medical records, e.g. for preparing a medical malpractice lawsuit, has also been in focus of the European Court's judgment in the case of *K. H. v. Slovakia* (2009)[69], as well as in *Gaskin v. United Kingdom* (1989)[70] and *M. G. v. United Kingdom* (2002)[71] to a certain extent. Another interesting aspect of the access to medical records is the so-called right to anonymous childbirth, a French concept of a mother's right to have her identity sealed for an adopted child, who would possess no civil rights on inheritance. However, some people attempted to petition the court in order to obtain information concerning biological forbearers: that is how the cases of *Odievre v. France* (2003)[72] and *Godelli v. Italy* (2012)[73] were born.

The rules of applying and derogating medical confidentiality may be diverse in various jurisdictions, so the European Court has to consider the peculiarities of national legislation in each

[60] *Z. v. Finland*, [1997] ECHR 10; App. No. 22009/93; Judgment of 25.02.1997; Rep. Tijdschrift de Gezonderheitsrecht / Revue de Santé (Nederlands) 1997-1998, p.p. 315 – 327
[61] *I. v. Finland*, [2008] ECHR 623; App. No. 20511/03; Judgment of 17.07.2008
[62] *Biriuk v. Lithuania*, [2008] ECHR 1528; App. No. 23373/03; Judgment of 25.11.2008
[63] *Rodina v. Latvia*, [2020] E.C.H.R. 326, App. Nos. 48534/10 & 19532/15, Judgment of 14.05.2020
[64] *Affaire Editions (Societe) Plon c. France*, [2004] ECHR 200; App. No. 58148/00; Judgment of 18.08.2004
[65] *Gillberg v. Sweden*, [2012] E.C.H.R. 569, App. No. 41723/06; Judgment of 3 April 2012
[66] *M.S. v. Sweden*, [1997] ECHR 49, App. No. 20837/92, Case No. 74/1996/693/885, Judgment of 27.08.1997 (also reported in French as *Affaire M.S. c. Suede*).
[67] *S. & Marper v. United Kingdom*, [2008] E.C.H.R. 1581, App. Nos. 30562/04; 30566/04, Judgment of 4 December 2008
[68] *Aycaguer v. France*, [2017] ECHR 587, App. No. 8806/12, Judgment of 22 June 2017
[69] *K. H. & Others v. Slovakia*, App. No. 32881/04, Judgment of 28 June 2009
[70] *Gaskin v. United Kingdom*, [1990] 1 FLR 167, [1989] ECHR 13, App. No. 10454/83, Judgment of 7 July 1989
[71] *M.G. v. United Kingdom*, App. No. 39393/98, Judgment of 24 September 2002
[72] *Odievre v. France*, (2003) 1 F.C.R. 621; App. No. 42326/98, Judgment of 13 February 2003
[73] *Godelli v. Italy*, [2012] E.C.H.R. 347, App. No. 33783/09, Judgment of 25 September 2012

specific case, applying its custom tests to determine if the plaintiff could prevail in action afterwards. The exhaustion of domestic remedies by the plaintiff is also a substantial point of consideration by the court, as Nordic states, in contrast with most European jurisdictions, possess quasi-judicial bodies, which may resolve minor civil disputes, inter alia, relating to health data revelations.

The European Court of Human Rights is a court of last resort, accepting claims for an alleged violation of human rights enshrined in the 1950 European Convention of Human Rights. By signing the said international-legal instruments, the signatories ipso facto recognized the jurisdiction of the Court and are obliged to execute its rulings, and the national courts must follow its practice, thereby shaping the national case law. The topic of medical confidentiality recently arose after the Latvian Senate's judgment No. SKA 41/2020, upon which the court found the transfer of an in-patient's person data to the state police to be illegal (the hospital staff suspected he committed a crime, since he was hospitalized after narcotics consumption)[74].

Foremostly, the topic of professional secrecy appeared in international law far before the international courts were established. Far back in 1887, the French branch of the Imperial Bank of Ottoman Empire (Turkey) unsuccessfully litigated against French Enregistrement that ordered to provide all the bank's documents for a check, invoking professional secrecy and its foreign origination, which, upon their view, was not subject to check by a revenue service; this view was not upheld by the Cour de Cassation[75]. In 1906, the assize court of Doubs (France) heard a case, which was a trial against Mrs. Cote, a French obstetrician, who conducted abortions in the Neuchâtel canton in Switzerland. The criminal proceedings were instituted on basis of a complaint of two doctors, who obtained private communications from their clients. The information was later conveyed to France by diplomatic channels, and the criminal proceedings were continued already in France. The question before the court was: may a foreign doctor (one of the doctors died pending the proceedings) testify on basis of his own client's communications obtained abroad, i.e. not in France? The court found, that medical secrecy (under Art. 378 of the Penal Code, acting 1810-1994) covers all information obtained in France, including by a foreign doctor; the court held that all private communications, which were obtained abroad, are admissible as testimony, and so the court found that a Swiss doctor could testify regarding such facts[76]. In the mid-to-late 1970s, when the European Court of Justice had already been established for already two decades, a number of disputes occurred between ex-employees of the European Communities structures and their ex-employers for a refusal to provide medical information relating their unfitness to work in the EEC structures on basis of professional

[74] *Latvijas Republikas Augstākā Tiesa*, Senata Administratīvo lietu departamenta, 2020 g. 6 novembra, Lieta Nr. A420305915, SKA-41/2020, see facts.
[75] *Congar: Banque commerciale de Sedan c. Enregistrement*, Cour de Cass., 22 mars 1887, Recueil Sirey 1888 I 277, p.p. 277 – 282
[76] *Min. Publ. c. Dame Cote*, Cour d'assizes du Doubs, 27 Octobre 1906, Dall. Per. 1909 II 65, p.p. 65 – 66; Revue du droit international privee, Tome 1907, p. 607 – 609

secrecy, namely the judgments of A. Moli (1977), E. Mollet (1978) and Miss M. (1980)[77]. For instance, in a 1994 judgment, the European Court of Justice ruled that a EEC structure employee cannot be obliged to undergo a screening HIV/AIDS-test in order for his HIV-status to be defined, who refused to undergo such test before[78].

As we may see, disputes involving professional secrecy (including the medical confidentiality as well), were already known at the dawn of international law, far before the first claims to the European Court of Human Rights were lodged, and issues relating to medical confidentiality could be spotted in the jurisprudence of the European Court of Justice. So, let us review the current jurisprudence of the European Court of Human Rights. The first group of cases deals with the disclosure of the person's HIV status. Over thirty years ago, the Superior Court of New Jersey, USA, ruled that the hospital should disclose the patients they are operated by a HIV-positive surgeon, but necessary technical precautions would not forbid a HIV-positive doctor to operate as such[79]; as a matter of fact ,the identity of a HIV-positive person, be it a doctor, or an individual of any other occupation, has to receive a very high degree of confidentiality, and so ruled the European Court in a number of his judgments. In the first judgment dealing with such issue, *Z v. Finland* (1997), plaintiff's medical records were used in the course of criminal proceedings against her husband (both spouses were HIV-positive) for murder as well as creating conscious risk for HIV contraction against unspecified women. The doctors were compelled to testify concerning her health facts, and later the law enforcement agencies seized her medical records. Her identity was disclosed at trial, and was later published in press. In this case, the Court has found that neither the doctors' testimony at trial, nor the seizure of plaintiff's medical records was a violation of her right to privacy, but the publication of the facts of her identity and the diagnosis both in the court judgment and the press releases infringed her right to privacy[80].

In a decade, an another judgment relating to the HIV-status of the patient was handed down in a case where Finland was the defendant (case of *I v. Finland* (2008)). The plaintiff was a HIV-positive nurse then employed in an ophthalmological clinic, who was undergoing treatment in the same clinics she used to work in the 1990s, where she was designated under a falsified name in the hospital register for a long time. She gradually recognized that her colleagues were aware that plaintiff was ill. By the time her HIV-status was diagnosed, all hospital personnel had access to the patient

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[77] *Alessandro Moli v. Commission of European Communities*, Case No. 121/76, Judgment of 27.10.1977, [1977] ECR 1972, 1972-1974; 1978-1980; *Emma Mollet v. Commission of European Communities*, Case No. 75/77, Judgment of 13 April 1978, [1978] ECR 898, 899-900; 905-909; *Miss M. v. European Commission*, Case No. 155/78, Judgment of 10 June 1980, [1980] ECR 1798, 1800-1805; 1806-1808; 1811-1812.

[78] *X. c. /Union syndicale-Bruxelles*, Cour de Justice des Communautés européennes, 5 Oct. 1994, Jurisprudence de Liege, Mons et Bruxelles Ann. 1995, p.p. 348 – 354, at p. 351 – 354.

[79] *Estate of Behringer v. Medical Center, etc.*, N.J. Super. Vol. 249, p.p. 597 – 659 (New Jersey Superior Court, Law Division, Mercer County, 25.04.1991)., p.p. 644-659

[80] *Z. v. Finland*, [1997] ECHR 10; App. No. 22009/93; Judgment of 25.02.1997; Rep. Tijdschrift de Gezonderheitsrecht / Revue de Santé (Nederlands) 1997-1998, p.p. 315 – 327., p.p. 9-18; 95-96; 113.

register. Later, when plaintiff already finished her work in the center, she desired to know who was acknowledged in her HIV-status, but the county governor office replied that it was impossible to determine it at that time; then plaintiff sued the local health department for negligent data maintenance, but failed in action, as the courts did not find anything negligent in the actions of hospital staff; the Supreme Court did not grant her a leave to appeal. Reviewing the case, the European Court of Human Rights emphasized that the national law must guarantee adequate safeguarding mechanisms for keeping health data confidential, which apparently was not performed; thus, the Court held that the legislation of Finland did not provide an adequate regime of her health data protection, ruling in favor of plaintiff[81]. Another "HIV-status"-related case reaching the European Court of Human Rights was *Biriuk v. Lithuania*. A 31-year-old woman became an object of the publication, upon which she was a deplorable example of leading an impious life, being unmarried with two children, having relationships with drug addicts, and was HIV-infected, and seemingly already having AIDS. What is more, this information was presumably (according to the press release) confirmed by the Pasvalis hospital, where she was brought to be treated from tuberculosis. The woman sued "Lietuvos Rytas", the news agency, for this publication, and managed to win over the lawsuit, but obtained very little money compensation (in her view). Then, she decided to impugn the first-instance court judgment, though the appellate court extinguished the sum of compensation triply, as the court did not find the publication was made with an intention to harm her. The Supreme Court confirmed the decision. The European Court found that Lithuanian law did not provide an adequate protection of plaintiff's privacy, the HIV-status of the plaintiff was the primordial focus of the publication, and this fact could not have sufficient public interest, as well as the facts of plaintiff's way of life. The Court also considered that the hospital staff confirmed her HIV-status, and emphasized that Lithuanian law must provide adequate protection of medical data, finding for plaintiff[82].

Medical records were indeed repeatedly disclosed not by hospitals, but by other parties, which caused resonant lawsuits. The case of *Societe Plon v. France* (2004) was one of these. In 1995, Societe Plon acquired the rights to publish a book named "Le Grand Secret" featuring the details of President Francois Mitterrand's combat against prostate cancer throughout his tenure. The book was published right after Mitterrand's demise in 1996, but was banned on basis of an injunction action by Mitterrand's family, approved by a court. Later on, criminal proceedings were instituted against the authors (Gonod, a journalist and Gubler, the President's ex-physician), as well as the director of the publication house: the journalist and the director were fined, and the doctor was condemned to a short-term conditional imprisonment. Before the European Court, the plaintiff (Societe Plon) claimed

[81] *I. v. Finland*, [2008] ECHR 623; App. No. 20511/03; Judgment of 17.07.2008, para. 5-17; 35-47
[82] *Biriuk v. Lithuania*, [2008] ECHR 1528; App. No. 23373/03; Judgment of 25.11.2008, para. 5-11; 34-47

a violation of freedom of speech (Art. 10 (1) of the European Convention of Human Rights). The Court found that it could be impossible to say that the fines for violation of medical secrecy were illegitimate upon the case law and legislation of France, which possess a centuryfold tradition; but at the same time, a permanent injunction was not justifiable, held the European Court. A temporary injunction could be justifiable at time when the country mourned on the president's death, but the time passing after the main character's (i.e. President Mitterrand) demise also had to be considered; so, the Court found a further injunction to be unjustifiable in such case, finding for plaintiffs[83].

Transfer of medical data unbeknownst to plaintiff was also a subject of litigation before the European Court. *In M. S. v. Sweden* (1997), plaintiff was a nurse suffering from a chronic spondylolisthesis since adolescent years. At age 30, in 1981, and being pregnant, she injured her back at work, rendering her barely capable to work for a long time. In the early 1990s, plaintiff opted for a temporary disability pension, which was granted to her, an in early 1994, she applied for a "permanent" disability pension. But when she was preparing a claim for compensation under the industry casualty law, her lawyer requested a copy of the folder compiled by the Social Insurance Office, upon which it became apparent that the said authority had contacts with her hospital, and the hospital transferred her medical records to the Office relating to her treatment in the 1980s; she had not been asked if she permits such transfer, and her later endeavor with litigating for disability compensation failed; the administrative court of last resort had refused leave to appeal. Considering the case facts, the European Court determined that the interference in her right to privacy had a firm legislative basis (Sweden possesses a special law on confidentiality – the 1980 Secrecy Act), and the transfer of medical records, which were decisive in the question of whether to grant her a disability pension or not, pursued a legitimate aim, and was proportionate for the needs of the plaintiff's claim. So, the Court concluded that there was no violation of Art. 8 (for defendant)[84], dismissing the claim in Art. 6 (1) and Art. 13 (1) as well[85]. The case of *L.H. v. Latvia* (2014) also presented a dispute relating to an unauthorized transfer of medical records, which was already discussed in the chapter before[86],

The last group of cases is devoted to the issue of access to medical records, as a part of patient's rights, which was also recognized as a derivative of privacy rights by the European Court in *K.H. et al. v. Slovakia* (2009)[87]. In *Gaskin v. United Kingdom* (1989) and *M.N. v. United Kingdom* (2003), the claims were similar. Both of the plaintiffs were raised in orphanages, having experienced

[83] *Affaire Editions (Societe) Plon c. France*, [2004] ECHR 200; App. No. 58148/00; Judgment of 18.08.2004, para. 21-53
[84] *M.S. v. Sweden*, [1997] ECHR 49, App. No. 20837/92, Case No. 74/1996/693/885, Judgment of 27.08.1997 (also reported in French as *Affaire M.S. c. Suede*), para. 8-15; 16-20; 36-44
[85] *Ibid*, para. 45-50; 51-56
[86] *L.H. v. Latvia*, App. No. 52019/07, Judgment of 29 April 2014, para. 6-18; 47-64
[87] *K. H. & Others v. Slovakia*, App. No. 32881/04, Judgment of 28 June 2009, para. 64

repeated abuse, and thus suffering from various health, psychological and mental problems. Both believed they could successfully sue the municipal organs (under the care of which they were placed) for negligent care, and thus requested the archival files relating to them, that contained lots of sensitive (involving medical) records. They both were refused on a superficial basis from a legal point of view: those days, the legislation in this respect was not very elaborate, and the municipal organs seemed to be initially guided by the traditional, unwritten norms of confidentiality, to which the English common law was nearly silent until 1970s, as well as precautions relating to the consent of disclosure of files where a third party's name or activities were featured (which was not always possible to obtain owing to defendant's contentions). In both cases, the European Court of Human Rights held that plaintiffs' right to privacy should involve a right to inquire information on their origin, descent, past etc., and the way they were refused access to archival files (i.e. in the *M.G.*, plaintiff managed to obtain a number of records, but was deceived in terms of their actual amount). In *Gaskin*, the Court held that since in the 1980s, the legislation already allowed a limited access to such files, the prevalence in withholding the documents was in favor of third parties, not the requesting party, and no authority could judge the balance, not speaking about obtaining the consent of report authors (i.e. it could be barely possible to find a report author decades after, had he been alive at all). In surplus, the plaintiff's situation in *Gaskin* made the Court find his privacy rights were violated (Art. 8 (1)), but his right to obtain information was not (Art. 10 (1)), as the state was not under obligation to give him information on himself[88]. Plaintiff in *M.G.* sought more specific documents, namely on the facts of his father's abuse in his childhood; despite having access to a limited amount of documents, the European Court assessed the amount of records he was given, and their actual amount (which was brought to the Court), and the outcome was that he was deceived on their actual volume. The Court found that *M.G.*, as *Gaskin*, had no virtual possibility to impugn the municipal bodies' acts in an independent authority, hence finding for plaintiff as well[89]. The case of *K.H. v. Slovakia* was quite typical for a claim for producing medical records. Several women were sterilized by tubal ligation unconsented within child delivery, and were preparing to file a lawsuit against the hospital; however, they and their legal representatives had big trouble with obtaining medical records – some were destroyed, while in other cases, lawyers were allowed to inspect records only by re-writing their content by court orders, which was insufficient, as they were refused in photo-copying. After unsuccessful litigation, the group of plaintiffs petitioned the European Court, which firmly recognized the right to access to medical records as a derivative of privacy rights, and held that such rights need to have a practical application (i.e. they could be really exercised). The court also emphasized, that

[88] *Gaskin v. United Kingdom*, [1990] 1 FLR 167, [1989] ECHR 13, App. No. 10454/83, Judgment of 7 July 1989, para. 19-28; 30-31; 46-49; 50-53

[89] *M.G. v. United Kingdom*, App. No. 39393/98, Judgment of 24 September 2002, para. 23-32; 34-36

the national courts did not give substantial argument concerning the restriction of plaintiffs and their lawyers to accessing the medical records, finding for plaintiffs[90].

The jurisprudence of the European Court of Human Rights in relation with medical confidentiality is enlarging, and the cases are becoming more diverse. Some may involve appeals to the court of last resort in trivial civil claims, while others may involve the issues of the fourth generation of human rights in medical law. The groups of cases, adjudicated by the European Court may be presented in overall as follows:

1. Divulgation and leakages of medical data, involving highly-sensitive data (e.g. *Z. v. Finland*, *I. v. Finland*, *Szuluk v. United Kingdom*);
2. Problems of a legitimate disclosure of medical information and their limits (e.g. *M.S. v. Sweden*; *L.H. v. Latvia*);
3. Publications, involving the disclosure of medical information and the limits of its legitimacy (e.g. *Societe Plon v. France*, *Biriuk v. Lithuania*)
4. Access to medical records and archival files involving medical information (e.g. *Gaskin v. United Kingdom*; *M.G. v. United Kingdom*; *K.H. et. al. v. Slovakia*);
5. Biomedical research privacy, access to sealed adoption records and similar data of highly sensitive origin (e.g. *Odievre v. France*; *Gillberg v. Sweden*, *Godelli v. Italy*).

Speaking of the judgments themselves, each of them has unique circumstances, making it difficult to be with one another within the jurisdiction of the European Court. The Court has to consider not only the facts of each case, but also the peculiarities of the national legislation and case law of the jurisdiction, from where the case originates. The topic of the European Court's jurisprudence in relation with the fourth generation of human rights and medical confidentiality requires a separate treatise, and for the matter of brevity, the authors will discuss these cases in their subsequent research.

Thus**,** medical confidentiality is an ancient legal institute of civil and criminal law (depending on jurisdiction), and the rules regarding its legitimate disclosure are diverse in each state, which is always considered by the European Court of Human Rights. These revelations may be legitimate, or completely illegitimate, or have a unclear legal basis, which may serve as a potential foundation for abuse in discretion of administrative bodies or private enterprises. The principles upon which the European Court adjudicates the cases may considerably vary even in similar cases, but the common feature of its principles is the clarity of the law, which poses restrictions on medical confidentiality, safeguards for protecting plaintiff's rights and the real necessity of such disclosure upon the circumstances of the case (insurance claims, medical malpractice lawsuits etc.).

[90] *K.H. et al. v. Slovakia*, App. No. 32881/04, Judgment of 28 April 2009, para. 11-19; 24-31; 64-73

1.5. Medical liability in the First Period of Independence of Latvia (1918-1940)

As the author has outlined in this chapter before, the contemporary medical law of Latvia is built upon a system of legislation, bylaws and court jurisprudence. As most of the Eastern European states, the Republic of Latvia has a patient's rights law ("*Pacientu Tiesību Likums*" in Latvian), enacted in 2009[91], which protect the rights of the patient, such as medical confidentiality, consent to medical treatment, access to medical records and the right to refusal of treatment. At the same time, such rights are mainly influenced by the Oviedo Convention (1997), and the explanation of the real scope of the patient's rights was provided by the Senate relatively recently. For instance, the rules regarding medical confidentiality have been expounded by the Senate in a 2020 judgment, where a man sued the hospital for giving out his medical records to the state police on their own initiative (he consumpt drugs shortly before being hospitalized)[92], and principles of informed consent were elaborated in the Senate's 2013 (relating to compulsory psychiatric treatment)[93] and 2020 (a surgical operation without a sufficient clarification of its possible negative effects and alternative ways of treatment, though the patient had a strong will to undergo the said operation himself)[94] judgments respectively. However, it is quite apparent that all the aforementioned patient's rights have a rich and long history. Do these patient's rights have their legacy in the First Period of Independence of Latvia? Yes, to a certain extent they do. Did the Latvian Senate rule on medical malpractice cases, abortions, failure to provide medical assistance? Yes, it repeatedly did. So did the lower courts of Latvia in 1918-1940.

However, such legacy is mainly undiscovered and underinvestigated – the same could be held in respect with the scholarship of the neighboring Baltic States. The Latvian segment of medical law scholarship in the First Period of Independence is relatively small. The works by Latvian scholars in the field of medical law include J. Ķuzis (1928)[95], P. Jakobi (1928)[96], K. Vikmanis (1928)[97], V. D-ds

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[91] *Pacientu tiesību likums*, Latvijas Vēstnesis, 205, 30.12.2009

[92] *Senata Administratīvo lietu departamenta*, 2020 g. 6 novembra, Lieta Nr. A420305915, SKA-41/2020, para. 11-17

[93] *G.D. pret Valsts sabiedrību ar ierobežotu atbildību „Strenču psihoneiroloģiskā slimnīca, Latvijas Republikas Augstākās tiesas*, Senāta Civillietu departamenta, 2013. gada 18. oktobra, Lieta Nr. 216/2013, para. 8.5 (p. 11)

[94] *A. pret. AS „EZRA-SK Rīgas slimnīca „BIKUR HOLIM""*, Senata Administratīvo lietu departamenta, 2020 g. 24 marta, Lieta Nr. A420172018, SKA – 790/2020, page 9-10 (para. 12-13)

[95] Ķuzis, J., *Latvijas pilsētu pašvaldības un likumdošana,* Pašvaldības Balls, Nr. 9 (01.11.1928). – Riga, 1928, p. 391-404.

[96] Jakobi, P., Vai var atsvabināt no kriminālās atbildības ārstu, kas iepotējis citam, ar tā piekrišanu, slimību zinātniskos nolūkos?. Jurists, Nr. 6 (01.11.1928). – Riga, 1928, p. 179-182.

[97] Vikmanis, K., *Žūpības apkaļošanas fonda līdzšinējā darbība un jautājums par obligatoriskās ārstniecības iestādes dibināšanu nelabojamiem dzērājiem*. Jurists, Nr. 7 (01.10.1929). – Riga, 1929, p. 206-214

(1929)[98], K.V. (1932)[99], N. Valters (1933)[100], A. Jākobsons (1936)[101], K. Barons (1937)[102]. Some of these works related to the issues of providing healthcare, whereas some discussed the issues of medical malpractice and rights of the patients. Ķuzis (1928) discussed the legal aspects of the system of provision of medical care, and K. Vikmanis (1929) wrote a work relating to the operation of the Anti-Alcoholism fund and the compulsory treatment of people, who are severely addicted to alcohol. P. Jacobi (1928) discussed the issue of physician's liability (and release from liability) in respect with using a vaccine with the patient's consent for scientific purposes, and K.V. (1932) had also observed the issue of patient's consent to medical interventions. N. Valters (1933) dealt with the legal aspects of abortions and A. Jākobsons (1936) dealt with issues of medical malpractice and unconsented operations, discussing Art. 218 and Art. 219 of the Latvian Penal Code of 1933 in respect with the liability of physicians. Very little was told in respect with medical confidentiality. For instance. V. D-ds discussed the draft law, which penalized the physician's illegitimate disclosure of information on the patient's venereal disease (this draft law had never gone into force). K. Barons (1937) in his work discussed the issues of hospital record-keeping and he had underlined the significance of confidentiality of medical records.

A. Jākobsons, discussing the doctor's penal liability under the 1933 penal law (Art. 218 and 219) has not mentioned a single case adjudicated by the Senate of Latvia, despite naming judgments from other jurisdictions[103]. The custom search of such cases in the Latvian State Historical Archives has shown that over 20 medical malpractice cases were adjudicated in the court district of Riga encompassing justices of peace (Lat. "Miertiesnesis"), district courts (Lat. "Apgabaltiesa") and the chamber of justice, the single acting appellate court for the district courts in 1918–1940 (Lat. "Tiesu palata") in the period of 1918–1940[104], however far not all court documents were well-preserved and survived in a decent shape for over 90-100 years, but at the same time, the investigation materials and originals of the criminal complaints lodged by aggrieved parties were well-preserved and thus are discussed in the paper below. The archival search of the author has shown over a hundred of very typical cases relating to illegal abortions, some of them went to the Senate, which has given proper guidelines for lower courts relating to determining the fault of the physician, as well as the patient, desiring to undergo abortion upon her own will. The Senate has also ruled in a number of cases on

[98] D-ds, V. Dažādi projekti, Jurists, Nr. 7 (01.10.1929). – Riga, 1929, p. 219-224

[99] V. K., *Vai ārstam ir tiesība izdarīt dzīvību apdraudošas operācijas bez slimnieka vai viņa piederīgo piekrišanas un kāda ir viņa atbildība slimnieka nāves gadījumā*. Jurists, Nr. 7 (01.10.1932). – Riga, 1932, p. 201-204.

[100] Valters, N. *Aborta sodamiba pec Latvijas sodu likumiem*. Jurists 1933 g. Nr. 3 (46).

[101] Jākobsons, A., *Ārsta atbildība pēc 1933. g. sod. lik. 218. un 219. p.*: Referāts, – Riga, 1936., 27 p.

[102] Barons, K., *Ceļojumu apraksts*, Latvijas Ārstu Žurnāls, Nr. 9-10 (01.09.1937), p.p. 275-301

[103] Jākobsons, A., Ārsta atbildība pēc 1933. g. sod. lik. 218. un 219. p. : Referāts., – Riga, 1936, p. 8-15

[104] If the case was submitted to the justice of peace, then the district court was the appellate court for the case. If the case was heard at the district court as a trial court, than the Trial chamber was the appellate court. The Senate was the court of cassation. It did not review the factual part of the case, reviewing the case only for material (a wrong application of the law) or procedure errors

the liability of physicians in the 1920s and 30s, which will be discussed in the further scientific works of the author.

In more contemporary legal scholarship, the doctoral thesis of L. Mazure (2011) relating to the concept of "patient's will", no judgments from the First Period of Independence of Latvia are mentioned, despite the author gives an extensive review of the history of medical law, and issue of patient's consent to medical treatment[105]. The promotional work by K. Palkova (2019) in relation to the rights of minor patients, providing an extensive overview of minor rights in relation with provision of healthcare services[106], did not involve a discussion on medical law in the First Period of Independence of Latvia, To sum up, the research on medical liability in the First Period of Independence of Latvia (1918-1940) is the first of its kind. In a recent article (2022), the author of the promotional work analysed the system of medical law in the Republic of Latvia in 1918-40, the legislation as well as the most frequent disputes in the sphere of healthcare[107].

The main *aim* of this sub-chapter is to investigate on the evolvement of medical law in the legal system of Latvia during the period of its first independence, embracing the period of 1918-1940, and to compare the approaches to the patient's rights in modern and oldtime law of Latvia. The given aim is achieved by discovering and selecting the judgments, reflecting the position of the courts in respect with violation of the patient's rights. The majority of discovered judgments were adjudicated by the Senate, and the inclusion of lower court judgment mainly depended upon the physical subsistence of the court materials, available for discovery: unfortunately, far not all judgments of the lover courts survived and thus, the existing ones are very valuable artifacts. Most of the judgments were collected from the "LVVA" (*Latvijas Valsts Valdības Arhīvs* – the Latvian State Historical Archive) and their subsidiary libraries in Riga, as well as the Latvian State National Library (*Latvijas Nacionala Bibliotekas*), which possesses the judgment volumes of the Senate's civil, administrative and criminal cassational departments. The majority of the Senate's judgments have never been digitized, which required working with original court reports and other court materials[108]. The reports of the lower courts were discovered by working with archival fund descriptions by the author, and subsequently requested, processed and translated. Apart from judgments, the author also pays attention to the Latvian scholarship legacy, involving the works of K.V. (1932)[109], N. Valters

[105] Mazure, L. 2011. Pacienta griba un tās civiltiesiskā aizsardzība: promocijas darbs. Rīga: Latvijas Universitāte, p. 28-41

[106] Palkova, K. 2019. Nepilngadīgo pacientu un Ārstniecības personu – Tiesisko attiecību problemātika ārstniecības procesā. Rīga Stradiņa Universitāte.

[107] Lytvynenko, A.A. Medical law in the period of the First Independence of Latvia (1918 – 1940), Book of Proceedings of the 8th European Conference on Health Law (20-22 April 2022, Ghent, Belgium), Tom Goffin & Tom Balthazar (editors)., p.p. 51-65

[108] For instance, lower court materials could include the reports of witness testimony, forensic expertises, reports by the prosecutor's office, interlocutory judgment texts etc., as well as documentary evidence applied in the case, for instance, the patient's medical records. Lower court minutes frequently included extensive information relating to the case.

[109] K.V., Vai ārstam ir tiesība izdarīt dzīvību apdraudošas operācijas bez slimnieka vai viņa piederīgo piekrišanas un kāda ir viņa atbildība slimnieka nāves gadījumā. Jurists, Nr. 7 (01.10.1932). – Riga, 1932

(1933)[110], A. Jākobsons (1936)[111], the comments of P. Minks & J. Lauva (1936) in respect with the provisions of the Latvian criminal code (1933)[112].

The *research method* applied in this chapter is historical-legal. Not so much legacy to comparative-legal approach is attributed, as the paper is entirely focused on Latvian law. At the same time, cases from other jurisdictions are featured to display the routes of the emergence of Latvian medical law in the period of First Independence. The cases from other jurisdictions, which are occasionally utilized in the article, are illustratively placed in order to compare a separate aspect, valuable for the discussion – for instance, the occurrence of medical malpractice cases in a featured jurisdiction, as such. Another research method, the synthesis, is used to generalize the principles, assembled by the Latvian Senate while expounding the provisions of criminal law, attributed to the liability of physicians for causing damages to the patients by careless behavior, non-admission to medical institutions, or negligent treatment. As it was mentioned above, the research is based upon original material, which was mainly undiscovered even in the 1930s legal scholarship, and requires substantial effort to work with. The jurisprudence of the First Period of Independence of Latvia (1918-1940) has never been a subject of a modern legal research before, and has never been generalized or systemized by any scholar, which poses additional significance on the given article, which is highly likely to be the first one of its kind in respect with the time fragmenton, which is investigated upon.

In European case law of the XIX century, the issue of patient's consent was repeatedly discussed by courts in different states: for instance, one such judgment was adjudicated by the appellate court of Braunschweig, Germany in 1893[113], another 1882 judgment relating to patient's consent could be found in the jurisprudence of the criminal court of Basel, Switzerland[114]; next, goes the remarkable case of Dechamps in Belgium in 1889–1890 (Dechamps c. Demarche)[115], as well as the Antiquaille Hospital Case, adjudicated by the correctional court of Lyon, France in 1859[116], and the 1894 judgment of the Supreme Court of Germany (then called Reichsgericht). In this matter (case no. 1406/94, judgment of 31.05.1894), a 7-year-old girl was admitted to a hospital, suffering from a tubercular suppuration of her tarsal bones. The surgeon (the defendant) tried to halt the progression of the disease claiming that in order to stop it, a bone resection was necessary. However, the girl's father repeatedly opposed to the said operation while negotiating with the hospital staff, desiring to

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[110] Valters, N. Aborta sodamiba pec Latvijas sodu likumiem. Jurists 1933 g. Nr. 3 (46).
[111] Jākobsons, A., Ārsta atbildība pēc 1933. g. sod. lik. 218. un 219. p. : Referāts., – Riga, 1936
[112] Mincs, P., Lauva, J. Sodu Likums (1936 g. izd.) ad kommentariem., – Riga, 1936.
[113] *OLG zu Braunschweig* (1 Sen.), Urt. v. 13 Feb. 1893, Sauffert's Archive fur Strafrechtliche Entscheidungen der Oberster Gerichte in deutschen Staaten (1893), Bd. 48, S. 413-414 (Sache No. 262)
[114] *In Sache des Karl Schulze*, Strafgericht Kanton Basel-Stadt, Urt. v. 14.06.1882, case reported in: Oppenheim, L., *Das ärztliche Recht zu körperlichen Eingriffen an Kranken und Gesunden*, Benno Schwabe, Verlagsbuchhandlung, Basel, 1892, p. 43
[115] Demarche c. Dechamps, 27 Nov. 1889, Trib. civ. de Liege, Belgique Judiciaire 1890.471, Pas. 1890 III 83, 85; Journal des Tribunaux (Belge) 1890 p. 8; Jour. de. Trib. et. Rev. j. 1890.76; appeal: Dechamps c. Demarche, Cour d'Appel Liege, 30 juillet 1890, Pas. 1891 II 78, 80; Sirey 1895 II 237, 237-238; Dall. Per. 1891 II 281; Pas. 1891 II 78, 79–80
[116] *Min. Publ. c. Guyenot et Gailleton*, Trib. corr. de Lyon, 15 dec. 1859, Dall. Per. 1859 II 87, 87-88

take the child back home. However, the operation was performed, and the surgeon did not succeed in it, despite all his efforts. In a month of time, the girl's foot was amputated, as the subsequent deterioration of its condition made no choice. After the amputation of the foot, the tubercular symptoms did not reappear any more, and the minor patient became regaining her health and strength, despite being apparently crippled. Next, the surgeon was prosecuted, but he was acquitted, and the prosecutor's office appealed altogether with the patient's father as a co-plaintiff (civil party), and after considering the facts of the case, the German Supreme Court found him to be guilty, remanding the case. The defendant surgeon was accused in assault (Art. 223 of the German Criminal Code, or *Strafgesetzbuch* in German language). A quote concerning the necessity of the patient's will is provided as follows: "*And with the moment of such a refusal* [to undergo a surgical operation] *by the sane patient or his legal representative, the doctor's authority to treat and mistreat a certain person for healing purposes also expires. Consequently, the doctor who deliberately commits physical abuse for healing purposes, without being able to derive his right to do so from an existing contractual relationship or the presumptive consent, the presumed commission of legitimate persons, acts unjustifiably, i.e. unlawfully, and is subject to the norm of §223 [of the Criminal Code] which prohibits such offenses*"[117]. Interestingly, after the case was heard by the lower court after the Supreme Court had remanded it, the doctor was acquitted.

In his treatise, Jākobsons (1936) mentioned Art. 57 of the 1926 Czechoslovak Draft Transfer Law, which prohibited providing medical interventions without the consent of the patient[118]; he also denoted, that the provision of the Latvian provision of Art. 218 of the 1933 Penal Code was modelled from it[119]. Having checked over a dozen of medical malpractice cases of the Supreme Court of the First Czechoslovak Republic, I found no judgments, directly related to informed consent; however, there was a case featuring a dispute on the remuneration of the treatment costs between a land fund with a father of a minor patient, who was transferred a to a specialized infirmary because of the fact he was suffering from a contagious disease, which was done without the consent of the parent, though the fact of the unconsented transfer was not disputed[120]. A civil case from early 1926 featured a lawsuit of a female patient against a physician for not warning on the possibility of burns during diathermic treatment, who had previously guaranteed the woman that the treatment should have been harmless. However, the physician was found to be not in fault for the patient's burns, and the

[117] *Reichsgericht*, III Strafsenat, Urt. v. 31 Mai 1894 g. W. Rep. 1406/94 = ERG St. Bd. 25, S. 375, 376-377; 380-384 (Sache No. 127).
[118] Jākobsons. A., Ārsta atbildība pēc 1933. g. sod. lik. 218. un 219. p. : Referāts, – Riga, 1936, p.p. 9-10
[119] Ibid, p. 18
[120] *Nejvyšší soud Československé republiky*, Rozh. ze dne 18. ledna 1927, Rv II 707/26, Vážny (Civil Cases), Vol. 9, p. 98-100 [Čís. 6707]

guarantee from his side was not accounted to be a "harmful" one, since the type of treatment (i.e. diathermy) was well-known and well-experienced in the 1920s[121].

At the same time, it was strange to see that the European legislature did not anyhow consider a well-developed body of case law relating to the patient's will an autonomy, originating from France and Belgium. French legislators never imposed specific liability on doctors (i.e. Art. 1382 of the Belgian and French Civil Code covered all issues as to negligence while performing professional duties), and even such things, as unconsented experiments on human-beings, bringing to their death, were viewed by the French courts in the light of this provision[122], despite in the XIX century, an unauthorized medical experiment without a curative goal, but solely for the needs of scientific research, constituted a battery (Art. 311 of the Criminal Code), which distinctly shown in the Antiquaille Hospital Case[123]. However, vasectomy was not within either the concept of the patient's will to undergo certain surgical operations or the civil responsibility for an unconsented operation, but was considered a crime for body mutilation, as displayed by the Cour de Cassation's decision of July 1, 1937 in the case of *Bartosek, Harel and Prevotel*[124]. Speaking about the case law of the First Czechoslovak Republic case law relating to medical malpractice, and taking into account the practice of the Supreme Court of First Czechoslovak Republic, then we may notice that in most cases the negligence of hospital staff invoked civil liability, and the hospital staff could be held criminally liable in case the negligence involved severe damages to the health of the patient, or death to the patient, or causing danger to the patient's life and security due to serious malpractice within carrying out medical interventions and procedures[125]. If we take into account the case law of the Supreme Court of First Czechoslovak Republic, then we may notice that in most cases the doctor's civil liability was based upon Art. 1299 of the Civil Code (as it already was in the late Austro-Hungarian Empire – A. L.)[126], which also differs from the approach of Latvian law. Therefore, the approach for

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[121] *Nejvyšší soud Československé republiky*, Rozh. ze dne 12. ledna 1926, Rv 1413/25, Vážny (Civil Cases), Vol. 8, p. 44-46 [Čís. 5638]

[122] *Consorts Chavonin c. K., Admin. d'assistance Publique et soc., des laboratoires Thorande* , Trib. Civ. de la Seine (1 Chambre), 16 mai 1935, Dall. Heb. 1935.390,390-392; Dall. Per. 1936 II 9 (first instance); *L. c. Consorts Chavonin et Cie des produits chimiques de la Sorbonne* , Cour d'Appel de Paris, 1 Chambre, 11 mai 1937, Dall. Hebd. 1937.340, 340-431 (appeal).

[123] *Min. publ. c. Guyenot et Gailleton*, Trib. Corr. de Lyon, 15 dec. 1859, Dall. Per. 1859 III 87, 87-88

[124] *Bartosek, Harel, Prevotel*, Cour de Cassation, Ch. Crim., 1 juillet 1937, Sirey 1938 I 193, 193-195.

[125] As in Austro-Hungarian Empire, the criminal liability of doctors for gross negligence was provided in Art. 335 and 356-357 of the Penal Code. In fact, the 1852 Penal Code was still acting within the existence of the First Czechoslovak Republic. As to the cases, see the following: *Nejvyšší soud Československé republiky*, Rozh. ze dne 5. března 1926, Zm II 439/25, Vážný (Criminal Cases), Vol. 8, p. 162-163 [Čís. 2308]; Rozh. ze dne 12. března 1926, Zm I 857/25, Vážný (Criminal Cases), Vol. 8, p. 171-174 [Čís. 2313]; Rozh. ze dne 14. února 1938, Zm II 253/37, Vážný (Criminal cases), Vol. 20, p. 93-97. [Čís. 6134].

[126] In the 19th century, the Austro-Hungarian courts rendered judgments relating to liability of physicians on basis of Art. 335 and 356-357 of the Criminal Code. There were not many cases of the K.K. Oberster Gerichtshof preserved relating to medical malpractice, but the early cases showed that the malpractice, for which the doctors were punished, was usually severe, like causing the patient's death by negligent acts, or an omission to provide medical assistance to the sick, resulting in the patient's death, see. K. K. Oberster Gerichtshof, Entsch. v. 27 Januar 1857 № 783, EOG Str. Bd. II, S. 3; Entsch. v. 2 Juni 1858 № 862, EOG Str. Bd. II, S. 77-78; Entsch. v. 6 Februar 1861 № 978, EOG Str. Bd. II, S. 182-183 K. K. Oberster Gerichtshof, Entsch. v. 12 Sept. 1867 № 1193, EOG St. Bd. II, S. 389-390 (notice it was a libel action against a

the misdemeanors conducted by physicians is likely to be in more concordance with Polish penal law of the 1920s, where medical malpractice invoked penal liability[127], though only in severe cases. At the same time, in several occasions, the hospital sickness funds (Pl. '*Kasa Chorych*') could also be sued in a civil action for: 1) entrusting activities requiring far-reaching specialization to a wrong doctor (i.e. major surgery) to a physician of a different specialty; 2) limitation of the physicians in the choice of medical and technical measures, or concerning the duration of medical treatment, which could have its consequences; 3) defective organization of the doctor's work from the insurance fund, such as non-professional supporting staff. Apart from the aforementioned cases, the responsibility of faulty treatment procedures shall be born by the doctor, who either performed such treatment, or recommended it[128].

In the view of the discussion of cases in the First Czechoslovak Republic, where the Austro-Hungarian law was still in force, let us briefly discuss the vaults of medical law and medical liability in Austria-Hungary (in fact, Jakobsons (1936) had also paid considerable attention to the legislative developments in late Austria-Hungary, and discussed a number of early 1920s medical malpractice judgments in the First Austrian Republic). In his work, Jākobsons (1936) discussed a multitude of Austrian judgments in relation to medical malpractice. However, owing to a very specific referencing, it complicated to identify the judgments he referred to, so the author had decided to conduct a custom search in respect with the judgments from this country. The early criminal law reports of the *K.K. Oberster Gerichshof*[129] suggested that the doctors (usually, the surgeons) could be held criminally liable for the death of their patient, the court had to establish a causal link between the death of the patient, and the doctor's neglecting to treat him, or his negligence in treatment, which caused death[130]. Ordinary negligence, which caused damage to the patient, could be established on basis of Art. 1299 of the Civil Code (Allgemeine Burgerliche Gesetzbuch, often abbreviated as *ABGB*), and the same principle was applied in civil cases as well[131]. One 1915 decision is worth being discussed. The facts of the case No. 7557 or Rv I 448/15[132] were the following: plaintiff, a solicitor's wife, had a problem

physician, lodged by an another physician, where the defendant accused the complainant in negligence, claiming he hadn't properly administered medical treatment to a 15-year-old wounded factory worker, who later died). However, the 1915 judgment was a civil claim, based upon Art. 1299 of the Civil Code.

[127] *Sąd Apelacyjnyj w Toruniu*, 31 sierpnia 1927 r., Sygn. T 103/27 (Criminal liability upon Art. 230 of the Criminal Code)

[128] Orzeczenie Sądu Najwyższego z dnia 6 grudnia 1935 r., Sygn. Akt. C.I. 1383/35, Orzecznictwo Sądów Polskich. T. 15, 1936, str. 360 – 362

[129] The full name of the court is "*Keiser-Koniglichen Oberster- und Cassationshof*", but mainly the court reports refer to it as "Oberster Gerichtshof" or "K.K. Oberster Gerichtshof".

[130] *K. K. Oberster Gerichtshof*, Entsch v. 21 Juli 1851, №39, EOG Str. Bd. I, S. 26; Entsch. v. 27 Januar 1857, № 783, EOG Str. Bd. II, S. 3; Entsch. v. 2 Juni 1858 № 862, EOG Str. Bd. II, S. 77-78; Entsch. v. 6 Februar 1861 № 978, EOG Str. Bd. II, S. 168.

[131] *K. K. Oberster Gerichtshof*, Entsch. v. 7. Sept. 1915 Nr. 7557, Rv I 448/15, EOG Ziv. S. Bd. 52 (LII) S. 844, 845-848

[132] All Austrian case reports are anonymized and referred in sophisticated codes, which are not easy to be comprehended, which often makes the case search complicated. Occasionally the cases may be traced by tables in the end of the judgment volumes, where the judgments are aligned upon the applicable provisions of the Civil Code. The Austrian-Hungarian case law legacy mainly consists of the case law of the Oberster Gerichtshof, though occasional lower court judgments could

with knock knees (gomna valga) since childhood, and desired to have a corrective operation, placing herself under the care of surgeon Dr. B. (the defendant) to operate her in an unspecified clinics in Vienna; however, the said operation was unsuccessful, despite all efforts of the doctors. So, plaintiff demanded compensation for an unsuccessful operation, claiming that instead of knock knees, she appeared to have bow legs, and "was permanently disfigured and could move with difficulty". She did not contest that the operation was performed skillfully and upon the well-established rules of medical science; it was fully affirmed by a medical expert conclusion upon which the surgical methods applied by the surgeon is used frequently, the operation itself was performed skillfully and aseptically. Plaintiff alleged Dr. B's fault in the following: 1) Dr. B did not examine her properly at the first consultation and [she] did not understand the possible consequences of the operation; 2) alleged negligent and improper hospital treatment, and finally, 3) in the failure to perform a new operation in due time or to point out the necessity of an operation in due time. The court of the first instance of Vienna dismissed her action, finding that: a) Dr. B did not assure plaintiff A., that the operation was one of the easiest, but on the contrary, by describing the operative process involved, made her sufficiently aware of the dangers of it; the prospect of a favorable success and the confidence in the skill of the Viennese surgeons led plaintiff to abandon all doubts and submit to the operation; b) Neither Dr. B, or his assistant, Dr. C., could be found to be negligent. The mere fact that the said operation was not very successful does not entirely mean, that the doctors neglected the established rules of medical art. Moreover, despite the result of the operation was not ideal, the improvement of A's condition was virtual: "In addition, there is the fact that the end result cannot be described as a bad one; that the mobility of the feet is good, the variety that has occurred is not a disturbing one, there is no difference in length of the legs, the knees are approximated except for a small space between them, the knee joints are perfect can be stretched and bent beyond a right angle, [plaintiff] A. can walk without a cane, run her household without problems, and even do individual business transactions; finally comes the fact, that an improvement in her condition is possible in the future.". The court found that no fault from the side of the doctor was established, nor damage was shown, nor a causal link between the acts and events was found. The court of appeals of Vienna upheld this decision. Concerning the duty of the doctor to inform the patient on the possible dangers of the operation, the following was said –

be found in legal periodicals. Austrian lower court judgments from the time of the Austrian-Hungarian Empire were also referred to in codes, which could be easily deduced from the reference to the impugned judgment number by the Oberster Gerichtshof. However, the lower courts in the cities under the jurisdiction of the Austrian-Hungarian Empire could have alterations in referring the cases, for instance, in the referencing numbers, or the case materials included the names of the litigating parties. The original case materials originating from the Austrian-Hungarian Empire are usually found in state historical archives, and are usually free for examination for legal researchers and historians. The archival funds also have descriptions of the cases contained in it, so the researcher may find the necessary case by consulting the description of the fund.

"*…In any case, the fault of Dr. B could not be found [in the aspect] that he did not specifically draw attention on the possibility, that the success of the osteotomy to be performed, could be impaired by a damaging displacement; because not only did the expert declare that Dr. B. by having made the plaintiff A. aware of the danger of the operation in general, he had fulfilled his duty; but it is evident even without special consideration of the report, that it cannot be the doctor's responsibility to give the patient [facts concerning] all possibilities, which may occur as a result of the planned operation, [and] to draw [his] attention to this, if only because the patient lacks the knowledge to understand and understand the necessary information*.".

So did the Supreme Court. The Oberster Gerichtshof claimed that there is no fault of Dr. B in the mere fact that the operation was not that successful did not mean the doctor could be in fault for this. The Oberster Gerichtshof affirmed that Dr. B. did not claim the operation was an easy one, made the patient aware of possible dangers of it, carried it out skillfully and upon all the rules of the medical art, but Dr. B. could not be responsible for the success of the operation; the Supreme Court concluded that the damage to plaintiff A. was not due to the fault of Dr. B., dismissing the appeal[133].

The approach of the Senate of Latvia in respect to consent to medical interventions at present time, upon the judgment No. SKC-216/2013, involving a dispute relating to involuntary psychiatric treatment, the Senate announced a number of principles of informed consent, hallmarking that the medical treatment may be lawful except of cases of involuntary treatment, and the patient, in order to provide a valid consent, must possess the ability to express his will, it must be voluntary, and it must involve the patient's awareness[134]. At the same time, the recent jurisprudence of the Senate (case no. SKA-790/2020) tends to show that the patient's mere desire to undergo an operation is not sufficient for the doctor to be released from his duties towards explaining the patient the peculiarities of future medical interventions[135].

If we carefully look at the proposed Art. 195-1 of the Penal Code, both clauses mention the so-called "involuntary" treatment. The current Latvian legislation does not prohibit unconsented operations under the Penal Code; it is subject to civil liability for negligence[136]. Upon *Jākobsons* (1936), who discussed the issue of unconsented surgery, cases in its respect, as well as legislative elaborations in order to penalize unconsented surgery already existed in Central and Eastern Europe in the 1920s and early 1930s[137]. The 1929 project of the Criminal Code only contained Article 195-196 relating to the liability of medical practitioners, though no reference was actually made neither

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[133] *K. K. Oberster Gerichtshof*, Entsch. v. 7. Sept. 1915 Nr. 7557, Rv I 448/15, EOG Ziv. S. Bd. 52 (LII) S. 844, 845-848

[134] G.D. pret Valsts sabiedrību ar ierobežotu atbildību „Strenču psihoneiroloģiskā slimnīca, Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta, 2013. gada 18. oktobra, Lieta Nr. 216/2013, p. 11 / para. 8.5

[135] *A. pret. AS „EZRA-SK Rīgas slimnīca „BIKUR HOLIM""*, Latvijas Republikas Augstākā tiesa, Senata Administratīvo lietu departamenta, 2020 g. 24 marta, Lieta Nr. A420172018, SKA – 790/2020

[136] *A. pret. AS „EZRA-SK Rīgas slimnīca „BIKUR HOLIM""*, Senata Administratīvo lietu departamenta, 2020 g. 24 marta, Lieta Nr. A420172018, SKA – 790/2020, p. 9-10 / para. 12-13

[137] Jākobsons, A., Ārsta atbildība pēc 1933. g. sod. lik. 218. un 219. p. : Referāts., – Riga, 1936, p.p. 9-25

to ordinary malpractice, nor to unconsented surgery. Art. 195 of the Criminal Code project proceeded as follows: "[The one], *who does not have the right to engage in medical treatment, or who has been deprived of this right, and who has treated [the patient(s)] with deadly or coercive substances, or means, or has treated a person in a hypnotic state, is punishable by*: [a] *temporary detention for not more than three months or – a fine not exceeding three hundred lats*"[138]. The formula of Art. 195 seemingly refers to the case of Gaužen (1924)[139], whereas Art. 196 related to liability of midwives, not being able to call a doctor for assistance, proceeding as of the underwritten "*A midwife who, without a noteworthy reason, has not fulfilled the obligation to recall a maternity doctor in cases specified by law, shall be punished: with detention for a period not exceeding three months or with a fine not exceeding three hundred lats*.". Also a similar case was heard by the Supreme Court of Czechoslovak Republic in 1923[140].

The commentary by Mincs and Lauva (1936), which included the Latvian Senate's judgments, also did not cite a single judgment on Art. 218-219 of the 1933' Criminal Code of Latvia[141]. We may intimate, that the legislature and the Ministry of Justice were aware of a case heard before a lower-instance (probably an appellate) court, relating to the issue of an unconsented medical intervention, but the judgment, regardless of its outcome, was not appealed to the Senate. Since the then-existing case law publications seldomly featured any court cases but of the Senate, it is not a surprise that the possible progenitor case of Latvian informed consent was "lost". At the same time, the author's search in the Latvian State Historical Archive funds is ongoing, and I still hope to find the appropriate judgments of the lower courts affirming that a case on unconsented medical intervention was actually heard before a Latvian court within the First Period of Independence.

The court practice relating to medical law in Latvia (1918-1940)

IV.I. Medical law in the other Baltic States

In 1930, the Civil Cassational Department of the Senate dealt with a case, where a doctor litigated with a hospital for terminating his employment contract, which was terminated based upon his negligent behavior. Assessing the plaintiff's behavior, the Senate held: "…*The Trial Chamber*[142] *had to take into account the highest moral quality required of a doctor; he should not be guided by any formal rules on the duties of a general practitioner, but by a love of fellow human beings and,*

[138] Sodu likumu projects, Tieslietu Ministrijas Vestnesa Izdevums, Iespiests Jul. Petersona spiestuve, Riga, Kr. Barona iela 20/22., – Riga, 1929, p. 42

[139] 1924 g. 14 okt. Gaužena l. Nr. 120, 1919-1928 Kopojums, p. 174 (Lieta Nr. 338)

[140] *Nejvyšší soud Československé republiky*, Rozh. ze dne 19. června 1923, Rv I 167/23, Vážný (Civil Cases), Vol. 5, p. 1068-1070 [Čis. 2740]

[141] Mincs P., & Lauva, J., *Sodu Likums (1936 g. izd.) ad kommentariem*., – Riga, 1936, p. 116-118

[142] The Trial Chamber ("*Tiesu Palāta*" in Latvian) was a court of appeal in the Republic of Latvia in 1919-1940. Currently, the appellate courts are called "Apgabaltiesa" in Latvian, or a "regional court". The name "Apgabaltiesa" was a name of a district court during the Period of First Independence of Latvia.

additionally, by a social consciousness"[143]. In this judgment, the Senate acknowledged a high moral standard, applied for physicians and their responsibilities. It is not, however, known, for what reason medical malpractice litigation was relatively seldomly spotted in court reports within the First Period of Independence of Latvia (1918-1940), but the existing artifacts of such – brought before the Senate, or the lower courts of Latvia are considerable. For instance, if we compare the preserved case law of the Estonian Riigikohus during the First Period of Independence of Estonia (1918-1940), the series "*Riigikohtu otsused*" does not present medical malpractice cases. There were administrative claims, however, not directly related to medical malpractice, but otherwise involving medical institutions. For instance, in 1925, an ex-serviceman, formerly a captain of Estonian Defense Forces, suffering from arterial diseases, had applied for a pension, but was refused: the decision of Defense Minister of 18.04.1925 denied him the requested pension. However, plaintiff managed to prove that the ailment he was suffering was contracted within his military service before the medical committee, and the Riigikohus annulled the Minister's decision, remitting for a new one[144]. Administrative appeals against various ministry decisions relating to the payment of costs for medical treatment, i.e. involving foreign doctors or purchasing foreign medical equipment, could also be found in the practice of Estonian Riigikohus[145]. Citizens also used to litigate in order to be released from necessity to pay for medical treatment, depending on the disease (i.e. a contagious one), and the success of an administrative complaint against the decision of a city council (i.e. that it may not release a citizen from paying the costs for being treated in a hospital) was variable, but mainly depended upon the legislation (i.e. the Public Health Law) and the issues of the possibility of recovery of treatment costs, or the release from payment, in diverse situations[146]. At such point, it cannot be claimed for sure that either the doctors were diligent in their medical duties, and medical negligence claims arose only before the justices of peace (if there were such), or the patients themselves were more interested in obtaining a compensation for treatment costs, no matter the quality of the treatment. The texts of the mentioned Riigikohus judgments do not mention any facts concerning the *quality* of the treatment, or whether the patient alleged that it was negligent – either they were happy (at least, let us say, satisfied with the mere fact of the possibility for medical treatment), or they were more interested to recover the costs of the treatment, not intending to sue a hospital for malpractice (even if it actually occurred).

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[143] 1930 g. 27. marta spr. Nr. 65. (4188), VI Izvilkumi No Latvijas Senata Civilā Kasācijas Departamenta Spriedumiem. V. Turpinājums līdz 1930. g. jūlījam ar alfabetisko rādītāju, rādītāju pievestiem Spriedumiem un likumu rādītāju. Sastadiju: Senators F. Konradi un Rigas Apgabaltiesas loceklis A. Walter. Autorizdevums. – Riga, 1930., p. 40-41

[144] 20 okt. 1925 a., *Hendrik Putniku kaebus sõjaministri otsuse peale 18. apr. 1925. a. pensioni nõud mise asjas*, Riigikohus Administratiiv-Osakond, Nr. 40, Riigikohtu otsused 1925. a., "Oiguse" valjaanne. Tartus, 1925, pp. 75–76.

[145] 8 nov. 1929 a., *Jaan Timuski kaebus Kohtu ja Siseministri resolutsiooni peale 10. sept, 1929. a. pojaravitsemis-hulude asjas*, Riigikohus Administratiiv-Osakond, Nr. 59, 1929 a. Riigikohtu otsused, "Oiguse" valjaanne. – Tartus, 1930, p.p. 81-82

[146] 30 jan. / 10 veeb. 1931. a. *Ella Tuling'i revisionikaebus Tallinna-Haapsalu Rahukogu otsuse peale 10. septembrist 1930. kaebuse asjas Tallinna Linnavalitsuse otsuse peale 25. aprillist 1930 ravimiskulude linna kända võtmise pärast*., Nr.7, Riigikohus Administratiiv-Osakond, 1931 a. Riigikohtu otsused, "Oiguse" valjaanne. – Tartus, 1931, p.p. 8-9

The Chief Lithuanian Tribunal (operating in 1918-1940) also had a number of cases in relation to medical law, and upon 3 of them, we may assume that there was some litigation relating to the obligation to treat poor patients between different state institutions, which could be responsible for them[147]. For instance, in judgment No. 22 (1939), the Chief Lithuanian Tribunal held that the municipality should repay the maintenance of a person confined in a psychiatric hospital, who stayed and died in its premises[148]. The abovementioned cases belonged to the civil cassational judgments, and the criminal cassational judgments are still under search at the time of composition of the given paper.

IV.II. Civil claims before the Latvian Senate

The liability of physicians, based both upon the 1903 Criminal Code (1903 Sodu Likums), as well as the new Criminal Code (Art. 218-219)[149], adopted in 1933, was an illustration that the duty of physicians to provide medical care and assistance was imperative, and negligence or any other doctor's faults could be prosecuted, including an abortion of a living fetus performed without medical indication[150]. The legal entities (i.e. the city, a parish) governing the hospitals could also sue to recover costs for the treatment from the establishment which could reimburse the costs for the patient's treatment[151], or directly from the patient[152], or his relatives (in case the patient had deceased)[153]. The

[147] See the following cases: 20.III.1939, Spr. 21 *Siaulių Miesto Burmistro skundą dėl A. Andriuškevičiūtės gydymo išlaidų prieš vidaus reikalų ministro 1939 m. sausio mėn. 13 dienos nutarimą*., Vyriausiojo Tribunolo 1939 Civ. Kas. Spr. p. 35-37; 20.III.1939, Spr. 22, *Valstybinės Psichiatrinės Ligoninės direktoriaus skundą dėl Antano Sirvinsko gydymo išlaidų prieš vidaus reikalų ministro sausio mėnesio 9 dienos nutarimą*., Vyriausiojo Tribunolo 1939 Civ. Kas. Spr. p. 37-38; 20.III.1939, Spr. 23, *Alfonso Jurevičiaus skundą dėl gydymo išlaidų prieš vidaus reikalų ministro 1938 metų gruodžio mėnesio 16 dienos nutarimą*., Vyriausiojo Tribunolo 1939 Civ. Kas. Spr., p. 37-38.

[148] 20.III.1939, Spr. 22, *Valstybinės Psichiatrinės Ligoninės direktoriaus skundą dėl Antano Sirvinsko gydymo išlaidų prieš vidaus reikalų ministro sausio mėnesio 9 dienos nutarimą*., Vyriausiojo Tribunolo 1939 Sprendimai p. 37-38

[149] Mincs P. & Lauva, J., Sodu Likums (1936 g. izd.) ad kommentariem, p. 116-118

[150] A reference of judgments of the Senate relating to abortions the author provides herewith: 1922 g. 21 marta spr. *Lendes* n. c. l Nr. 166, 1919-1928 Kopojums, Lieta No. 585, p. 304-305; 1923 g. 16 okt. *Lidke* l. Nr. 405, 1919-1928 Kopojums, Lieta No. 586, p. 305; 1924 g. 29 nov. spr. *Bekera* l. Nr. 544, 1919-1928 Kopojums, Lieta Nr. 587, p. 305; 1924 g. 29 nov. spr. *Davja* l. Nr. 454, 1919-1928 Kopojums, Lieta Nr. 588, p. 305-306; 1926 g. 28 sept. spr. *Londenberga* l. Nr. 537, 1919-1928 Kopojums, Lieta No. 589, p. 306-309; 1927 g. 28 janv. spr. *Cerbula* n. c. l. Nr. 30, 1919-1928 Kopojums, Lieta Nr. 590, p. 309-310; 1927 g. 27 sept. spr. *Šaršums* l. Nr. 626, 1919-1928 Kopojums, Lieta Nr. 591, p. 310, 1928 g. 30 marta. *Sternbergs* l. Spr. No 124, Lieta Nr. 592, p. 310-311

[151] 1924 g. aprila mēneša 30. dienā., Spr. N. 93, Limbazu pilsētas pilnvarnieka, priv. adv. V. Gaila lūgums par Rīgas Apgabaltiesas sprieduma atcelšanu Limbazu pilsētas prasiba pret Valnizu pagasta sabiedrību, Senāta Civilā Kasācijas Departamenta spriedumi 1924 g., Nr. 35 (L. Nr. 93), p.p. 72-74, *Tieslietu Ministrijas Vēstnesis*, Pielikums (Nr. 8). Riga, 1928 g., Latvijas Valsts vestures arhivs 1535 f., 3 apr., lieta Nr. 1159; 1930 g. 30 apr. 1930, Spr. N. 25, *Pilnvarotās Rīgas pilsētas zv. adv. [zverinata advokata] Kuzu pieteikums atcelt Tiesu palātas lēmumus Baltās zvaigznes līnijas un Baltās zvaigznes dominēšanas līnijas lietā pret Rīgas pilsētu un iesniedzēja pilnvarnieka Magnusa paskaidrojums*, 1930 Senata CKD Spr. (L. Nr. 94), p. 20-21 // Senāta Civilā Kasācijas Departamenta 1930. g. spriedumi., Valsts tipografija Riga, pilī. Riga – 1936 g.

[152] 1939 g. 5 jul., spr. Nr. 39/573, *kasācijas sūdzību par Rīgas apgabaltiesas 1938. g. 6. oktobra spriedumu galvas pilsētas Rīgas prasībā pret Indriķi Tūbu par Ls 205, — ar %*, Pašvaldību Darbinieks, Nr. 10 (01.10.1939), "Ārstēšanas parādu lietā.". The number of the judgment according to LVVA 1535, f. 8, CKD Spriedumi 1939 g. jūlijs.

[153] 1938. g. 16. maijā., Spr. Nr. 38, Rīgas pilsētas pilnvarnieka zv. adv. J. Ķuža sūdzība par Rīgas apgabaltiesas 1938. g. 18. janvāra spriedumu Jāņa Tatarinoviča sūdzībā par Rīgas pilsētas valdes ar domes tiesībām lēmumu viņa mir. dēla Jāņa Tatarinoviča ārstēšanas izdevumu lietā. (L. Nr. 440.), Latvijas Senata Administratīvā Departamenta Spr. 1938. g., p.p. 48 – 49, printed in: Valdības Vēstnesis, Nr. 270 (28.11.1938), Pašvaldības Balss, Nr. 8 (01.08.1938), Spr. Nr. 22., p. 447-448

Senate's Administrative Department frequently ruled in disputes instituted by sickness funds concerning the legitimacy of ministerial orders to pay out money to certain citizens[154], as well as in disputes relating to compensation of treatment costs for the poor, or anyhow otherwise socially disadvantaged people, who were treated not in the circuit of their city or region: hospitals from another city could admit them, but the town authorities would usually claim to reimburse the treatment costs from the authority, responsible for the patient[155]. Indeed, a "patient representative" could exist those days[156], but it was either a charity institution or another instance being in charge for a certain citizen owing to peculiar circumstances (a good example would be the judgment of *White Star Line and White Star Dominion v. City of Riga* (1930)), or *Re: Aleksandrs Berči (Ventspils municipality complaint against the Decision of the Ministry of Welfare)* (1930)[157]. The Latvian Senate also ruled in cases relating to the employers inability to fulfill his obligations to manage the treatment of his employee, causing him pecuniary damage: for instance, in the case of *Kalniņs v. Cesvaine Dairy Society* (1934), an employee sued his employer for not registering him in a hospital sickness fund – the employee suffered from a stroke and was incapable to work, and the failure to register him at the said fund caused plaintiff substantial pecuniary damage for hospital treatment, transportation and visits to the doctor (defendant's appeal in cassation was dismissed)[158]. In case a citizen attempted to recover damages from improper or careless treatment, he would rather file a criminal complaint against the physician whom he blamed to be negligent[159]. So, let us examine several outstanding cases, adjudicated by the civil and administrative cassational departments of the Latvian Senate.

In 1924, the Latvian Senate dealt with a very unusual case on medical malpractice, where the patient was… a horse! Plaintiff sought compensation in a suit for damages; defendant was a veterinary physician, who operated a sick horse, which tragically died 7 weeks after the operation. Defendant denied his fault, claiming that 1) he performed the operation correctly, 2) he did not undertake the treatment of the horse, but gave the usual appropriate measures for the care of the horse, 3) that he did not assume any guarantee or risk of the concluding result of the operation. The regional court established his fault as "*the defendant's reckless or negligent conduct had been established, through*

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[154] 1924 g. 1 oct. spr. Nr. 49, *Jelgavas apgabala skolotāju, pašvaldību un sabiedrisku iestāžu darbinieku slimo kases sūdzība par Darba ministrijas lēmumu Emiljas Bolšakovas ārstniecības izdevumu samaksas lietā*, 1925 Senata AKD Spr.
[155] 1930 g. 17 marta, spr. Nr. 595, Ventspils pilsētas pašvaldības sūdzība par tautas labklājības ministrija lēmumu, 1930 Senata Administrativa Departamenta Spr., *Pašvaldības Balls*, Nr. 9; 01.11.1930 [Spr. Nr. 23]. Note: the date of the judgment in *Pašvaldības Balls*, Nr. 9 (01.11.1930) was stated as March 12, 1930, though the original date of the judgment was March 17, 1930, Latvijas Valsts vestures arhivs 1535 f. 1 apr. Lieta Nr. 16545.
[156] 1930 g. 30 apr. 1930, spr. N. 25, 1930 Senata CKD Spr. p. 20.
[157] 1930. g. 12. marta, spr. Nr. 23 / AKD; 1930 g. 30 apr. 1930, spr. N. 25 / CKD
[158] 1934. g. 21. martā., Spr. Nr. 23, *Cesvaines piensaimnieku sabiedrības pilnvarnieka Jaņa Lūša lūgums atcelt Rigas apgabaltiesas spriedumu Alfreda Kalniņa prasībā pret Cesvaines piensaimnieku sabiedrību*., 1934 Senata CKD Spr., p. 25-26.
[159] Not accounting *Grzibovskis*, who chose to recover damages from the city (to be paid to him as a pension), usually the citizens wrote a criminal complaint against a doctor, and joined the proceedings, as a civil plaintiff. See, for instance, Riga Apgabaltiesa, II Kriminalnodala (Valmiera), 1929 g. 30 maja, L. Nr. 1863 (1929), Latvijas Valsts vestures arhivs, 1536 f. 17. apr., Lieta Nr. 125

which he had caused the ordinary damage and for which he was liable". The court below established the causal link between the defendant's operation and the death of the horse. Defendant appealed against the regional court's judgment, but unsuccessfully. The basis of the claim for damages, according to the Latvian Senate, is a non-performance of a service contract[160].

In 1929, the Latvian Senate handed down a judgment relating to pharmaceutical law and freedom of press. The plaintiff instituted a complaint where he alleged the illegitimacy of a then-newly-established order of the Ministry of Welfare[161], which prohibited advertising diverse medicinal goods without the authorization of the Pharmaceutical Board of the Department of Health of Latvia. The Latvian Senate did not find any illegitimacy of the 1929 order, finding that it complies with Medical Treatment Law (*Ārstniecības likums*), and did not violate the provisions of the Press Law (*Preses likums*), as the freedom of press existed within the boundaries of law. The Administrative Department of the Senae hereinafter rejected his complaint[162].

In *White Star & Dominion Line v. City of Riga* (1930), representatives of the city of Riga (with advocate Janis Kuzis acting as plenipotentiary representative for the city) demanded 1036 l.[163] compensation for the treatment for the treatment of the children of migrants (the migrants were transported to Latvia in mid 1920s and supervised by the *White Star & Dominion Line*), who fell ill with scarlet fever, and were treated in late 1924 and early 1925. The Senate found the claim of City of Riga to be unfounded. In 1922, the City Council of Riga adopted the compulsory rules for contagious disease control (Regulation of 6 November 1922[164]), upon which the City of Riga had the obligation to treat all patients, contracted with contagious diseases (whereas scarlet fever as well as diphtheria were mentioned directly) free of charge, regardless of the fact whether the patients applied for medical treatment upon their own will, or were hospitalized. Moreover, the White Star & Dominion Line contracted to recover all the medical expenses with the Ministry of Internal Affairs, which, as of the Latvian Senate, apparently did not create any rights for the City of Riga, which was not a contracting party, and did not relieve the City of Riga from its obligation to treat patients, suffering from scarlet fever[165].

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[160] 1924 g. 22 okt. Spr. Nr. 150, Jazepa Megna lūgums par Liepjas Apgabaltiesas sprieduma atcelšanu Vija Klajuma prasiba pret Jazepu Megni un Vila Klajuma paskaidrojums., Senata Civila Kasacijas Departamenta Spriedumi 1924. g., Nr. 60 (L. Nr. 150), p. 146–148; Latvijas Valsts vestures arhivs 1535 f., 3 apr., lieta Nr. 1216

[161] 1929. g. Vald. Vēstn. Nr. 209 (1929 g. 16 septembra)

[162] 1929 g. 16 dec. spr. Nr. 68, *Kārla Čunčiņa sūdzība par Tautas labklājības ministrijas rīkojumu, kurš publicēts 1929. g. 16. septembra Valdības Vēstnesī Nr. 209*, 1929 Senata AKD Spr.

[163] Latvian Lat, a currency in Latvia during the First Period of Independence (1922-1940) and was re-enacted in 1993 before was replaced with Euro.

[164] *Valdibas Vēstnesis* (1922): No. 253, 256, 257

[165] 1930 g. 30 apr., Spr. N. 25, *Pilnvarotās Rīgas pilsētas zvans adv. Kuzu pieteikums atcelt Tiesu palātas lēmumus Baltās zvaigznes līnijas un Baltās zvaigznes dominēšanas līnijas lietā pret Rīgas pilsētu un iesniedzēja pilnvarnieka Magnusa paskaidrojums*, 1930 Senata CKD Spr. (L. Nr. 94), p. 20-21

In an unnamed case from 1930 (simply referred as Judgment no. 65 in Volume VI of *Latvijas Senata Civilā Kasācijas Departamenta Izvilkumi*, or Extracts from the Latvian Senate's Civil Cassational Department), a doctor litigated with his employer (seemingly, it was a hospital, though not pronounced directly) for terminating his employment contract. The reason for this was plaintiff's (he filed the appeal in cassation) impious behavior and negligence towards his patients. The Trial Chamber found, that the testimony of the patients, the midwife working with him, and the expressions of plaintiff himself did not establish the fault of the doctor, but the Senate overturned its decision. Having announced a notorious sentence concerning the high moral standards applied to the job of a general practitioner, the Senate found that: it is not admissible for a doctor to refuse providing medical assistance without examining a patient, merely finding that medical assistance is not necessary, or because it was "not known" whether a midwife actually would necessitate his help; he offered snacks to the patients at the doctor's office and refused to see a patient claiming to have dinner with a "notorious" person, and he drank alcohol so as the patients could see him consuming it – the given circumstances made the Senate find the doctor's behavior was intolerable, especially in the view he was a general practitioner "…*This is the person, which the local residents of the parish are forced to turn in case of illness*...", and stated that the Trial Chamber had to assess and discuss "*whether the plaintiff's conduct complied with the professional, moral and social requirements which the public may have against the doctor who undertakes to perform the duties of a public doctor*...", vacating the Trial Chamber's judgment[166].

The Latvian Senate's case no. 37/1330, *Vaclav Grzibovskis v. City of Riga* (1937) featured a lawsuit against the city of Riga and other parties for negligence causing damage to plaintiff, the patient, by not providing him necessary medical help, because of which the plaintiff subsequently lost a leg. The facts were quite intriguing, and involved a case of substantial medical malpractice. In late September 1933, a bus overran plaintiff's leg. A police officer assisted him and took the man to the Riga City Hospital Nr. II, where he was neither provided with necessary medical assistance, nor was admitted to the hospital. It was known, that the hospital staff was employed by the Latvian University. As time went, the plaintiff's state of health deteriorated. On October 19, 1933, plaintiff entered Riga City Hospital Nr. I, where he was ordered to have his leg amputated, but he refused. On November 3, 1933 he was discharged from Riga City Hospital I, but on the next day (November 4, 1933), plaintiff was admitted to already the third hospital. That evening, his left foot was amputated; and the entire leg was amputated in a few days. As a result, plaintiff lost 75% of his working capacity. Therefore, the plaintiff requested to recover from the defendants the City of Latvia, the University of Latvia, doctors K. Rudzītis, K. Dolietis, P. Meķis (the doctor from the hospital sickness fund, who

[166] 1930 g. 27. marta, spr. Nr. 65. (4188), VI Izvilkumi No Latvijas Senata Civilā Kasācijas Departamenta Spriedumiem. V. Turpinājums līdz 1930. g. jūlījam ar alfabetisko rādītāju, rādītāju pievestiem Spriedumiem un likumu rādītāju. Sastadiju: Senators F. Konradi un Rigas Apgabaltiesas loceklis A. Walter. Autorizdevums. – Riga, 1930., p. 40-41

allegedly treated him negligently) and Riga Central Sickness Fund jointly and severally in favor of the claimant LVL 111 per month.

The Trial Chamber upheld the claim against the City of Riga, but dismissed the action against other defendant parties, joining the motives of the Riga district court[167]. As of the facts, it was established that after the accident, plaintiff was driven to Riga City Hospital No. II, where the defendants, the hospital doctors, whom he also sued, superficially examined the leg, finding that hospitalization was not necessary. On the next morning, plaintiff was again taken to the hospital, but was not admitted once more. Later, when plaintiff was permanently hospitalized, he was diagnosed a gangrene, and the leg was subsequently amputated, due to which he lost 75% of his working capacity. The City of Riga was held liable owing to the fact it did not fulfill its public-legal obligation to provide medical assistance to the population. Defendant City of Riga, through its representative, did not deny such obligation, but referred to an agreement concluded between it and the University of Latvia, after which the latter took Riga City Hospital No. II into governance. Therefore, held the defendant, the legal responsibility for plaintiff's non-admission to the hospital should be of the University. The Senate, however, negatively assessed such argument, denying it as follows: "*Once the provision of medical care is a public-legal obligation, then on the one hand the city cannot be released from such an obligation by concluding a contract with a third party, and on the other hand, the plaintiff has neither the obligation nor the right to request medical assistance from the city subordinate, the respective hospital staff of the last service*.". Therefore, concluded the Senate, the Trial Chamber could find that the claim against the University of Latvia and the doctors had no legal basis, but is justified in respect with the City of Riga. Since the plaintiff also filed an appeal in cassation against the decision of the Trial Chamber, it was also dismissed, as the defendant's. As it was held before, the Senate held there was no legal basis for the claim against the doctors and the University of Latvia. With regard to the possible liability of other defendants, it was already established by the appellate court, that it did not exist. Thus, both appeals in cassation were dismissed[168].

IV.III. Criminal cases involving the liability of physicians before the Senate in 1918-1940

Liability of medical practitioners, imposed by the law, was criminal in the times of the First Independence of Latvia. The most frequent reason for prosecution was an abortion, which was

[167] 1937 g. 22 februara, Lieta Nr. 523a/37, Vacslava Gržibovska prasībā pret Rīgas pilsētu v. c. summā Ls 14.097, – darba spēju zaudējumu atlīdzības, Latvijas Tiesu Palata, Civilnodala, Latvijas Valsts vestures arhivs 1534 f. 1. Apr., Lieta Nr. 23935

[168] 1937 g. 25 nov. / 16 dec. Spr. Nr. 37/1330, Prasītāja Vacslava Gržibovska un atbildētājas Rīgas pilsētas pilnvarnieku, zv. adv. J. Ķuzis un J. Volkova, kasācijas sūdzības par Tiesu palātas 1937. g. 22. februāra spriedumu Vacslava Gržibovska prasībā pret Rīgas pilsētu v. c. summā Ls 14.097, – darba spēju zau dējumu atlīdzības un Vaclava Gržibovska pilnvarnieka, zv. adv. A. Jakovļeva, un Latvijas universitātes pilnvarnieka zv. adv. P. Lejiņa un Rīgas pilsētas pilnvarnieka zv. adv. J. Volkova., Latvijas Senata Civila Kasacijas Departamenta, Latvijas valsts vestures arhivs 1535 f. 3 apr. Lieta Nr. 15551; judgment of the court of appeals: Latvijas Tiesu Palata, Civilnodala, 22 febr. 1937, Lieta. Nr. 523a/37 g., Latvijas Valsts vestures arhivs 1534 f. 1. Apr., Lieta Nr. 23935; the judgment of the Latvian Senate was also reported in Pašvaldību Darbinieks, Nr. 4 (01.04.1939), p. 366, and Pašvaldības Balss, No. 7 (01.07.1939), p. 529-531

illegitimate unless there were firm medical reasons to conduct it; persons inducing a woman to undergo an abortion could also be held liable upon Art. 466 of the Criminal Code (until 1933) and 439-440 (1933-1940) – even if they were not physicians, but, for instance, their relatives[169]. At the same time, the circumstances of each abortion had to be assessed by the courts, and the physician usually had a certain discretion in deciding whether the abortion is necessary upon a firm medical indication, mainly relating to the mother's health condition, which could be morbid[170]. The fetus definitely had to be alive in order for the abortion to become a crime, and the abovesaid fact had to be proved by various documentary evidence, witness testimony and expert conclusions[171]. In the case of *Londenberg* (1926), the Senate held that the abortion becomes criminally punishable when "…*the health condition of the pregnant woman in a particular case was such, which would make childbirth possible*"[172]. Four years earlier, the First Senate set out two criteria for the invalidity of the offense in extracting the fetus: 1) it he had previously been lifeless at the time of its removal (i.e. abortion); 2) if it could not at all have been born alive[173]. In 1939, the crime of abortion was ranked as the 9th of the 11 most frequent crimes throughout the criminal cases heard before the regional courts of Latvia, according to the reports of the prosecutor's offices[174]. In 1939, the quantity of abortion-related cases heard before regional courts could vary from 5 to 28 per year[175]. Six more cases were reported in the first trimester of 1940[176]. After the 1933 Criminal Code was enacted, P. Mincs proposed to amend the provisions regarding the abortion allowing women to apply for a legitimate abortion[177]. The existing case law proves that considerable judicial scrutiny was required in order to prove the doctor's fault, which often made cases to fall apart owing to insufficient evidence, as the case of *Londenberg* (1926)[178], or *Sternbergs* (1928)[179]. The 1933 Penal Code made a clarification (Art. 438-440) concerning the limits of a legitimate abortion. Firstly, the abortion was legitimate, when the birth of the child could endanger its mother (it was apparently in the discretion of the doctors to assess it primarily). Next, it was also non-punishable when there was a strong predisposition the baby could be born physically or mentally impaired (the question is, how could the midwife define it upon the first trimester – the legitimate term of terminating the pregnancy upon Art. 440 of the 1933 Penal Code, especially taking into account the technologies of 1930s, is a very rhetorical question); as well

[169] 1923. g. 16 okt. spr. *Lidke* l. Nr. 406, 1919-1928 Kopojums, Lieta Nr. 586, p. 304; 1940. g. 27 janv. spr. Nr. 23, LVVA 1535-7 p. 104-106.
[170] 1926 g. 28 sept. spr. *Londenberga* l. Nr. 537, 1919-1928 Kopojums, Lieta No. 589, p. 308-309
[171] 1928 g. 30 marta spr. *Sternbergs* l. Nr. 124, 1919-1928 Kopojums, Lieta No. 592, p. 311
[172] 1926 g. 28 sept. spr. *Londenberga* l. Nr. 537, 1919-1928 Kopojums, Lieta No. 589, p. 309
[173] 1922 g. 21. marta spr. *Lendes* u. c. l. Nr. 166, 1919-1928 Kopojums, Nr. 585, p. 304-305
[174] Skādulis, K., *Prokuraturas darbība 1939. gadā*., Tieslietu Ministrijas Vēstnesis, Nr. 3 (01.05.1940). According to this source, the total number of abortion cases referred to regional courts was 277 per year.
[175] *Ibid*.
[176] V.V., Tiesu un prokuraturas darbība 1940. g. 1. ceturksnī., Tieslietu Ministrijas Vēstnesis, Nr. 4 (01.04.1940)
[177] Mincs, P. *Vai tiešām nepieciešams uzsākt izstrādāt jaunu Sodu likumu?*, Tieslietu Ministrijas Vēstnesis Nr. 4 (01.04.1936)
[178] 1926 g. 28 sept. spr. *Londenberga* l. Nr. 537, 1919-1928 Kopojums, Lieta No. 589, p. 306
[179] 1928 g. 30 marta spr. *Sternberga* l. Nr. 124, 1919-1928 Kopojums, Lieta No. 592, p. 310-311

as the fetus, whose conception occurred under conditions of Art. 497-502 of the Penal Code, and in cases where the birth of the child could "cause serious harm to the mother or the family"[180]. As we can deduce from the said provisions, such circumstances of a legitimate abortion were relatively broad and thus depended upon the interpretation of the case facts by courts, had a certain doctor, midwife or the pregnant woman herself committed an illegal abortion, or they had not.

Abortions were the most common crime the doctors were blamed for. The First Senate had enough decisions relating to abortions, the most outstanding of which were the case of *Londenberg* (1926) and *Sternbergs* (1928). All of the said judgments reveal that cases against physicians frequently "fell apart" owing to lack of evidence – mainly the lower courts did not clearly establish that the fetus was alive, or that the medical indications to conduct the abortion did not exist, or the experts could not define the pregnancy period precisely etc., which was not surprising owing to the real stage of development of medical technologies.

The case of Londenbergs featured a lengthy criminal trial against a physician from Jelgava, for an allegedly illegal abortion. The facts, upon the minutes of the Senate report of the case, were the following. Defendant, a physician operating in the city of Jelgava, aged 56, made an abortion to a pregnant woman, between 3 and 8 October 1924 in his cabinet; the operation was done with the patient's consent, and the fetus was surgically removed by metallic surgical appliances. For this acts, the Trial Chamber sentenced defendant for 3 years of imprisonment, inhibiting him to practice medicine for two years after serving his sentence. Defendant claimed he had not done the abortion, and it was conducted by someone else, and the only thing he did is that he gave opium to stop bleeding. The lower courts were not sure at what date the abortion actually took place, but seemingly it was October, 8. Defendant also replied, that in fact, he only assisted in removing the consequences of the abortion, and since it was the first pregnancy of the woman, it was likely not to be completed in one session. Such procedure, said defendant, would have caused longitudinal ruptures of the cervix, which was not documented in fact. He also claimed that the lower court expert made wrong conclusions, and was not actually a qualified gynecologist. The medical experts, interviewed by the Trial Chamber told, that on the first three months of the pregnancy, the abortion could be conducted without a cervical rupture in theory, but it was initially declared, that the woman was already on the fourth month of pregnancy (despite the woman herself believed it was only the third one). According to the minutes of the Trial Chamber, which were referred to in the Senate's decision, there was no uniform view between the experts when the abortion actually took place. The witness testimony of a nurse, who cared for the woman in October, revealed that there was no bloodstains on her laundry, and that would be sufficient, had blood-soaking bandages not been used by the medical personnel (which, seemingly, was not clearly established). The Court came to a conclusion, that the abortion

[180] 1933 g. 24 aprils. Sodu likums. – Riga, 1939, p. 137

took place on October 8 because the relatives of the woman observed her as "completely weak" on that date. However, the report also disclosed that the experts were unable to give a conclusive answer regarding the date. The Senate also denoted, that far not all abortions are illegal, and in some cases, when there is a risk to the woman's health, it is legitimate; the Senate held, that a true ability of the woman to deliver a child (that is, safely), should be certified by a medical council – in ideal; however, there may be some cases, when it is impossible in an urgent situation: even the non-compliance with the Medical Regulations by the doctor under certain circumstances (highly likely that the Senate meant acute conditions) would not render him an offender. The Senate considered, that the woman in the case was, in fact, very sick. She suffered from lues pharyngis (throat syphilis), and both of her parents had died of pulmonary tuberculosis. The Senate held that many circumstances had not been assessed properly to claim that the defendant was actually guilty, and so decided to set aside the judgment[181].

In the case of Sternbergs, the accused was a midwife, who was prosecuted for an allegedly illegal abortion (the mere fact of conducting the abortion was never denied) to a woman. Sternbergs appealed claiming that the regional court did not establish the fact that the fetus was alive at the moment when the abortion took its place – as it is not punishable to extract a dead fetus: obviously, a dead fetus cannot be a victim of a murder in the sense of Article 466 of the Penal Code (acting 1919-1933). In essence, the court cannot determine such medical fact without a special expert opinion, and the appellant asked to examine the question by summoning an expert gynecologist at his own expense. He also claimed, that the historia morbi[182] also did not reveal whether the patient was actually pregnant. The Trial Chamber upheld the decision of the regional court, not paying much attention to determine the fact whether the fetus was alive, or it was not. The Senate found, that the courts, while examining abortion cases, should clarify whether the fetus was alive, or dead at the time of the abortion took place, and the cassational court denoted, that the fetuses could die of various different reasons – but such conclusions should be reached upon the opinions of medical experts. Thus, it held that the lower court must not deny the request of the accused to examine the given circumstances of the abortion, and a correct adjudication of the case is "inconceivable" without determining the necessary facts, i.e. the fact whether the fetus was dead, or it was alive. The Senate quashed the judgment and remanded it for re-consideration[183].

Under Art. 497 of the then-acting Criminal Code, the doctor could be held liable for failure to provide medical assistance, but on practice, this provision was applied to any medical negligence.

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[181] 1926 g. 28 sept. spr. *Londenberga* l. Nr. 537, 1919-1928 Kopojums, Lieta No. 589, p. 306-308

[182] "*Historia morbi*" is a Latin phrase used by Latvian courts (1919-1940) dealing with various civil and criminal cases (and medical malpractice cases in particular), literally meaning "History of illness", or more commonly, "Medical record", or "Hospital record", as on practice, it featured the patient's stationery treatment in a hospital. The "*historia morbi*" could be usually found in a folder of a court case in the archives.

[183] 1928 g. 30 marta spr. *Sternberga* l. Nr. 124, 1919-1928 Kopojums, Lieta No. 592, p. 310-311

Herein, the Senate also emphasized that the assessment of individual case circumstances is very significant to define whether the doctor could be held liable, and upon the preserved jurisprudence, only when the patient's health was in a dangerous condition[184]. Upon the excerpts of the First Senate's judgments, in case the patient was not unconscious or had no otherwise urgent health condition, the court would not find the doctor's fault in non-admission of the patient[185]. Doctors could be also punished under Art. 195 of the Penal Code (the 1903 Penal Code) for administering life-dangerous medicines to patients, or acting under various means of coercion[186]. As the Senate explained in one of the civil cases relating to remuneration of treatment costs, Art. 497 of the Criminal Code is enacted to punish for non-provision of adequate medical care, and this provision "protects the interests of the patient"[187]. Art. 217 of the 1933 Criminal Code provided criminal liability (mostly, it was imposed as a fine up to 500 LVL) for those violating the rules of public health. It was a very general provision (i.e. it could also include breach of sanitary rules), and Mincs (1939) mentioned that it was frequently (and mainly) applied against violations of quarantine measures, where additional restrictions were provided to combat spread of contagious diseases[188].

IV.IV Notable lower court judgments (1920s-1930s)

The court judgments dating 1919-1940 were not officially published apart from small excerpts and are not generally accessible except from the archives. The Senate's judgments were reported in special editions and legal newspapers, while the judgments of the appellate courts could rarely be found there, if any. A certain number of cases involving the liability of doctors was discovered in the LVVA archives in the fund of Riga District Court prosecutor's office, embracing the judgments from various district courts. The criminal trials against doctors and other hospital personnel, or any private practitioners (i.e. dentists) included medical negligence, failure to provide necessary medical assistance (with various consequences), severe misconduct while providing medical services and abortions. The Senate and LVVA funds including Riga Regional Court's Criminal Division and the Trial Chamber (court of appeal) included around 20 cases on medical malpractice in the period of 1925-1939, the most notable of which are hereby presented in the paper[189].

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[184] 1924 g. 16 febr. spr. *Goldringa* l. Nr. 34, 1919-1928 Kopojums, Lieta No. 648, p. 338-339; 1929 g. 30 apr. spr. *Betaka* u. c. l. Nr. 168, Latvijas Senata Kriminala Kasacijas Departamenta spriedumi tezes. 1928-1930. g., Lieta Nr. 1906, p. 75

[185] 1929 g. 30 apr. spr. Betaka u. c. l. Nr. 168, 1928-1930 Tezes, Lieta Nr. 1906, p. 75

[186] 1924 g. 14 okt. spr. *Gaužena* l. Nr. 120, 1919-1928 Kopojums, Lieta Nr. 333, p. 174

[187] 1925. g. 30 sep., Spr. Nr. 189. Latvijas Sarkanā Krusta biedrības pilnvarnieka zv. adv. pal. Beķera lūgums par Rīgas apgabaltiesas sprieduma atcelšanu Latvijas Sarkanā Krusta biedrības prasībā pret Rūjienas pagasta sabiedrību, Senāta Civilā Kasācijas Departamenta spriedumi 1925 g., Nr. 70 (L. Nr. 189), p. 147-149. *Tieslietu Ministrijas Vestnesa*, Pielikums (Nr. 11–12). Riga, 1929 g, Latvijas Valsts vestures arhivs 1535 f., 3 apr., lieta Nr. 1633.

[188] Mincs, P. Kriminaltiesibas: Seviska dala, Latvijas Universitetas. – Riga, 1939, p. 131.

[189] The author is grateful for the translation of these cases to his scientific supervisor, Dr. iur, Ass. Prof., sworn plenipotentiary solicitor, Tatjana Jurkeviča.

The case of *Dr. Mejis* (1924-1926) was a trial against a doctor, who refused to provide medical care to a woman in labor. The circumstances of this case were next. A woman gave birth to a child in the corridor of an unspecified house in, or nearby the city of Riga. She was sent to the First Hospital (seemingly, the court report presumes the First Hospital of Riga). Defendant was a doctor at the maternity home (department No. 21), and refused to provide the woman with necessary after-labor medical care. The woman, despite her condition, the baby, and one unspecified escorting person went to the III Riga Police Department to ask for help. The policemen brought the mother to the same hospital, but Mejis refused again, even in the presence of policemen. It was later clarified in the court report, that even the doctor on duty told Mejis to accept her, but he refused notwithstanding anything. It was not disclosed, whether the woman's condition deteriorated due to these facts, but she apparently survived and lodged a complaint, alleging Mejis is guilty of violating Art. 492 (2) of the Criminal Code. The justice of peace, which started investigating on the case, found, that Mejis was not a doctor at the First Hospital of Riga, but was an official of it, and thus, provided he was guilty, he was guilty of a different offence, but not medical malpractice. What was the qualification of the alleged offence (the justice of peace cited Division 37 of the Penal Code of 1903), the judge did not state at all, and did not send the case folder to the prosecutions' office. The telephonogram with the hospital director revealed, that Mejis, in fact, was a doctor, not an official. He was an assistant at the maternity home and was a specialist in gynecological diseases. The justice of peace still believed that Mejis was a hospital official, and one witness claimed it was true. The justice of peace also did not believe the aggrieved party, and he thought that Mejis could be only in fault for not accepting the patient, where she could ask for help of other doctors. When the case went to the Riga Regional Court, it returned the case to the Regional Court's district investigative judge, who, after having heard a medical expert commission, and having found that the hospital beds were spared for women before birth, but not after it, and having found that the hospital isolator had no spare beds, decided to terminate the case[190].

The case of *Ziberg v. Adamson* was a trial against a dentist, who treated a factory worker, and whose "treatment" made the poor man's condition even worse. Ziberg, a workman at a cellulose factory in the town of Sloka, once had trouble with his teeth. He went to the dentist, Dr. Adamson, a doctor of the Sloka Slimo Kase (hospital insurance fund), knowing, that there was plenty rumors relating to Dr. Adamson, who was known to be negligent with his patients, never maintaining dental appliances clean, does not wash his hands or disinfect them. When Ziberg paid a visit to Dr. Adamson, he assured himself that the rumors were, in fact, true. Adamson examined his tooth and said that it has to be extracted; he went to a wardrobe, took out a pair of pincers, and Ziberg noticed, that they were dirty, covered with strange dots on their surface. Next, Adamson wiped the ends of the pincers,

[190] Artura Meija lieta, Riga Apgabaltiesa (I Kriminalnodala), 1925 g. 13 februari, Lieta Nr. 49, pec prok. reg. 322/26. Case preserved at: Latvijas Valsts vestures arhivs 1537 fonds., 6 apr., Lieta Nr. 210

and extracted Ziberg's sick tooth, which was, according to his complaint, a very painful procedure. On the following day, Ziberg's cheek swelled up, and he felt difficulties in moving his jaw. He again asked for help of the factory doctor. Then, Ziberg's body temperature began to rise, and within a short period of time, complainant was so sick, that he was hospitalized to the Riga Red Cross Hospital, where he underwent several surgical operation, and was later transferred to a dental institution for an outpatient treatment, where Ziberg continued treatment at the moment of lodging his complaint against Dr. Adamson. Ziberg desired to clarify, what amount of working incapacity he suffered in percentage, but the doctors could not tell him an exact number, despite he believed he lost 50% of his working capacity, and was disfigured (though in the complaint he does not mention how) because of Adamson's negligence. Ziberg also mentioned that Adamson was roughly careless not to foresee all the consequences of ignoring the necessary precautions of dental treatment. He also mentioned, that Adamson caused a lot of harm not only to him, but to a multitude of other patients, and some of them died because of his reckless treatment. Adamson was put on trial, bearing a procedural status of an accused. However, the defendant died, and the case was terminated[191].

In the case of *Traub-Bins* v. *Bertuls-Ziemels* (1931), complainant was a prisoner of the Riga Central Prison, suffering from a toothache, and blamed a prison dentist, a woman, for a very clumsy fulfillment of her duties. According to the text of the Trial Chamber, his name was Vulfs. The text of his complaint, made in handwriting in a somewhat comic style is the main source for discovering the circumstances of the case. Vulfs agreed with an unnamed dentist woman (her surname appeared in the court judgment) to seal his tooth, and she did the work, but according to him, she was very careless to fulfill it, disregarding any measures of precaution and not giving him water to rinse out the tooth fragments. Vulfs believed he had swallowed the fragments, and he thought it caused acute pains in his duodenum, because of which he was nearly unable to eat anything for two weeks. Vulfs ascertained that his inmates, as well as the prison medical assistant could approve his statements. However, the treatment of his tooth progressed, and despite an acute pain in his tooth, the dentist continued sealing his tooth. The seal was so bad, claimed Vulf that he spit the seal by fragments the following day during a walk and during the meal, which was also seen by his fellows and a medical assistant. Vulf met the dentist and showed her the seal fragments, but she only replied, that these were probably the fragments from the sides of the tooth, but not the fragments from a clumsy seal. Vulf kept the fragments of the seal, and claimed that he had not only spent the money for treatment in vain (he paid 12 Lats), but sustained a lot of damage to his health, and swore he could give the seal fragments to investigating authorities. Later, as he held, when he further contacted the dentist, she refused to treat his teeth. In October 1931 (according to the complaint to the Trial Chamber), Vulfs

[191] Ziberg pret Dr. Adamson, Rīgas pilsētas 13. iecirkņa miertiesnesis, 1929 g. 31. maja, Lieta Nr. 135, Latvijas Valsts vestures arhivs, 1555 f. 1. apr., lieta Nr. 110

received an answer from Riga Regional Court's prosecution office, upon which his claim was dismissed, and desired to impugn this decision at the Riga Trial Chamber. The Trial Chamber held, that Vulfs actually insisted the dentist to treat his teeth not in accordance with the general rules, but entirely as he wished; and thus, the subsequent refusal of the dentist to treat his teeth contained nothing unlawful, and so, Vulf's complaint had to be dismissed[192].

In the case of *A. Miller and others* (1935), a man and his wife were prosecuted for an abortion, which apart of being a crime itself under the established facts (i.e. it was not legitimate by medical and related reasons), caused the death of the pregnant woman. It was not stated, whether the defendants were actually professional doctors, or they were amateur "obstetricians", which was not a rare phenomenon in rural Central Europe back in the early 20th century. The facts relating to the abortion were quite simple, but at the same time, they could sound as barbarous for a contemporary reader: in April 1935, a woman repeatedly visited the house of the Millers, who lived in Lauči, Skulte parish, being pregnant on the 5th month already. The latter killed the fetus of by inserting a solid-body object into her uterus and piercing the uterine membrane by means of it; it resulted into the death of the fetus. However, soon the woman died as well. Upon the investigation of an expert, a Riga district doctor, the woman died because of general blood poisoning, which could have resulted from the insertion of a sharp solid body object into her uterus, such as a special wooden stylus used for preterm birth; the examination also revealed, that the woman's pregnancy was terminated on the 5th month. The investigating judge has determined that Millers acted upon the request of the woman, and their acts resulted both in killing her fetus, and causing the woman's demise as well. Thus, they were convicted under Art. 49, Art. 437 (p. 1) and Art. 439 (p. 1)[193].

The case of *Kovalenoks v. Dr. Akerman* also featured a complaint of a prisoner against a prison doctor. Having no comic circumstances, as the case of Vulfs (1931), it featured the following facts. Gerasims Kovalenoks, a prisoner of Cesis Prison (it was not stated for what reason he was convicted) was very unhappy with his fate, as he was suffering from the inflammation of the sciatica for over three years. Since December 1937 to April 1938, the prison physician, Dr. E. Akerman repeatedly treated Gerasims, released him from work and gave him medicines, who still repeatedly complained to the prison officials and blamed Akerman in negligent care. Finally Kovalenoks desired to be transferred to Riga Central Prison hospital – and his wish was fulfilled by the officials. Nevertheless, Gerasims Kovalenoks managed to lodge a complaint in order to institute criminal proceedings against Akerman. Upon the condensed court report, the Riga Regional Court prosecutor refused to start criminal proceedings, and Gerasims lodged a complaint about the refusal of the prosecutor to institute

[192] *Traub-Bins pret Bertuls-Ziemels*, Tiesu Palata, 9.11.1931, Original number unknown. Preserved in LVVA, f. 1536, Descr. 9, Case Nr. 999

[193] *Annas Millers un cita apsudzibu pēc Sodu lik. 439 p*., 1935 g. 20 junija, Rigas Apgabaltiesas Valmieras Apriņķa 2.iecirkņa, Nr. 74/1935

criminal proceedings against Dr. Akerman to the Trial Chamber. However, after verifying the facts of the case, the Trial Chamber did not find that Dr. Akerman demonstrated any negligent behavior towards Kovalenoks, and dismissed his complaint. The Trial Chamber's judgment was rendered in early 1939[194].

Conclusions from Chapter 1

Chapter 1 was the introductory chapter of the promotional work, discussing the issues of the rights of patients in the Republic of Latvia and the place of medical confidentiality in it. The author discussed the Law on the Rights of Patients and the overall scope of the rights of patients in the first part of the first chapter of the promotional work. The next parts of the first chapter were dedicated to the discussion of the judgment of the Senate of Latvia No. SKA-41/2020, which is the leading case on medical confidentiality in the Republic of Latvia, as well as the judgment of the European Court of Human Rights in the case of *L.H. v. Latvia* (2014). The judgment of the Senate of Latvia No. SKA-166/2020 relating to the right to expungement of blood test samples (as non-recorded personal data) of a deceased person, will be discussed in detail in Chapter 3. Chapter 1 also discussed the cases on breaches of medical confidentiality brought before the European Court of Human Rights, grouping the cases upon various categories (judicial and extrajudicial disclosures, transfer of medical records to various other institutions). The last part of Chapter 1 is devoted to the development of medical liability for medical malpractice during the period of the First Independence of Latvia, which is one of the first academic scholarship dealing with the issue of the development of medical law during the First Independence of Latvia (1918-1940). This part of Chapter 1 covered the issues of legislation and case law, as well as the historical routes of medical law, which may have impacted the emerging medical law of Latvia during the 1920s and 1930s. Very few academic publications during the period of First Independence of Latvia were devoted to the discussion of legal aspects of doctors' and hospitals' legal liability, which made the research even more complicated. The materials, provided in the given article, were mostly extracted from Senate court reports and the Latvian State Historical Archives heritage, though many legacy still remains underinvestigated, or is ultimately lost due to age and other circumstances. The discovered case law shows that the most frequent violations by doctors were either illegitimate abortions, or negligence in administering medical assistance, punishable under Art. 497 of the Penal Code (up to 1933), and Art. 219 (in 1933 – 1940). Unfortunately, no legacy was found relating to the application of Art. 218 of the Penal Code (unconsented medical intervention), and no legacy was found in relation to the disclosure of medical information. The reasons for it are unknown, but the author assumes that either the patients were not

[194] *Kovalenoks pret. Dr. Akerman*, Tiesu Palata, Kriminalnodala, 27.02.1939, Number unknown, case preservation at: LVVA, Fund Nr. 1536, Descr. 2, Case Nr. 1175

striving to institute criminal proceedings for such violations, had they actually occurred, or the doctors were diligent enough not to disclose or sell such information elsewhere. It is also questionable, for what reason medical liability was a very rare bird in the legal scholarship of the Baltic States. A brief examination of the case law of the Estonian and Lithuanian supreme courts has showed that very few cases related to medical liability (e.g. in comparison with the Latvian Senate), but it could be explained by the reason that not every complainant would desire to litigate for a long time to receive redress because of medical malpractice, and such cases could not thereby reach the cassational courts. Thus, many court judgments may be undiscovered to date, as the court reports of the Baltic states were usually confined to the cassational jugments, and the answer relating to how much medical malpractice cases were heard and were adjudicated in the Lithuanian Republic in 1918 – 1940 and the Estonian Republic in 1918 – 1940 lies in the archive materials, which are to date undiscovered, which requires a distinct research work on it.

Chapter 2

2.1. Gist of medical confidentiality as an institute of civil and criminal law. The history of medical confidentiality in case law

"*It is curious that there is so little authority as to the duty to keep customers' or clients' affairs secret, either by banks, counsel, solicitors or doctors. The absence of authority appears to be greatly to the credit of English professional men, who have given so little excuse for its discussion*"- said Judge Thomas E. Scratton of the Royal Family (King's Bench Division) in *Tournier v. National Provincial and Union Bank of England* (1924), currently a leading case for the protection of personal data in the field of professional secrecy, which involved a disclosure of the customer's bank account to his employer[195].

Judge Scratton was entirely right: the practice of the courts of the Anglo-American legal family regarding liability for the disclosure of professional secrets (which, in fact, includes medical secrets) was relatively little at the time of the first half of the 20th century. A. Hopper (1973) in his work on the fiduciary duty of the physician wrote the following in relation to medical secrecy: «however, in reality, the rights of patients, in practice, are quite well protected by professional ethics"[196]. Hopper wrote this in the context of Anglo-American law, where, indeed, cases can be "counted on the fingers of one hand"[197]. Daniel Schumann (1985), one of the researchers of medical secrecy in the historical context of the practice of the courts of England wrote, that the absence of such cases was absolute back in the XIXth and the first half of the XX century, except in one case, though in some rare occasions, the courts dealth with the admissibility of evidence based on medical testimony. He named a number of reasons, for which it was so. In the earlier times, medicine was clearly not a reliable source of evidence, and there was no consensus among prosecutors at the time on whether to force doctors to testify; another reason is more prosaic: such cases could be «lost in history», as not all English cases were strictly reported (i.e. the way they were collected by French case law publishing houses, like Dalloz or Recueil Sirey etc[198]. However, as it turns out, not all the cases were «lost», and the history of the concept of «medical secrecy» in the practice of courts is long and stunning. It has also developed «exceptions to the rules» that give doctors the right to divulge medical secrets, which has manifested itself in the practice of civil law and common law courts from the early 20th century to the present day.

Lawyers-practitioners and scholars have been studying the issue of civil and criminal liability for the disclosure of medical secrets since the middle of the 19th century, but not everyone has focused

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[195] *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461, 479 [per Scrutton, L. J.]
[196] Hopper, A., *The Medical Man's Fiduciary Duty*, 7 Law Teacher 73, 74 (1973)
[197] *Ibid*, p. 75
[198] Shuman, D.W., The Origins of the Physician-Patient Privilege and Professional Secret, 39 Sw. L. J. 661, 672 (1985)

on the practice of courts on this issue. In addition, medical secrecy has not been a separate object of study for a long time, so in most early legal treatises, medical secrecy itself was investigated in the framework of medical law and negligence in medical law. Among the works, in which the issue of medical secrecy from the earlier period of its development was studied, or was at least mentioned, is the legal treatise of prominent French medical law scholar A. Trebuchet (1834)[199] on the theoretical and practical aspects of medical law in France in the 18-19 centuries, the work of Charles Muteau on the theory and practice of professional secrecy in the legislation and jurisprudence of France and Belgium (1870)[200], a brief discussion on medical secrecy in the book on theory of penal law by Chaveau & Helie (1872)[201] a book on medical law by G. Ziino (1882)[202], the notes of French advocates and scholars M. Ville and M. Tenon in the judgment reports of Watelet and Dallet in 1885[203]; subdivisions of the Encyclopedia of British and American Law (1892)[204], two books by a French professor of medical law named Paul Brouardel (1887[205] and 1898[206]), who wrote valuable treatises on civil and criminal liability for medical negligence in French law, the book of the French lawyer A. Fazembat (1903)[207], a book by the Italian lawyer A. Luigi concerning the law on the functioning of psychoneurodispensaries in Italy (1907)[208], as well as some others. Among the authors of the middle-to-late 20th century, who studied the issue of medical secrecy mostly in the Anglo-American legal system, we can outline such authors, as K. DeWitt (1953[209] and 1959[210]), S. Friedman (1954)[211], R. Dunsmore (1959)[212], R. W. Baldwin (1962)[213], D. Vaver (1966)[214], C. Roedersheimer

[199] Trebuchet, A. Jurisprudence de la medicine, de la chirurgie et de la pharmacie en France, Paris, Librairie de L'Academie Royale de Medecine, Londres, Meme Maison 219 Regent Street, 1834, p. 273-286
[200] Muteau, C. Du Secret Professionnel: Traite Theoretique et Practique, Paris, Marescq Aine, Libraire Editeur, 1870, p. 248-256
[201] Chaevau, A. Helie, F. Theorie du Code Penal, Tome Cinquintiene. Paris, Imprimerie et Librairie Generale de Jurisprudence. Place Dauphine, 27, 1872
[202] Ziino, G. Compendio di medicina legale e giurisprudenza medica: secondo le leggi dello stato, Napoli, Libreria nella R. Universita, 1882, p. 21-23
[203] *Watelet et Dallet, gerant du journal le Matin*, Cour d'Appel de Paris, 5 mai 1885, Sirey 1885 I 347, 348 та *Min. Publ. c. Watelet et Dallet*, Cour de Cass., Cham. crim., 19 decembre 1885, Dall. Per. 1886 I 347, 348
[204] American and English Encyclopedia of Law (ed. by. J. H. Merrill), Volume XIX (19), Edward Thompson Co., Northport Long Island N.Y., 1892, p. 148-151
[205] Brouardel, P., *Le Secret Medical*, Paris, Librairie J.B. Bailliere et Pils, 1887
[206] Brouardel, P., *La Responsibilite Medical*, Paris, Librairie J.B. Bailliere et Pils, 1898
[207] Fazembat, A.. Responsibilite legale des Medecins Traitants, Paris, Bailliere et Fils, 1903 Bulletine de la Societe de Medecine legale de France, 38 Annee, Paris, Librairie de la 8. Cour de Cassation, 1907, p. 38-43
[208] Luigi, A. *La legislazione italiana sui manicomi e sugli alienati : commento alla legge 14 febbraio 1904, n. 36 ed al regolamento approvato con R. decreto 5 marzo 1905, n. 158*, Unione Tipographico-Editrice Torinese, Torino, Corso Rafaello 28, 1907, p. 62-66
[209] DeWitt, C. *Medical Ethics and the Law: The Conflict between Dual Allegiances*, 5 W. Res. L. Rev. 5, 19-23 (1953)
[210] DeWitt, C. *Privileged Communications between Physician and Patient*, 10 Wes. Res. L. Rev. 488, 492-495 (1959)
[211] Friedman, S. Medical Privilege, 32.1 Canadian Bar Rev. 1, 7-11 (1954)
[212] Dunsmore, R. B., *Hospital Records as Evidence*, 8 Cleveland-Marshall L. Rev. 459, 463-466 (1959)
[213] Baldwin, R. W., *Confidentiality Between Physician and Patient*, 22 Md. L. Rev. 181, 182-185 (1962)
[214] Vaver, D., Medical Privilege in New Zealand, 6 Auckland L. Rev. 63, 66-70, 74-78 (1966)

(1967)[215], W. K. Bernfeld (1972)[216], A. Hopper (1973)[217], A. Samuels (1980)[218], D. Schumann (1985)[219], E. Deutsch (1992)[220], A. McLaren (1993)[221], L. Weller (1993)[222].

The topic of anonymous childbirth, to which we will turn in Chapter III, covering the issues of civil law, medical law and family law, have also brought the attention of various oldtime and contemporary legal scholars, as this concept dates back to the XVII century. For the first time, this aspect of medical secrecy is addressed by A. Trebuchet (1834)[223], later, it was briefly discussed by Muteau (1870)[224] in France – the state, where the concept was created by the mores of society, and later was legitimized in case law and legislation (Belgian courts have discarded it, moreover, manipulations with anonymizing birth records were used for fraud and other illegitimate activity in the XIX century[225]). Modern legal scholarship regarding anonymous childbirth includes the works of such scholars as L. Passion (1983)[226], E. Crane (1986)[227], M. Jacub (2004)[228] as well as some others.

The aim of the given chapter is to analyze the historical and current practice of the courts in cases of disclosure of medical secrets in order to gain understanding of its evolution and the rules of such courts. Some aspects of the research are the development of the definition of "health data" and the author's development of the concept of "right to anonymous childbirth", which gives the child's biological forbearers the right to remain anonymous, which is considered both in its historical aspect (French and Belgian law) and in the contemporary one, unveiling the current practice of the ECtHR, United States and Italy (in particular, as an implementation of the ECtHR judgment in *Godelli v. Italy*).

What is meant by information protected by the term "medical secrecy" was successfully formulated by French courts more than a hundred years ago: for example, the civil court of Rennes in the case of *Dame Pellerin c. B et F.* (1903) noted that it covers the etiology of the patient's disease, the circumstances that caused the disease, its course, treatment of the patient and its outcome – In

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[215] Roedersheimer, C.J., Action for Breach of Medical Secrecy Outside the Courtroom, 36 U. Cin. L. Rev. 103, 103-115 (1967)
[216] Bernfeld, W. K. Medical secrecy, 3 Cambr. L. Rev. 11, 12-16 (1972)
[217] Hopper, A. The Medical Man's Fiduciary Duty, 7 Law Teacher 73, 75-76 (1973)
[218] Samuels, A. The Duty of the Doctor to Respect the Confidence of the Patient, 20 Med. Sci. Law. 58, 60-64 (1980)
[219] Shuman, D.W. The Origins of the Physician-Patient Privilege and Professional Secret, 39 Sw. L. J. 661, 667-672; 678-681 (1985)
[220] Deutsch, E. *Das Persönlichkeitsrecht des Patienten*, 192 Bd. H. (Archiv für die civilistische Praxis) 161, 170-175 (1992)
[221] McLaren, A. Privileged Communications: Medical Confidentiality in Late Victorian Britain, 37 Medical History 129, 137-140 (1993)
[222] Waller, L., Secrets Revealed: The Limits of Medical Confidence, 9 J. Contemp. Health L. & Pol'y 183, 187 (1993).
[223] Trebuchet, A. Jurisprudence de la medicine, de la chirurgie et de la pharmacie en France, Paris, Librairie de L'Academie Royale de Medecine, Londres, Meme Maison 219 Regent Street, 1834, p. 277-281
[224] Muteau, C., Du Secret Professionnel: Traite Theoretique et Practique, Paris, Marescq Aine, Libraire Editeur, 1870, p. 248-256
[225] See, for instance, *Min. Publ c. L.. et S.*., Trib. Corr. de Gand, 28 juin 1856, B.J.1856.998, 999-1002; 1005-1008
[226] Passion, L., Législation et prophylaxie de l'abandon à Paris au début du XXème siècle, Histoire, économie & société (Année 1983), p. 478-492
[227] Crane, A. E., *The Right to Know Versus the Right to Privacy*, 1986 A.S. Am. Law 645, 647 etc. (1986)
[228] Iacub, M., Naître sous X, Savoirs et clinique 2004/1 (No. 4), p. 45-52

fact, this is how the court tried to distinguish, what may, and what may not the doctor disclose in court as a witness in civil proceedings[229]. However, French courts could not reach uniformity as to what should and should not be held as admissible evidence, in case such evidence contained secret. There still is no uniformity in terms of what is the scope of the term "medical data". May such data include, for example, the X-rays? Obviously, it may be considered as personal data under certain circumstance, although the courts have rarely touched on this issue. Indeed, the Supreme Court of Michigan (1935), in *McGarry v. J.A. Mercier Co*., faced the following case: the railway company refused to pay the doctor for the treatment of its employee, requiring plaintiff (the doctor) not only to provide all the information about the patient, but also to provide the X-rays to prove the patient's injuries.The court ruled, that despite being "unreadable" to a non-professional, the X-rays are an important part of a patient's "clinical record" for a physician (since it is obvious, that with the appropriate knowledge of a doctor of medicine, he can identify them), and considering that the X-rays are the property of the physician (and in many U.S. states, both hospitals and physicians have property rights in medical records[230], to the same extent as in England[231] and Germany[232]), and the fact that the physician provided the company with a report on the employee's treatment, the court ruled in favor of the plaintiff doctor[233]. The aforesaid statements may be wittily summed up by the apt statement of the Constitutional Court of Colombia (1996) in the case of *Arroyo*, upon which, the term "medical data" includes all the information about the health of the patient (usually plaintiff in the case), contained in his medical history, and the conclusions, which are derived from it[234].

Among "medical personal data" there is a number of other medical-related data, the confidentiality of which may be prospectively higher, than merely the medical history and current, or past diagnosis of the patient. Thus, in England, such are the medical data (and usually other personal data) of minors, adopted children, or citizens, who were under the care of municipal authorities (i.e. in the orphanages under their governance), and are strictly confidential: any out-of-court disclosure was prohibited. The first official guidelines for such enhanced secrecy could be found in 1968, but they seem to be rather traditionally-based, than on basis of laws and bylaws[235]. Such data may be bound to disclosure even for biological parents. For instance, in the case of "D (Infants)" in 1970, the biological mother was unable to obtain information even through the court regarding the adoption of her children, whom she had once left in an orphanage, and later expressed a desire to accept them again[236].

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[229] *Dame Pellerin c. B. et. F.*, Trib. civ. de Rennes, 12 juin 1903, Dall. Per. 1905 I 321, 321-322
[230] *In Re June 1979 Allegheny Cty. Gr. Jury*, 415 A.2d 73, 76-78 (1980)
[231] *R. v. Mid Glamorgan Family Health Services Authority & Another / Ex Parte Martin*, [1995] 1 W.L.R. 110, 116; 119-120
[232] *Bundesgerichtshof*, 23.11.1982; VI ZR 222/79, para. 16
[233] *McGarry v. J. A. Mercier Co*., 272 Mich. 501, 504-505 (Mich. 1935)
[234] *Corte Constitucional*, Sentencia C-264/96, Exp. N. D-1139 (Re: *Jaime Alberto Miranda Arroyo*).
[235] Hawkins, W.F.S., *Practice Direction (Adoption: Disclosure of Confidential Information)*, [1968] 1 W.L.R. 373
[236] *In Re D (Infants)* [1970] 1 W.L.R. 599, 600-602

Similarly, the plaintiff in *Gaskin v. Liverpool City Council* (1979-80) was unable to gain access to information about his state of health (and other archival records featuring the facts of his early life) during the time he was placed under the care of various orphanages in his infant and adolescent years; plaintiff considered that he could sue the municipal bodies for negligence, which, as he believed, had led to a number of mental disorders he was suffering from at an adult age, and eventually brought to his unemployment and caused a multitude of problems in his life. The court ruled that the public interest would require keeping such data "locked"[237]. In fact, this case became the reason for his lawsuit before the European Court of Human Rights, which was successful for plaintiff[238].

In some U.S. states, psychiatric health records are considered by the courts to be so confidential that they are prohibited by a subpoena duces tecum: this principle was adopted by judgment of the Pennsylvania Supreme Court in the case of B (1978)[239]; at the same time, the Federal Court of Appeal of the Ninth District Caesar v. Mountanos (1978), adopted directly the opposite position[240]. In Canada, the Supreme Court prohibited the utilization of blood test results as evidence by the prosecution without the consent of the defendant in the case of *Dyment* (1987)[241]. In the case of *Plant* (1993), the Supreme Court of Canada included fingerprints in the unwritten personal data[242]. In Belgium, the courts held, that taking a blood test from a potential offender (i.e. a person, who could be blamed of a car accident), does not violate professional secrecy[243], but at the same time, in case the physician has freely disseminated the information he had treated a person, who may be guilty of a misdemenour, he violates professional secrecy[244].

"Special" medical data may also include the prospective plaintiff's HIV-status and all the health-related information touching it, in defense of which some Canadian and US states have adopted statutes. In Canada, physicians may be obliged to report such information to healthcare authorities, or to the relatives of the patient, but not beyond the meaning of the statutes, which exist in a number of Canadian provinces since the 1980s[245]. However, some US state courts required the hospitals to provide information relating to blood donors in medical negligence cases, where the plaintiff was

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[237] *Gaskin v. Liverpool City Council*, [1980] 1 W.L.R. 1549, 1552-1553 (Per Denning, L.J).
[238] *Gaskin v. United Kingdom*, (1989) 12 E.H.R.R. 36
[239] *In Re B*, 394 A. 2d 419, 425-426 (1978) [Penn. Sup. Ct].
[240] *Ceasar v. Mountanos*, 564 F2d. 1064, 1068- 1069 (1978).
[241] *R v. Dyment*, [1988] 2 SCR 417, 436-440
[242] *Robert S. Plant v. Queen*, [1993] 3 R.S.C. 281, 291-296
[243] *T. c/ M. P.*, Trib. pol. De Namur, 27 fevrier 1981, Jurisprudence de Liege, No. 19 du 9 Mai 1981, p.p. 181-182
[244] *M. P. / G*, Cour d'Appel Liege, 2 mai 1984, Jurisprudence de Liege, No.24 du 15 Juin 1984, p. 351-352
[245] Concerning the application of them in US case law, see *Doe v. Roe*, 155 Misc.2d 392, 404-409; 588 N.Y.S.2d 236, 244-246 (1992); Concerning the Canadian law, see. 12. Casswell, G. D. Disclosure by a Physician of Aids-Related Patient Information:an Ethical and Legal Dilemma, 1989 68-2 Canadian Bar Review 225 [Ann. 1989], see also: *Canadian AIDS Society v. Ontario*, Ontario Court of Justice, 04.08.1995, Docket No.4581/94, Ontario Reports (Canada), 3rd Ser., Vol. 28, p. 388

infected with HIV/AIDS, or another disease during a blood transfusion (though protective orders relating to the donor's identity were issued as well)[246].

Some issues relating to sensitive and "special" personal data were also covered by the European Court of Human Rights. In *I v. Finland* (2008), which was also a lawsuit relating to mishandling and leakage of HIV-data at a hospital where plaintiff used to work and undergo treatment, the European Court of Human Rights, stated that respect for the confidentiality of patient data is one of the most concordant principles of the legal systems of all signatories to the European Convention on Human Rights, stressing that special attention should be paid to protecting the confidentiality of HIV information, providing a high-quality legal mechanism to ensure it so that the HIV-patient data would be under a robust seal[247]. To date, the European Court of Human Rights still hasn't provided a specific definition of what categories of data would cover the concept of "medical data", although in S. & Marper v. United Kindgom (2009), the European Court has confirmed that DNA data (which, according to the instant circumstances of each legal case could be accounted as health-related data), should be considered as "personal data", although they are not recorded on standard means of storage, like paper or electronic hospital records, but may properly processed (and be identifiable) by a special machine[248]. The Latvian Senate upheld this position in judgment No. SKA-166/2020, which is discussed in this promotional work – the court recognized that the blood samples of plaintiff's deceased father, which were collected for the needs of a criminal investigation, terminated for 5 years at the time of the lawsuit, also constituted personal data, though not recorded in a "classical" way[249].

In fact, "special" medical data could also be recorded in an "ordinary" way. If the medical information is obtained, for example, from a blood test, it is transferred to plain paper or entered into a computer, it is the same information about the state of health as any other medical data in the patient's card[250]. In the case [on the admissibility of the action] *Van der Velden v. The Netherlands*, the ECtHR repeatedly mentions that plaintiff's fingerprints are maintained in the national DNA database of the Netherlands, which, is obviously a database containing electronic medical records, wherein the specialists, having the appropriate equipment, could would identify the plaintiff by them[251].

If we recall the older case law of the ECtHR, such as the case of *Gaskin v. United Kindgom* (1989), then we may notice, that in which the Court has clearly classified the plaintiff's health data as

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[246] *Tarrant County District Hospital v. Hughes*, 734 South Western Rptr. 2d 675, 678-680 (Tex. App. – Fort Worth 1987); *Boutte v. Blood Systems Ltd*, 127 F.R.D. 122, 125-126 (1987); *Stenger v. Lehigh Valley Hospital Center*, 609 A.2d 796, 803 (1992

[247] *I v. Finland*, [2008] ECHR 623, para. 38

[248] *S & Marper v. United Kindgom*, [2008] ECHR 1581, para. 60-63; 70-74

[249] *A pret. Veselības ministrija* , Latvijas Republikas Augstākās tiesas,Senāta Administratīvo lietu departamenta, 2020 gada. 30.septembrī, Lieta Nr. A420260716, SKA-166/2020, para. 11-14

[250] *R v. Christie Ann Culotta*, 2018 ONCA 665, para. 13-15 (Ontario Court of Appeals, Canada)

[251] *H.J. Van Der Velden v. The Netherlands*, [2006] ECHR 1174, Sect. A.; B

data belonging to his "private and family life"[252]. In the case of *Z v. Finland*, where the European Court of Justice has determined the legitimacy of a doctor's testimony regarding HIV-positive status and the use of this data as evidence in criminal proceedings, the HIV testing documents have been included with other medical data and thus can also be considered in health data[253]. In some earlier cases, dating back to late 19th century, in particular from France, the expression 'depositary' of a medical secret sometimes appears in the court reports, meaning a person who has been entrusted with medical secrecy and who is liable (criminally liable in the context of France and Belgium, and – liable in tort in context of England, USA and Canada) in case of disclosure of such records[254]. In the *Behringer* case (1991), the Supreme Court of New Jersey (the circumstances of this case are somewhat similar to the case of I v. Finland in the ECtHR)) noted, that the obligation to maintain medical secrecy lies not only with the doctor or other staff, but also at the institution (hospital, clinic) where the patient is treated[255].

History of the concept of "medical secrecy" in the practice of courts of the XIX-XX centuries

In continental law states, such as France, Germany, Italy, Spain, Chile, Argentine and a number of other jurisdictions, the disclosure of medical secrets is considered a minor crime. Given the current practice of French courts of the 19th and 20th centuries, defendants were usually fined and were very rarely imprisoned[256], although the French lawyer A. Fazembat argued that sentences of imprisonment still existed in the late 19th century, though such were very short-term ones in fact[257]. Interestingly, the fine for divulging medical secrets in modern France (art. 226-14) of the French Criminal Code (1994 – present data), as mentioned in the judgment of the European Court of Human Rights in the case of *Societe Plon v. France* (2004), constitutes 15 thousand euros[258].

In France. France is a country where the practice of medical secrecy is the earliest and still one of the most developed in Europe, and has a wide range of cases, both relating to the admissibility of medical evidence, as well as cases on out-of-court disclosure since the early 19th century. In this chapter, the autor has decided to summarize the practice of the French courts and consider the most interesting cases in both aspects.

So, the legal basis for criminal liability in 1810-1994 was Art. 378 of the Criminal Code of France (adopted in 1810), and the practice of the courts comes directly from it. The question arises –

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[252] *Gaskin v. United Kindgom*, [1989] ECHR 13, para. 34-37
[253] *Z v. Finland*, (1997) 25 EHRR 371, para. 36-57
[254] *Dame Pellerin c. B. et. F.*, Trib. civ. de Rennes, 12 juin 1903, Dall. Per. 1905 I 321, 321-322
[255] *Estate of Behringer v. Medical Center*, 249 N.J. Super. 597, 632 (1991)
[256] See, for instance, *B... c. X...*, Cour d'Appel de Besancon, 22 mai 1888, Sirey 1888 II 128
[257] Fazembat, A., Responsibilite legale des Medecins Traitants, Paris, Bailliere et Fils, 1903 Bulletine de la Societe de Medecine legale de France, 38 Annee, Paris, Librairie de la Cour de Cassation, 1907, p. 48-53
[258] *Societe Plon c. France*, [2004] ECHR 200, para. 19

was there anything else before 1810? There is little information about this, but there is some. Recalling pre-Napoleonic times, Trebuchet wrote that prior to the adoption of the Napoleonic Code, no legislation existed on this subject, although the parliaments (which in the days of monarchical France also served as appellate court) of various French cities have handed down at least 3 such decisions. According to Lurat, the Attorney General of the Grenoble Court of Appeal in the case of Girard (1900) in a commentary on the case), such cases were handed down in 1599, 1600 and 1747, though very little is actually known about them[259]. The first case, according to ancient French legal literature, was handed down on July 9, 1599 by the Parliament of Paris: an apothecary was condemned (or fined – the report was very little and does not provide detailed information) for revealing the fact that his indebted client was suffering from a disease: the condense reports suggested it was a "...une maladie que la sagesse ne lui permetíoit point de révéler", that is, "an ailment, which the wisdom would not allow to reveal"[260]. The 1747 case was a trial against a surgeon from Rouen, whose name was Toissant Duprey according to Isambard (1894), and who revealed that a nobleman was suffering from a venereal disease; he was fined and banned from exercising his profession for 6 years[261]. At some point, starting from 1600, when the statute of the Paris Medical Faculty was adopted, its Article 19, prohibited any disclosures of patient information, a several other medical institutions (i.e. Caen, Montpellier) copied these provisions and banned the doctors to disclose any information relating to the patient's health even under oath[262]. Lurat (1900) recalls that in more ancient French law, professional secrecy belonged to priests, one of whom was unhappy to be hanged for disclosure of his confessional communications (and seemingly repeated obscene behavior), which happenned upon a decree of a local parliament around 1672; at the same time, priests were rarely called upon to testify, and if they were, the XIX century courts would usually allow them not to do so even if the priest had acted not in the place of his work (i.e. a church), but acted as a confessor himself, even if he had spoken to anybody revealing a crime at his domicile – the early French courts held, that to rule otherwise would harm the principles of the Catholic religion[263]. Jean Domat (1777), in his book on public law in France, notes that the "roots" of medical secrecy lie in Roman law[264]. At the same time, the case note of Watelet case (1885) refers to the maxim that professional secrecy (including medical confidentiality) as a derivative of natural law, and its adoption is a matter of public order, as otherwise

[259] Procureur gen. de la Cour de Appel de Besancon c. Girard, Cour. de Cass, Cham.crim., 10 mai 1900; 15 fevrier 1901, Dall. Per. 1905 I 553, at p. 553-554 [Note Lurat]
[260] Peuchet, J. Encyclopédie méthodique. Jurisprudence. T. 1, Paris/Liege, 1783, p. 373-374 (APOTHEQUE).
[261] Isambard, E., La Communauté des chirurgiens de Pacy-sur-Eure aux XVIIe et XVIIIe siècles, Pacy-sur-Eure, Imprimerie Emile Grateau, 1894, p. 86-91
[262] Gendrin, A. N., De la nature et des limits de l'obligation imposee legalement aux medecins de garder les secrets qui leur sont confies, Journal de Medecine, de Chirurgie et de Pharmacie (Francaises et etrangeres), Tome 110. Paris, janvier 1830, p.p. 335-336
[263] Joseph Lavaine c. Ministiere Public, Cour de Cass., Sect. Crim., 30 nov. 1810, Sirey T. 11 p. 49; Jour du Palais, T.8 p. 667
[264] Domat, J., Le Droit Publique et Legum Delectus, Paris, Tome Second, 1777, p. 129-130

the confidence in a number of professions (i.e. doctors and lawyers) from the side of their clients would be lost[265].

Trebuchet was the first to outline the problematic issues in the field of medical secrecy: 1) whether it is possible to allow a doctor to testify when he, after an autopsy, sees an unnatural death (in the example in the unnamed trial of 1830, which he cites, which featured an infant poisoning with fatal consequences, allegedly an infanticide)? In his opinion, this is quite controversial and he had no explicit answer; 2) Should the doctor provide all personal data of biological parents to the city register, in accordance with Art. 56 of the Civil Code of France? His answer was affirmative (this was adopted by Belgian, not French courts, as the later case law showed); 3) Should a doctor report an illness of a patient who has not paid for his work by suing him? Trebuchet believes that he should not, but the patient should be sued for breach of contract between doctor and patient; 4) should the doctor inform the patient's wife (or bride) about the disease he has? Trebuchet believed that yes, and the Lyon Court in the case of G c. R. (1909)[266] judgment was of a similar opinion (technically, this was a lawsuit for misdiagnosis, and upon the facts, plaintiff did not oppose the presence of his wife while he was examined by the doctor), while the Grenoble Court of Appeal case of "M" (1909) concluded that the submission of a medical report by a doctor, authorized for an expert opinion on an accident at work (the victim of which was the plaintiff), is not a violation of medical secrecy[267]. In 1913, the court of the town of Bar-le-Duc held that a doctor's certificate concerning the testator's mental health condition is admissible for a trial to challenge the validity of a will[268].

The practice of the French courts of the 19th and 20th centuries can also be grouped by judicial and extra-judicial disclosure of medical secrets. Perhaps the first known case relating to medical secrecy in post-Ancien Regime France was the judgment of *Fournier c. Remusat*, the decision of which was handed down by the Court of Appeals of Grenoble in 1828 – it can claim the title of the oldest French case within civil proceedings, which touches the issue ov medical secrecy (unless we account the legacy of Ancien Regime, which is very underinvestigated). The wife, Remusat, initiated a lawsuit for a legal separation, and a doctor, Fournier, was called as a witness to testify that he was treating her for a disease (apparently a venereal one) which the husband had infected her within the sexual intercourse. The doctor, however, refused to testify, moreover, being a witness on the part of the plaintiff. The plaintiff and her lawyers claimed that the doctor had misused his "privilege not to testify" because, in theory, that evidence was in her best interests. The trial court ordered the doctor to testify, but he appealed. The Court of Appeals of Grenoble decided in favor of the doctor, because he, in the view of the court, should not disclose it even as a witness on the part of the plaintiff – then

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[265] *Watelet et Dallet, gerant du journal le Matin*, Cour d'Appel de Paris, 5 mai 1885, Sirey 1885 I 347, 348 та *Min. Publ. c. Watelet et Dallet*, Cour de Cass., Cham. crim., 19 decembre 1885, Dall. Per. 1886 I 347, 348

[266] *G c. R.*, Cour d'Appel de Lyon, 16 juin 1909, Dall. Per. 1910 II 123, 125

[267] *M c. Docteur V.*, Cour d'Appel de Grenoble, 29 janvier 1909, Dall. Per. 1910 II 121, 121-122

[268] *Cons. Aubertin c. V. Perrin*, Trib. de Bar-Le-Duc, 15 Oct. 1913, Sirey 1914 II (Bull. des Somm.) 13

the courts interpreted the concept of medical secrecy as "absolute" and did not prefer to work out any exceptions. The Court also held, that by not testifying, the doctor correctly applied the legislation and ensured high moral standards of his professional behavior[269]. Trebuchet also mentioned that it was completely unclear what are the limits of medical secrecy according to Art. 378 of the Criminal Code of France[270].

Several cases were related to information about the patient's health in the context of reimbursement to the plaintiff or his relatives (in case of death) of the insurance policy: there was no manipulation, because citizens, as practice shows, have learned to conceal their diseases, because the statutes of French insurance companies would not allow such citizens to be issued a policy, as they had some progressive ailments, that lead to death – the statutes of insurance companies usually did not allow citizens suffering from some peculiar diseases to receive insurance policies. In two "twin cases", from the civil court of Le Havre (1886) and the civil court of Besançon (1887), as the court reports reveal, the insurance companies, in order not to pay the amount of the policy for the demise of the insured, tried to get a confirmation from the physicians to learn the causes of their deaths. In both cases, the courts recognized the doctor's right to refuse to issue such a medical certificate, unless, of course, the patient (during his life) allowed him to do so. Although this position is quite anachronistic in the modern world, undoubtedly, this position of both medical syndicates (mentioned in the case of Le Havre) and the courts, deserves attention[271].

In the case of *Bousquet c. Compaigne le Gresham* (1899), adjudicated by the Cour de Cassation, a man named Bousquet in bought an insurance policy with an insurance amount of 70 thousand francs, on behalf of a man named Faure, in May 1892. Faure died soon after (in late 1892) due to progressive tuberculosis. As a proof, Bousquet provided an medical report to confirm the demand to repay the full amount of the policy. The insurance company refused, suspecting that Faure had in fact concealed a bladder disease and used a fistula to urinate during his lifetime, and the statutes forbade the company from insuring such citizens as Faure was, as well as provided for the cancellation of the policy in case of inaccuracies in the health insurance contract. Dr. F., who had previously given the medical certificate, was summoned to court; he was known to have treated Faure for the last twelve years of his life. The Court of Appeal of Paris allowed the use of Dr. F.'s testimony as evidence. At the same time, the plaintiff files an appeal in cassation to annul the decision allowing the evidence of the doctor to be admissible. The Court of Cassation declared to annul the lower court's decision, considering the doctor's testimony inadmissible as evidence. At the same time, the doctor's duty to testify is in no way waived, and the court may ask him questions, some of which he may choose not

[269] *Fournier c. Remusat*, Cour d'Appel de Grenoble, 23 aout 1828, Sirey 1828 II 318, 319-320
[270] Trebuchet, A., Jurisprudence de la medicine, de la chirurgie et de la pharmacie en France, Paris, Librairie de L'Academie Royale de Medecine, Londres, Meme Maison 219 Regent Street, 1834, p. 277-282
[271] *Traffault c. Boutan*, Trib. civ. Du Havre, 30 juillet 1886, Sirey 1887 II 69, Dall. Per. 1887 I 347; *Daguet c. Garderon et. Comp. d'assur sur la vie Phenix*, Trib. civ. de Besancon, 17 fevrier 1887, 1887 Jour. du. Pal. 476, 477-478

to answer owing to his privilege. However, the notion of what medical information should be rendered as "secret" and what may be not, according to the note of the case, was not clearly clarified – the courts themselves have not worked out any general rules regarding this aspect in the late 19th century, therefore, the result may vary from case to case depending on the circumstances[272].

Extra-judicial disclosures of medical secrets in the late 19th century were first characterized by the divulgation of patients' medical histories with information, allowing to figure out their identity, which sometimes gave rise to resonant lawsuits. One of the most well-known cases of divulging medical information was the case of Watelet and Dallet (1885), in which criminal proceedings were instituted against a doctor for disclosing information about the illness and death of a famous French artist, Jules Bastien-Lepage (1848-1884), and the case is also well-known for being cited by the European Court of Human Rights in Societe Plon c. France (2004)[273]. The facts were the following. Defendant Watelet have out the history of the disease of Bastien-Lepage to the newspaper "La Matin" (P. Brouardel provides a copy of the letter of Watelet in his first book [6, pp. 19-21]). Bastien-Lepage, who had cancer, traveled to Algeria for 10 years and returned in extremely poor health. In the letter, Watelet mentions that the artist also suffered from rheumatism, and that he died from complications of cancer, and medicine was powerless to save him[274]Watelet was sentenced to a fine in the Seine Correctional Court, losing an appeal. The Court of Cassation of France noted that the absence of malicious intent in his actions does not absolve him from responsibility, and (referring to the text of the trial court's judgment) noted that a breach of professional secrecy "[it] harms not only the individual, but also the whole society, because then, the trust in the professions, [to] which the society itself trusts [...] is lost." The Court of Cassation upheld the lower courts' decision in the Watelet case. In addition, the principles developed in the case of Watelet are quite comparable to the decision of the ECtHR in this case, as well as the circumstances of the case. Later, summarizing the case of Watelet (1885) in the Consul (1893-1895) judgment, the French Court of Cassation noted that the publicity of the plaintiff (or a deceased person whose relatives are being tried for breach of medical secrecy) is not an excuse for disclosing medical secrecy[275].

In the case of "B", the director of a mental hospital in Besançon published a booklet describing the medical history of a woman, who, according to his observations, was suffering from monomania, which led to two actions against him – one from the prosecutor, and on from the woman herself: in total, he was fined 2,200 francs (of which, however, only 200 was for divulging medical secrets), and he appealed for a reduction in damages. As it may be derived from the case facts, the woman ran away from a mental asylum, but was soon captured and was treated at the mental hospital, where he

[272] *Bousquet c. Compaigne le Gresham*, Cour de Cass., 1 Mai 1899, 1899 Dall. Per. I 585, 587-588
[273] *Editions Plon (Societe) v. France*, [2004] ECHR 200, (2006) 42 EHRR 36, para. 20
[274] Brouardel, P., *Le Secret Medical*, Paris, Librairie J.B. Bailliere et Pils, 1887, p. 21-22
[275] *Consul c. Pitres*, Cour. de cass.; Cham. Civ., 9 avril 1895, Sirey 1896 I 81, note.

was the director. Then, upon the observations of the plaintiff (that is, the director of the mental asylum), a booklet was published, printed in a circulation of 800 speciment. The medical history of woman"X" was described in detail, and in addition, the identity of "X" could be revealed, since the plaintiff mentioned her husband. The plaintiff emphasized that he had made the publication in the interests of science, but the court said that this was not a reason to violate the patient's confidentiality (it may be added here that the Court of Appeal of Bordeaux in the case of the Consul (1893) stated that alone on himself, the published description of the patient's medical history, photographs and the process of his treatment, is not a violation of medical secrecy as such; however, the doctor is not allowed to identify his patient, which, accordingly, will already be a violation[276]). The Besancon Court of Appeal also noted, that most of the facts in the booklet had in fact been copied from early records, which, however, also gave no reason to violate medical secrecy the way the director did. The appeal was dismissed.

The case of the Consul (1893-1895) is no less interesting, not only because of the circumstances and the judgment of the courts (Court of Appeal of Bordeaux and the Court of Cassation of France), but also because the courts have developed a number of rules that could significantly assist in resolving the cases relating to medical secrecy revelations. It is worth noting the age of this decision, as well as the advanced ideas of French judges of the late 19th century: for example, in England, those days there were no (and, in principle, there is still no at present day) general rules developed on the relating to the disclosure of patient health information on basis of established case law (see separate section for England). Thus, the plaintiff in the case, Josephine Consul, aunt of Paulina Consul (born 1860s – died 1891), filed a lawsuit against the famous French psychiatrist and neurologist, Albert Pitres (1848-1928) for publishing medical history, photographs and numerous descriptions of the symptoms of illness of one of his patients, Paulina, who had already died at the time of filing the lawsuit[277]. Paulina was a patient at the Hospital Saint-Andre in Bordeaux, where she was treated for four years. All this time, Pitres (defendant) recorded the symptoms and the process of her treatment. He called the disease "unilateral hypnosis": a young woman, 20 years old at the time of admission to the hospital, was ill throughout her childhood, spent several years in a convent, where her health occasionally improved. After the death of her mother (around 1882), the girl's health deteriorated sharply again. Mostly, she suffered from a whole range of mental disorders. Pitres published his observations in a two-volume "Leçons cliniques sur l'histérie et l'hypnotisme. Faites à l'Hôpital Saint-André de Bordeaux "(1891), where he identified the plaintiff's niece as" Pauline C. ", where he also posted photographs of Paulina[278].

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[276] *Consul c. Pitres*, Cour d'Appel de Bordeaux, 5 juillet 1893, Dall. Per. 1894 II 177, 177-178

[277] *Consul c. Pitres*, Cour. de Cass., Cham. civ., 9 avril 1895, Sirey 1896 I 81, 82

[278] Pitres, A., *Leçons cliniques sur l'hystérie et l'hypnotisme. Faites à l'Hôpital Saint-André de Bordeaux, Tome Second, Paris, (O. Doin, Editeur),* 1891, p. 321-328; 479-480

The Bordeaux Court of Appeals first noted that the medical literature does indeed often describe cases involving the medical history, detailing the symptoms and treatment process, which may include the patient's initials, photographs of these symptoms and pathologies. Is this a violation of medical secrecy in this case? No, if the patient *cannot* be identified by the information; however, at the same time, the doctor has no right to provide specific facts about the patient's identity – otherwise, it is a violation (in fact, similar conclusions were reached by the Court of Appeal of Paris in the case of Watelet (1885)[279]). Since Paulina died, the right to sue belongs to her heir or relative. However, the legal basis for the claim is not Art. 378 of the Criminal Code, but Art. 34 of the Law of July 29, 1881 – that is, slander against the memory of the deceased[280]: accordingly, it is a civil lawsuit, but not a criminal complaint. In addition, the plaintiff will not win over the case unless he proves that the publication has damaged the reputation of a currently living person at the moment, or can cause it in the future[281]. The plaintiff believed that the photo was an indirect "personification of her family," but the court did not consider it to be tortious. In addition, according to the established facts, the court noted that Paulina was very pleased to read all of conclusions written by Albert Pitres, and readily agreed to their publication, including photographs. Moreover, Albert Pitres offered the plaintiff to remove the photos of Paulina from the book[282]. Therefore, the plaintiff failed to prove the damage done to her, and the court ruled in favor of the defendant. The Court of Cassation upheld the lower court's decision[283].

Owing to this judgment, as well as a number of other cases, the French courts have been able to derive some general rules for dealing with cases, relating to violations of medical confidentiality. They can be listed below:

1. If the scientific work on medicine, in which the medical history is published, consists of information obtained in the course of the doctor's work, and the facts submitted by him identify the plaintiff, then it is a violation of medical secrecy[284].
2. Photographs, initials, mention of relatives and medical history can be "identifiers" of a person[285].
3. Scientific interest is definitely not an indulgence for the disclosure of medical secrets. Such is the exceptional public need, which, according to the law adopted in 1893 in France[286], is the obligation to report on epidemics and the people, who are sick with dangerous or contagious diseases (actually, such an exception appeared very quickly in US law in the early 20th century)[287]. In the later case of

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[279] *Watelet et Dallet, gerant du journal Le Matin*, Cour d'Appel de Paris, 5 mai. 1885, Sirey 1885 II 121, 121-122, see note.
[280] *Loi du 29 juillet 1881 sur la liberté de la presse*, Art. 34
[281] Cour d'Appel de Bordeaux, 5 juillet 1893, Dall. Per. 1894 II 177, 177-178
[282] *Consul c. Pitres*, 9 avril 1895, Cour. de cass., Sirey 1896 I 81, 84
[283] Cour. de Cass., Sirey 1896 I 81, 84
[284] Cour d'Appel de Bordeaux, Dall. Per. 1894 II 177, 178
[285] *B... c. X...*, Cour d'Appel de Besancon, 22 mai 1888, Sirey 1888 II 128
[286] Dall. Per. 1893 IV 14, Art. 15
[287] *Simonsen v. Swenson*, 104 Neb. 224, 228-230; 177 North-Western Reptr. 831, 832 (1920)

Dijon (1897), the Court of Cassation held, that in case a public official is entrusted with the communications bearing a medical secret, he is a confidant of such secret, as a doctor is[288].

4. If the person whose data are disclosed has died, the legal basis for the claim is Art. 34 of the law of July 29, 1881. If the person is currently, alive – then it is Art. 378 of the Criminal Code. The plaintiff must prove in court that the publication caused him (and not the deceased) moral damage (the case of the Consul). The means of legal protection are: a claim for damages; claim for prohibition of publication of materials (judgment of the Court of Cassation in the case of the Consul)[289];

5. The absence of malicious intent is not an excuse for disclosure (the case of Watelet and Consul)[290].

6. In some cases, the patient may consent to the disclosure of secrets, but his relatives may not, provided the patient had already deceased[291]. The same principle was applied by Belgian courts in the 20th century jurisprudence, upon which only the patient himself, but not his relatives, could release him from his duty to maintain confidentiality[292]. Belgian courts also held, that apart from cases, which were expressly provided by law, the doctor may not release any medical records or certificates related to the health condition of his patient without his consent, and it will not be accepted by the court as admissible evidence in such case. As a general rule, the doctor may disclose the information on the disease his patient suffers from to any third parties without his express consent[293].

7. The doctor is not really relieved of the obligation to testify about everything he has seen and heard in everyday life[294];

8. It is quite difficult to say unequivocally whether all the facts obtained by a doctor are confidential in nature. Sometimes, their character was assessed by the judges directly at the proceedings, so it is quite difficult to "guess" what will be considered and what will not[295];

9. In early 20th-century French law, the courts tried to determine what could be considered a "secret fact" and concluded that the patient must have a certain interest in order to conceal any information he delegates to the doctor[296];

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[288] *Procureur General c. Dijon, Cour de Cassation, Arrêt Cass. Crim. 13 mars 1897, Pandectes Francaises*, Ann. 1898, Partie I, p. 25, 25-28

[289] *Consul c. Pitres*, Cour. de Cass., Cham. civ., 9 avril 1895, Sirey 1896 I 81

[290] See note of *Pitres c. Demoiselle Josephine Consul*., 5 juill. 1893, Cour d'Appel de Bordeaux, Dall. Per. 1894 II 177

[291] *Trafault c. Boutan*, Trib. civ. du Havre, 30 juillet 1886, Sirey 1887 II 69

[292] *Les Epoux V. c/ F*, Cour d'Appel de Liege (2 Ch.), 19 fevr. 1957, Journal des Tribunaux (Bruxelles), 1958, p. 129-130, 73 Anne, No. 4183, 23 Fevrier 1958, Lemmens contre Notebaert, Cour d'Appel de Liege, 2 december 1976, Jurisprudence de Liege, 84 Anne – No. 24 (12 Mars 1977).

[293] *Rensonett c. Cassalette et cons*., Cour d'Appel de Liege (2 Ch.), 15 janvier 1957, Journal des Tribunaux (Bruxelles), 1958, p. 130-131, 73 Anne, No. 4183, 23 Fevrier 1958.

[294] *Bousquet c. Compaigne le Gresham*, 1 Mai 1899, Cour de Cass., 1899 Dall. Per. I 585, 585-587

[295] *Bousquet c. Compaigne le Gresham*, Cour de Cass., 1 Mai 1899, 1899 Dall. Per. I 585, 587-588; *Erlander c. Soc. Venot et Co.*, Cour de Cass., 26 mai 1914, Sirey 1918 I 9, 9-11

[296] *Bousquet c. Compaigne le Gresham*, 1 Mai 1899, Cour de Cass., 1899 Dall. Per. I 585, 585-587; *Erlander c. Soc. Venot et Co.*, Cour de Cass., 26 mai 1914, Sirey 1918 I 9, 10

10. A professional secret in French law is equal to property, and belongs to the one who entrusted it to the doctor - he is the administrator of the secret, and may give the doctor the right to disclose it if necessary[297].
11. Evidence provided by a doctor (it is possible that under duress) is not allowed by the courts as evidence if the court considers that the evidence was obtained in circumvention of medical secrecy[298];
12. In court, the plaintiff has the right to submit medical records prepared by his doctor as evidence.[299]
13. If the enterprise where the plaintiff is employed authorizes the doctor to make an expert opinion on the loss of his ability to work, the provision of this opinion to the company is not a violation of medical secrecy[300]. However, if the doctor is not specifically authorized to do so, then he violates medical secrecy by providing employers with information about the health of the plaintiff[301].
14. In 1957, the French Court of Cassation held, that in case the doctor choses to testify in court on the facts he had learned during exercising his profession, which constitute medical secrecy, he may not be blamed in a violation of professional secrecy[302].

Germany. In the earlier times, the prohibition to disclose confidential communications was enshrined in Art. 300 of the 1851 and 1871 Prussian Penal Code (*Preußisches Strafgesetzbuch*). The right of action lied in the person itself, or, as later the Reichsgericht clarified, in the head of family and guardians of a legally incompetent person[303]. In 1872, the Prussian High Tribunal (*Preußisches Obertribunal*) condemned a doctor, who failed to report he was treating a minor smallpox patient to the police authorities, who only messenged this fact to the mother of the child[304]. This was an imperative measure, posed upon the legislation, and it was apparently not accounted as a breach of professional secrecy. The 1885 judgment of the German Supreme Court (then called "Reichsgericht") in the case of "W", clarified the nature of breaches of professional secrecy from the side of the doctors. There, a doctor revealed a bill of one of his patients, a woman, whom he treated from a sexually transmitted disease, whose husband wrote a complaint against him, prevailing in action. The Court held, that in case the doctor reveals the confidential communications, he commits a breach of trust, punishable under Art. 300 of the 1851 and 1871 Criminal Code. The right of action, as I held earlier in this passage, lies in the aggrieved party, the head of the family (as was the husband), or the guardian

[297] *Proc gen. de la Cour d'Appel de Besancon c. Girard*., Cour. de. cass, Cham. crim.; 10 May 1900; 15 Fevr. 1901, Dall. Per. 1905 I 553
[298] *Bousquet c. Compaigne le Gresham*, 1 Mai 1899, Cour de Cass., 1899 Dall. Per. I 585
[299] *Erlander c. Soc. Venot et Co.*, Cour de Cass., 26 mai 1914, Sirey 1918 I 9, 9-10
[300] *M c. Docteur V*., Cour d'Appel de Grenoble, 29 janvier 1909, Dall. Per. 1910 II 121, 121-122
[301] *G c. R*., Cour d'Appel de Lyon, 16 juin 1909, Dall. Per. 1910 II 123, 125
[302] *Fermanian et autres c. dlle Leberger*, Cour de Cass., 22 janvier 1957, Journal des Tribunaux (Bruxelles), 1957, p. 717-718, 72 Anne, No. 4172, 8 Decembre 1957
[303] *Reichsgericht*, III Strafsenat, Urt. v. 22 Oktober 1885 g. B. Rep. 2421/85, ERG St. Bd.13, S. 61-62 [RGSt. Bd. 12, S. 60 – 65]
[304] *Preußische Obertribunal*, Entsch. v. 15. Mai. 1872 c. Driesen (350 I. Cr.), PrObTre Str.Bd. 13, S. 307, 307-308

of an incompetent person[305]. What is interesting, this case was never mentioned in newer German case law relating to medical secrecy, though the German courts have repeatedly analyzed the issue of the vaults of medical secrecy in old German law. In 1901, the Court of Appeals of Hamburg (I) heard a case, which was a divorce lawsuit, where the husband was blamed in contracting his wife with syphilis, which he seemingly contracted himself because of repeated adulteries, which he denied. The doctor, who treated him, was reluctant to testify, but the court ordered defendant to release his doctor from the obligation of confidentiality so as to establish the necessary evidence. The court also held, that it of the legitimate interests of the wife to know such facts, and family life without sexual intercourse (which the defendant avoided for several years, according to the court report) is impossible, as sexual intercourse is an inalienable part of family life. The court also denoted, that the physicians should be cautious to reveal confidential communications frivolously, and it would be better for physicians to be officially released from confidentiality by one of the parties of the proceedings (defendant in this case) – despite defendant did not will to release his doctor from confidentiality, the court compelled him to do so[306].

Another case of the German Supreme Court (Reichsgericht), adjudicated in 1905, concerning the necessity to divulge medical secrets under certain circumstance, which is quite significant for the future development of German case law in respect with the revelations of medical secrecy. The facts were the following. One day, the doctor (defendant) visited plaintiff's family, determining that a woman, a member of the family, had syphilis. Seeing that the children were in constant contact with the mother, the doctor decided to warn the plaintiff's daughter-in-law, who lived with her of the danger. After the doctor announced the diagnosis, the plaintiff filed a complaint against him: the Berlin city court decided to fine defendant. In the defendant's appeal, the court accepted the defendant’s side: although the court did not deny that the defendant had in fact disclosed confidential communications, the question of his responsibility for this lies in the justification for such actions. In this particular case, according to court, the doctor was not that he could – but *had* to disclose such information: otherwise, if children contracted syphilis, he could be held liable for professional negligence[307]. The German Supreme Court’s position on the admissibility of medical secrecy in civil proceedings was opposite: in the divorce lawsuit, the doctor was asked to confirm that the plaintiff's husband was infected with syphilis (presumably due to adulteries), but the physician refused to confirm the diagnosis even though the lower court complied him to do so. The court, however, concluded that the doctor's obligation to maintain medical secrecy was, in some sense, "higher" than

[305] *Reichsgericht*, III Strafsenat, Urt. v. 22 Oktober 1885 g. B. Rep. 2421/85, ERG St. Bd.13, S. 62-65 [RGSt. Bd. 12, S. 60 – 65]
[306] *Ehefrau Anna Th. M. B. geboren N. in Hamburg gegen ihren Ehemann den Comptoirboten B.H.B in Hamburg*, Oberlandesgericht Hamburg I., v 14 Juni 1901, Hanseatische Gerichtszeitung Bd. 22 (XXII) (1901) S. 269 – 271.
[307] *Reichsgericht*, Beschluss v. 19 Mai 1905 – ERG II (Strafsenat) Bd. 38 [1906], 62, p.p. 62-66

the plaintiff's interest in dissolving the marriage, and therefore allowed the doctor not to testify about the defendant's diagnosis[308].

In modern German law of the 20th century, the interpretation by the courts of the disclosure of medical secrets, as in many other European countries, lies in two areas: 1) the admissibility of the disclosure of medical secrets in civil or criminal proceedings; 2) extra-procedural disclosure. It should be borne in mind that health data may be evidence in the process (for example, medical negligence), so in such cases, the courts held that failure to provide access to a patient's medical record could not be justified by medical secrecy[309]. In Germany, as in France and the United States, medical secrecy covers both the disclosure of any information about a patient's health to any third party, including non-physician hospital staff[310], and the right of doctors[311] and nurses[312] not to testify in civil and criminal proceedings, however, German courts often concluded that, if evidence was necessary, doctors still had to testify. For instance, in a 1959 case adjudicated by the Land Court of Cologne, the employee of a private clinics was fined for refusing to hand over the patient register of the gynecological department and not providing necessary testimony, which was necessary for court proceedings. A woman, the client of the clinics, was robbed somewhere in the premises of the hospital. The victim asked to provide a list of patients to find out who could have committed the robbery. The receptionist refused to testify as well, invoking professional secrecy. The court, however, found, that the patient list, in general, is covered by the concept of "medical secrecy" for professional use, but it is not bound to be disclosed, if this information can be evidence of a crime, confirming the lower court judgment[313]. In the 1985 case, adjudicated by the Federal Supreme Court of Germany in 1985, a nurse was fined for refusing to testify about the perpetrators, one of whom was injured within an unsuccessful robbery of an electrical store and hospitalized to the healthcare institution, where she was working: the court ruled that she had no right to conceal facts other than the ones relating to the treatment of the offender, as a patient of the hospital[314]. In a later case, the Lower Saxony Regional Court for Labor Disputes found a violation of medical secrecy by the fact of disclosure the plaintiff's health-related information to a non-medical staff of the hospitals, granting 6000 DM damages[315].

In United States of America. The classification of the disclosure of "medical secrets" into procedural (judicial) and extrajudicial (extrajudicial) is fully ingrained in the legal literature of the United States and Canada in the 1950s, as evidenced by the work of Friedman (1954) and DeWitt

[308] *Reichsgericht*, Beschluss v. 19 Januar 1903 – ERG VI (Zivilsenat) Bd. 53 [1903], 315, p.p. 315-319
[309] *Bundesgerichtshof*, 31.05.1983 – VI ZR 259/81, para. 2-6, 19-20; 25; 28; 30
[310] *LAG Niedersachsen*, 15.09.1993; 5 Sa. 1772/92, various
[311] *Bundesverwaltungsgericht*, 25.09.1958 – BVerWG WDB 9/58, various
[312] *Bundesgerichtshof*, 20.02.1985 - 2 StR 561/84, para. 7-11; 13-14
[313] *Landesgericht Koln*, 02.04.1959 – 34 Qs 76/59; NJW 1959, 1598, p. 1598-99
[314] *Bundesgerichtshof*, 20.02.1985 - 2 StR 561/84, para. 7-11; 13-14
[315] *LAG Niedersachsen*, 15.09.1993; 5 Sa. 1772/92, various

(1954), who were among the first to classify them upon such distinction and later in the 1960s, Ch. Roedersheimer (1967) considered tortious liability for the disclosure of medical secrets by a doctor based on the practice of American courts in 1930-1960 (here we can add that the Oregon Court of Appeal in *Humphers v. First Intestate Ba*nk (1984-85) regarding the disclosure of the identity of the biological mother to the adopted daughter described in this article, also approached the issue of tort liability in this area quite thoroughly[316]). The practice of the US courts of the 19th century, however, did not distinguish between "judicial" and "extrajudicial" disclosures most likely due to the lack of such cases[317], reducing the existing practice of courts to the question of the admissibility of the use of medical evidence as evidence in civil and criminal proceedings.

The 19th edition of the Encyclopedia of British and American Law (1892) does not mention any cases of extra-procedural disclosure of medical secrets, while the question of the admissibility of medical evidence has been raised from time to time in various states in 19th century practice. Early U.S. case law did not establish such a concept as "patient-physician privilege" (or duty, though not absolute - this was often decided by the courts that relied on the doctor not to testify about the patient's health), at the same time , some states in the United States adopted special statutes alike the Civil Code (they were mainly called "Annotated Statutes"), forbidding doctors to testify about the health of their patients: the configuration of these statutes may differ, because in some states doctors were forbidden to testify only in civil cases, in others – they were bound to testify in criminal cases and in some states such a "privilege" did not exist at all. It fact, only in 1883-1887, such statutes were adopted in about 20 US states[318].

Thus, in civil proceedings (this statement applies to those states of America where physicians were not allowed to testify about the patient's health), the testimonies of physicians containing information obtained by him during communication with their patients, for example, in cases of reimbursement of the amount of the policy for the death of the insured[319], the state of health of one of the spouses (as evidence of infidelity in case of sexually transmitted diseases)[320]. The legal nature of "patient-physician privilege", according to the practice of the US courts, is mixed, because in some states it comes from the statute, whereas in others it derives from precedent (and was repeatedly "borrowed" from the practice of courts in other states)[321]. Quite early in the US jurisprudence, the "cornerstones" of medical secrecy were identified, in fact – who can be considered a "depositary of secrecy", and in which case the doctor is the one who takes care of the patient; and what is the method

[316] *Humphers v. First Intestate Bank*, 68 Or. App. 573, 578-587 (1984); *Humphers v. First Intestate Bank*, 298 Or. 706m 719-722 (Or. 1985) [affirmed].
[317] American and English Encyclopedia of Law (ed. by. J. H. Merrill), Volume XIX (19), Edward Thompson Co., Northport Long Island N.Y., 1892, p.148-151
[318] Ibid, p. 147-150
[319] *Edington v. Mutual Life Insurance Company of New York*, 5 M. T. Hun (New York) 1, 7-9 (1875); *The Masonic Mutual Benefit Association v. Beck*, 73 Ind. 203, 209-211 (1881)
[320] *Cramer v. Hurt*, 154 Mo. 112 (1900)
[321] *The Masonic Mutual Benefit Association v. Beck*, 73 Ind. 203, 209-211 (1881)

of extracting information that constitutes this medical secret[322]. The information received by the doctor (witness) during communication with the patient, who is familiar to him as a friend, or in other cases when the patient was not under his care, was not considered inadmissible for disclosure in court[323]; in fact, visiting doctor and his assistants were considered as such "depositaries" on their duty[324].

From the beginning of the 20th century, the practice of US courts began to develop a number of exceptions to the non-disclosure of medical secrets. In one of the author's works, these exceptions in the practice of US courts were well systematized[325], so let's list them briefly. Thus, in the early 20th century, the legislatures of several US states, quite indicative, according to R. Baldwin (1962)[326] adopted statutes according to which the doctor was obliged to report data on a person suffering from a dangerous (mainly, a contagious) disease. Such case arose in Nebraska in 1920. Plaintiff in Simonsen's case, after being diagnosed with syphilis by a doctor, who reported this fact to the hotel manager where he stayed, was unable to win over lawsuit against the doctor, because the defendant merely complied with the law, and did not conduct an illegitimate breach of medical secrecy[327].

The same prescriptions (again, following the example of Nebraska court practice) required physicians to report sexually transmitted diseases[328]. Subsequently, such exceptions began to cover an imperative demand to report cancer, certain other dangerous infectious diseases, penetrating and bullet wounds of the patient, abortions, burns, violence against children, as well as certain categories of crimes[329]; socially dangerous persons[330], addresses of residence and names of parents of dead embryos (i.e. New York)[331]. In some cases, adjudicated in 1970s, courts allowed the use of patient cards as documentary evidence, provided, that this information would be used explicitly for the medical malpractice lawsuit[332] (an ongoing one, or was expected to be instituted in the nearest future). Thus, the practice of US courts shows that there are more than enough exceptions to the "absoluteness" of medical secrecy.

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[322] American and English Encyclopedia of Law (ed. by. J. H. Merrill), Volume XIX (19), Edward Thompson Co., Northport Long Island N.Y., 1892, p. 148

[323] *Edington v. Mutual Life Insurance Company of New York*, 5 M. T. Hun (New York) 1, 4-5, 8-9 (1875)

[324] *H. Streeter v. City of Breckenridge*, 23 Mo. App. [Kansas City Ct. App.] 244, 251-253 (1886)

[325] Lytvynenko, A.A. Common Law Right to Access to Medical Records: The Commonwealth and European Court of Human Rights Practice, 7th International Conference of PhD students and Young Researchers: Law 2.0 – New Methods, New Laws (Vilnius, Lithuania) (2019), p. 197-198

[326] Baldwin, R.W., Confidentiality Between Physician and Patient, 22 Md. L. Rev. 181, p. 182-183 (1962)

[327] *Simonsen v. Swenson*, 104 Neb. 224, 228-230; 177 North-Western Reptr. 831, 832 (1920)

[328] *M. Brown v. E. T. Manning et al*., 103 Neb. 540, 452 (1919), No. 20962

[329] *Rea v. Pardo*, 522 N.Y.S.2d 393, 396; 132 N.Y. App. Div. 2d 442, 445-446 (1987)

[330] *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 431, 444-445, 452 (1976); *Davis v. Lhim*, 124 Mich. App. 291, 298-302 (1983)

[331] *State v. Jacobus*, 348 N.Y.S.2d 907, 912-913ж 75 Misc.2d 840, 843-844 (1973)

[332] *Garner v. Ford Motor Co*., 61 F.R.D. 22, 23-24 (1973); *Anker v. Brodnitz*, 98 Misc. 2d 148, 151 (1979)

In England and Scotland. Many researchers have addressed the problem of medical secrecy in England and its history, in particular, K. DeWitt (1953[333] and 1959[334]), O. Hopper (1973)[335], A. Samuels (1980)[336] and D. Schumann (1985)[337]. H. Lai (1995) has provided a thorough analysis of the history of legal professional privilege, mainly considering the issues relating to client-attorney privilege[338], but the gist of it is in general applicable to patient-physician relationships, as 1) clients and attorneys had bilateral relationships, built on contract or trust (the legal foundation may be expounded by various legal theories depending on the jurisdiction, the time era etc.); 2) attorneys were also depositories of communications containing professional secrets; 3) the prospective violation, had it occurred, either contained a) the lawyer's testimony or affidavit, which contained information bearing a professional secret, or the lawyer, being not a credible person, has revealed his client's private communications. The same principle apply to doctors and patients. According to H. Lai, the origination of professional privilege in the XVI-XVII centuries was likely to be dictated by the nature of a honorable profession of an attorney (as he was mostly speaking in relation with lawyers), but the early legacy reveals that firstly, it was restrained by at least two issues: a) in case the solicitor gained such knowledge not exercising his profession, but as a regular person; b) in case such communications were "scandalous and unfit for them to be trusted in"; secondly, not all lawyers seemed to exercise such privilege, but seemingly only well-respected and high-positioned lawyers were beyond the obligation to testify those days[339].

Each of the researchers named hereinabove tried to understand the reason for both the actual lack of systemized court practice (i.e. relating to principles of admissibility of medical evidence), and the extremely small amount of historical legal cases, being the monuments of such practice. However, England may concur with France in its aged historical case legacy: for example, in the book by F.E. Birkenhead (1926) mentions the cases of the late 17th century, where doctors testified (the case of Cooper)[340] as well as *Gais and Bunn* (1981)[341] and *D. Schumann* (1985)[342] mention the grotesque "Callender case", in which several women were tried for witchcraft, and doctors testified, confirming the supernatural powers of the accused. If we assume that the said case is not a fiction, then it must be ascertained, that medical evidence was already accepted by courts as admissible by 1662, to which

[333] DeWitt, C. *Medical Ethics and the Law: The Conflict between Dual Allegiances*, 5 W. Res. L. Rev. 5, 19-23 (1953)
[334] DeWitt, C. *Privileged Communications between Physician and Patient*, 10 Wes. Res. L. Rev. 488, p. 489-492 (1959)
[335] Hopper, A. *The Medical Man's Fiduciary* Duty, 7 Law Teacher 73, 74-76 (1973)
[336] Samuels, A., *The Duty of the Doctor to Respect the Confidence of the Patient*, 20 Med. Sci. Law. 58, p. 58-59 (1980)
[337] Shuman, D.W., *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 Sw. L. J. 661, 671-676 (1985)
[338] Lai, H., *History and Judicial Theories of Legal and Professional Privilege*, Singapore J. Leg. St. (Dec. 1995), p.p. 558 – 596.
[339] Lai, at p. 560-561.
[340] Birkenhead, F.E., Famous Trials of History, Garden City (New York), Garden City Publishing Co., Inc.; The Star Series, 1926, p. 91, 95-101
[341] Geis, G., Bunn, I., Sir Thomas Browne and Witchcraft: a cautionary tale for contemporary law and psychiatry, 4 (1-2). Int'l. J. Law & Psychiatry 1, 2 (1981)
[342] Shuman, D.W., The Origins of the Physician-Patient Privilege and Professional Secret, 39 Sw. L. J. 661, 672 (1985)

the case dates back. K. DeWitt, in his second work (1959), notes that in England, until the middle of the 16th century, it was not obligatory to testify in court, and therefore, in those days the question did not stand as such[343]. According to the American lawyer Blewett Lee (1921), mentions of paranormal phenomena and the supernatural abilities of people existed quite often in court practice (despite, most of the cases he cited in his works related rather to probate trials, where the testator was likely to be either mentally ill to believe and speak with ghosts, spirits etc.; or was under undue influence of some , but no special rules for proving their reality, except for providing valid evidence, never existed[344] One of the first (though, according to the same facts provided by Schumann (1985) it was not the first) cases, was the trial "against the Duchess of Kingston", which was charged in bigamy, where a doctor was reluctant to testify of the facts he had known. Judge Mansfield said that to disclose the patient's secret "would be a great dishonor", but to testify on the court is a completely different matter to which the doctor must submit[345].

A very interesting case on medical confidentiality arose in Scotland, namely *Whyte v. Smith* (1851), a Scottish case, which K. DeWitt (1953)[346] W. Bernfeld (1972)[347], O. Hopper (1973)[348] pay considerable attention. The wife of the plaintiff (Whyte), the elder of the church ("Kirk") in October 1849 gave birth to a child, and 6 months have actually passed since the couple's marriage, making the fact of the child's conception to be out of wedlock – if anybody minded this. Probably, in the 19th century it could be somewhat obscene for a church elder. Whyte asked the doctor (Dr. Smith) to make sure this baby was not born prematurely. Dr. Smith confirmed that the baby was born full-term, as he wrote it in his report; he sent this conclusion to the rector of the church, who soon dismissed Whyte. He immediately sued the doctor. Defendant claimed in court that there was no confidentiality between the doctor and the patient, and that this confidence did not follow from an implicit agreement between them.The Scottish Session Court rejected his arguments, stating that the confidentiality of the relationship between the doctor and his patient was beyond doubt and that the doctor's implicit obligation to keep such information secret existed and was recognized as legitimate, though was subject to limitations, presuming that doctors are obliged to testify regarding medical communications in courts (according to Lord Ivory). Thus, the Court of Session found for plaintiff[349].

Interestingly, English law for a long time "did not know" such cases after this. However, it should be noted that there were cases regarding the admissibility of medical testimony at trial, some

[343] DeWitt, C., Privileged Communications between Physician and Patient, 10 Wes. Res. L. Rev. 488, 488-489 (1959)
[344] Lee, B. Psychic Phenomena and the Law, 24 Harv. L. Rev. 621, 635-638 (1921)
[345] *R. v. Duchess of Kingston*, 20 How. St. Tr. [Howell's State Trials] 355, 572-73 (1776).
[346] DeWitt, C. Medical Ethics and the Law: The Conflict between Dual Allegiances, 5 W. Res. L. Rev. 5, 20-21 (1953)
[347] Bernfeld, W. K., Medical secrecy, 3 Cambr. L. Rev. 11, 12-16 (1972)
[348] Hopper, A., The Medical Man's Fiduciary Duty, 7 Law Teacher 73, 74-76 (1973)
[349] *Whyte v. Smith*, Dec. 13, 1851; 14 D. 177, 179-180 (No. 46); 24 S.C. 78, 79-80 (1851) [D = Dunlop Reports; S.C. = Court of Sessions].

of which are mentioned in the 17th issue of the British-American Encyclopedia of Law (1892)[350] In the *Garner* case (1920), which was a divorce lawsuit in which a woman suspected that her husband had infected her with syphilis, a doctor was called to testify. Although he initially refused to testify on the grounds that the government's syphilis control program required him, as a hospital employee, to maintain exceptional secrecy, the judge thanked the doctor for his honesty, but in his opinion, the administration of justice is higher than ethics, so the doctor took an oath and testified, confirming that the plaintiff's husband was indeed suffering from syphilis[351]. D. Schumann (1985) cites several similar cases in 1940-1950s[352]

Medical secrecy has also been implicitly mentioned in several cases of relating to inspection of health data prior a medical negligence lawsuit or other civil litigation for producing evidence. Thus, in the above-mentioned case of *D (Infants)* (1970), the court noted, that upon the provisions of Adoption Act 1958 (acting 1958-1976), information on adopted minors was confidential and that guardianship officers, who possess it, except in court, have no right to disclose it[353]. In a number of cases in England concerning access to health data – prior to the enactment of the Administration of Justice Act 1970, hospital records could only be requested by a subpoena duces tecum[354] – the courts did not allow the plaintiff to have access to his medical history directly, though occasionally let the consultants and medical or legal advisers to make a proper insight[355]. Physicians in England should also provide information about the patients, when requested so by law enforcement agencies[356]. Given the privacy policy regarding "childcare reports", the plaintiff in *Gaskin v. Liverpool City Council* lost the lawsuits before the national courts in an attempt to obtain insight to them: the court clearly stated, that there was "public interest" in keeping this information secret – this was mentioned by the European Court of Human Rights in the *Gaskin* (1989) case as well[357]. Fifteen years later, in the case of *ex Parte Martin*, the court ruled that although the plaintiff had the right to access to his health data under common law (that is, a cascade of court precedents generally recognizes such a right), hospitals and other municipal institutions have the right to decide for themselves, whether to provide the patient with access to documents in accordance with the patient's best interests[358].

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[350] American and English Encyclopedia of Law (ed. by. J. H. Merrill), Volume XIX (19), Edward Thompson Co., Northport Long Island N.Y., 1892, p. 147
[351] *Garner v. Garner*, 36 T.L.R. 196, 196-197 (1920) [Times Law Reports, Vol. 36]
[352] Shuman, D.W., The Origins of the Physician-Patient Privilege and Professional Secret, 39 Sw. L. J. 661, 676 (1985)
[353] *In Re D (Infants)* [1970] 1 W.L.R. 599, 600-602 [Weekly Law Reports, Vol. 1970 / 1]
[354] *Davidson v. Lloyd Aircraft Services Ltd*., [1974] 1 W.L.R. 1042, 1045: *Irvin v. Donarghy*, [1996] P.I.Q.R. 207, 210
[355] *Deistung v. South West Metropolitan Regional Hospital Board*, [1974] 1 W.L.R. 213, 216-217
[356] *Hunter v. Mann* [1974] Q.B. 767, 771-773 [Queen's Bench Division, Vol. 1974]
[357] *Gaskin v. United Kindgom*, [1989] ECHR 13, para. 15-17
[358] *Regina v. Mid Glamorgan Family Health Services Authority & Another / Ex Parte Martin*, [1995] 1 W.L.R. 110, 116; 119-120

1.2. Patient's right to access to medical records

The patient's right to access to health records is an inalienable right of the patient nowadays. There may be various reasons for inspecting medical records, which are frequently connected with preparing medical malpractice lawsuits, determining the cause and circumstances of the relative's death, as well as using them as evidence in various civil litigation, as challenging testaments or repayment of insurance policies. Hospitals frequently object the production of medical records, having various real or superficial reasons of doing so, which makes the patients litigate against healthcare entities to produce the medical records in a court order.

The issue of the patient's right to access health data or use it as evidence in civil proceedings (as, for example, in medical malpractice lawsuits) has been addressed by few lawyers and scholars, although this topic has become widespread due to high-profile lawsuits. England and the United States in the 1970s and 1980s, and at the same time, the growing popularity of the concept of the patient's right to autonomy in decision-making regarding his treatment. Thus, among those who contributed to the development of the concept are R. Dunsmore (1959)[359], R. Harpst (1962)[360], J. Daniels (1976)[361], J. Dworkin (1979)[362], L. Passion (1983)[363]A. Crane (1986)[364], E. Deutsch (1992)[365], D. Feenan (1996)[366], M. Wischnath (1998)[367] L. Demont (2000)[368], M. Jacub (2004)[369]. The author of the article had also studied this problem, in particular in the practice of the courts of the United States and England, and has analyzed several decisions of the ECtHR on this issue in one article (2019)[370] and also studied the practice of German courts (from the 1970s to the 2000s) in another article (2019)[371] having elaborated a generalization of the practice of German courts on the patient's right to access data on his health, which in the future may well be needed in the work of the European Court of Human Rights. In another publication (2020), the author conducted a comparative

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[359] Dunsmore, R.B., *Hospital Records as Evidence*, 8 Cleveland-Marshall L. Rev. 459, 463-464 (1959)
[360] Harpst, R.J., *Ownership of X-Rays*, 11 (2) Cleveland-Marshall L. Rev. 272, 273-275 (1962)
[361] Daniels, J. *Die Ansprüche des Patienten hinsichtlich der Krankenunterlagen des Arztes, Neue Juristliche Wochenschrift*, 1976:345, 348-349
[362] Dworkin, G., *Access to Medical Records – Discovery, Confidentiality and Privacy*, 42 (1) Mod. L. Rev. 88, 90-91 (1979)
[363] Passion, L., *Législation et prophylaxie de l'abandon à Paris au début du XXème siècle*, Histoire, économie, société (Année 1983), 475, at 478 et seq.
[364] Crane, A. E. *Unsealing Adoption Records: The Right to Know versus the right to privacy*, A. S. A. L. 643, 645 et seq. (1986)
[365] Deutsch, E., *Das Persönlichkeitsrecht des Patienten*, Archiv für die civilistische Praxis, 192(3):161-180 (1992)
[366] Feenan, D. *Common Law Access to Medical Records*, 59 (1) Mod. L. Rev. 101, 101-102;105-106 (1996)
[367] Wischnath, M., *Einführung zu den Bewertungs und Erschließungsempfehlungen für Krankenakten*, Der Archivar, Jg. 51 (2):233-244, at p. 241-242 (1998)
[368] Demont, L., *Secret Medical et instance judiciare*, Rev. Juridique de l'Quest (No. Special 2000), 75-100, at p. 76-79
[369] Iacub, M., *Naître sous X*, Savoirs et clinique 2004/1 (No. 4), p.p. 45-52
[370] Lytvynenko, A.A., *Common Law Right to Access to Medical Records: The Commonwealth and European Court of Human Rights Practice*, 7th International Conference of PhD Students And Young Researchers: "Law 2.0: New Methods, New Laws", Vilnius, Lithuania, p. 196-206
[371] Lytvynenko, A.A., *A Right of Access to Medical Records: The Contemporary Case Law of the European Court of Human Rights and the Jurisprudence of Germany*, 6.1 Athens Journal of Law 102 (2019)

analysis of court practice, including the case law of the European Court of Human Rights in the field of medical secrecy: it examined the right to access data on the plaintiff's biological parents, its historical background in the practice of higher courts France[372] and Belgium[373] in the mid-19th century, as well as the current case law of the European Court of Human Rights (in the cases of *Odievre v. France and Godelli v. Italy*), including individual cases of US court practice and the case law of the Italian Court of Cassation in the 2010s[374], as well as ECtHR judgment in Godelli v. Italy[375].

The conference paper is based upon the author's 2020 publication on the patient's right to access to medical records[376], with some new materials and judgments.

The purpose of the given subchapter is the following:.

- To describe the right of access to medical records, as a patient's right, what is the purpose of insight to the medical records, what are the legitimate exceptions to it;
- To determine what is the practice of EU state courts and the international courts on this issue;
- To discuss the trends of access to medical records in selected common-law (England) and mixed-to-common-law (i.e. United States of America) jurisdictions, selected by the case peculiarities.

The right to access to medical records is a patient's right (often the plaintiff in the subsequent proceedings) to access medical records regarding his or her health condition and the medical treatment, which was applied to the patient before, and occasionally, individual clinical episodes of treatment[377]. This right can also be exercised by the patient's relatives if it is actually required by law[378] or permitted by court practice (such as in Germany, where there are no legal provisions on the patient's right of access to medical records, so courts call this right a derivative of the contractual relationships between the patient and the physician or a hospital[379], whereas no special contractual provisions are required for exercising this right[380]). A similar position was taken by the Supreme Court of Austria in its judgment of 1984[381]. The international courts (ECtHR and ECJ) did not provide a specific definition of this right, although the European Court of Human Rights has unequivocally

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[372] *Mallet*, Cour de Cass., Cham. Crim, 16 septembre 1843, Sirey 1843 I 915, 916; 919; *Romieux*, Cour. de Cass, Cham. Crim., 1 juin 1844, Sirey 1844 I 670, 671

[373] *Bessems c. Le Ministere Public*, Cass. 20 juillet 1855, Pas. 1855 I 303, 305-307; 308-309

[374] Corte di Cassazione, sez. III Civile, sentenza 9 novembre 2016, n. 22838; Corte di Cassazione, sez. III Civile, sentenza 29 settembre 2017, n. 1946

[375] Lytvynenko, A.A., Data privacy in the sphere of medical confidentiality: the historical and contemporary case-law of the United States, the European Court of Human Rights and selected Continental Europe states, 83 Topical Problems of State and Law, p.p. 100-134 (2020), at p. 124-132

[376] Lytvynenko, A.A., *The right of access to patient's health data: a comparative analysis of the case law of the European Court of Human Rights, the European Court of Justice, and the practice of the courts of the United States and some European countries*., 33 (2019) Legal Horizons, p.p. 135-158 (published 2020).

[377] *Unidade de Saude A c. B...*, Acordao do Supremo Tribunal Administrativo, 08.08.2018, Processo 0394/18, Sec. II, 1-11

[378] Sec. III, 3-4

[379] *AG Weltzar*, 15.08.1978 – 3C 707/78, para. 8-9 and 15; *LG Gottingen*, 16.11.1978 – 2 O 152/78, para 9-10; 16; *BGH*, 23.11.1982; VI ZR 222/79, para 14-15; *AG Essen*, 21.04.1997 – 12 C13/97, para 5-6; *OLG Munchen*, 19.04.2001 – 1 U 6107/00, para. 21

[380] *Bundesgerihtshof*, 31.05.1983 – VI ZR 259/81, para. 12

[381] *Oberster Gerichtshof*, 23.05.1984, 1 Ob. 550/84

recognized that the right to access such data belongs to the category of “private and family life” protected by Article 8 (1) of the ECHR. In Gaskin v. United Kingdom (1989), the ECtHR has firmly stated, that the information contained in the folders concerning the plaintiff (who desired to know the facts about his childhood illnesses and treatment in municipal hospitals at the time of his youth, expecting to sue the municipal bodies for malpractice relating to his care during his adolescent years) undoubtedly belonged to the "private and family life" of the plaintiff, so the issue of access to these documents (at least in this case) is covered by the content of Art. 8 of the Convention, although the Court added that it would not decide whether, in principle, the right of access to personal data was derived in abstracto from Art. 8 (1) ECHR[382]. In the case of *Miculic v. Croatia* (2002), where a 1996-born minor plaintiff tried to identify her father through her representatives (the girl was born out of wedlock), and the Court noted that the plaintiff's "personal life" included, inter alia, a desire to know the fact who her biological father is[383]. In the case of Odievre v. France (2003), the Court proceeds from the fact that Art. 8 of the Convention protects the right to identity and personal development of the plaintiff, which includes, inter alia, the facts of birth and finding the identity of the parents, and therefore the birth of the plaintiff, as well as the circumstances in which he was born, form the notion of "personal life" of the plaintiff, guarded by Art. 8 of the Convention[384]. In the case of *K. H. & Others v. Slovakia* (2009)[385], the Court recognizes that the right of plaintiffs to “effective” access to information concerning their state of health (including reproductive health) concerns their “private and family life” within the meaning of Art. 8 of the Convention, referring to *Roche v. United Kindgom* (2005), in which the plaintiff, as a young military man, became the object of an experiment in Porton Down Technopark in 1962, which undermined his health - he tried to find out from medical records what experiments were performed on him, and what danger threatened him in order to be able to receive a pension on the basis of loss of health in the future[386]. In the case of *Godelli v. Italy* (2012) the Court confirms that the "right to know one's origin" derives from the notion of "private life", but the complexity of the situation in such cases is that the Convention protects the right to privacy of everyone - both plaintiff (including in the Godelli case) and his biological parents, and therefore, the Court must strike a fair balance between the interests of the two persons[387]. In the judgments of the European Court of Justice, this right appeared in the disputes between former employees of the EEC structures: in them the plaintiffs preferred to get not so much access to the documentation as the very conclusions by which they were found unfit for duty[388]. Neither the ECtHR nor the ECJ have ever

[382] *Gaskin v. United Kingdom*, [1990] 1 FLR 167, [1989] ECHR 13, Judgment of 7 July 1989, App. No. 10454/83, para 37
[383] *Miculic v. Croatia*, [2002] 1 FCR 720, para. 53, 54, 55
[384] *Odievre v. France*, [2003] ECHR 86, Judgment of 13 February 2003, App. No. 4236/98, para. 29
[385] *K. H. & Others v. Slovakia*, Judgment of 28 April 2009, App. No. 32881/04, para. 44-46, 47
[386] *Roche v. United Kindgom*, [2008] ECHR 926, Judgment of 19 October 2005, App. No. 32555/96, para. 12-16, 155
[387] *Godelli v. Italy*, [2012], Judgment of 12 September 2012, App. No. 33793/09, para. 47, 50
[388] *Miss M. v. European Commission*, Judgment of 10 June 1980, Case No. 155/78 [1980] ECR 1798, 1811

provided specific definitions of this right, despite having adjudicated a number of cases relating to access to medical records.

What is the purpose of the patient's access to health data? D. Feenan (1996), one of the few researchers of the concept in Anglo-Saxon law, noted that contextually, in Anglo-American law, it was necessary to obtain evidence to file a civil lawsuit against hospitals for negligence and, in some cases, complaints against health care facilities, and that another goal in gaining access is unlikely to be legally possible in England (and seemingly Scotland) due to the peculiarities of the legislation in the field of health care, as well as the rather specific practice of the courts[389]. In addition, which documents fall into the category of "health records", and which of them, in the event that it is not regulated by law, should be allowed to be inspected by the plaintiff, and which documents should not be? According to the decision of the Higher Regional Court of Bremen (1979), they include documentation on the current state of health of the patient, and the forecast of his health for the future[390]. M. Wischnath (1992), noted that in the practice of record keeping in German hospitals, as a rule, there were about 20 types of "records" in the medical documentation[391]. In Portugal, in the case of “Processo No. 2147 / 18.T8AGD.P1”, adjudicated by the Porto Court of Appeals (2019), plaintiff, preferring to complete his dental treatment in an another clinic (the plaintiff believed that the clinic where he was treated previously provided poor quality services), has requested 25 types of medical records, although the Porto Court of Appeals, decided to grant him access to only a few of them (for details, see selected cases from the case law of the Portuguese courts)[392].

Aims of accessing medical records. The most common purpose of gaining access to medical records is to obtain evidence in a lawsuit against doctors or hospitals for negligence in treatment, the reasons are not limited to this in the practice of courts, including international (ECtHR and ECC). At the same time, for example, German courts tend to consider that the plaintiff should not prove the necessity of his access to the documentation at a court hearing under ordinary circumstances (i.e. this condition is most likely to refer to ordinary medical records, not for instance, psychiatric one), although, at the same time, such proof is mandatory, if it was not the patient himself, who requested the medical records (but these were his relatives or legal representatives)[393], or the plaintiff was a person who requested to be provided with medical documentation on her psychiatric treatment – in such case the German courts demand the plaintiff to prove the purpose of obtaining the medical records[394]. Such lawsuits arise due to the refusal of hospitals to provide medical documentation to

[389] Feenan, D. *Common Law Access to Medical Records*, 59 (1) Mod. L. Rev. 101, 105 (1996
[390] *OLG Bremen*, 31.07.1979 – 1 U 47/79, параграф 15
[391] Wischnath, M., Einführung zu den Bewertungs und Erschließungsempfehlungen für Krankenakten, Der Archivar, Jg. 51 (2):233-244 (1998)
[392] *B c. C.*, Acordao do Tribunal da Relacao do Porto, 08.09.2019, Processo No. 2147 / 18.T8AGD.P1, Sec. II
[393] *BGH*, 31.05.1983 - VI ZR 259/81, para. 19-20
[394] *LG Saarbrucken*, 20.09.1995 – 16 S 1/93, para. 7.

patients under different circumstances, in particular, according to the practice of courts of different countries, the following reasons can be given here:

1) medical secrecy[395];

2) encroachment on the alienation of hospital property (documents)[396];

3) the hospital's assertion that patients or their counsels will not be able to decipher the documentation (a typical argument in the practice of the courts of England[397], but rejected by the courts of Germany[398]);

4) fears of doctors about the infringement of intellectual property rights in their personal records in the patient's card and assumptions about his health (because of this, the Court of Appeal of Porto in its decision of September 8, 2019 proposes to include doctors' notes to exceptions to the right to receive access to patient documentation - see selected cases from the jurisprudence of the Portuguese courts[399]);

5) according to the hospital, the plaintiff will improperly handle the documentation (including, for example, MRI or Roentgen images), or spoil and destroy them (medical records, according to the practice of courts, such as Germany, are owned by the hospital)[400], or patient access to his medical records may adversely affect their maintenance[401];

6) if doctors have good reason to believe that access to documents will significantly worsen the patient's health, leading to recurrence of the disease, especially if he has a psychiatric illness - here the German courts fully agreed that in this case, access to documents on the state of health of the plaintiff may be severely limited[402];

7) lack of specific purpose of obtaining access to medical records (yes, in the practice of German courts, this sometimes referred to information about the mental disorders of the plaintiff[403];

8) access to data on the health of the plaintiff, his metrics, data on his treatment at a minor age, documentation of his illness and his treatment while in orphanages held by municipal authorities is restricted or prohibited by law or public policy (for example, the Court of Appeal of Britain and Wales in *Gaskin v. Liverpool City Council* (1980), the plaintiff in which later sued the United Kingdom at

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[395] See, for instance, **Germany**: BGH, 31.05.1983 – VI ZR 259/81, para. 13-14; 17;18; ***England***: *Davidson v. Lloyd Aircraft Services Ltd*, [1974] W.L.R. 1042, 1046; ***Portugal***: *Unidade de Saude A c. B...*, Acordao do Supremo Tribunal Administrativo, 08.08.2018, Processo 0394/18, Sec. II, 1-11. In ***Belgium***, the doctors expressed a view they could violate Art. 456 of the Penal Code (breach of professional secrecy) in case they hand over the medical records to the patient; however, courts held, that the legitimacy of the objection of the doctor, or the hospital to produce medical records are upon the sole appreciation of the judge, who is hearing the case. See: *Caisse patronale du commerce et de l'industrie c. L*, Trib. Trav. Bruxelles (5e ch.) 3 juin 1977, Journal des Tribunaux (Bruxelles), Vol. 1977, p.p. 627-628.

[396] *OLG Munchen*, 19.04.2001 – 1 U 6107/00, para. 2-13

[397] *Davidson v. Lloyd Aircraft Services Ltd*., [1974] 1 W.L.R. 1042, 1045-1046

[398] *LG Gottingen*, 16.11.1978 – 2 O 152/78, para. 9-16; *OLG Koln*, 12.11.1981, 7U 96/81, para. 24-25; *BGH*, 23.11.1982; VI ZR 222/79, para. 17-27; 30

[399] *B c. C*., Acordao do Tribunal da Relação do Porto, 08.09.2019, Processo No. 2147 / 18.T8AGD.P1

[400] *OLG Munchen*, 19.04.2001 – 1 U 6107/00, para. 2-13, 25-26

[401] *OLG Koln*, 12.11.1981, 7U 96/81, para. 24-25

[402] *Bundesgerichtshof*, 02.10.1984 – VI ZR 311/82, para. 5; *BGH*, 06.12.1988 - VI ZR 76/88, para. 3, 4-7

[403] *LG Saarbrucken*, 20.09.1995 – 16 S 1/93, para. 7-8

the ECHR (*Gaskin v. United Kindgom*, 1989), which is simply referred by the courts as the "public interest"[404]. Examples of the case law of the European Court of Human Rights, in which plaintiffs were denied access to these categories of data, include a number of judgments, in particular in the following cases: *Gaskin v. United Kindgom* (1989)[405]; *M.G. v. United Kindgom* (1996)[406]; *Odievre v. France* (2003)[407]; *Godelli v. Italy* (2012)[408];

9) When the patient expressly prohibited the disclosure of medical records to his relatives, or legal representatives owing to specific reasons. Such cases usually occur, when relatives strive to produce a deceased patient's history of illness to determine the reason of his death. In Belgium, a relatively recent judgment of the Cour de Cassation in the case of *Christelle* (2016), a woman, whose son had wounded her with a knife and was later brought to temporary civil commitment at a mental asylum, and later died at the hospital (at the time of his death, he regularly visited the asylum for the needs of treatment, but was not confined there anymore), desired to determine the cause of his death, and was denied such access both by the doctors and the courts, as her son expressly forbad to disclose his medical records to her[409].

Herein, the author summarizes below the practice of the courts regarding the purpose pursued by patients when contacting hospitals (in the case of a request for information about their biological parents - and other institutions) regarding access to health and treatment data, as well as medical documentation regarding their relatives (alive, or already dead at the time of filing the application to the hospital, or filing the lawsuit – in case the hospital is reluctant to produce such documents, or the law presupposes an application to the court in order to obtain the medical records):

1) to file a claim for damages for negligence and hence use the medical records as evidence for the needs of the proceedings[410]; alternatively, to discover the evidence that doctors have not diagnosed the patient with a particular disease or made mistakes in the patient's treatment[411]. The plaintiffs could also desire to produce their medical records in order to find evidence of harm caused by manipulations not agreed with patients – a clear example of such reason for disclosrue is the judgment of the European Court of Human Rights in the case of K. H. & Others v. Slovakia (2009)[412]. In the case of M. G. v. United Kingdom (2002), the plaintiff, having received facts about his stay in boarding

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[404] *Gaskin v. Liverpool City Council*, [1980] 1 W.L.R. 1549, 1554-1555 (per Megaw, J.)
[405] *Gaskin v. United Kingdom*, [1990] 1 FLR 167, App. No. 10454/83, Judgment of 7 July 1989, para. 15-17
[406] *M. G. v United Kingdom*, [2002] F.C.R. 289, App. No. 39393/98, Judgment of 24 September 2002, para. 9-17
[407] *Odievre v. France*, [2003] F.C.R. 621, App. No. 42326/98, Judgment of 13 February 2003, para. 9-14
[408] *Godelli v. Italy*, App. No. 33783/09, Judgment of 25 September 2012, para. 5-15
[409] *Christelle / Jean et S.A. A.G.*, Cour de Cassation (Belge), 1re Chambre, 14 mars. 2016, JLMB 2016/27 p. 1282 (at p. 1283– 1286)
[410] ***Germany***: BGH, 23.11.1982; VI ZR 222/79, para. 1-5 (facts); ***Portugal***: Acordao do Supremo Tribunal Administrativo, 08.08.2018, Processo 0394/18, Sec. III, 4. ***USA***: *Matter of Glazer v. Department of Hosps. Of City of N.Y.*, 2 Misc. 2d 207, 211-215 (1956); ***Belgium***: (C ... c. Ordre des médecins et crts.), Trib. Civ. Bruxelles (réf.), 7 mars 1988, Journal des Tribunaux (Bruxelles), Vol. 1988, p.p. 458-459
[411] *OLG Koln*, 12.11.1981, 7U 96/81
[412] *K.H. & Others v. Slovakia*, App. no. 32881/04, Judgment of 28 March 2009, para. 8-9

schools, also decided to sue the social services, believing that they had treated him carelessly as a child[413].

2) To determine the cause of death of a relative, and if it occurred through the fault of hospital staff – to file a lawsuit against the hospital for negligence[414].

3) To discover the identity of the biological parents (in particular, this issue is touched upon by two cases of the European Court of Human Rights – Odievre v. France and Godelli v. Italy). It is difficult to say unequivocally what the plaintiff is trying to achieve by such legal action, but there may be very trivial reasons for doing so. For example, in the United States, in the state of Louisiana, according to Art. 214 of the Civil Code of this state, the adopted person has the right to inherit his biological parents, being legally born, and from his/her other blood relatives[415]. Accordingly, the reason for the claims for disclosure of the plaintiff's biological parents is obvious here[416]. In some cases, where patients have tried to confirm or rule out the inheritance of their diseases, believing that access to this data will help them. Thus, in Italy, the constitutional submission of the Court of Catanzaro in 2013 on the constitutionality of a number of provisions of the Italian law of May 4, 1983 (Legge 4 maggio 1983, No. 184), which effectively excluded access to the personal data of the adoptee's biological parents, arose precisely from a civil lawsuit, where plaintiff desired to learn the facts about the presence of her parents' diseases, which she was a carrier of[417]. Similar cases can be found in the case law of the US courts[418]. Neither in the Odievre nor in the Godelli cases did the plaintiffs set such a goal, simply desiring to know the identity of their parents[419]. Since the 1990s, similar cases have appeared in the practice of German courts, but access to data on biological parents can be provided not only if the plaintiff proves legitimate interest in obtaining this documentation, but also under the condition that the plaintiff's blood relatives (biological siblings) would consent[420].

4) The plaintiff's attempt to find out, through access to documentation, facts from his life that were unknown to him (for example, the grounds for his detention in a psychiatric clinic)[421]. The circumstances of the ECtHR cases Gaskin v. United Kindgom (1989), M.G. v. United Kindgom (2002) and to some extent, *Roche v. United Kindgom* (2005) and *K. H. & Others v. Slovakia* (2009), although in the latter two, the plaintiffs tried to find out with the help of medical records not the facts about their illnesses or treatment in childhood, but rather in their adulthood instead, which were concealed for unspecified reasons..

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[413] *M. G. v United Kingdom*, App. No. 39393/98, Judgment of 24 September 2002, para. 17
[414] *BGH*, 31.05.1983 – VI ZR 259/81, para 17 and 28; *AG Essen*, 21.04.1997 – 12 C13/97, para. 5-6
[415] LSA – CC Art. 214 (*Louisiana Statutes Annotated*).
[416] *Spillman v. Parker*, La., So. 2d. 573, 575-576 (1976); *Massey v. Parker*, La.., 369 So. 2d. 1310, 1313-1315 (1979)
[417] *Corte di Constituzione*, Sentenza n. 278 del 2013
[418] *Kirsch v. Parker*, La., 383 So. 2d 384, 385-388 (1980)
[419] *Odievre v. France*, [2003] F.C.R 621, App. No. 42326/98, Judgment of 13 February 2003, para. 25-31; *Godelli v. Italy*, App. No. 33783/09, Judgment of 25 September 2012, para. 33, 35, 37, 47-49
[420] *OLG Bayern*, 07.02.1996 – 1 Z BR 72/95, para. 9-11
[421] See. *Bundesgerichtshof*, 02.10.1984 - VI ZR 311/82, at p. 5-8

5) The necessity to obtain medical records of the testator for challenging the validity of a testament, or the codicil of the testament. Such cases could be found in Netherlands[422], Germany[423] and Belgium[424]. Cases relating to disputing a will on basis of the testator's alleged mental incapacity could also involve the necessity of a doctor to testify regarding facts which constitute medical confidentiality. In the 1980s, the Supreme Court of Finland found that there was nothing immoral and disrespectful for the deceased person, had the doctor testified concerning such facts, thus accepting such evidence as admissible[425]. In Norway, the patient has a right to release his treating physicians from the obligation to maintain confidentiality under the law, and thus, they could legally testify regarding these facts[426].

6) The plaintiff's attempt to find out the reason for his dismissal or non-admission to work in certain public authorities or in the structures of the European Economic Community institutions, as evidenced, in particular, by lawsuits of former employees of EEC institutions to the EEC since the mid-1970s[427]. Subsequently, similar decisions were handed down by the European Civil Service Tribunal (currently defunct, acting in 2005-2016)[428].

7) The plaintiff's necessity to provide information from the medical records of his wife for the dissolution of a church marriage to the church (diocese) court. A similar practice, for example, exists in Italy[429]. As of 2021, there is no similar practice in the ECtHR.

8) The plaintiff's attempt to establish the identity of the biological father, even though the plaintiff (minor) is illegitimate and lives with his mother - this aspect is covered in the decisions of the European Court of Human Rights in Miculic v. Croatia (2002)[430] and Phinikaridou v. Cyprus (2007)[431].

9) Another purpose – usually for private needs with no actual aim for producing medical records for the needs of civil litigation. For example, in the case of Gotkin v. Miller (1974) in the United States, the plaintiff wanted access to documentation from a neuropsychiatric clinic, preferring to write a book about the events she experienced during treatment[432]. Interestingly, no specific objectives of the

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[422] *Hoge Raad*, 20 April 2001, NJ 2001, 600; No. C99/030 HR, para. 3.1; 3.2 (facts); *Rechtbank Arnhem*, 8 August 2005, Prg. 2005, 195, No. 128531, para. 1-4

[423] *OLG Düsseldorf* , Urt. v. 29.03.2000, Az.:3 Wx 436/99 at para. 12-19

[424] *(X t./Psychiatrisch Centrum Y)*, Rb. Hasselt (kort geding), 2 oktober 1997, T. Gez. / Rev. Dr. Santé 1997-1998, p.p. 333-335. [reported in Dutch].

[425] *Korkein oikeus*, Judgment of 04.05.1984, Case No. S83/286, KKO: 1983-II-30

[426] *Borgarting lagmannsrett*, 2020-07-17, LB-2020-96569 (No. 20-096569ASK-BORG / 04) (Borgarting Court of Appeals, judgment of 17 July 2020)

[427] *Alessandro Moli v. Commission of European Communities*, Judgment of 27 October 1977, Case No. 121/76 [1977] ECR 1971, p.p. 1978-1980; *Emma Mollet v. Commission of European Communities*, Judgment of 13 April 1978, Case No. 75/77, [1978] ECR 897, p.p. 907-908; *Miss M. v. European Commission*, Judgment of 10 June 1980, Case No. 155/78 [1980] ECR 1798, p.p. 1811-1812.

[428] *V. v. European Parliament*, Case F-46/09, Judgment of 5 July 2011, para. 110 – et seq.

[429] *F.M. contro Casa di Cura Polispecialistica (...) e M.I.*, Consiglio di Stato, Sezione V., sentenza 28 settembre 2010, no. 7166

[430] *Miculic v Croatia*, App. No. 53176/99, Judgment of 7 February 2002, para. 8-32

[431] *Phinikaridou v. Cyprus*, App. No. 23890/02, Judgment of 20 December 2007, para. 8-11

[432] *Gotkin v. Miller*, 514 F.2d 125, 128-129 (1975)

plaintiffs in the decisions of the ECtHR in Odievre v. France (2003) or Godelli v. Italy (2012), except for the desire to "find their roots", was not mentioned at all.

In England and Scotland. Following the UK's enactment of the Administration of Justice Act 1970, patients were for the first time able to comply with requests for documentation of their state of health in a lawsuit (usually either medical negligence or compensation from employers) under section 31. Before year 1970, the production of documents was carried out by the courts through a subpoena, and other methods, according to the judges, did not exist at all[433]. At the same time, production of medical records upon a court order already existed in Scotland. However, in a very limited shape – a diligence (that is a court warrant in Scotland) would be issued in case plaintiff could claim precisely, what records he or she necessitated (usually, for a malpractice action against a hospital), i.e. for a distinct clinical episode, but not for the entire folder of medical records[434].

Interestingly, the UK municipal authorities were very meticulous about the confidentiality of health data, especially with regard to adoption records – access to it was extremely unlikely[435]. Until the late 1970s, courts refused to recognize a patient's right to direct access to his or her treatment and health records, restricting him or her from providing these documents to plaintiffs' lawyers and physicians, and in some cases, to independent experts[436]. In the Deistung case (1974), a father and a minor daughter decided to sue a hospital for negligence committed by its employees. The girl and her father were poisoned by sausages. The daughter's treatment was unsuccessful, and the child was also forced to undergo two laparotomies, but her further treatment was effective only in another hospital. Interestingly, the archivist previously entered in the documents the suspicion of the child's pregnancy (which, of course, was later removed from the records). The hospital agreed to provide documentation only to the consulting physician, but not to the plaintiffs themselves or their attorneys. The consultant performed a report on the girl's treatment, but the lawyers thought that would not be enough to win the case. The court ruled that the doctor-consultant who executed the report could become an expert witness in the process, and the professor could, if necessary, continue to communicate with the representatives of the hospital; therefore, both the plaintiffs and their lawyers could, if necessary, consult a doctor-consultant, but the Court ruled that the documentation itself should not be provided to the plaintiffs and their lawyers[437]. In Davidson's case (1974), a communications engineer filed a lawsuit against employers (Lloyd Aircraft Services Ltd.), seeking damages for a three-day malaria infection that caused the plaintiff to lose his ability to work. This happened in 1969, when the plaintiff went to Zanzibar without being vaccinated before the flight - a week later, he became ill with malaria.

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[433] *Davidson v. Lloyd Aircraft Services Ltd*., [1974] 1 W.L.R. 1042, 1045 [rep. 1977].
[434] *Boyle v. Glasgow Royal Infirmary & Associated Hospitals*, 1969 S.C. 72, 73-75; 78-83. (Scottish Court of Sessions).
[435] *In Re D (Infants)*, [1970] 1 W.L.R. 599, 600-602
[436] *Dunning v. United Liverpool Hospitals' Board of Governors*, [1973] 1 W.L.R. 586 (per curiam) i *Deistung v. South West Metropolitan Regional Hospital Board*, [1974] 1 W.L.R. 213, 215-217
[437] *Deistung v. South West Metropolitan Regional Hospital Board*, [1974] 1 W.L.R. 213, 216-217

Although the plaintiff returned to work for a while after treatment, he soon began to have heart problems, and therefore, he filed a lawsuit against his employer for damages for disability. His lawyers wanted to pass the medical records to a professor who was a specialist in tropical diseases, and preferred that the statements be passed on to both them and the plaintiff. The trial court decided that the hospital should provide the documentation as the plaintiff and his lawyers wanted, but the appellate court ruled that only limited access to the documentation was permissible, citing the following grounds: 1) non-professionals may misunderstand the documentation (what is peculiar, when the German courts were faced with a similar argument of the defendant in several similar cases, it was rejected, and the courts said that this is not always a true statement that the patients could not be aware of the meaning of hospital records[438]); 2) the doctor's prognosis or other records regarding the patient's state of health may be too deplorable for him to provide to the plaintiff; 3) existing facts (sometimes - unconfirmed) can have an extremely negative impact on the patient and his relatives; 4) these records are confidential, and doctors can avoid writing their conclusions - writing "frank and complete" judgments, knowing that they will be available outside the medical profession. The court ruled in favor of the defendant, ruling that the disclosure of data can be allowed only in relation to the professor appointed by the plaintiff[439].

However, in *McIvor's* case (1978), the House of Lords criticized this position: the plaintiff, McIvor, filed a lawsuit against some Reid with whom he had an accident, and preferred to have access to his health data to determine if the disease he plaintiff suffered, was provoked by an accident, or by his previous illnesses. The hospital itself, which kept the documentation, refused to provide the documentation to the plaintiff, who tried to obtain this through the court, which decided to provide the plaintiff with the documents. The hospital filed an appeal, preferring to overturn the court's decision, seeking to "narrow" the provision of documents only to the consulting doctor, but not to the plaintiff and his lawyers. The case eventually reached the House of Lords, which ruled that it should not be understood that the provisions of the Administration of Justice Act (1970) contained such severe restrictions, and lawyers themselves could ask the consultant to interpret the records; 2) documents should be used only for one claim; 3) in the event that there is a need not to give the plaintiff records, if they are too deplorable for him, they can not be provided to him personally (although, obviously, under normal circumstances, deprive the plaintiff of the opportunity to check their medical records). Therefore, the House of Lords ruled in favor of the plaintiff[440]. But it should be noted, that despite this decision of the House of Lords, medical records on the balance sheets of hospitals and municipal authorities (for example, medical records of adoptees, as in the Gaskin case (1980)) still remained restricted: yes, in the *Gaskin* case (1980), the plaintiff in which later sued the

[438] *OLG Koln*, 12.11.1981, 7U 96/81, para. 24-25
[439] *Davidson v. Lloyd Aircraft Services Ltd*., [1974] 1 W.L.R. 1042, 1045-1046
[440] *McIvor v. Southern Health & Social Service Board*, [1978] 1 W.L.R. 757, 760-761

United Kingdom at the European Court of Human Rights (*Gaskin v. United Kingdom*), desired to receive his "childcare reports" from his infant and adolescent years, assuming that due to ineffective treatment he did not get rid of a number of diseases (including mental ones), because of which the plaintiff could not find a job, but the municipal authorities denied him access, he did not achieve his goal in the courtroom as well[441], but won a lawsuit in the ECtHR in 1989. In the late 1970s, a high-resonant lawsuit was filed in England: the religious organization “Church of Scientology” sued the UK Department of Health Services: after allegations that doctors allied with Church of Scientology negligently and unprofessionally treated some people suffering from mental disorders, which led to a significant deterioration in their health, the Church of Scientology filed a series of defamatory lawsuits against the Ministry, thereafter desiring to obtain medical documentation confirming that in fact the health of patients did not deteriorate, and accordingly, the Ministry had slandered them. However, the court ruled that access to these medical records should be limited to one consultant physician, and if the plaintiff, represented by Church of Scientology, had access to the records in a particular lawsuit, access to the medical records should be restricted to avoid abuse of procedural rights[442]. In the case of *Martin* (1995), the circumstances of which are similar to those of Gaskin (1980), the plaintiff preferred to obtain his medical records from his childhood, a few years after which he spent in boarding schools, although, unlike the plaintiff in the case of *Gaskin* (1980), in principle did not want to sue anyone. But he was denied on the grounds that the facts requested by the plaintiff would be too "deplorable" for the plaintiff; of course, the refusal did not stop him, and he decided to obtain documents through the courts. The Court stated that, despite his right of access to his medical records, the Court had used the term 'common law right', as section 32 of the Administration of Justice Act 1970 did not directly concern the patient's right of access to medical records on request, as is the case, for example, in Portugal, where there is a clear norm of law regarding a patient's statutory right of access to medical records, which in turn has already been confirmed by court practice, including the judgment of the Supreme Administrative Court of Portugal in 2018[443]; access to patient health records was already recognized in British court practice in the 1970s), it was in his “best” interest not to have access to them, and the hospital, in turn, had the discretion to understand that could independently decide which documents are subject to disclosure and which are not. Accordingly, it can be stated that the right of access to medical records in England is rather limited, so the actions brought before the European Court of Human Rights for denying the plaintiffs access to them are quite logical.

In United States of America. The earliest cases related to the plaintiff's right to access medical records kept in hospitals date back to the 1930s and 1940s: in these cases (actually, as in

[441] *Gaskin v. Liverpool City Council*, [1980] 1 W.L.R. 1549, 1552-1553
[442] *Church of Scientology v. DHSS*, [1979] 1 W.L.R. 723, 728 – onward
[443] *Unidade de Saude A c. B...*, Acordao do Supremo Tribunal Administrativo, 08.08.2018, Processo 0394/18, Sec. III, 3

most of their modern counterparts), the plaintiffs desired to receive a court order to produce the medical records, preparing a claim against hospitals for medical negligence: given that this was the sole purpose of obtaining these documents, the court decision documents must be provided to the plaintiffs[444]. In the 1970s, U.S. courts ruled that providing medical records to a patient on request was either a "common law" duty of a physician or a hospital[445], or, conversely, a statutory one, in case the state legislation contained such provisions[446]. In one of the earliest cases on this subject, the Goldwater case (1940), the New York City Council required Lincoln Hospital to provide it with all medical records of hospital patients as part of an investigation concerning mismanagement, and the hospital refused to provide them the medical records, citing the statutes of the New York State on "medical privilege" (most often, this meant the right of healthcare employees, i.e. doctors and other hospital staff not to testify in court, citing medical secrecy, but on practice, it was often understood as a ban on disclosing information about the health of the patient[447]). The New York State Court of Appeals upheld the hospital's position, arguing that such evidence would be inadmissible under this statute[448]. Undoubtedly, the position of other state courts on this issue could be radically different: for example, in the case of Allegheny County Grand Jury Investigation (1980) with somewhat similar circumstances, the Pennsylvania Supreme Court decided to provide medical records to patients for investigation[449]. The earliest cases concerning the right of access to health data originated in the State of New York, and the local courts recognized that the statute conferring the right to "medical privilege" could not apply if the plaintiff preferred to have access to the data relating the state of health in order to further use them in a lawsuit for medical negligence: for example, in the case of Hoyt (1938), the plaintiff was infected with syphilis during a blood transfusion (2 transfusions were performed), and according to her, doctors did not check the donor blood for syphilis according to existing tests. The hospital flatly refused to provide her with information from the medical records of this particular clinical episode (apparently fearing that the plaintiff would sue, as was almost always the case in the United States). The court stated that medical confidentiality is based on the principle that the patient has the right to control where his personal data is disclosed or used: if the patient (and the plaintiff in this case) prefers to receive it, the hospital has no right to do so. to refuse under section 352 of the Civil Justice Act of the State of New York ("medical privilege"). Therefore, the Supreme Court of the State of New York ruled in favor of the plaintiff[450]. A similar decision was made by the same court in the *Weiss* case (1955), in which the plaintiff intended to sue the hospital for negligence,

[444] *Hoyt v. Cornwall Hospital*, 169 Misc. 361, 363 (N.Y. 1938); *In re Weiss*, 147 N.Y.S 2d. 455, 456 (1955).
[445] *Cannell v. Medical & Surgical Clinic S.C.*, 315 N.E.2d 278, 280 (1974); *Rabens v. Jackson Park Hospital Foundation*, 40 Ill.App.3d 113, 116; 351 N.E.2d 276, 279 (1976).
[446] *Clay v. Little Co. of Mary Hospital*, 277 Ill.App.3d 175, 178-180; 213 Ill.Dec. 866, 868-869; 660 N.E.2d 123, 125-126 (1995)
[447] *Hoyt v. Cornwall Hospital*, 169 Misc. 361, 362-363 (1938)
[448] *N.Y. City Council v. Goldwater*, 31 N.Y.2d 31, 32-33 (1940)
[449] *In Re June 1979 Allegheny County Grand Jury Investigation*, 415 A.2d 73, 76-77 (1979-1980)
[450] *Hoyt v. Cornwall Hospital*, 169 Misc. 361, 363 (N.Y. 1938)

but the hospital management refused to provide the names of the doctors who committed it against the plaintiff, who was a patient there shortly before the lawsuit[451]. In fact, the practice of American courts knows many case examples, where doctors and hospitals concealed the information that could be the reason for the lawsuit – often they did so intentionally because of the statute of limitations for medical negligence actions. Under the laws of many US states the statute of limitations for a civil claim for damages (under which a medical malpractice action falls) does not exceed 1-2 years. However, provided that the basis for the claim is *concealed*, the statute of limitations for the tort is *maintained*, which is a general rule in the practice of US courts – the time does not begin to expire until the plaintiff learns of the damage within the existence of a legal relationship between patient and the doctor or the hospital[452]. Thus, in many occasions, the hospitals could not claim that the action is time-barred. In the interpretation of some US courts, the statute of limitations for filing a lawsuit is calculated from the moment of *termination* of legal relationship, because after their termination the patient (and, accordingly, the future plaintiff) has full right to access documentation about his treatment and health[453].

Since the mid-20th century, lawsuits in which former hospital patients have previously sought medical records regarding their health and treatment, suspecting negligence on the part of hospital staff, and after having received a refuse, sued the hospitals to obtain a court order to provide them with the requested medical records, has already ceased to be a rarity[454]. Since the 1970s, cases have begun to appear in U.S. court practice where plaintiffs have cited other reasons for going to court. Thus, in the *Kennell* case (1974), one of the leading cases in the United States in the field of access to health data (as it seems in the further case-law), the plaintiff, Julian Kennell, a trustee of a man named Steve Nelson, on behalf of him, sent a request to the hospital for information about his health and treatment (directly to the specialist who treated Nelson), but was denied. In the application for suspension of the proceedings, the defendant (Medical and Surgical Clinic, Illinois) stated that thereby, the plaintiff wants to deprive the hospital of its property (documentation); information folders are confidential; upon the view of the defendant, the production of medical documentation is permissible only if the trial is ongoing, and that the plaintiff intended to initiate damages proceedings, in that case, said the defendant, the plaintiff was not entitled to receive any information from the medical records prior to the hearing. The trial court dismissed Kennell's lawsuit, and the Illinois Court of Appeals decided to determine whether the doctor was generally under obligation to provide information concerning the patient's health and medical records, in cases other than the summons. Although the Illinois state court decisions confirming the existence of such an obligation did not exist

[451] *In re Weiss*, 147 N.Y.S 2d. 455, 456 (1955)
[452] *Perrin v. Rodriguez*, 153 So. 555, 556 (La. Ct. App. 1934); *Sheets v. Burman*, 322 F.2d 277, 280 (1963); *Emmet v. Eastern Dispensary and Casualty Hospital*, 396 F.2d 931, 938 (D.C. Cir. 1967)
[453] *Guy v. Schuldt*, 256 Ind. 101, 110 (1956)
[454] *Gotkin v. Miller*, 514 F.2d 125, 128-129 (1975)

at the time, the position on the existence of such an obligation (at the time) was already expressed by the U.S. District Court of Appeals in the *Emmett* case (1967)[455]. The Illinois Court of Appeals stated that the patient was not required to be a plaintiff in a process where this documentation was required as evidence for a health care facility to undertake to provide it - the Court accepted the position of the U.S. District Court of Appeals in its decision in the case of *Emmett* (1967), and decided in favor of the plaintiff[456].

In Germany. The author paid considerable attention to the study of the practice of German courts in the context of the right to access data on health status in one of his recent articles [13, p. 103-122], so here will be selected only selected cases from the practice of the Federal Court of Germany, the decisions of lower courts are described in the above work of the author. The patient's right of access to medical records in Germany derives from his contract with a doctor or hospital and is was never enschrined in law until 2013, when it was included into a brief provision of Art. 630 of the Civil Code. At the same time, these provisions are not detailed, and the resolution of a dispute relating to production of medical records on practice depends upon the existing case law and the appreciation of the case facts by the judge. Generally the right derives from the contract between the patient and physician (or the hospital), which is a firm position of the Federal Supreme Court[457]. Although some German lawyers in the mid-1970s, such as J. Daniels (1976), did not believe that the patient should be given such a right [3, p. 348-349], the courts ruled the opposite: in 1978-1979, the courts of four German cities (Weltzar District Court (1978), Gottingen Land Court (1978), Limburg Land Court (1979) and the Highter Land Court of Bremen (1979)) ruled to provide the plaintiffs with access to medical records (in all cases, the plaintiffs alleged negligence in the actions of hospital staff)[458]. The author of the article describes the decisions of the above-mentioned courts in his recent article on the practice of German courts on the right of access to medical records (2019)[459]. Following a number of influential rulings by the Federal Supreme Court in the 1980s upholding the right to access medical records, German legal scholars began supporting the concept of the patient's right to access medical records as part of his right to self-determination (autonomy), including the German civil law scholar E. Deutsch (1992)[460]. The German courts interpreted the concept of the patient's right to self-determination (autonomy) in the 1970s and 1990s, finding a place for the right to access medical records as follows: this right is part of the patient's right to self-determination, which, in

[455] *Emmet v. Eastern Dispensary and Casualty Hospital*, 396 F. 2d 931, 935-936 (D.C. Cir. 1967)
[456] *Cannell v. Medical and Surgical Clinic*, 315 N.E.2d 278, 280 (Il. Ct. App. 1974); 21 Ill. App. 3d 383, 384-386 (1974)
[457] *BGH*, 23.11.1982; VI ZR 222/79, para. 14-15
[458] *AG Weltzar*, 15.08.1978 – 3C 707/78, para. 8-9, 15; *LG Gottingen*, 16.11.1978 – 2 O 152/78, para. 9-16; *LG Limburg*, 17.01.1979 – 3 S 244/78, para. 7-8; 10; 13; *OLG Bremen*, 31.07.1979 – 1 U 47/79, para. 15
[459] Lytvynenko, A.A., *A Right of Access to Medical Records: The Contemporary Case Law of the European Court of Human Rights and the Jurisprudence of Germany*, 6.1 Athens Journal of Law 102, 112-114 (2019)
[460] Deutsch, E., *Das Persönlichkeitsrecht des Patienten, Archiv für die civilistische Praxis*, 192(3):161-180 (1992)

addition to informed consent to surgical (and other invasive or potentially hazardous) interventions[461], as well as the patient's consent to the transfer of data from one health care facility to another[462], include the right to access information about his or her health status. According to German court practice, special provisions of the contract between the doctor / hospital and the patient are not required for access to medical records[463]. Consider a number of decisions of the Federal Supreme Court of Germany in the 1980s. In the first of these (1982), the plaintiff underwent surgery on the spinal cord in 1976 to prevent further pinching and to stop the progressive paralysis. After the operation, the plaintiff did not feel better, but his health only worsened. While preparing a lawsuit against the hospital for negligence, he preferred to have access to documentation regarding his treatment. To this end, he hired a doctor and a lawyer. Instead, the defendant stated that 1) he would not allow the plaintiff's lawyer to check the medical records; 2) it may adversely affect the property rights of the hospital in the medical records; 3) the disclosure of these documents can have an extremely negative effect on the plaintiff[464]. The court noted that the plaintiff had the right to access his medical records, however, at the same time, the limits of the right of access had to be defined[465], confirming that the legal nature of this right was contractual and derived from the patient's dignity and self-determination, and hereby the patient is not a mere object of treatment[466]. The Federal Supreme Court of Germany, as well as the Supreme Court of Cologne in its decision a year earlier (1981)[467], came to the following conclusions: 1) it is impossible to say unequivocally that non-professionals can not understand medical records, and even if they really cannot , one may ask for professional help; 2) property rights and copyrights in medical records exist – the Federal Supreme Court does not deny this, but the patient's "personal" right to access medical records (here the Court calls it "Personlichkeitsrecht", the German "Personal Right", which is often used in the sense of the right to privacy[468]; 3) the only "known" inclusion is the "privilege of the doctor-patient" (essentially a medical secret), which can hardly be applied to such cases. 4) The Court also notes that there may well be communication between doctors concerning patients to whom should be provided because

[461] See *Bundesgerichtshof*, 16.01.1959, VI ZR 179/57, para. 14-16. In this case, the plaintiff was not informed of the potential danger of radiation therapy. The case was won by the plaintiff on the basis of breach of contract / breach of the doctor's obligation to inform the patient about the possible negative consequences of treatment. This case became the "leading case" in the concept of "self-determination" of the patient (German: "Recht der Selbstbestimmung") in the case law of the German courts (see paragraph 15 of the judgment). In the 1950s. (and even earlier), in the practice of German courts, the obligation of the doctor to inform about the potentially dangerous consequences of treatment was recognized, but only partially, if the frequency of some side effects were confirmed by medical practice, see judgment of the Federal Supreme Court of Germany: *Bundesgerichtshof*, 11.04.1956 – VI ZR 20/55, at paragraphs 10-12. However, if the plaintiff could prove that the doctor had committed negligence, he could have won the claim on that basis.

[462] *AG Neunkirchen*, 28.10.1991, 5 C 648/91, para. 16

[463] *Bundesgerichtshof*, 31.05.1983 – VI ZR 259/81, para. 12

[464] *Bundesgerichtshof*, 23.11.1982; VI ZR 222/79, para. 1-5

[465] *Ibid*, para. 14-15

[466] *Ibid*, para. 15-16

[467] *OLG Koln*, 12.11.1981, 7U 96/81, para. 18-27

[468] See the interpretation of the Federal Supreme Court in *Bundesgerichtshof*, 19.09.1961 – VI ZR 259/60; BGHZ 35, 363, p. 367

physician records may contain subjective judgments or suspicions of diagnoses - simply put, this is information that is not intended for patient access. The Court notes that in the present case it is not the case that the patient requested such documentation at the hospital, so it decided that the plaintiff was entitled to access records of his state of health, but limited by the factual findings of the doctors[469].

In the judgment of the Federal Supreme Court of Germany in 1984, the plaintiff was treated in a closed psychiatric hospital in 1965. He thought he had been placed there in a criminal case against him that he had never known before. Almost twenty years later, the plaintiff wanted to check the records in the medical records. At the time of filing the lawsuit, the symptoms of the plaintiff's psychiatric illness had not appeared for more than a decade. The court of first instance upheld his claim, but the defendant (the hospital to which he had previously applied) decided to appeal the decision. So the case came before the Federal Supreme Court. The court confirmed that the plaintiff had the right to access medical records, but stressed that the restriction of access could depend on the plaintiff's illness and his current state of health. At the same time, even in spite of the plaintiff's request for documentation containing the facts concerning his psychiatric illness, the mere fact of this could not prevent him from granting access to them. The hospital (defendant) did not provide any adequate explanation for the rejection of his request, instead, as the Court argued, only expressed a reluctance to give the plaintiff access to the documentation; in addition, the appellate court in this case concluded that the disclosure of the records would in no way harm the plaintiff's health. The Federal Supreme Court of Germany upheld the decision of the appellate court, emphasizing that the denial of access should be based on facts and conclusions of doctors, and not on speculation, deciding in favor of the plaintiff[470]. The decision of the Federal Supreme Court of Germany in 1988, as well as its previous decision on this topic, touched upon the issue of access to documents of the patient regarding his psychiatric treatment. A former patient of a psychiatric hospital (plaintiff) asked the hospital to provide him with all medical documentation regarding his treatment in 1976-1981 (previously, the plaintiff was already superficially acquainted with them in the presence of a doctor). However, the plaintiff was hospitalized twice in 1986 and 1987, so his application was rejected by the hospital because doctors believed that if the plaintiff gained access to medical records, his health would deteriorate. The plaintiff had no choice but to gain access through the courts. In this case, the plaintiff did not want to know any information about his treatment and its results, but instead tried to find out what the doctors really thought about his health. The court reaffirmed that he was fully entitled to access records of his state of health, but noted that his right could be significantly restricted in relation to data on his mental state. Having assessed all the circumstances of the case, the court stated that the disclosure of this information would in fact harm the plaintiff's mental state, and that the plaintiff

[469] *Bundesgerichtshof*, 23.11.1982; VI ZR 222/79, para. 17-27; 30
[470] *Bundesgerichtshof*, 02.10.1984 – VI ZR 311/82, p.p. 5-8 of the original court report

might erroneously communicate the factual findings to other doctors who could treat or consult him[471]. The Court also noted that the doctor had the right to restrict access to some of the information concerning the applicant's state of health, but that "psychiatric data" were not in themselves literally "unavailable". However, in the case of existing hypochondria, as the Court notes, access to data may be restricted on the basis of this fact - in which case, the documents may be provided to a hired consultant or may not be provided to the plaintiff in full. However, the Court decided to allow the plaintiff to provide access to his medical records in the presence of a doctor who would interpret the information provided in the records[472].

In Portugal. In Portugal, the access to medical records is regulated by the provisions of the 2005-enacted "Health Information Law" (Lei No.12/2005, " Informação genética pessoal e informação de saúde ", or literally"personal genetic information and health information"), the law on consolidation of the rights and duties of healthcare users (Lei No. 15/2014) and the law on administrative documents (LADA-2016), as well as the 1998 data protection law (Lei No. 67/98). Upon the general concept, under Art. 2-3 of the 2005 law, the patient has property in his medical records, while the hospitals are depositors of them, but not their owners. Such approach may make a difference in jurisprudence, which has a number of milestones in Portuguese case law already.

A key decision in the practice of Portuguese courts on access to health data, including access to these documents by third parties, is the decision of the Supreme Administrative Court of Portugal in 2018. The circumstances of the case were as follows: the plaintiff, "B", was the son of a man "C", who was hospitalized with a severe brain injury in June 2014, due to which the patient was diagnosed with left tetraparesis, as well as suffering from speech, swallowing and behavioral disorders. Plaintiff and his mother, "D", guardians of "C" dealt with all issues related to the treatment of "C". In August 2016, the patient's nail was removed. The plaintiff then, through a lawyer, requested the provision of photographs and other documents regarding the clinical episode that caused the operation. He did not receive a response from the hospital, however; therefore, the plaintiff filed an application with the Committee on Access to Administrative Documents, which, in turn, expressed the view that the hospital should provide him with access to documents, but the hospital refused, arguing that the plaintiff did not show interest in this, and his data parents are confidential and not subject to disclosure. After re-applying to the hospital, which ended in nothing, the plaintiff filed a lawsuit[473].

The Administrative Court of Sintra (Tribunal Administrativo e Fiscal Sintra, TAF Sintra) ruled in favor of the plaintiff, believing that he had grounds for access to the father's medical records. The hospital decided to appeal the decision to the Tribunal Central Administrativo Sul (TCAF), which

[471] *Bundesgerichtshof*, 06.12.1988 - VI ZR 76/88, para. 3, 4-7 (case facts)
[472] *Bundesgerichtshof*, 06.12.1988 - VI ZR 76/88, para. 9-10
[473] *Unidade de Saude A c. B...*, Acordao do Supremo Tribunal Administrativo, 08.08.2018, Processo 0394/18, Sec. II, 1-11; 11-13.

upheld the trial court's judgment, holding that the plaintiff, as the patient's son, was entitled to access. The patient's son desired to obtain data to determine whether the staff had been negligent in claiming damages, so the court considered that this basis was sufficient to obtain the patient's documentation[474]. The hospital then appealed to the Supreme Administrative Court of Portugal. The court noted that in the present case the plaintiff, the patient's son, is not a subject of personal data, although he is directly related to them. The SAC of Portugal emphasized that, first of all, the data on the state of health refer to all information on the current or hypothetical future state of health of the patient, living or dead, including his anamnesis[475]. The court referred to Art. 2 (1) and 5 (1) Lei No. 26/2016 (LADA-2016), according to which citizens have the right to access administrative documents regarding their "existence", and equated patient documentation to "registered documents", so the procedure for their provision should fall under Art. 3 (b); 6 (5) and 7 Lei No. 26/2016; Art. 3 (a), 5 (1) (a) and 11 (5) Lei No. 67/98 (Lei da Protecção de Dados Pessoai, law on personal data protection), as well as Art. 2, 3, 4 Lei No. 12.2005 (Personal genetic information and health information, law on genetic information). Therefore, the court provided a number of principles according to which the following cases should be decided:

1) Health data is any information that is directly or indirectly related to a particular patient;

2) This information is the property of the patient (data subject), and accordingly, hospitals are repositories of documents;

3) The owner of the data has the right to access them, unless otherwise provided by law, or in the event that this information harms him (see the decision of the Court of Appeal of Porto 2019 below). He must indicate the purpose and type of data he prefers to receive at the hospital;

4) Third parties also have the right to access the patient's documentation if he has given his consent, but to the extent that he has given his consent in a special document;

5) If the patient wishes, access to the data can be provided through the doctor of his choice;

6) If the patient's desire to access the documentation for some reason cannot be confirmed, it can be done through a doctor;

7) If a third party prefers to have access to the documentation, it must demonstrate a specific, personal and legitimate interest protected by the Constitution (Portugal). In this case, the court must make a decision on the basis of the principle of proportionality - confidentiality of personal data on the one hand, and the principle of open management - on the other, which in turn supports the provision of administrative documents;

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[474] *Bernardo ... c. Santa Casa da Misericordia de Lisboa*, Acordao do Tribunal Central Administrativo, 31.01.2018, Processo 353/17.BESNT, Sec. II.2, 1.2.

[475] *Unidade de Saude A c. B...*, Acordao do Supremo Tribunal Administrativo, 08.08.2018, Processo 0394/18, Sec. III, 2

8) Only the information that is necessary for the legitimate interests of the plaintiff (third party in this case) can be provided to him - this means that not all the information contained in the records will be available;
9) Hospitals should prevent unauthorized access of third parties to the documentation in accordance with the legislation on personal data protection[476].

The court noted that the plaintiff had previously requested that he must be provided with the desired medical records regarding the manipulation of his father's nail removal. The plaintiff himself was certainly not a data subject and therefore had to demonstrate a legitimate interest in obtaining the documentation[477]. The court noted that the plaintiff's primary purpose was to obtain documents to verify whether a lawsuit could be filed against the hospital for negligence. According to the court, the son (plaintiff) was fully entitled to file a lawsuit against the hospital if its employees were negligent towards his father, and the son, in the guise of a "third party" is not "any" third party. Therefore, the Court confirmed that the son had substantiated the need for access to the father's medical records by rejecting the hospital's appeal[478].

One of the latest decisions of Portuguese courts regarding the right of access to medical records was the decision of the Porto Court of Appeals in 2019. The circumstances of the case were quite simple: the plaintiff went to court to force the dental clinic to provide medical documentation so that the plaintiff could continue treatment at another clinic. Some time before the lawsuit, the plaintiff agreed on his treatment with the clinic, but was forced to look for another to complete it, believing that the treatment was of poor quality and harmed his health. Therefore, the plaintiff requested 25 types of medical documents, but the defendant refused him, except for several types. The court tried to single out what should and should not be included in the notion of "access to health data", as Portuguese law itself did not specify this[479], and the plaintiff asked for "not much, not little", but ... 25 types of medical records. The court confirmed that according to Art. 3 Lei No. 12/2005 information about the patient's health is his property, while health care institutions are only repositories of documents, and have no right to use them in any other way than for his treatment, and other activities provided for in Art. 5 of this law. The law of Portugal, as already mentioned by the author, provides the statutory right of access to medical records under Art. 3 (2) Lei No. 12/2005, Regulation 14/2009 DR 2nd Ser. No. 8 of January 13, 2009, Art. 100 of the Code of Medical Ethics and Art. 5 (3) Lei No. 15/2014. The court stated that patients whose records are kept in health care facilities should not involve intermediaries or explain the need for access to medical records, but should obtain them themselves. At the same time, the court had to decide whether all existing

[476] *Ibid*, Sec. III, 3
[477] *Ibid*, Sec. III, 4
[478] *Ibid*, Sec. III, 5-6
[479] *B c. C.*, Acordao do Tribunal da Relacao do Porto, 08.09.2019, Processo No. 2147 / 18.T8AGD.P1, Sec. II

documents should be made available to the patient - say, what about the doctor's private notes on the patient's health? Therefore, the court decides that it would be correct to exclude these notes from "available" medical records, and cites several types of exceptions from "available documents", namely:

- "Therapeutic privilege", i.e. facts, in case they are received by the patient, which can seriously harm the person and his, or her health;

- Personal notes of the doctor, for example, comments on the patient's behavior (the court emphasizes that doctors have the intellectual property rights to these notes);

- Data on the health status of third parties, if such are contained in the patient's documentation;

- Data provided by third parties (spouse or family members).

On that basis, the Court decided to grant access only to some of the documents requested by the plaintiff[480].

Conclusions from Chapter 2

Medical secrecy is a very old institute of civil or criminal law (depending on the jurisdiction we are discussing), which has a twofold nature: 1) to protect the privacy of the patient, and the privacy of his, or her relatives; 2) to safeguard the trust between the patient and the doctor. In this chapter, the author reviewed the history of medical confidentiality, as well as outlined the categories of data, which should be considered as medical personal data, or medical data. Such information is considered as sensitive personal data, as its unauthorised disclosure may cause damage to the patient concerned; the lawsuits for a disclosure of medical information are quite frequent in Europe nowadays, and a number of cases on breaches of medical confidentiality were brought before the European Court of Human Rights. These cases were discussed in *Chapter 1*. At the same time, Chapter 2 displays that the patient does not only have a right to have his medical information kept in confidentiality, but may have a certain right to control over his medical information, including his right to insight into his medical record.

The patient's right to access to his/her medical records is a prominent and inalienable right in the general concept of the patient's right to self-determination regarding his / her treatment (the so-called "right to autonomy"), and is properly reflected not only in the practice of courts of a number of European countries and the United States of America, but also in the case law of international courts. Hence, it is quite logical that the said concept has significant potential for development and further research in the field of human rights. As any other right, it has a number of exceptions which are provided by law, or are dictated by the reluctance of the hospitals to provide the medical records of the patient, which frequently causes litigation. Apart from the other patient’s rights, the patient’s right to inspect his medical records is relatively recent, and is a counterpart of paternalistic medicine

[480] *Ibid*, Sec. II

with traditional legacy, marking the amplification of the engagement of the patient into the process of his medical treatment. The issue of the right to *access to psychiatric records* is the subject to the discussion in Chapter 3 (2) of the thesis work.

Chapter 3: Medical confidentiality and the 4th generation of human rights
3.1 Revelations of the patient's HIV-status records: comparative and international court practice

Historical background

Medical confidentiality is a key legal principle in the legal relationships between the patient and the healthcare institution, as to hold otherwise, there would be no trust in such healthcare, and patients would refrain from such services[481]. Principle to maintain confidentiality in the earlier times was well known in French case law[482], where, upon the acting legislation (Art. 378 (1) of the Napoleonic Penal Code, acting 1810-1994, replaced by Art. 226-14 of the 1994 Penal Code), the secrecy of professional communications, including by those obtained by medical practitioners, was absolute; however, the courts developed a number of exceptions. Since HIV/AIDS is a sexually transmitted disease, the most common close-up ailment, the disclosure of which was bound by law, was syphilis, and occasionally tuberculosis. As early as 1828, a doctor in Grenoble refused to testify from the side of plaintiff in divorce proceedings regarding treating her from syphilis, which she seemed to have contracted from her husband. Being sued by the wife, he managed to win over the appeal, as the court found he acted correctly, acting with high moral standards[483]. In early 1890s, the legislature enacted a law upon which the records on people suffering from contagious diseases may be legally transmitted by the doctors to the authorities in sealed envelopes (viz. Dalloz 1893 IV 9, etc; Law of 30 Nov. 1892, Art. 15), and the courts later held, that in case a person is acquainted with the content of such envelope, he becomes a confidant of medical communications as a doctor, and thus is criminally liable for its disclosure[484]. Later on, in year 1909, the Court of Appeals of Lyon held that a factory doctor (plaintiff was a factory worker), disclosing the patient suffering from syphilis in the presence of his wife, did not breach his duty of secrecy, despite the lawsuit was technically based on a misdiagnosis, which was later communicated to plaintiff's employers at the factory, which was approved by the factory's statute – with the court holding it was not a "dead letter" for "violating" medical confidentiality, as such. It was also confirmed by the court, that the patient himself never objected to the presence of his wife during the examination by the factory physician[485]

In Germany, back in 1885, the Supreme Court (Reichsgericht) has handed down a decision to condemn a doctor for revealing contents of a medical bill of complainant's wife, who had a sexually transmitted disease (under Art. 300 of the Prussian Penal Code, the right of criminal complaint was

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[481] *Latvijas Senāta Administratīvo lietu departamenta*, 2020 g. 6 novembra, Lieta Nr. A420305915, SKA-41/2020, p.p. 7-8

[482] Lytvynenko, A. A., *Data privacy in the sphere of medical confidentiality: the historical and contemporary case-law of the United States, the European Court of Human Rights and selected Continental Europe states*, 83 Topical Problems of State and Law, p.p. 100-134, 104-111 (2020)

[483] *Fournier c. Remusat*, Cour d'Appel de Grenoble, 23 aout 1828, Sirey 1828 II 318, Dall. Per. 1828 II 237

[484] *Procureur General c. Dijon, Cour de Cassation, Arrêt Cass. Crim. 13 mars 1897, Pandectes Francaises*, Ann. 1898, Partie I, p. 25, 25-28

[485] *G. c. R.*, Cour Appel de Lyon, 16 juin 1909, Dall. Per. 1910 II 123, 124

in the aggrieved party – in the interpretation of Reichsgericht, it expanded to the father of the family, or the guardian in case the person was mentally ill or deaf)[486]. Later, in 1901, the Court of Appeals of Hamburg (I) held a doctor could legitimately testify relating to the state of health of a trial party in case he is released from confidentiality; and the court may compel the defendant to do it by an interim judgment (which was actually done in this case, which was also a divorce lawsuit, where the doctor had to prove that defendant was suffering from syphilis, most likely to be contracted because of his adulteries, and therefore refraining from sexual intercourse with his wife)[487]. In the United States, statutes requiring the doctors to report contagious and dangerous diseases to healthcare authorities existed from the end of the XIX century, and thus the doctor could not be held liable for such revelation, i.e. see *Simonsen v. Swenson* in Nebraska (1920)[488]

Current developments in diverse national jurisdictions. HIV/AIDS was known as primarily a sexually transmitted disease in the middle of 1980s. By the late 1980s and the early 1990s, United States, Pacific states and the European states started enacting laws and bylaws for protecting confidentiality of the HIV-positive/AIDS patients[489]. In terms of civil law, American state legislatures also regulated the issue of HIV-positive minor adoptees, allowing their HIV-status to be disclosed to foster forbearers, which some authors found to be discriminatory as well as somewhat stigmatizing towards the minors themselves[490] In 1991, in the case of *Behringer*, the New Jersey Superior Court held that hospitals must inform patients that they will be operated upon by a HIV-positive surgeon, not finding it to be anyhow discriminatory, but rather shaping it in a form of informed consent, and advising that additional precautionary measures need to be followed by doctors[491]. In Canada, several provinces enacted statutes limiting the AIDS-relating confidentiality already in the mid-1980s, by obliging the doctors and the healthcare institutions to report HIV-infection carriers to the healthcare authorities, or legitimately allowed a physician (i.e. a family doctor) to tell the patient's family he was HIV-positive[492]. In terms of Canada, the disclosure of such information, where illegitimate, is apparently remediable by both at common law and by statute, as such information apparently relates

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[486] *Reichsgericht*, III Strafsenat, Urt. v. 22 Oktober 1885 g. B. Rep. 2421/85, ERG St. Bd. 13, S. 60, 62-65 [RGSt. Bd. 12, S. 60 – 65] (Reichsgericht Entscheidungen in Strafsachen, Bd. 12 [1885], S. 60 – 65).

[487] *Ehefrau Anna Th. M. B. geboren N. in Hamburg gegen ihren Ehemann den Comptoirboten B.H.B in Hamburg*, Oberlandesgericht Hamburg I., v 14 Juni 1901, Hanseatische Gerichtszeitung Bd. 22 (XXII) (1901) S. 269, 269-271

[488] *Simonsen v. Swenson*, Supreme Court of Nebraska, 14.02.1920, Nebraska Sup. Court Reports Vol. 104 [1920], p.p. 224-230 (p. 227-230); Northwestern Reporter (United States of America), 1st Ser., Vol. 177, p.p. 831–832 (p.p. 831-832)

[489] Mae, P., *Medical Confidentiality and the Public Disclosure of HIV Status*, Journal of South Pacific Law, [2004] Vol. 8, Iss. 1, Art. 4 (Digital).

[490] Chejfec, C., *Disclosure of an Adoptee's HIV Status: A Return to Orphanages and Leper Colonies Comment*, 13 J. Marsh. Comp. & Inf. Law 343, 357-361 (1995)

[491] *Estate of Behringer v. Medical Center*, etc., New Jersey Superior Court, Law Division, Mercer County, 25.04.1991, New Jersey Superior Court Reports (United States of America), N.J. Super. Vol. 249, p.p. 597 – 659, p.p. 644-659

[492] Casswell, D.G. *Disclosure by a Physician of Aids-Related Patient Information: an Ethical and Legal Dilemma*, 1989 68-2 Canadian Bar Review 225, 229-234 (1989)

to medical records[493]. but the data relating to HIV/AIDS as well as diseases having similar hazard parameters, seems to have a special regime of both protection and legitimate disclosure. In African states, even well-developed ones, HIV-related data and its consideration by the employers, especially if an employee works at a healthcare institution, may be a substantial ground for discrimination, and the only adequate remedy is to litigate against the employer[494]. A nurse from Nigeria, who was found to be HIV-positive by an unauthorized HIV-test in the mid-1990s (she was never told of it, just being referred as a "test"), was dismissed from her workplace on basis of her HIV-status. The High Court of Lagos State, finding for plaintiff, ordered compensation of damages for an unlawful termination of employment (no facts concerning her negligent performance of duties were ever represented), as well as for an unauthorized HIV-test without her informed consent and the defendant's negligence[495].

Information relating to HIV-status and its disclosure had repeatedly became an issue in civil proceedings. In Canada, in a 1995 civil action of *Canadian AIDS Society v. Ontario*, the plaintiff sued the Canadian Red Cross for examining ten-year-old blood samples, some of which were HIV-positive, and reported the personal information of their holders to the healthcare authorities. The court, however, found such actions were a fair balance between the individual right to privacy and the legislative requirements to report such information[496]. In the United States, litigation against hospitals and blood banks for AIDS blood contamination within transfusion involved a sensitive issue of producing the personal information of donors, which was resolved by state courts with variable outcome. In a federal case of *Boutte v. Blood Systems*, Inc. (1989), a man sued a non-profit community blood bank for negligence within a blood transfusion: he underwent surgery, and received blood, as it was soon figured out, from a HIV-positive donor. The said donor previously received a HIV-negative test, but it was HIV-positive on the second time, and apparently, plaintiff got a HIV-positive test. Plaintiff requested a discovery of the donor's identity so he could learn concerning the AIDS-screening procedure, which was highly likely to be done improperly. Obviously, defendant opposed it invoking the issues of the donor's confidentiality. The court held that in the parity between the individual right to privacy of the donor and the society's interest in a high-quality blood supply (we cannot obviously omit plaintiff here, whose interest in the same is compatible with the aforesaid society's interest); the last must prevail; at the same time, the court issued a protective order, so the

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[493] *Canada (Solicitor-General) v. Ontario (Royal Commission of Inquiry into Confidentiality of Health Records in Ontario)*, Ontario Supreme Court, 11.05.1979, Dominion Law Reports (Canada), 3rd Ser. Vol. 98, p. 704 (1979), para. 41-42; 45-50 [see in principle concerning medical data disclosure remedied, judgment was reversed on appeal]

[494] Onyemelukwe, C. *Discrimination on the Basis of HIV Status: An Analysis of Recent Developments in Nigerian Law and Jurisprudence*, 17 Int'l J. Discr. & L. 160, 167-172 (2017)

[495] *Georgina Ahamefule V. Imperial Medical Centre & Dr. Alex Molokwu*, High Court of Lagos State, 27.09.2012 (Suit No. ID/1627/2000), p. 18-24

[496] *Canadian AIDS Society v. Ontario*, Ontario Court of Justice, 04.08.1995, Docket No. 4581/94, Ontario Reports (Canada), 3rd Ser., Vol. 28, p. 388 (para. 60 – 195).

donor (as a person) would be anonymized in the further proceedings[497]. Within a couple of years, a similar case arose in Pennsylvania in the mid-80s (*Stenger v. Lehigh Valley Hospital Center* (1992)), where a woman received blood transfusions within treatment from an injury, suffered in an automobile accidents in 1984. Then, the blood center had learned, that one of the donors was HIV-positive around a year after the accident (Aug. 1985), but did not inform the hospital of this fact until May 1986. In late 1986, patient (the woman), whose health rapidly deteriorated, was receiving treatment by the same hospital, where she was notified that her blood was contaminated by the transfusion 4 years before. In early 1987, her husband and son were also diagnosed as HIV-positive, and the woman died in early July 1988 of AIDS complications. The father, altogether with minor son (the deceased wife was also cited as plaintiff) sued the hospital and the blood bank, requesting to produce the donor for an anonymous questioning concerning the screening procedure, as well as allowing plaintiff to access anonymous AIDS-tests results by other blood recipients of the said blood donor. The court found the discover to be permissible and not violating the patient-physician privilege, allowing a limited discovery with the anonymization of all the third parties involved[498]. In an earlier 80s case, *Rasmussen v. South Florida Blood Service*, plaintiff's request for discovery of donor names of addresses (whereas the blood bank was not sued for any negligence) was not upheld, being referred to as a "fishing expedition", holding that such revelation could negatively affect the individuals involved[499]

In international law. Disclosure of plaintiff's HIV-status records became a subject of lawsuits before international courts as well. In a case before the European Court of Human Rights, *Z. v. Finland* (1997), plaintiff was a HIV-positive woman whose medical records were used by law enforcement authorities within the criminal proceedings of her husband, who was accused in murder and transmitting HIV by sexual intercourse with unnamed women. Within the proceedings, doctors testified relating to hear state of health, and the medical records were later seized by police authorities, her identity was disclosed at the trial, and the facts were published by the press, to which she opposed. The Court, having heard the case, decided that testifying by the doctors or seizure of the medical records did not violate her right to privacy, but the publication of her personal details in the press, involving her diagnosis, violated her right to privacy[500]. In the case of *I. v. Finland* (2008), the plaintiff was a HIV-positive nurse, who underwent treatment in the same clinics she was employed, being

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[497] *Otto Boutte v. Blood Systems, Inc*., United States District Court W.D. Louisiana (Lafayette–Opelousas division), 30.06.1989, Civ. A. No. 88–1812; Rep. Federal Rules Decisions (United States of America), Vol. 127, p.p. 122 – 126 (1989)

[498] *Stenger v. Lehigh Valley Hospital Center*, Supreme Court of Pennsylvania, 02.06.1992; Pennsylvania Supreme Court Reports (United States of America), Vol. 530, p.p. 426–441; Atlantic Reporter 2nd Ser. Vol. 609, p.p. 796–804, at p.p. 800 – 804.

[499] *Rasmussen v. South Florida Blood Service*, Supreme Court of Florida, 05.01.1987, [No. 67081], Southern Reporter (United States of America), 2nd Ser., Vol. 500, p.p. 533–538, at p.p. 535 – 537.

[500] *Z. v. Finland*, [1997] ECHR 10; App. No. 22009/93; Judgment of 25.02.1997; Rep. Tijdschrift de Gezonderheitsrecht / Revue de Santé (Nederlands) 1997-1998, p.p. 315 – 327 (original court report para. 9-18, 96, 113)

sheltered by a fake name in the hospital register, but her colleagues learned of her HIV-status. Striving to know who was the person having virtual access to her medical record, plaintiff did not manage to find it out, and her claims against the local health department for negligent data management failed. In this case, the European Court found that Finnish national law did not provide sufficient safeguards for keeping her medical records confidential, which apparently was not performed by defendant, and ruled in her favor[501]. Another, lesser known case, *Biriuk v. Lithuania* (2008), involved a lawsuit of a Lithuanian national, whose HIV-status was revealed in local press, being affirmed by a hospital where she was treated from tuberculosis. The woman was also described having impious behavior and having relationships with lumpen people. Prevailing in her lawsuit against the newspaper agency, she did not manage to recover much money, and the upper courts only diminished the amount of redress. The European Court had judged that the national law did not provide adequate mechanisms for protecting such medical information, and her HIV-status was of a foremost focus of the article, such fact did not constitute to be of public interest; nor plaintiff's way of life possessed one. It was affirmed that the HIV-status was ascertained by the hospital representatives, and the European Court stressed that the national law must possess ensure protecting such medical information, ruling for plaintiff[502]. In the judgment of the European Court of Justice, *X. c. /Union syndicale-Bruxelles* (1994), the ECJ held that an EEC structure employee, who refused undergo a HIV/AIDS-test (in order to define his AIDS/HIV status, which is apparent), cannot be obliged to pass it, as well as to undergo any other screening tests, which could bring to a suspicion that he may carry the virus[503].

Inferences.

Disclosures of HIV-status may occasionally be on a limited and a legitimate nature, defined by legislation, or at least approved in case law. However, the leakages or indiscrete revelations may considerably discriminate a prospective plaintiff and bring to his labor and societal ostracism. Despite the AIDS epidemics is not the main healthcare concern nowadays, the amount of HIV-positive people is still large, and does not seem to decrease anytime soon; the protection of HIV-positive people's rights is multidimensional, and requires protecting their confidentiality as one of their human rights.

3.2 The patient's right to access to psychiatric records

Despite medical law is relatively young, the worldwide jurisprudence hae witnessed actions for medical records production for already a century, despite it has been widely known for a couple of decades. The purposes for an insight into medical data may be different – from preparing medical

[501] *I. v. Finland*, [2008] ECHR 623; App. No. 20511/03; Judgment of 17.07.2008, para. 5-7; 35-47.
[502] *Biriuk v. Lithuania*, [2008] ECHR 1528; App. No. 23373/03; Judgment of 25.11.2008, para. 5-11; 34-47
[503] *X. c. /Union syndicale-Bruxelles*, Cour de Justice des Communautés européennes, 5 Oct. 1994, Jurisprudence de Liege, Mons et Bruxelles Ann. 1995, p.p. 348 – 354, at p. 351 – 354.

malpractice actions to challenging a testament, divorce proceedings and various private needs. Though all the medical records are deemed as sensitive data, the records concerning a patient's psychiatric treatment, diagnosis and prognosis are considered even more highly confidential. However, psychiatric records are not bound to be inspected by patients. The regime of access is mostly more strict than of ordinary medical records, but the legislation of many states is silent towards the distinction between these records and the possibility of insight to them, remaining this issue for the courts to decide. The purposes for access to psychiatric records may considerably vary from insight into ordinary medical records and the hospitals are frequently reluctant to produce them finding it could endanger the health of an ex-patient, or resurrect his old ailments. The current position of the courts is for allowing the production of such records though not disregarding the necessary precautions: some courts found that the insight must be limited, justified by the plaintiff and the records should be inspected in the presence of physicians. The right to access to psychiatric records may also arise more complexified aspects, such as use of minor psychiatric records, or a plea to expunge psychiatric records in an analogy with criminal records. Civil or administrative proceedings in respect with access to psychiatric records are relatively rare and the courts often substantiate their judgments upon the trial facts, taking into account the health and mental condition of the patient as well as his justification to inspect such records.

Overall comments on insight into psychiatric records. Access to medical records, as recognized by both courts and legislatures, is one of the patient's rights involving an insight to his medical records, which may be exercised either by patient himself or by his authorized representative, which may be continued after the patient's demise unless he expressly objects such inspection[504]. In some countries, a patient may also sign a document to relieve the hospital staff from medical confidentiality regarding his health condition – such written statement will enable the hospital staff to testify in court[505]. Contemporary case law also shows that patients may also expressly inhibit their treating physicians to disclose medical records to their family members[506]. Not only the patient or his close relatives may be allowed to inspect the medical records of him, but the hospital staff: this principle, upon Spanish case-law, is laid down by a necessity of providing adequate healthcare, guided by the principle of maintaining confidentiality[507] and is conditioned by the complexifications

[504] See. e.g. Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 2 marca 2015 r. VII SA/Wa 1369/14 (Warsaw Voivodeship Administrative Court, judgment of March 2, 2015).
[505] See, for instance a case from Norway on the subject: *Borgarting lagmannsrett*, 2020-07-17, LB-2020-96569 (No. 20-096569ASK-BORG / 04) (Borgarting Court of Appeals, judgment of 17 July 2020)
[506] *OLG Karlsruhe*, Urt. v. 14.08.2019 – Az.: 7 U 238/18, para. III, a, b. Over 30 years ago, the German Federal Supreme Court also held that the heirs or close relatives of the deceased patient would not be able to inspect the medical records of the decedent in case he expressly forbad it: *BGH*, 31.05.1983 – VI ZR 259/81, para. 13-14; 17;18.
[507] Accord the Decision of the Spanish Constitutional Court of 1989: *Mitja Lluna Societat Cooperativa Limitada*, Tribunal Constitutional, AUTO 600/1989, de 11 de diciembre, Sec. II, 1-3 (recurso de amparo action).

of patient-physician relationships, upon which the *healthcare*[508] is provided not by a single physicians, but a group of healthcare professionals, often referred to as "medical team"[509]. Outside the healthcare issues, the access to medical records of a patient is strongly restricted[510]. The mishandling of medical records by hospital staff may also result in penal liability for breach of medical confidentiality[511]. Surprisingly, Spanish courts held that the patient has no right to know who has inspected his medical records[512]. Litigation concerning mishandling of medical records by hospital staff featuring access to patient registers was also brought before the European Court of Human Rights, in particular in the case of *I v. Finland* (2008)[513]. Contemporary case law also affirms that the patient has a right to obtain results of laboratory blood test examinations and unless provided the appropriate information, may file an action for damages against the healthcare institutions or establishments providing tests for not furnishing the plaintiff laboratory tests information[514]. It is also true that the acting legislation of some countries may allow controlling authorities to examine specific medical records kept by physicians and hospitals, and medical confidentiality legislation (or, at least the principles elaborated in case-law) does not preclude it from being produced for such inspection[515]. In such countries, as Sweden, where county authorities allow inspection of digitized medical records by the representatives of a patient, the data protection inspectorates used to litigate to enjoin the county authorities from such practices, though with no success[516]. It has to be also augmented, that the obligation of physicians to provide hospital records to inspection boards for insight is strictly with

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[508] For instance, in Portugal, providing healthcare, as of the wording of the Supreme Court, results from the contractual duty of the physicians towards the patients*: AA, BB, CC contre Dr. DD & Gabinete de Radiologia de A..., Lda*, Tribunal Supremo de Justica, 19 junho 2001, Processo No. 01A1008, Sec. III

[509] *Sentencia Contencioso-Administrativo № 206/2018*, Tribunal Superior de Justicia de Castilla y Leon, Sala de lo Contensioso, Seccion 1, Rec. 553/2017 de 28 de Febrero de 2018, Sec. III.

[510] See. *Sentencia Social № 372/2005*, Tribunal Superior de Judicia de Castilla y Leon, Rec. 372/2005 de 21 de Marco de 2005, Sec. IV

[511] See. e.g. the judgment in the case of *Marí Luz* by the Supreme Court of Spain: Sentencia del Tribunal Supremo, 18 de Octubre de 2012, No. 990/2012 (STS 990/2012); Sec. *Fundamentos de Derecho*, I-V.

[512] Sentencia del Juzgado Cotencioso-Administrativo №2 de Albacete, de 31 de Marco de 2016, No. 49.

[513] See. I. v. Finland, Judgment of 17 July 2008, App. No. No. 20511/03, Sec. I (para. 7-19)

[514] See, for instance the judgment of the Supreme Court of Latvia (2008), *Māris D. pret BO VAS „Paula Stradiņa klīniskā universitātes slimnīca" un BO VAS „Iekšlietu ministrijas poliklīnika"*, Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta, 2008. gada 9.janvāra, Lietā Nr. SKC – 13, p. 7-9 (Supreme Court, Department of civil cases, Judgment of 9 January 2008). Section 4 (7) of the Law of the Latvian Republic "On the Rights of the Patients" (2008) seemingly deals with such types of medical records: "*Information need not be provided to a patient only in such case if such information or facts are at the disposal of the physician that the receipt of information significantly threatens the life or health of the patient or other persons*". However, to date the author was not able to trace a Latvian court judgment which expressly dealt with the aforegiven provision. Concerning the application of section 4 of the abovementioned law which concern the informational rights of the patient, see *Administratīvā rajona tiesa Rīgās tiesu nams*, 2017.gada 12.maijā, Lietas Nr. A420313316 (Lietas arhīva Nr. A42-00955-17/5), at section 10.1-10.4 – 13 (District Administrative Court of Riga, Judgment of 12 May 2017); *Vidzemes apgabaltiesas, Civillietu tiesas kolēģija*, 2018.gada 10.septembrī, Lietasarhīva Nr. CA-0212-18/14, p. 2-4.

[515] See, for instance, *Staten v/Arbeids- og velferdsdirektoratet mot A.*, Høyesterett, HR-2011-2072-A – Rt-2011-1433, para. 3-9 (facts); 42-56 (judgment) (Norway Supreme Court, Judgment of 8 November 2011)

[516] *Landstinget i Uppsala mot Datainspectionen*, Högsta förvaltningsdomstolen, 2017-12-04, HFD 2017:67

accordance with the legislation and the said boards do not acquire any property rights in the medical records according to the Swedish jurisprudence[517].

Medical records (frequently referred to as "hospital records", "information concerning [the patient's] state of health"[518], "clinical records" or "clinical history"[519]) as argued by several scholars, are a set of personal records containing the patient's data, the evaluation and information of any kind concerning the current state of health and the clinical evolution of a certain patient within the healthcare process[520]. The courts in Germany referred to medical records as personal records describing the patient's state of health as well as the prognosis for the future[521]. Psychiatric records (alternatively referred to as "mental health records", and retrospectively "(insane) asylum records"[522]) are medical records, which display mental health of the patient, information concerning his treatment and frequently the prognosis of his future. However, inspection of such records is a more complicated issue: as *Weil* (1993) denotes, the insight into psychiatric records involves certain risks of harming the patient's health, especially if the person tends to be paranoic or hypohondric or the physician's notes contain a certain amount of highly embarrassing or evaluative information concerning the psychiatric patient[523]. The courts in Germany came to the same conclusion, despite stating that psychiatric records are not generally exempt from inspection[524]; in fact, the court may found its judgment whether let or not let a psychiatric patient to inspect his personal records upon his behavior[525] and upon his justification for it[526], or his actual health condition and the possibility of its worsening in case he inspects the said psychiatric records[527]. Upon the author's research on insight to psychiatric records in German case law, I assume to conclude that German courts tend to find that the fact the medical records being requested by plaintiff are psychiatric ones, does not make them completely exempt from the patient's insight. But their amount is mostly reduced to objective findings, they have to be inspected in the presence of healthcare professionals and the patient's insight (e.g. a need to commence a malpractice action) has to be justified[528], although German courts held

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[517] *Høgsta Domstolen*, 2016-11-10, No. Ö2491-15, NJA 2016, p. 922, at para. 20-26

[518] Such expression may be found in Portugal (originally "*informação de saude*".). For instance, see Lei No. 12/2005, "*Informação genética pessoal e informação de saúde*", article 2; in case law: *Unidade de Saude A c. B...*, Acordao do Supremo Tribunal Administrativo, 08.08.2018, Processo 0394/18, Section III, 1-2

[519] Mainly adopted in Spanish-speaking countries, being designated as "*historia clínica*" both in legislation and case-law. See, e.g., *Millan/Velasco c. Saludcoop EPS & Clinica Metropolitana de Bucumaranga*, Corte Constitucional, Sentencia T1146-08 (Columbia)

[520] J. Antomas, S. Huarte del Barrio, *Confidencialidad e historia clínica*, An. Sist. Sanit. Navar. 2011; 34 (1): 73-82, at 76.

[521] *OLG Bremen*, 31.07.1979 – 1 U 47/79, at para. 15

[522] See., for instance, Evidence – Hearsay – Admissibility of Hospital Record (Comment on Recent Decisions), 19 St. Louis L. Rev. 255, 255-256 (1934) (C.B.P., Anonymous)

[523] Weil, F., *The Right of the Mental Patient to be Medically Informed*, 12 Law & Med. 681, 683-684 (1993)

[524] *BGH*, 06.12.1988 - VI ZR 76/88, para. 9-10; *BVerfGE* – Beschluss vom 16 Sep. 1998, 1 BvR 1130/98, para. 10

[525] *BGH*, 06.12.1988 - VI ZR 76/88, para. 3, 4-7; ; *VG Dusseldorf*, Urt. v. 01.10.2003 – 7 K 1821/01, para. 25-30

[526] *LG Saarbrucken*, 20.09.1995 - 16 S 1/93, para. 7-8

[527] *BGH*, 06.12.1988 - VI ZR 76/88, para. 3, 4-7, 9.

[528] Anatoliy A. Lytvynenko, *A Right of Access to Medical Records: The Contemporary Case Law of the European Court of Human Rights and the Jurisprudence of Germany*, 5.3 Athens Journal of Law 103, 115-116 (2020)

that there is no need for the plaintiff to demonstrate a legal interest for inspection of medical records under ordinary conditions[529] – psychiatric records definitely will not fall under such conception[530].

The reduction of inspection to objective findings in medical records somehow corresponds with the "dual system of medical records" as suggested by Dr. *Alan F. Westin* (1977), an outstanding data protection pioneer of the 1970s[531]. Concerning records on psychiatric treatment, German courts give certain discretion to the hospital physicians to decide whether to grant access to psychiatric records, or not, but even psychiatric detainees are, in fact, not exempt from the right to inspect their respective medical records as such. The same is applied to their counsels – they cannot be refused to inspect client's psychiatric records just on basis of medical concerns – the opposing reasons for such refusal should be well justified though not going into much detail[532]. With so many examples in case law, nothing indicates that the decision of boards not to grant the psychiatric [ex-] patients insight into their medical record, may not be impugned in court order. As the mid-20th century German jurisprudence shows, the appropriate justification of insight into psychiatric records may serve well even for a long-term prison detainee[533].

The distinction between ordinary medical records and psychiatric records is clearly distinguished in both law and academic literature. For instance, *R. Showalter* (1985), one of the pioneers of psychiatric record-keeping issues claimed, that the psychiatric records are qualitatively different from ordinary ones owing to a diffuse symptoms of psychiatric patients, making such personal records more "vulnerable" (using his wording) to subjective evaluation and would cause divergences between evaluative judgments of treating physicians[534]. Some authors also assumed that such records have very limited inspection possibility (if any at all) owing to a substantially sensitive nature of treatment of psychiatric maladies[535]. The distinction is also virtual under the law: for instance, when various US legislatures commenced enacting the statutes on access to medical records in the late-to-mid 1970s, psychiatric records were banned from inspection from one hand, and from the other, as *Nokes* (1978) denotes, had less privacy protection from third parties authorized to inspect them[536]. Somehow or other, but if speaking about earlier US jurisprudence concerning if the plaintiff

[529] *BGH*, 31.05.1983 – VI ZR 259/81, para. 8
[530] *LG Saarbrucken*, 20.09.1995 – 16 S 1/93, para. 7
[531] Westin, A.F., *Medical Records*: *Should Patients Have Access*?, The Hastings Center Report, Vol. 7 no. 6 (Dec. 1977) at p. 27
[532] *OLG Karlsruhe*, Urt. v. 21.02.2001 – 2 Ws 213/01, para. 18-20; 23-24.
[533] See, for instance, the judgment of the Federal Social Court of Germany *BSG*, Urt v. 23.02.1960, 9 RV 576/55, at para. 5 (facts), 14, 15, 16.
[534] Showalter, R.C. *Patient Access to Psychiatric Records: A Psychodynamic Perspective*, 4 Med. & Law 351, 353 (1985)
[535] Madden, J.M. *Patient Access to Medical Records in Washington (Comment)*, 57 Wash. L. Rev. 698, 708 (1981)
[536] Nokes, B. G. *Patient's Right of Access Limited to Records of Hospitals Receiving Legislative Appropriations: Doe v. Institute of Living, Inc. (Note)*, 11 Conn. L. Rev. 44, 56-57 (1978)

could inspect hospital records in custody of a mental clinics, even statutes banned it from inspection unless a court order[537].

Purposes for insight: medical records and psychiatric records. In authors recent papers has outlined a number of purposes for which patients desire to inspect their medical records. In a large number of cases, these records are requested as evidence for medical malpractice suits, though there is around a dozen of other purposes, such as divorce proceedings, discovery of the cause of one's demise, recovery of an insurance policy, challenging a will and many others[538]. The insight to psychiatric records could bear the same purposes, but both academicians and court jurisprudence show they may vary. In this section, the author will give examples of academic views concerning the purposes of insight into psychiatric records, and subsequently present a table of several illustrative court decisions, which will display the plaintiffs' justifications for the inspection of psychiatric records. Besides, occasionally plaintiff may not be obliged to substantiate his claim in order to be granted access even to his psychiatric records. For instance, a Ukrainian court has recently upheld plaintiff's claim to insight into asylum records despite he had not stated any actual reasons for it, merely claiming he the access to his psychiatric records is his legitimate interest.[539]

Showalter (1985) determined nine reasons for accessing psychiatric records by psychiatric patients. Let us reckon them up[540]:

1) A wish to understand the malady better (if we reckon up the Decision of the Federal Supreme Court of Germany of 1984, plaintiff desired to investigate on the reasons for which he was confined and treated in a mental asylum nearly twenty years priorly to this action, believing he was placed to the psychiatric hospital in the course of a criminal investigation, unknown to plaintiff[541]);
2) A belief that the hospital personnel has not disclosed all facts and opinions which are contained in the actual psychiatric record. A good example of this statement, though not stringently connected with psychiatric records, is the judgment of *M.G. v. United Kingdom* (2002), adjudicated by the European Court of Human Rights: there, a man desired to inspect his archival records of his youth, when he was in custody of municipal childcare institutions, as well as being temporarily fostered. Despite he was let to inspect a number of his archival

[537] See. e.g. *Bane v. Superintendant of Boston State Hospital*, 350 Mass. 637, at p. 368 (1966) (also reported in: North-Eastern Reporter, Ser. 2, Vol. 216 at p. 111); appeal to courts of federal jurisdiction: Bane v. Spencer, 273 F. Supp. 820, 822 ff. (D. Mass. 1967; Civil Action Nos. 65-627 M; 65-704 M); Bane v. Spencer, 393 F.2d 108, 110 (1st Cir. 1968).
[538] See, for instance, comments and cases cited in Lytvynenko, A.A., *A Right to Access to Medical Records in the Case Law of the Portuguese Courts: Possible Guidelines for future European Court of Human Rights Case Law*, 5.4 Athens Journal of Law 265, 267 (2020) and Anatoliy A. Lytvynenko, *The right of access to patient's health data: a comparative analysis of the case law of the European Court of Human Rights, the European Court of Justice, and the practice of the courts of the United States and some European countrie*s, 20 (33) Legal Horizons 135, 138-139 (2020).
[539] *Markiv district court of Lugansk oblast*, Judgment No. 71481729, 03.01.2018
[540] Showalter (1985), at 354-356
[541] *BGH*, 02.10.1984 - VI ZR 311/82, at page 4-8.

records, he was sure he had not been shown the full amount of them. Taking into account that all his personal records were brought to the Court (meaning the European Court), where the Court inferred that the amount of the records disclosed and their *actual* amount considerably differed, plaintiff was definitely not mistaken to having believed that he was not disclosed all the records, despite the plaintiff had been previously assured by defendant authorities, that he had been supplied with all the existing entries[542]. In the 1988 ruling of the German Supreme Federal Court, an ex-psychiatric patient desired to inquire what the physicians' thoughts concerning him existed[543].

3) Patient's need (or I suppose belief) in maintaining and preserving "a sense of control" in patient-physician relationship. In the late 70s, German land courts held that the inspection of medical-records derives from the covenant of the physician (hospital) and the patient for healthcare[544], as well as deriving from the patient's right to self-determination and dignity[545].
4) Patient's concern about the accuracy of his personal records. As the author will contend further, in real life, the "concerns" of patients, especially psychiatric ones, are not actually, so to say, "gentle" as they appear to be in the wording of medical ethics comments. My attention was brought to a Swedish case, adjudicated by the Stockholm Administrative Court of Appeals, where a woman desired to obtain access to her health records (the judgment text did not express if such were psychiatric or not) and subsequently request the record to be expunged, which allegedly affected her "ability to work", claiming that this information was incorrect. Despite the first instance court upheld her claim, the appellate court found for the Health and Care Inspectorate as defendant[546] as plaintiff had not substantiated her claim properly[547].
5) Belief that ordinary symptoms could be interpreted as a psychiatric disorder.
6) Patient's belief that his malady is not considered to be true or is supposed by physicians to be feigned.
7) The need to prove his recovery or process of recovery.
8) Invoke a course of diagnostics and treatment on basis of his own inspection of health records, or alternatively, blame the hospital staff in negligent care (if it could be called so).

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[542] *MG v United Kindgom*, App. 39393/98, judgment of 29 Sept. 2002, facts & judgment (para.
[543] Bundesgerichtshof, 06.12.1988 – VI ZR 76/88, para. 3, 4-7 (facts).
[544] *AG Weltzar*, 15.08.1978 – 3C 707/78, para. 8-9 and 15; *LG Gottingen*, 16.11.1978 – 2 O 152/78, para. 9-10; 16
[545] See the judgment of the German Federal Supreme Court: *Bundesgerichtshof*, 23.11.1982; VI ZR 222/79, at para. 16.
[546] According to Swedish legislation, namely the Patient Data Act (originally – *Patientdatalagen* 2008:355), 8 kap. §4, the Health and Care Inspectorate (Inspektionen för vård och omsorg in Swedish) is the body which could decide upon whether to expunge the health records. The law anchors a number of situations wherein the deletion of such medical records is permissible (see. expungement of psychiatric records).
[547] Kammaratt Stockholm, 2014-10-16, Fall. No. 2014-2402 (Stockholm Administrative Court of Appeal, Judgment of 16 October, 2014)

9) Cause anger or frustration towards hospital staff[548].

From the side of medical ethics, scholars agreed that many practitioners used to deceive their patients or withhold their medical records in case their maladies were substantially offensive to their health, though the justification was apparent: the disclosure could amplify a patient's emotional distress and aggrieve the malady (which is quite true for psychiatric diseases), that the patient is unable to conceive what would be communicated to him, and that some patients would not want to hear the precise information concerning their maladies[549]. But is that actually true? The general problem of medical ethics, to my view, is that authors do not consider that patients do not merely seek access to their psychiatric records (or even medical records in general) out of sincere curiosity, or, let us say, *spy* (using the words of the Munich Regional Court in its 2008 judgment[550]) on the relative's ailments. But time and the law have significantly changed over the decades (though, as the author will contend in the text later, the aims of the patients to produce medical records did not vary that much a hundred years ago), and thus, in 1984 the Austrian Supreme Court further held that the patients should have a right to inspection of their medical records kept upon the balance of the hospital[551]. The German jurisprudence of the seventies and beyond considerably extended the right of autonomy of the patient and his informational rights. The Higher Land Court of Cologne in its respective 1981 judgment held that it is not correct to presume that non-professionals couldn't read and conceive medical records properly[552]. This statement was affirmed by the Federal Supreme Court of Germany in its 1982 judgment: herein, this court added that even if a layman may not interpret the said medical records, he may employ necessary people seeking professional advice, and thus, such justification to refuse insight to medical records is not valid[553]. In the late 1970s, the Limburg Regional Court (Landsgericht Limburg) ruled to allow a couple to insight into medical data featuring the treatment of their neonatal child, emphasizing that it is the patient's responsibility to contend all the risks of subsequent disclosure[554]. That is, the ethics concerning the disclosure of patient records, being formulated in the mid-to-late 20th century, could not be held to coincide with applicable jurisprudence in full volume. The fact of a multitude of litigation in respect with inspection of ordinary medical records, involving psychiatric records shows that that far not all patients do really fear their diagnosis. Moreover, many ex-patients stringently like to litigate, or they *must* litigate owing

[548] *Showalter* (1985), at p.p. 355-356
[549] See., e.g., Gillon, R. *Telling the truth and medical ethics*, 291 British Med. J. 1556, 1556-1557 (1985); Parrott, J., Strathdee, G., Brown. P., *Patient access to psychiatric records: the patient's view*, 81 Journal of Royal. Soc. Med. 520, 521 (1988)
[550] *OLG Munchen*, Urt v. 09.10.2008 – 1 U 2500/08, para. 34
[551] *Oberster Gerichtshof*, 23.05.1984, 1 Ob. 550/84
[552] *OLG Koln*, 12.11.1981, 7U 96/81, para. 24-25
[553] *BGH*, 23.11.1982; VI ZR 222/79, para. 17-27; 30
[554] See *LG Limburg*, 17.01.1979 – 3 S 244/78, para. 7-8; 10 and 13; this judgment was briefly commented upon in one of my previous papers, see Lytvynenko A.A., *A Right of Access to Medical Records: The Contemporary Case Law of the European Court of Human Rights and the Jurisprudence of Germany*, 6.1. Athens Journal of Law 103 at p. 113 (2020)

to various circumstance[555], and the necessity to obtain the desired medical records (as well as psychiatric ones) may spread far beyond the contended assumptions.

Herein, the author presents a table of examples in jurisprudence reflecting the aims of psychiatric patients, their relatives, legal representatives etc. to inspect psychiatric records:

Year	Case name	Court, country	Aim of inspection/production	Judgment
1868	Inhabitants of Townsend v. Inhabitants of Pepperell, 99 Mass. 40 (1868)	Supreme Judicial Court of Massachusetts	Proof of insanity (the dispute concerning the determination of settlement of an elderly insane pauper)	Evidence is found to be admissible.[556]
1901	Hempton v. State, 111 Wis. 127, 86 N.W. 596 (1901)	Supreme Court of Wisconsin, United States	Psychiatric records of defendant, who committed a murder of his wife were produced to raise an insanity defense[557]	Psychiatric reports were found to be admissible, defendant was found guilty of murder of the first degree.
1913	Massachusetts Mut. Life Ins. Co. V. Board of Trustees of..., 178 Mich. 193, 144 N.W. 538 (1913)	Supreme Court of Michigan, United States	Production of evidence to revoke life insurance contracts in a lawsuit against the heirs of the deceased patient[558]	Inspection denied as such information was considered as privileged communications[559].
1976	In Re Application of J.C.G.	New Jersey Superior Court, Appellate Division, New Jersey, United States	A mother of a mentally ill 13-year-old daughter, who had applied and obtained a court order for her daughter's civil commitment in a mental asylum, desired to inspect through her counsel, inter alia, the mental asylum records in order to ascertain herself that the treatment her	The Court ruled against granting the inspection of the child's psychiatric records, as the ad litem guardian was stringently against it, and plaintiff did not prove that it would anyhow benefit the patient concerned [561](see also the rules governing the disclosure of confidential information in cases

[555] For instance, if we accord *Morris v. Hoester*, the plaintiff has mentioned that he contacted over 200 employers so as to obtain a working position.
[556] *Inhabitants of Townsend v. Inhabitants of Pepperell*, 99 Mass. 40, 43-46 (1868)
[557] *Hempton v. State*, 111 Wis. 127, 86 N.W. 596, 598 (1901).
[558] *Massachusetts Mutual Life Insurance Co. v. Board of Trustees of...*, 178 Mich. 193, 195; 198-202; 144 N.W. 538, 540-541 (1913)
[559] *Ibid*, p. 540-541
[561] *Ibid*, at 586-588

			daughter received, was proper[560].	like the one that was discussed, N.J.S.A. 30:4-24:3).
1984	BGH, 02.10.1984 - VI ZR 311/82	Federal Supreme Court of Germany	Plaintiff was treated in a mental asylum nearly twenty years before the suit was brought. He never knew for what reason he was kept there, believing he was kept in custody owing to some unspecified criminal investigations. He desired to insight into his psychiatric records. By the time of the lawsuit, plaintiff was mentally adequate for over a decade.	The court found for plaintiff, emphasizing that any restriction of access to medical records should be justified and grounded upon existing facts and conclusions[562].
1988	BGH, 06.12.1988 - VI ZR 76/88	Federal Supreme Court of Germany	Plaintiff desired to investigate what the treating physicians actually thought concerning his health condition.	The Court decided to allow plaintiff to insight the psychiatric records in the presence of a physician, who could explain the meaning of the records to him[563].
1989	BverwG, 3 C 4/86	Federal Administrative Court of Germany	The exact aim of inspecting the records was not stated, but since the plaintiff engaged a lawyer to inspect the records, it could be presumed he prepared to commence a lawsuit.	For plaintiff. The Court found that there was no objective obstacles from granting him access. Plaintiff's behavior did not demonstrate dangerous tendencies (e.g. suicide attempts)
1995	LG Saarbrucken, 16 S 1/93	Saarbrucken Land Court, Germany	To inspect medical records which the plaintiff necessitated for employment and concluding an insurance contract	Claim denied, as the plaintiff had already been acquainted with the records of his diagnosis, treatment and

[560] *In Re Application of J.C.G.*, 144 N.J. Super. 579, 582 (1976)
[562] *Bundesgerichtshof*, 02.10.1984 - VI ZR 311/82, p. 2-4; 5-8 (original court report).
[563] *Bundesgerichtshof*, 06.12.1988 - VI ZR 76/88, para. 4-7, 9-10.

				medical examinations[564].
1996	M. gegen Psychiatrische Klinik Schlössli Oetwil a.S. und Regierungsrat des Kantons Zürich (staatsrechtliche Beschwerde), BGE 122 I 153	Federal Tribunal, Switzerland	Plaintiff requested the medical records concerning his stays at Psychiatrische Klinik Schlössli in the 1980s. The court report does not disclose his aims for this, except for "The person concerned has an interest in ascertaining the truth of the entry" (BGE 122 I 153, at 162), though in may not be the actual aim of plaintiff. Plaintiff was granted access to a part of them, but the information and statements third parties was banned from his inspection[565].	Assessing the private interests of plaintiff and the necessity to remain the non-hospital staff statement confidential, the Court concluded that the restriction was justifiable. The Court, however, held, that the psychiatric patients also have a right to inspect their medical records. The Court came to a conclusion that plaintiff had received enough records to receive a comprehensive picture of the period of life he was interested in[566].
1998	BVerfGE – Beschluss vom 16 Sep. 1998, 1 BvR 1130/98	Constitutional Court of Germany	To inspect medical records in order to bring a lawsuit	Constitutional complaint not accepted, it did not rise constitution-related issues, which had not been covered by the Bundesgerichthof's case law[567].
2003	VG Dusseldorf, Urt. v. 01.10.2003 - 7 K 1821/01	Administrative court of Dusseldorf, Germany	Production of evidence for a trial	Access denied owing to previous offensive behavior of plaintiff
2016	Christelle / Jean et S.A. A.G., Cour de Cassation (Belge), 1re Chambre, 14 mars. 2016,	Court of Cassation, Belgium	Son of plaintiff, who was detained and thereafter treated on an outpatient basis in a psychiatric hospital (after having stroke his mother with a knife), died owing an	The Court did not grant access to the medical record finding that it was against the will of the patient, which was confirmed by medical reports (see

[564] *LG Saarbrucken*, 20.09.1995 – 16 S 1/93, para. 7-9
[565] *M. gegen Psychiatrische Klinik Schlössli Oetwil a.S. und Regierungsrat des Kantons Zürich (staatsrechtliche Beschwerde)*, 19.06.1996, BGE 122 I 153, 155-156; 161-162
[566] *Ibid*, p. 164-167
[567] *BVerfGE* – Beschluss vom 16 Sep. 1998, 1 BvR 1130/98, II (para. 6-8)

	JLMB 2016/27 p. 1282		unknown reason. The mother attempted to define his precise cause of death.	description in the section "Inspection by third parties in relation to a deceased patient".

History of the issue. Psychiatric patient data, as the other medical records historically were not of free for public inspection. There were also not held to be admissible as evidence in some court decisions in the United States of the 19th century[568], though other courts of the said county did account them as such, and found that the evidence obtained from psychiatric asylum books to be admissible[569]. As time went on, some American courts have recognized medical records to be "public records", though not available to access to general public[570] (justification of designating the medical records as "public records" could be substantially different in the view of the courts[571]). In such states, as Austria, medical record keeping practices have started from 17th century, being governed by internal hospital regulations[572]. At the same time, those days, these medical records were property of the hospitals or physicians, and their inspection was not free for the patients, but only for hospital administration, hospital staff and for the sanitary officers[573]. *Gründling* (2011) reports a sophisticated situation dealing with a right to inspection of medical records in an unnamed city in Austria occurring in 1888: a lawyer attempted to inspect medical records of his client who was to commence an action for damages, but was refused to have them produced by the administration of the hospital. There is no information of whether this lawyer attempted to apply to the court to produce the medical records by a subpoena: the conjectural court decision would be stunning to behold and to comment[574]. Forgery of medical certificates was well-known in French case law of 19th and early 20th century[575]. False declarations in respect with birth certificates where a concubine was designated defendant's wife, however, were not found to be strictly a forgery in the earlier (pre-Napoleon Code) French

[568] *State v. Pegels*, 92 Mo. 300, 4 S. W. 931, 934 (1887)
[569] *Inhabitants of Townsend* v. *Inhabitants* of *Pepperell*, 99 Mass. 40, 43-45 (1868); *Hempton v. State*, 111 Wis. 127, 86 N.W. 596, 598 (1901)
[570] *Morris v. Hoester*, 377 S.W. 2d 841, 844 (Tex. Civ. App. 1964)
[571] See, for instance, *Oliver v. Harborview Medical Center*, 94 Wash. 2d. 559, 565-566, 618 P. 2d 76, at p. 80-81 (1980) [Pacific Reporter, vol.618, 2nd series]. Concerning the fact that the medical records contain a lot of various confidential data relating to the patient, the wording of the Supreme Court of Washington was the following: <*...Without question the medical record of a patient at a public hospital contains personal data. It also contains information of a more public nature, however, i. e., administration of health care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs, all of which are carried out or relate to the performance of a governmental or proprietary function. The fact that some personal or private data is contained in the patient's record does not impress thereon the character of a nonpublic document...*> [Pacific Reporter, vol. 618, 2nd series, at p. 81]. In this judgment, the Court found that medical records should be recognized as "public records" under the Public Disclosure Act of 1972.
[572] Gründling, J.N. (2011). „Die Dokumentationspflicht und das Einsichtsrecht des Patienten in die Krankengeschichte" (dissertation) University of Vienna, Faculty of Law, at p. 30-32.
[573] *Ibid*, at p. 34-35
[574] *Ibid*, at p. 35
[575] *Min. Publ*. c. *Doumayrou*, Cour de Cass., Cham. crim. 6 Mai 1836, Dall. Per. 1837 I 246.

jurisprudence[576], but in fact, the offsprings suffered a loss of right of heritage not being able to prove the fact of his forbearer's marriage, which was actually not an uncommon subject of civil litigation between the offspring and collaterals those days[577]. Curious cases have occurred in respect with *separation de corps* proceedings. In one of such cases brought before the Court of Cassation in 1892, a young woman filed a separation de corps action blaming her husband for not having sexual intercourse with her at all. She produced a medical certificate approving that she was virgin after having cohabited with defendant for several years. The fact of her virginity was not disputable, but the Court of Cassation did not consider it as a valid reason for legal separation, augmenting that plaintiff's husband had never acted impiously or humiliate her[578]. In fact, similar judgments were not rare for French jurisprudence those days[579]. Nevertheless, the mores of society could differ from one jurisdiction to another. For instance, the Oberlandesgericht of Hamburg in a 1901 judgment was absolutely firm to conclude that sexual intercourse is an inalienable part of marital life[580].

Some instances featuring a revelation of psychiatric data could be found in older French jurisprudence. In one of the author's recent treatises relating to the history of medical secrecy, the author has commented upon two similar cases[581], which we will briefly discuss hereafter. In 1888, a director of a mental asylum in Besancon, France published several hundred specimen of a pamphlet describing the history of illness of his ex-patient, whose name was not directly mentioned, but she could have been identified, since her husband's name was clearly mentioned. The Court of Appeals of Besancon said that a publication of the history of illness does not violate medical confidentiality, unless the patient is identifiable. The fact that the said descriptions were taken from previously prepared medical records, did not actually change the result – he was fined for medical confidentiality violation[582]. Another outstanding case of the mid 1890s, *Consul c. Pitres,* featured a lawsuit of the aunt of a deceased young woman Pauline Consul, against a famous psychiatrist Albert Pitres for having included the medical history of her niece into his book on psychiatry, which featured an

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[576] For instance, accord: *Requisitoire de M. le proc-gen-imp*., Cour de Cass., Sec. reunies., 1 et 6er pluviose; 2 germinal an XIII [21 et 26 janv.; 23 mars.], 1804/1805 Sirey I 257 [Tome V], p. 263-266; *Huret* (Huret c. Min. Publ), Cour de Cass., Sect. crim., 18 brumaire an XII [9 novembre 1803], Jour. des. Aud. an XII, 135, 135-136; Dall. Per. 1824-30 T8, 336; Sirey 1791-an XII (1803), 883; Journal du Pal. 1837-1842, T.3, 401, Landlade, Repertoire, Tome III (1823), viz. Naissance [Acte du], p. 659.

[577] *Le tuteur de Joseph-Antoine Meynard c. La veuve Meynard*, Cour de Cass., Sec. civ, 2 Mars 1803, Sirey 1803 I 319, 319-320

[578] *Dame E. c. E.*, Cour de. Cass., 20 decembre 1892, Dall. Per. 1893 I 149, 149-150

[579] *Dame L. c. L.*, Cour d'Appel de Grenoble, 5 mai 1870, Sirey 1871 II 35, 36. Here, for instance, the Grenoble Court of Appeals did not find that the complete absense of sexual intercourse within spouses to be justifiable for separation de corps. Upon the findings of the trial court, the couple has lived in harmony for several years and the husband always behaved good to his wife. See also: *Dame D. c. C. son mari*, Cour de Cass., 22 fevrier 1899, Dall. Per. 1899 I 244

[580] *Ehefrau Anna Th. M. B geboren N. in Hamburg gegen ihren Ehemann den Comptoirboten B.H.B in Hamburg*, OLG Hamburg I v 14 Juni 1901, Hanseatische Gerichtszeitung Bd. 22 (1901) S. 269, 270–271.

[581] Lytvynenko, A.A., *Data privacy in the sphere of medical confidentiality: the historical and contemporary case-law of the United States, the European Court of Human Rights and selected Continental Europe states*, 83 Actual Problems of State and Law 100, 109-110 (2020)

[582] *B... . c. X...* ., Cour d'Appel de Besancon, 22 mai 1888, Sirey 1888 II 128 (see full comment of the case at Lytvynenko (2020), at p. 109

extensive description of her symptoms and treatment[583], as well as a photograph of her[584]. She blamed defendant in a medical confidentiality breach, which is criminally punishable in France (those days, under Art. 378 of the Napoleon Penal Code). However, the courts rejected her claim. Firstly, upon the applicable legislation and case law, only a living person could commence a lawsuit against the physician for breach of medical confidentiality, the relatives of a deceased could bring a civil action for defamation of the dead with a burden of proof that the publication has caused damages to her surviving relatives, or could cause such in the future. Moreover, Pitres proposed to exclude Pauline's photograph from the said book. Thus, the plaintiff was unable to prove damages and lost the lawsuit[585]. The Cassational Court affirmed the judgment of the court of Bordeaux. Moreover, upon the findings of this court, the young woman was pleased with writings of Albert Pitres, and consented to the publication of these materials, including the photograph[586].

The issue of medical and psychiatric records production in common law world is quite complicated. The complexity of this issue is claimed by fact that there is very little (at least as supposed by *DeWitt* (1953)[587]) case law authority concerning actions against physicians or hospitals for disclosing the medical record content of patients. It is not however definitely known that it is actually so. For instance, *Shuman* (1985), one of the finest authors dealing with medical secrecy and its origination in common law to upon the view of the author of the promotional work, contended, inter alia, that there could have been more judgments on the subject from the earlier days of common law, though undiscovered[588].Medical records of a third party (not even speaking about litigants) have been known to be used as evidence in civil litigation: in a dispute between the remarried widow and the trustees of the deceased husband concerning the school education and place of residence of her three minor daughters, the woman brought in the medical reports concerning the vulnerable health of

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[583] However, in sharp contrast to the case of *Watelet*, he did not reveal her real personal details. The deceased niece of the plaintiff was referred to as "Pauline C.". In the trial of Watelet, a doctor was fined for publishing a letter to a news magazine La Matin describing the ailment history and death of the painter Jules Bastien Lepage (1848-1884), who had died of cancer. See:

[584] Pitres, A. *Leçons cliniques sur l'hystérie et l'hypnotisme. Faites à l'Hôpital Saint-André de Bordeaux, Tome Second, Paris*, (O. Doin, Editeur), 1891, p. 321-328; 479-480

[585] Cour d'Appel de Bordeaux, 5 juillet 1893, Dall. Per. 1894 II 177, at p. 177-178

[586] See judgment of the Cassational Court of France: *Consul c. Pitres*, 9 avril 1895, Recueil Sirey 1896 I 81, at p. 84. For a more detailed comment on Consul c. Pitres, see. Lytvynenko (2020), at p. 109-110

[587] DeWitt, C. Medical Ethics and the Law: The Conflict between Dual Allegiances, 5 W. Res. L. Rev. 5, 20 (1953)

[588] See Shuman, D.W., *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 Sw L.J. 661, 671-672 (1985). "*This occurrence* [meaning the absense of case-law authority on medical privilege, roughly speaking, the right not to testify in court concerning the facts you have been deposited in the course of your profession i.e. doctor, which are confidential] – he writes, *might be explained in several ways. First, because of the existing state of medical science, physicians may not have been a reliable source of evidence. Second, attorneys may have assumed that physicians should not or could not be compelled to disclose confidential patient communications, and thus may not have requested such information. Third, attorneys may have assumed that physicians could be compelled to disclose confidential communications, and thus may not have objected to requests for such disclosure. Fourth, courts may have addressed this question prior to 1776* [date of Duchess of Kingston's trial] *in decisions that remain undiscovered*". Later he contended that it was not actually true, citing a couple of curious trials on witchcraft. He cited several books on the outstanding historical trials, upon the content of which I may assume that he did not err that medical testimony had been received by the English courts before. Some of these could be found here: Birkenhead, F.E., Famous Trials of History, Garden City (New York), Garden City Publishing Co., Inc.; The Star Series, 1926, p. 95-101.

the daughters confirming their health could be damaged, had they been removed. The Court of Sessions requested Doctor *John Abercrombie*, a celebrated Scottish surgeon, to visit the minors, consult the family physicians and thereafter submit a report. Upon the report, the elder sister truly necessitated constant care from her mother. The Court found that it would be not justified to separate the two other minors from the elder sister and the mother, dismissing the claim[589]. The duty to preserve confidentiality of patient-physician communications has been affirmed in the splendid decision of *AB v. CD (Whyte v. Smith)* sixteen years after *Morton v. Thorburn* discussed above, though it recognized that this duty may surrender for the needs of justice – the Court of Sessions, however, did not clarify in which instances it would be done so[590] – later on, Shuman claimed that the approach to confidentiality of such communications between patients and the physicians is utilitarian[591]: in short, it means it would be for the appreciation of the judge to decide whether the medical facts obtained in the course of the physician's exercise of his profession could be disclosed as evidence. *Shuman* (1985) did not speak about extrajudicial revelations of medical secrecy akin to *Consul* or *AB v. CD*.

Inspection by the third parties (heirs/relatives/dependents) in relation of a deceased patient. The relatives of a deceased patient may also request to inspect his medical records. Primarily, they strive to inspect these medical records in order to define the cause of death, determine if it was caused by the negligence of the hospital staff, or produce evidence that the patient was treated negligently. Occasionally, litigation between the heirs or relatives and the hospital may derive from an alleged fraud in issuing the death certificate and the plaintiffs seek to obtain the treatment records in order to define the actual diagnosis and the course of treatment[592].

Claims for producing medical records of a deceased patient could be spotted in the jurisprudence of many European countries. In the same way, medical records are requested by the relatives or heirs of a deceased person who died in a mental asylum. In many European countries, upon legislation and jurisprudence a patient may dissent to disclosing medical data regarding his state of health and treatment – in express or presumed form; at the same time, it could be to the contrary: a patient may sign a document to relieve treating personnel from confidentiality that would firmly enable them to testify on his state of health in a court[593]. Several rules have been established by courts in respect with the right of heirs to inspect the medical records of a deceased patient in Germany:

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[589] *Morton v. Thorburn*, Court of Session, Inner House, 7 March 1835, (1835) 13 S. 640, 641

[590] *AB v. CD*, Court of Session [Inner House], 1st Division, 13 Dec. 1851, (1851) 14 D. 177 at p. 179-180 (Case No. 46), as *Whyte v. Smith*, 24 S.C. 78, 79 (1851)

[591] *Shuman* (1985), at p. 674

[592] See judgment of the Bucharest Court of Appeals: *TP-D. & T.I. c. Institutul Național de Boli Infecțioase Prof. Matei Balș*, Curtea de Apel București, Decizia nr. 5234/2014, Secția A VIII-A C. Administrativ și Fisca, Dosarul nr. 1943/2/2014, 20.06.2014.

[593] See. *Borgarting lagmannsrett*, 2020-07-17, LB-2020-96569 (No. 20-096569ASK-BORG / 04) (Borgarting Court of Appeals, judgment of 17 July 2020).

1. Medical confidentiality concerns are not itself a justification to deny access to the deceased person's medical records. It has to be reasoned[594].
2. The physician's obligation to maintain confidentiality does not cease after the patient's death[595].
3. The right to inspection of medical records, upon the wording of the Federal Supreme Court is an ancillary claim arising from the treatment contract, and it is not "fully highly personal" not to be transferred to other persons, regardless of the fact the patient concerned is living or has deceased[596].
4. The heir's (or other related people) right to inspect medical records derives from an express or presumed consent of the patient while living[597].
5. The heirs' (or other related people) interest has to be substantiated[598].
6. The hospital staff or physician may prevent the insight into medical records if such was the will of the patient while he was still living[599].
7. The desire of the patient not to know the unfavorable prognosis of their malady usually does not survive his demise[600].
8. In case the third parties request to produce medical records of a deceased patient to commence a malpractice suit, it is not justifiable for the doctor to deny insight if he has doubts that the prospective plaintiff will assert the claim for damages[601]. If a patient has died in a psychiatric asylum, and the fact that the prosecutor's office has concluded investigative proceedings regarding his death due to lack of evidence of third-party negligence, it may not be regarded as a justification to deny access to his health records, as the next of kin may file a criminal complaint in the future again. Even if no penally punishable negligence proof is established, plaintiff could also file a civil action for damages sustained for pain and suffering ("*Schmerzengeldanspruch*", as it is called in German)[602].
9. In modern case law, the courts find that the wish of the patient to maintain confidentiality is not a rule, but rather an exception[603].
10. The patient's wish to maintain confidentiality necessitates to be founded upon firm evidence. For example, the Higher Regional Court of Munich in its 2008 judgment ruled

[594] *Bundesgerichtshof*, 31.05.1983 - VI ZR 259/81, para. 25
[595] *AG Magdeburg*, Urt. v. 19.11.2008 – 180 C 2825/07, para. 29
[596] *Bundesgerichtshof*, 31.05.1983 - VI ZR 259/81, para. 11
[597] *Bundesgerichtshof*, 31.05.1983 - VI ZR 259/81, para. 28; *OLG Munchen*, Urt. v. 09.10.2008 – 1 U 2500/08, para. 48
[598] *Bundesgerichtshof*, 31.05.1983 - VI ZR 259/81, para. 29-30;
[599] *Ibid*, para. 18-22
[600] *Ibid*, para. 23
[601] *OLG Munchen*, Urt v. 09.10.2008 – 1 U 2500/08, para. 46
[602] *VG Freiburg*, Urt. v. 29.10.2015 – 6 K 2245/14, para. 28-29
[603] *Ibid*, para. 50

that the mere fact that the patient has distanced himself from his family during the last period of his lifetime, as well as did not bequeath them property did not serve as a justification to conclude that he did not wish them to inspect their medical records[604]. Moreover, upon the findings of the court, the fact of his distancing from the family was not considered to be actually true[605]. What is interesting, in a 2015 decision of the Administrative Court of Freiburg, a psychiatric patient, who committed a suicide at a mental asylum and repeatedly acted to distance himself from his mother, the court nevertheless held that the presumed will of the patient would stand for the clarification of what had happened to him[606]. Therefore, it could not be ultimately assumed that the mere fact of distancing from the future heirs, or relatives, dependents etc., could be considered as a presumption that the patient would choose to maintain the confidentiality of his medical record. However, similar assumptions are decided by the court individually and may considerably vary from one to another jurisdiction (i.e., see *Christelle* below).

11. The right of inspection by legal entities, such as insurance companies may exist, but it derives from public law regulations, which clearly provide such right[607].

In Belgium, upon section 9 of the Patients Right Act of 2002, the relatives of a deceased patient could also request his medical records for various purposes, but the insight may also be denied upon an express wish of the patient concerned. The same applies to psychiatric records, which is already virtual in jurisprudence. In the decision of the Cassational Court of 2016, plaintiff was not granted access into her son's medical record, who was a psychiatric patient and continued rehabilitation at the time of his demise. The facts of this judgment were as follows: one Florent, the son of plaintiff, attacked and stabbed his mother with a knife in a state of delusion. Luckily, she survived. The man was put into a psychiatric asylum in Bertrix. In early 2009, Florent was conditionally released under the obligation to live in a retirement house «Le Manoir» in Izel (Chiny, Belgium) as well as being constantly supervised by a physician (Dr. Jean) and being prohibited to meet his mother. He continued to visit the mental asylum as an outpatient and was subsequently supervised by the same physician. In early 2010, Florent was hospitalized owing to his epileptic seizures and died within a few days. The burial was conducted by the father of the decedent, of which the mother was notified several days after. The woman desired to know the cause of his death and subsequently requested Dr. Jean through an intermediary physician to communicate a copy of the treatment documents. Dr. Jean wrote her a letter where he refused to give out the dossier on grounds of the decedent's plea not to give out the medical records to his mother. Before the Cassational Court,

[604] *Ibid*, para. 55-56
[605] *Ibid*, at para. 57
[606] *VG Freiburg*, Urt. v. 29.10.2015 – 6 K 2245/14, para. 31.
[607] *AG Magdeburg*, Urt. v. 19.11.2008 – 180 C 2825/07, para. 42-48

she contended that her right to inspect medical records of her son were enshrined by the Patient's Right Act of 2002, Section 9 (4), upon which the third-party access, if justified and not directly prohibited by the patient concerned, is allowed. Defendant Dr. Jean claimed that the medical records belonged to the asylum, not to himself, maintaining that the decedent expressly opposed such disclosure. At the same time, Florent was eager to speak to his father, being convincingly persuaded to terminate all contacts with the plaintiff, which was confirmed by other hospital staff. The same was stated by the decedent before the Social Defense Commission in 2008 and 2009 – in general, decedent had repeatedly expressed, both orally and in writing, to suppress any contacts with the plaintiff. The court said, that «*To decide otherwise [to grant her access] would be to annihilate the patient's will and would be contrary to the intention of the legislature to give the patient control over the fate of the medical data after his death*». Thus, the court dismissed her claim[608].

Conclusions.

The given chapter provided a research on a complicated and sensitive aspect of an insight into medical records, namely the medical records of psychiatric patients. Despite the litigation concerning psychiatric records is less frequent than of ordinary ones, it concerns a wide variety of foundations for the legal claim, and most of them are far from being made out of mere curiosity (as the German case law shows, many plaintiffs needed their psychiatric records as evidence for litigation). The nature of psychiatric records, as a very sensitive one, was outlined by the courts decades ago, as the potential harm to a psychiatric asylum patient, even the one who has been an inpatient long ago, could be hardly predictable. The case law also shows that courts are not reluctant to recognize that even psychiatric patients have a right of insight to these medical records, but their amount should be considered upon a case-by-case basis, that is, each case is unique and individual for the court's assessment. A firm body of case law regarding psychiatric records could be found in Germany, where the Federal Supreme Court has delivered a number of judgments since 1980s, not even mentioning the lower courts. An interesting elaboration was found in the case law of Belgium, where the Court of Cassation adjudicated the case of Christelle (2016), having coined a number of principles, upon which a third-party access could be granted, or reversely denied. All the aforesaid testifies that access to psychiatric records is a distinct segment in medical law, which demands extensive research and scholarship.

[608] Christelle / Jean et S.A. A.G., Cour de Cassation (Belge), 1re Chambre, 14 mars. 2016, JLMB 2016/27 p. 1282 (at p. 1283-1286)

3.3. Right to anonymous childbirth

"The right to an anonymous childbirth" ("l'accouchement sous le secret") is a French-originating concept, being on the edge of civil law, family law and medical law, describing the right of biological parents to remain anonymous, provided that their child, being adopted, would either never learn the identity of his biological parents, or learns it after a long period of time. It is likely to be presumed, that such concept would also mean that the adoptee would be everlastly deprived of hereditary rights, as only a legitimate child could claim them[609]. Such practice, according to to the ECtHR in the case of *Odievre v. France* (2003), dates back to the 17th century (i.e. *Ancien Regime*), but the only survived cases date back to the first half of the 19th. Thus, in the early 1830s, A. Trebuchet, highlighting a number of issues concerning medical secrecy, suggests that sooner or later, the lawyers and courts will have to face the following situation: should a doctor provide information about the child's biological parents? As noted above, he was inclined to believe that he should[610]. However, French courts, as it turned out, did not support his position, thought the Belgian courts accepted it. The fact is that according to Articles 56-57 of the French Civil Code (adopted 1810), the doctor who gave birth had to notify the city register of the birth of a child with two witnesses within three days, providing a number of personal data and information about the parents, including their names , place of residence and profession[611]. Interestingly, a similar practice existed before the adoption of the "Napoleonic Code"[612]. In one such early case, the Royal Court of Dijon[613] imposed a fine of 15 francs on a doctor who refused to provide data to the mother of a newborn child in the city register[614]. The excerpt from the Dijon court decision does not explain on what grounds the defendant decided not to provide data, but the reason for this is prosaic: in those days many children were born in a concubinage, or in general from an “unknown” father who was not in a legitimate or de-facto relationship with the child’s mother at the time of the child’s birth; therefore, a decade later, the Angers Court of Appeal, in justifying its position on the legitimacy of "concealment" of the parents' data in the Chedanne’s case, noted that the mother's personal data, if such were put down into the

[609] See, for instance, *Requisitoire de M. le proc-gen-imp*., Cour de Cass., Sec. reunies., 1 et 6er pluviose; 2 germinal an XIII[21 et 26 janv.; 23 mars.], 1804/1805 Sirey I 257 [Tome V], p. 263–266; *Huret* (*Huret c. Min. Publ*), Cour de Cass., Sect. crim., 18 brumaire an XII [9 novembre 1803], Jour. des. Aud. an XII, 135, 135–136; Dall. Per. 1824-30 T8, 336; Sirey 1791-an XII (1803), 883; Journal du Pal. 1837-1842, T.3, 401, *Landlade*, Repertoire, Tome III (1823), viz. *Naissance* [Acte du], p. 659; *Le tuteur de Joseph-Antoine Meynard c. La veuve Meynard* , Cour de Cass., Sec. civ, 2 Mars 1803, Sirey 1803 I 319, 319–320

[610] Trebuchet, A., *Jurisprudence de la medicine, de la chirurgie et de la pharmacie en France, Paris*, Librairie de L’Academie Royale de Medecine, Londres, Meme Maison 219 Regent Street, 1834, p. 277-284

[611] See. *Romieux*, Cour. de Cass, Cham. Crim., 1 juin 1844, Sirey 1844 I 670, 671

[612] See the explanation of the Court of Cassation in *Coron c. Testefort-Abel, dit Hamelin*, Cour de Cass., 28 mai. 1810, Sirey 1810 I 193, 193-196, 201-202

[613] Cour Royale (in original) was the name of French appellate courts in the mid-19th century. This name was not used in the court reports omnipresently.

[614] *Clertau c. Ministere Public*, Cour de Royale Dijon, 14 aout 1840, 1843 Jour. du. Pal. 737, 737-738

register, could “compromise the reputation” if the child was born out of wedlock[615]; the same position was applied by the French Court of Cassation in the case of *Mallet* (1843), arguing that such disclosures could greatly "*harm the honor and future of families*."[616] Thus, the position of the Belgian Court of Cassation in the Bessems case (see the description of the case below) makes it clear that the main reason for the mother's or both parents' desire to remain anonymous, was the fact that the parents were unmarried at the time of childbirth, and thus the child was illegitimate[617]. Two years earlier, the *Ghent Court of Appeals* (1853) claimed that a child whose mother's personal information a doctor was trying to conceal (for which criminal proceedings had been instituted against him), was in fact illegitimate[618].

Articles 55-57 of the French Civil Code required 2 persons to be present at the birth of a child (seemingly a typical heritage of Ancient Roman Law), within three days to report this fact to the city register sanction for failure to comply with the instructions was a fine of up to 300 francs, or imprisonment for up to six months under Art. 346 of the Criminal Code of France. However, French courts found that there may be an exemption to the rule. In the first case of the Court of Cassation of France, the trial of Mallet (1843), the accused physician refused to hand over the data of the child's mother to the birth register, claiming that he had received this information "in the course of his profession" and therefore had no right to disclose it. Despite the institution of criminal proceedings against him, the doctor managed to win over the case to the prosecutor's office (which twice appealed against his acquittal, finally lodging an appeal in cassation to the Court of Cassation). The Court of Cassation said, that the doctor had the right not to disclose information about the mother, while providing any other necessary information. The basis for the Court’s decision was that the "medical secret" is "absolute" (or rather, was such a character in French law until the early 20th century), therefore, the Court ruled that the doctor had the right *not* to disclose this information[619]. A similar decision was made by the French Court of Cassation in the case of Romieux on August 1, 1844[620] – this case has been repeatedly cited by researchers as evidence of the historical basis for the existence of the "right to anonymous childbirth"[621] [27, p. 45], although in view of the author's practice of courts in the case of *Romieux*, and the facts cited by *Muteau* (1870), it is obvious that this case is not the first. Interestingly, *Luc Passion* (1983), does not mention any case law in his study of the problem of anonymous childbirth[622]. This approach underwent a number of changes during the 19th century, and flowed into its modern form – the law of 1904 enshrined the right of parents to remain anonymous

[615] *Chedanne*, Cour d’Appel de Angers, 18 novembre 1850, Dall. Per. 1851 II 20
[616] *Mallet*, Cour de Cass., Cham. Crim, 16 septembre 1843, Sirey 1843 I 915, 916
[617] *Bessems c. Le Ministere Public*, Cass. 20 juillet 1855, Pas. 1855 I 303, 305-307
[618] *Min. Publ. c. Lecleuse*, Cour d’Appel de Gand, BJ 1853.1293, 1294 [Belgique Judiciaire, Ann. 1853]
[619] *Mallet*, Cour de Cass., Cham. Crim, 16 septembre 1843, Sirey 1843 I 915, 916; 919.
[620] *Romieux*, Cour. de cass, Cham. Crim., 1 juin 1844, Sirey 1844 I 670, 671
[621] Iacub, M., Naître sous X, Savoirs et clinique 2004/1 (No. 4), p. 45
[622] Passion, L. *Législation et prophylaxie de l'abandon à Paris au début du XXème siècle*, Histoire, économie & société (Année 1983), p.p. 478-479

when the biological child was adopted: a prototype, which was developed in the two aforesaid judgments of the French Court of Cassation, as well as several lower courts judgments in the middle of the 19th century enshrined the right of parents to remain anonymous. Interestingly, court practice notes on the issue of the right to anonymous childbirth cite very interesting cases in which a mother, long after the birth of her child (if the cild was born out of wedlock), nevertheless declared her true identity[623].

However, the "French" approach did not find application in Belgian law, moreover, it was challenged by the Belgian Court of Cassation: its practice, fortunately, has "survived" to this day. In the case of Paul Bessems, the defendant, a doctor, was the subject of criminal proceedings for failing to provide information to the city register of the child's mother in the municipality of Breham, Antwerp. The accused motivated his actions by medical secrecy (then – on the basis of Article 378 of the Criminal Code of Belgium, later, the disclosure of professional secrecy was punishable under Art. 458 of the Belgian Criminal Code); if it worked for the court of first instance, the decision was overturned on appeal, and the defendant was fined 16 francs – therefore, the doctor filed an appeal in cassation. The Cassational Court of Belgium, in its decision, in fact voiced what the European Court of Human Rights stated 160 years later in the case of *Godelli v. Italy* (2012)[624]: Two interests should be considered: the mother's interest, who would prefer to "hide the guilt", and the child's interest, who, due to the absence of a specified person of the mother in the certificate, may lose some of his rights (including the right to inheritance, which was obviously the most valuable right in the 19th century, and perhaps still is at present day). The Court denoted, that without proper identification of the mother, so the birth certificate is incomplete, and ruled that it was inadmissible to carry out actual segregation of newborns on the basis of whether the child was born in wedlock or not, to which the judge said: "[In that case] it will be enough to write [in the birth certificate] - a child, a boy, born in Brussels ?! " The Belgian Court of Cassation has ruled, that regardless of whether the child was born in wedlock or not, the parents' details must be entered in the birth register. The court ruled that the submission of the child's parents' names was the responsibility of the doctor and could not be disregarded, citing his duty to maintain secrecy. The court noted that medical secrecy could not be used to cover "the criminal intentions of parents to conceal the origin of [their child] ...". The Belgian Court of Cassation upheld the decision of the Antwerp Court of Appeal[625].

By the way, the case of the Belgian Cassational Court was not the first on this issue in this country: in 1853, the Court of Appeal of Ghent in a similar case declared the inadmissibility of abuse of medical secrecy, and fined a doctor who tried to conceal the mother's identity in the birth

[623] *Louise Sargine c. Lev. et. consorts*, Cour d'Appel de Paris, 4 fevrier 1867, Sirey 1867 II 97
[624] *Godelli v. Italy*, [2012] E.C.H.R. 374, para. 50; 54-56
[625] *Bessems c. Le Ministere Public*, Cass. 20 juillet 1855, Pas. 1855 I 303, 305-307; 308-309

certificate[626]. Thus, it can be ascertained, that there was a strong position against the "right to anonymous childbirth" in Belgian law even in the 19th century. Interestingly, French cases of anonymous childbirth in the 19th century attracted the attention of lawyer Muteau (1870), who commented on the French approach to this issue, noting that French courts have faced similar cases more than a dozen times, and not every time, the decision was repeated in cases of Mallet and Romieux - moreover, even the case from Dijon was not the first on this issue[627]. However, unfortunately, not all extracts from them have survived until this day, which is why it will be difficult to generalize the practice of at least half of them.

A more modern approach to the concept of "anonymous childbirth" has been adapted in the United States, where in the early 1970s, congresses of more than 30 states passed statutes that allowed biological parents to remain anonymous and their descendants could not obtain court decisions to reveal their names and surnames, as well as some other personal data. These records were often called “sealed records” [26, art. 647 et seq.]. But US lawmakers left a "loophole": the plaintiff could prove in court that he has "good reason" to gain access to such concealed records. Thus, in the case, originating from Louisiana, *Massey v. Parker* (1979), plaintiff, born in 1945, being adopted at the age of 2, desired to obtain a court order on the disclosure of information about his biological parents, preferring to verify whether he owns any inheritance. Plaintiff also claimed he wanted to help his real parents financially if they needed to. Because the plenipotentiary New Orleans archivist had previously denied his requist, Massey filed a lawsuit, winning it, but an appeal was filed against this decision. The Louisiana Supreme Court claimed, that plaintiff’s desire to know whether he had any inheritance was proper enough to order the disclosure of the sealed records. The court decided to appoint a curator who would review the contents of the documents, and check whether there were really “good reasons” for their discovery, including the issues of potential inheritance[628]. In Louisiana, this was not the first such lawsuit with similar circumstances - in the case of *Spillman v. Parker* (1976), the Louisiana Court of Appeals, recognized the plaintiff's right to access information about his biological parents, because the plaintiff, as in Massey, desired to know if he had an inheritance, claiming that failure to provide him with information about his biological parents would violate his inheritance rights. The court found this to be sufficient to provide a decision on access[629]. In fact, the cause of the lawsuits lies on the surface: Art. 214 of the Louisiana Civil Code, according to which, an adopted child retains the right to inherit from parents (being legally born) and other blood relatives[630]. In a later case, *Kirsch v. Parker*, the plaintiff, being adopted at age 5, tried to find

[626] *Min. Publ. c. Lecleuse*, 9 aout 1853, BJ 1853.1294 [Belgique Judiciaire, Tome Ann. 1853, p. 1294]
[627] Muteau, C., *Du Secret Professionnel: Traite Theoretique et Practique*, Paris, Marescq Aine, Libraire Editeur, 1870, p. 254-256
[628] *Massey v. Parker*, La.., 369 So. 2d. 1310, 1313-1315 (1979)
[629] *Spillman v. Parker*, La., So. 2d. 573, 575-576 (1976)
[630] LSA – CC Art. 214; see also *Spillman v. Parker*, La., So. 2d. 573, 576 (1976)

out the causes of her illnesses (such as kidney problems), and whether they could be passed on to her children, and whether she inherited her parents' property, so she tried to get a court order allowing her to disclose the sealed records. The Supreme Court of Louisiana ruled in favor of the plaintiff[631].

There have also been lawsuits by biological parents against hospitals for disclosing their personal data to their descendants, based on tort law. In the case of *Humphers v. First Intestate Bank* (Oregon, USA, 1984-1985). The plaintiff, Ramona Humphers, D. Kastning's mother, gave birth to a daughter in 1959, who grew up, and 21 years later decided to find her own mother. Unable to obtain information about her mother, she sought out Humphers' doctor, Harry E. Mackey, who volunteered to help her. He stated that he could not find the real documents of the plaintiff, but due to the fact that "he gave the mother diethylstilbestrol ... and in order to determine the potential consequences, the daughter will need to find the identity of her mother." However, this turned out to be untrue, and the doctor decided to help the woman thus find the materials from the medical card of the plaintiff, which was found and handed over to D. Kastning in 1982. The mother was not happy to see her, and sued Mackey, but the doctor had died. The Supreme Court of Oregon confirmed the breach of confidence by Harry E. Mackey (represented by First Intestate Bank of Oregon), ruling in favor of plaintiff on the basis of tort of "breach of confidence"[632].

Having regard to the case of *Godelli v. Italy*, where the European Court found that Italian law did not provide for an adequate mechanism for finding plaintiff's family originations, I think it is logical to briefly describe aspects of this phenomenon in the legislation and case law of Italy. The basis for legal regulation is the Italian law of May 4, 1983 (Legge 4 maggio 1983, n. 184). The decision of the Constitutional Court of Italy in 2005 confirmed that the right of the biological mother to remain anonymous does not contradict the Constitution of Italy[633]. Access to the identity of the biological parents of the adopted plaintiff (often the mother) was established on the basis of a court order, and in addition, under a number of conditions that could completely thwart the plaintiff's efforts. In fact, the inadequacy of the access mechanism led to a lawsuit against Italy in the European Court of Human Rights and a decision of the Italian Constitutional Court upholding a number of provisions of this law. However, since 2013, no changes have actually been made to Italy's legislation on anonymous childbirth. Then, the case law came into force: thanks to the decisions of the Italian Court of Cassation in 2016[634] and 2017[635], the plaintiffs obtained the right to disclose the data of one of the biological parents in case of his (her) death, as well as the right to obtain a court authorization, upon which the court itself would contact the plaintiff's biological mother and request permission to

[631] *Kirsch v. Parker*, La., 383 So. 2d 384, 385-388 (1980)
[632] *Humphers v. First Intestate Bank of Oregon*, 696 P. 2d 527, 533-536 (Or. 1985)
[633] *Corte di Constituzionale*, Sentenza n. 425 del 2005
[634] *Corte di Cassazione*, sez. III Civile, sentenza 9 novembre 2016, n. 22838
[635] *Corte di Cassazione*, sez. III Civile, sentenza giugno – 29 settembre 2017, *n. 1946*

disclose her identity[636]. In the judgment of the Italian Court of Cassation in 2016, the plaintiff's mother, at the time of filing the lawsuit regarding the disclosure of her identity, had already died. The juvenile court of the city of Turin, where he sued, stressed that the death of the biological mother is not an implication for the disclosure of her identity, and that remaining anonymous remains with the death. Now, the plaintiff was effectively left without the right to obtain information about the mother's identity due to the fact that the mother's attitude to the disclosure of her data could not be obtained because of her death. The plaintiff also desired to know whether he had the right to obtain information about his mother's identity earlier than 100 years after the birth certificate was created (it is logical to assume that it would be doubtful he could survive until such a date). The Court, taking into account the judgment in *Godelli v. Italy* and the Judgment of the Constitutional Court of Italy (2013), noted that it would be extremely unfair that a plaintiff whose biological mother is no longer alive cannot obtain information about his mother's identity, however, another [hypothetical] plaintiff who the biological mother is alive would be, if the mother agrees. The court ruled that the plaintiff had the right to access data on the identity of the biological mother, believing that access would not harm the interests and reputation of third parties[637]. In its 2017 judgment, the Italian Court of Cassation ruled that, at the suit of an adopted person, the court had the right to ask the plaintiff's mother whether she wished to remain anonymous or whether she would prefer to disclose her identity.[638]

As of 2021, the European Court of Human Rights has faced cases on anonymous childbirth twice: in the case of *Odievre v. France* (2003) and *Godelli v. Italy* (2012). Thus, in the first of them (hereinafter – "the case of Odievre"), the plaintiff, a woman, a French citizen born in 1965, was left by her parents at birth. In the late 60's, the plaintiff was adopted and since then bore the name of the adoptive parents. At the age of 30, the plaintiff sent a statement to the Seine Child Welfare Service (Paris) to obtain information about her biological parents, believing that she had siblings. However, all she managed to receive was a set of "anonymous" data, which was completely meaningless for the plaintiff. Her lawsuits to all the court instances were in vain, so she had to sue to the European Court of Human Rights. The European Court recognized its subject matter over the case and denoted, that legislation allowing "anonymous births" was not very common in Europe[639], except for a few countries, including France, which was in fact the "father" of the concept. In addition, French legislation and case-law allowed the plaintiff to gain access to "anonymous" data of her biological parents, which, according to the court, meant that the plaintiff had not been deprived of her informational rights. Therefore, the Court did not find a violation of Art. 8 of the Convention, deciding in favor of the defendant[640].

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[636] *Ibid*.
[637] *Corte di Cassazione*, sez. III Civile, sentenza 9 novembre 2016, n. 22838
[638] *Corte di Cassazione*, sez. III Civile, sentenza giugno – 29 settembre 2017, *n. 1946*
[639] See the comment of the European Court in *Godelli v. Italy*, [2012] E.C.H.R. 347, para. 28-31
[640] *Odievre v. France*, [2003] F.C.R. 621, para. 15-onw.

The judgment in the case of *Godelli v. Italy*, brought to the court under similar circumstances, the outcome was somewhat opposite, but the actual gist is in the peculiarities of national legislation. The plaintiff in this case, an elderly woman of almost 70 years old, decided to find her ancestors. She was born in 1943 and was adopted at the age of six. While living in the village, the plaintiff met a girl who, as it turned out, was also adopted, but their parents constantly tried to prevent contact between the children, and never provided information about the plaintiff's parents. Half a century has passed since then, and the 63-year-old plaintiff has applied to the city registry for access to information about her real parents, but was obviously denied. The plaintiff lost her claim at the court of first instance. The same result was on appeal: the appellate court noted that under the provisions of the Italian Civil Code, the disclosure of such documents is possible under two conditions: 1) by a decision of the juvenile court, provided that the plaintiff is 25 years old; there are "medical"[641] reasons to make a decision; 2) access is provided to the doctor. It should also be added that the law in Italy, the adoption of an adopted person to the recorded data of the biological mother without her consent is also not allowed[642]. The court, as in the case of *Odievre v. France*, confirmed that the practice of "anonymous childbirth" is still a rarity in the legislation and case law of the countries of Continental Europe, but is not, generally speaking, a hoax[643]. In the statement of claim to the ECtHR, the plaintiff claimed that she could not obtain even "anonymous" records, considering it to be a violation of Art. 8 (1) of the European Convention on Human Rights.

Within the assessment of the balance, the Court noted that the balance between competing private interests should be properly weighed – on the part of the descendants, and on the part of the biological parent (basically, this is what the Belgian Constitutional Court emphasized in the mid-19th century[644] - the balance moved to the side of the plaintiff in contemporary Italian jurisprudence[645]). If we compare the circumstances of the case with the case of *Odievre v. France*, if in the first – the plaintiff freely gained access to the "anonymous" records of both parents, but it did not happen in the case of *Godelli*[646]. The European Court, trying to strike a "fair balance" (as far as possible), noted that despite the plaintiff's age (she was almost 70 years old at the time of the court decision), she wanted to reveal her pedigree – and the plaintiff's desire does not disappear with age. Italian law, unlike French law, did not provide the necessary balance between providing access to at least "anonymous records", as it was in *Odievre*. Therefore, the Court decided in favor of the plaintiff[647].

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[641] It was not specified what was meant to be under the term “medical reasons”. I assume, it could the same, as it was in *Kirsch v. Parker*, La., 383 So. 2d 384, 385-388 (1980). The facts of the case from the Italian Constitutional Court 2013 judgment (*Corte Constituzionale, Sentenza n. 278 del 2013)* allow to assume, that the plaintiff, a potential carrier of hereditary diseases, could seek for the sealed records to define whether his biological parents had such diseases.
[642] *Corte Constituzionale*, Sentenza n. 278 del 2013; *Trib. Milano*, Sentenza no. 11475/15 del 14 Ottobre 2015
[643] *Godelli v. Italy*, [2012] E.C.H.R. 374, para. 18-23; 28-31
[644] *Bessems c. Le Ministere Public*, Cass. 20 juillet 1855, Pas. 1855 I 303, 308
[645] *Corte di Cassazione*, sez. III Civile, sentenza 15 giugno – 29 settembre 2017, *n. 22838*
[646] *Odievre v. France*, [2003] F.C.R. 621, para. 12
[647] *Godelli v. Italy*, [2012] E.C.H.R. 374, para. 50, 54-56; 57-59

The application of the judgment of the European Court of Human Rights in *Godelli v. Italy* is reflected in the decision of the Constitutional Court of Italy in 2013. In the case at stake, the Catanzaro Juvenile Court raised the question of the constitutionality of a number of provisions of the 1983 Act, which effectively precluded the applicant from being provided with information about his (her) biological parents. The Catanzaro court's petition to the Constitutional Court stemmed from a lawsuit filed by a woman born in 1963, who learned about her adoption in adulthood during the divorce proceedings and desired to learn information about her origin, believing that the diseases the plaintiff suffered from were apparently hereditary. The plaintiff did not receive any access, because her mother did not wish the information concerning her identity to be disclosed: it turns out, that her right to receive information was annulled by the reluctance of biological parents, and this was provided by law: under Art. 28 (7) of the law of May 4, 1983, the possibility of giving the adopted person access to information about his origin is excluded without prior verification of the will of the mother concerning her unwillingness to be identified as the biological mother of the child. So, the question is the following: is the plaintiff really endowed with an "empty" right in case of reluctance of the mother, or by the fact that the mother's personal data were not originally recorded in the birth certificate?

The Constitutional Court, having regard to the judgment of the European Court of Human Rights in Godelli v. Italy (2012), noted that the provisions of the 1983 law do not allow the mother to reveal her person in the future if she once wishes so, and the law makes it impossible to obtain information about the health of the plaintiff's ancestors, which may be necessary for the prevention of hereditary diseases. The court confirmed, that the Italian law, in parity between the rights of parents and descendants favors the latter, according to which the damage caused to the mother by the disclosure of her data (if this data was recorded) is greater than the damage caused to the plaintiff who failed (and will not be able) to learn about their origin. The Italian Constitutional Court has concluded that, given that Italian law does not provide access not only to actually identifying data, but also to 'anonymous' data (as opposed to French law, which is clearly originating from the ECtHR's *Odievre* judgment), this article of the law was found to be unconstitutional[648].

[648] *Corte Constituzionale*, Sentenza n. 278 del 2013

3.4. Medical confidentiality and biobanks. Production of biobank data for the needs of civil and criminal proceedings: jurisprudence from the EU states

The purpose of biological material retention may be diverse. The biorepositories, which are possessors of biological materials, are referred to as the "biobanks" in English-language scholarship or "biotheques" in French. There is no uniform agreement in legal and medical scholarship for the scope of biological material to be maintained in order for the institution to be called a "biobank", or the actual aim of such maintenance. At present day, special techniques is already able to determine the identity of the individual, whose biological material is retained, and thus, in case such data is identifiable by techniques, they should be considered as personal data in accordance with the recent judgment No. SKA-166/2020 of the Latvian Senate. Such inference is quite apparent, but this issue requires resolving the situation when biobank data could be legitimately produced for the necessity of administering justice, if they could in principle. The court practice of the Nordic States already depicts that the court may allow the production of biobank records, which heavily depends upon the case circumstances: such situations may arise in civil litigation relating to paternity claims or the right to know one's origins, and the prosecution offices may opt to request biobank data for investigating suspicious deaths. In some other instances, biobanks, cryobanks and medical institutions governing biobanks may be sued for illegitimate collection and maintenance of biological samples without the notification of the party involved, which are known in United States of America, as well as one outstanding case in Iceland. The current situation concerning litigation relating to legitimate biobank data disclosure is evolving, and the legislation relating to it either is frequently absent, or lacks clarification. In this paper, the author calls for clarification of legitimate instances, where the biobank data could be disclosed for the needs of court proceedings upon the examples of Latvian law, as well as highlights the current jurisprudential developments in respect with litigation against biobanks and the institutions governing them in respect with an alleged privacy violation.

Overall facts. Biobanks are referred to be institutions maintaining various biological samples for diverse needs[649]. Despite the concept of biobank itself is definitely not new itself (i.e. some scholars mention that collections of biological materials, not excluding human ones, are well known

[649] See., Lipworth, S.C., Aparicio W., Fleming J., Kerridge, I. "*The Problems of Biobanking and the Law of Gifts*" In: Goold et al (eds). *Persons, Parts, and Property: How Should we Regulate Human Tissue in the 21st Century?* (2014) Hart Publishing. pp 25-38, see in particular p.p. 26-29. Note, that the purposes of biobank operation are diverse. The Supreme Court of Norway in its 2013 judgment designated them as follows: "*Based on their application purpose, the biobanks are divided into three main categories: diagnostic biobanks, treatment biobanks and research biobanks. Diagnostic biobanks contain material obtained in connection with the examination and / or treatment of a specific patient. Treatment biobanks are collections of biological material that are to be used for the treatment of a specific patient or a specified group of patients. Research biobanks are collections of biological material used for research, whether the material is collected directly for research purposes or is transferred from diagnostic biobanks or treatment biobanks*", *Norges Høyesterett*, HR-2013-868-A – Rt-2013-565, para. 31.

in history[650]), a peculiar name for a collection of biological samples in English language emerged only in 1996[651], whereas in France, the term "*biothèque*" is used as a synonym to the word "*biobanque*"[652], while the latter was used two decades ago in empirical legal research in terms of data protection of such medical institutions[653]. However, French courts use neither of the aforesaid terms to refer to biobanks within administrative disputes involving them, which are connected with a revocation of the biobanks license to conduct biomedical research, usually referring to them upon the actual name of the institution, not mentioning them by an overarching name[654].

The topicality of the issue of legitimate biobank data disclosure in civil and penal proceedings is high. As we may notice from the passages *infra*, paternity disputes may involve a request for DNA data, stored at a biobank (i.e. Norway, Netherlands), and it is not uncommon that these DNA data are the only sufficient evidence to prove one's paternity; and thus, the court, under the circumstances of the case, may decide that the interest in disclosure (i.e. to protect minor's and family rights) may be higher than the one to protect the confidentiality of information, stored in biobanks[655]. To date, there has been very little discussion relating to liability of biobanks in general, and some works have been dedicated to the issue of separate legal cases, for instance, the Judgment of the Icelandic Supreme Court of 2003[656], or the relatively recent American judgment of Kanuszevski[657]. The author's attention was brought to several publications, where authors tend to believe that biobank data should not be used for any forensic investigations, or for any court proceedings in general (i.e. *Keis* (2016)[658] and *Hallinan* (2021)[659]). This was, however, mentioned in the context of Estonian biobanks, but the author does not see any particular difference in issues of medical confidentiality in Estonia, or elsewhere in Europe, that may be in parity with the necessity of disclosure in paternity proceedings.

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[650] See. *Biobanks and the Public. Governing Biomedical Research Resources in Europe*. A Report from the BBMRI Project (Graz, Austria, 2013) [English version], p.p. 10-18

[651] Luigi Coppola, Alessandra Cianflone, Anna Maria Grimaldi, et al., *Biobanking in health care: evolution and future directions*, Journal of Translational Medicine, Vol. 2019 / 17, p. 173-178

[652] Chabannon, C., Lassailly, F., Romain S., et al., *Le réseau des Centres de Ressources Biologiques (CRB) et tumorothèques de l'agglomération marseillaise*, MEDECINE/SCIENCES 2006, p. 22 (n'spécial) 26-31, see particularly p. 27-29.

[653] Laurent, P. Armesto, V.L., *La Constitution, la propriété et l'accès aux «biobanques» sous l'angle de la protection juridique des bases de données: place à l'open access?*, Cahiers Droit, Sciences & Technologies, Nr. 3, 3 Partie, p.p. 193-214 (2010)

[654] See, for instance: *Cour administrative d'appel de Paris*, 3-ème chambre, 10/05/2012, 10PA0582; *Cour administrative d'appel de Paris*, 8-ème chambre, 29/12/2017, 16PA00905; *Cour administrative d'appel de Versailles*, 4-ème chambre, 12/03/2019, 17VE02492

[655] See, for instance, the judgment of the Norwegian Supreme Court: *Norges Høyesterett*, HR-2013-868-A – Rt-2013-565, para. 28-75.

[656] See, for instance, Gertz, R. *An analysis of the Icelandic Supreme Court judgement on the Health Sector Database Act*, SCRIPT-ed 1 (2) (2) p.p. 241 – 258 (2004).

[657] See, *Kanuszewski v. Michigan Department of Health and Human Services*, United States Court of Appeals, 6th Cir. .June 10, 2019; 927 F.3d 396; comment: A. Hart, *An Insufficient Screening: The Constitutionality of Michigan's Newborn Screening Program*, 61 (9) Boston C. L. Rev. E-supp. II-213 (2020) [p.p. 213-229]

[658] Keis, A. *Biobanking in Estonia*, J. Law Med Ethics. 2016 Mar;44(1):20-3, at p. 22

[659] Hallinan, D., *Protecting Genetic Privacy in Biobanking through Data Protection Law*, TJ Books Limited (Oxford, UK), 2021, p. 100

Such views have already been expressed far before by different authors[660], but a valid reason for an enhanced regime of confidentiality (i.e. between biobank data and hospital data) have never been mentioned. At the same time, it is not likely that there should be a reason, for which biobank data are bound to be disclosed under the same circumstances, under which hospital records may be. Strict confidentiality and paternalistic medicine are no longer in trend – what is more, it was far not uncommon for doctors or hospital officials to ignore the maxim of non-disclosure a century ago, when the matter related to publishing books, articles or other scientific findings about people with rare diseases (or merely referring to the patients making them identifiable)[661]. Moreover, when courts assess whether to grant an order for disclosure of biobank records, they carefully assess the conflicting interests and conflicting legal provisions (if so), and we may not claim that everything is done for the needs of justice so far, and that a potential disclosure of biobank records for a limited purpose would somehow toll to an abuse of procedure. As the reader may find out below, the courts (i.e. in Norway, where quite a lot of judgments relating to biobank data disclosure for the needs of civil and criminal proceedings were handed down) do analyze not only the general provisions of the Criminal or Civil Procedure Acts, which relate to production of evidence, necessary for trial, but a number of other laws, which may put restrictions on such production – as the biobank laws in Norway are[662]. At the same time, the author does not see any valid reasons for banning the production of such records at all – this could definitely harm the administration of justice. To a certain extent, we may suppose, that in terms of paternity proceedings, the biobank data will be produced without the consent, or awareness of the patient. At the same time, the courts have held, that in such cases, the consent is not necessitated (at least, speaking of Norway)[663]. In terms of awareness, the existing jurisprudence shows that in paternity claims, the father may be either unavailable, or unwilling to participate in the proceedings[664]. In case we assume the court is reluctant to order to produce the biobank data, the case falls apart. Over a century ago, the Scottish Court of Session held in *Whyte v. Smith*, that medical confidentiality, obviously existing in the tissue of common law, is not absolute: "…*The obligation* [of secrecy] *may not be absolute. It may and must yield to the demands of justice, if disclosure is demanded in a competent Court*"[665]. The author does not see whether this aged postulate has ever changed in civil

[660] Otlowski, M. Nicol, D. Stranger, M. *Biobanks Information Paper* (2010), 20 Journ. L., & Inf., & Sc. 97, at p.p. 163 and 212

[661] For instance, such cases could be found in early French and Luxembourgish jurisprudence: *B… . c. X…* ., Cour d'Appel de Besancon, 22 mai 1888, Sirey 1888 II 128; *Consul c. Pitres* (originally C… c. P…), Cour d'Appel de Bordeaux, 5 juillet 1893, Dall. Per. 1894 II 177, at p. 177–178; *Consul c. Pitres*, Cour de Cass., 9 avril 1895, Recueil Sirey 1896 I 81, at p. 82 – 84 (France); *Min. Publ. c. Dr. G*., Cour sup. de Justice (Cassation), 20 janv. 1893, Pas. L. 3, 20 (p.p. 20 – 25) (Luxembourg)

[662] As an example, see the following judgments of the Norwegian Supreme Court: *Norges Høyesterett*, HR-2013-868-A – Rt-2013-565, para. 28-75; *A (advokat Elias Christensen) mot B., Norges Høyesterett*, HR-2018-2241-U, 2018-11-23, para. 10-33

[663] *Norges Høyesterett*, HR-2013-868-A – Rt-2013-565, para. 60.

[664] See the factual background of the judgments HR-2013-868-A – Rt-2013-565 and HR-2018-2241-U.

[665] *AB v. CD*, Court of Session (Inner House, First Division), 13 Dec. 1851, (1851) 14. D. 177, at p. 180 (Dunlop's Session Reports); 24 S. C. 78, 78-79 (as *Whyte v. Smith*). [per Lord Fullerton, J.]

law, or at common law; apparently, the rules regulating producing facts containing medical secrecy, or testifying in court in respect with such facts, may be different. However, in many jurisdictions, the communications containing medical secrecy are not absolutely privileged; and nothing suggests biobank data are somewhat different.

At this point, the author would like to outline the aims of the chapter:

- To discuss the main civil law doctrines (which may also be dubbed in common law doctrines), upon which the operation of biobanks exists. This includes the patient's autonomy (informed consent, medical experiments and research), right to privacy and medical confidentiality; proprietary rights in body parts or other biological materials, as well as the patient-physician relationships, based upon a contract;
- To review the recent judgment of the Senate of Latvia (SKA-166/2020), relating to the expungement of data preserved in a forensic medical center, technically a biobank;
- To observe the recent Nordic (Norwegian and Swedish) jurisprudence in regard with the disclosure of biobank records for the needs of court proceedings. Such include paternity claims, diverse criminal investigations and search for missing persons.
- To unfold the "myths" relating to the impossibility of producing biobank records and biological materials for the needs of justice.

The methodology applied in the chapter changes upon the context, but in general, it applies the following methods, namely: 1) the comparative legal research, since many different jurisdictions are discussed by the author; 2) the historical-legal method and the doctrinal approach: to observe legal doctrines which are applied to biobanks and the issues relating to them, which involves a historical investigation of the issue in old legislation and case law; 3) the hermeneutic (descriptive) approach, which is used for commenting upon the most relevant legal cases, where the courts dealt with the issues of biobank data production for the necessity of civil and criminal proceedings.

In international law. Another complicated question is the correlation of biobank data production with the European Convention of Human Rights (Art. 8) and the Oviedo Convention. To date, the European Court of Human Rights hasn't discussed the violations occurring in biobanks, or the legitimacy of biobank data procurement for the needs of justice. But the legitimacy of medical data production for the needs of justice administration has already been observed in the case of *Z. v. Finland* (1997), where the plaintiff's medical records were seized by police authorities, and her doctors were obliged to testify concerning her state of health, as such information was necessary for criminal proceedings against the plaintiff's husband, who was accused in knowingly contracting unspecified women with HIV-virus (and both plaintiff, and her husband were HIV-positive). The European Court recognized that the seizure of her medical records and the obligation of the doctors to testify did not violate her right to privacy, and had a legitimate aim, but the violation occurred in

the episode with the publication of the judgment report with identifying information, later disseminated in the press[666]. Thus, the principle, announced by the Scottish Court of Session in Whyte v. Smith still works: the disclosure of information containing medical secrecy before a court is very different from disclosure of such information elsewhere voluntarily[667]. It should be the same in the case of biobanks: the judgments, where such data are used, are usually anonymized (especially in civil law jurisdictions), and the persons, whose medical information is used, remain confident. As the author has mentioned before, it is very common for an alleged father not to participate in paternity proceedings, or biobank data may be the only reliable evidence – not only in paternity proceedings, but also in the search of missing persons. It is apparent, that the courts in different jurisdictions may have diverse positions in this aspect, though. But it does not seem that either the European Convention of Human Rights, or the Oviedo and its additional protocols are the instruments that preclude the production of biobank data. At some point, the cases relating to production of biobank data may reach the European Court of Human Rights. The position of this court, which is the court of last resort within the scope of the ECHR signatories, will be apparently crucial in the future to this regard. At the same time, the analysis of the court reports from Norway or Sweden proves that the courts consider the national legislation (which, in fact, may be in conflict relating to production of such data as evidence) to resolve such issues, but not international instruments. Moreover, the Oviedo Convention does not inhibit the production of medical records: Art. 10 of the said instrument does not provide for an absolute confidentiality of medical records as such[668]. Biobanks are not explicitly mentioned in the Oviedo Convention, but could fall under the scope of Additional Protocol relating to biomedical research (CETS-195), in case we are talking about entirely research biobanks. Indeed, Art. 25 of this Additional Protocol provides for ensuring of research participant confidentiality[669]. In fact, as the Supreme Court of Norway held, there may be a variety of purposes for which biobanks operate, and according to this ruling, the scope of their operation lies far beyond research[670]. At the same time, the basic rule on confidentiality within biobank maintenance or research on humans is not disputed, but neither the Convention, nor its Protocols declare a ban on production of such records or data for court proceedings.

The provision of Art. 2 of the Oviedo Convention, declaring "*The interests and welfare of the human being shall prevail over the sole interest of society or science*" is potentially a legal norm, which may have impact upon the assessment of the parity of confidentiality and public interest in

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[666] *Z v. Finland*, [1997] ECHR 10 ; (1997) EHRR 371, App. № 22009/93, para. 9-18 (facts)
[667] *AB v. CD*, Court of Session (Inner House, First Division), 13 Dec. 1851, (1851) 14. D. 177, at p. 178-180 (Dunlop's Session Reports); 24 S. C. 78, 78-79 (as *Whyte v. Smith*).
[668] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, European Treaty Series – No. 164, p. 3
[669] Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, Council of Europe Treaty Series – No. 195, p. 8
[670] *Norges Høyesterett*, HR-2013-868-A – Rt-2013-565, para. 31.

civil and criminal proceedings in some civil law or common law jurisdictions in the future. However, it very superficial to deduce that production of biobank or hospital records is impermissible on its basis. Firstly, the said norm is declarative in its wording, and the basis for restraining the production of such evidence, as biobank data, should be firm. Secondly, there is no uniform interpretation of this norm to date[671]. Thirdly, the explanatory of legal norms is put upon the courts, and the interpretation of such provision by a German court is not binding for a French court, though it may be considered in theory. Had the European Court of Human Rights interpreted the given norm in a very strict sense (i.e. concerning production of biobank data) – it would be easier to be applicable by national courts.

Patient autonomy and biomedical research. There is very little legal precedent in respect with the issues which are historical predecessors of biobanks, such as collections of human organs in medical universities, or exhibitions of biological specimen organized by research institutions, museums, or private parties (i.e. doctors). Some authors suggest that the legal doctrine surrounding biobanks should be treated from the point of view of property law and the law of gifts[672], whereas it could be sound to assume that the legal aspects covering the legitimacy of experiments on human-beings is also applicable to a certain extent. The legal scholars investigating upon the legal issues of legitimate medical experiments in the 1960s and onward have found that Anglo-American law has very little to tell in this respect[673], however herein, French and Belgian precedents, as well as some others, may come to rescue. Consent of the patient is essential for any experimental or potentially hazardous procedures – this was clearly established by the civil law courts over a century ago. In the case of *Dr. Albrecht* (1856), the Obergericht and the Oberappellationsgericht (court of appeals and the court of cassation in the free Prussian cities respectively – A.L.) of the town of Lübeck held, that a physician was guilty of negligence for not informing a wet nurse of a baby sick with syphilis, because of which she and her entire family was contracted with the disease[674]. In 1859, the Correctional Court of Lyon condemned two doctors for conducting an experiment for treating a child suffering from ringworm by an inoculation of syphilis, whereas the procedure was an entire medical experiment used for drafting a scientific article; and apparently, no consent from the side of the boy's parents was given or sought[675]. This case was later designated as "*The Case of the Antiquaille Hospital*", becoming classic for the vaults of informed consent[676]. The later Belgian case of

[671] Helgesson, G., Eriksson, S., Against the principle that the individual shall have priority over science, Jour. Med. Ethics Vol. 34 (1), 2006
[672] *Stewart et al*, supra note 1, p.p. 27-32.
[673] Waddams, S.M., *Medical Experiments on Human Subjects*, 25 Fac. L. Rev. 25, 28 ff. (1967)
[674] *Carl Joachim Christian Bracker, Klager, gegen Dr. Juris Albrecht, mand. nom*, Oberappellationsgericht zu Lübeck, 30 Dezember 1856, Sammlung von Erkenntnissen und Entscheidungsgründen des Ober-Appellationsgerichts zu Lubeck, etc. Band 3, 1re Abteilung, Sache No. 16, S. 172, 176-190.
[675] *Min. publ. c. Guyenot et Gailleton*, Trib. Corr. de Lyon, 15 dec. 1859, Dall. Per. 1859 III 87, 87-88.
[676] See the author's comment in respect to the given case, as well as subsequent judgments concerning medical experiments, i.e. case of *Chavonin* (1935-1937): Lytvynenko, A.A., *The Rise of the French Doctrine of Informed Consent: Criminal Responsibility for an Unauthorised Medical Experiment - The Case of the Antiquaille Hospital and Subsequent Notable Judgments*, 7 (4) Athens Journal of Law, p.p. 603-616 (2021)

Dechamps also involved an allegedly unconsented osteotomy, which was never conducted on the minors of the age plaintiff's son was, which could be also experimental to a certain extent[677]. Finally, the case of *Chavonin* (1935-37), where the heirs of a man plunged into an unauthorized medical experiment with radiography, who died later owing to negative consequences to his health, litigated against all the parties involved, the Paris court established the such acts are illegitimate without the person's free and informed consent ("*consentement libre et éclaire*"), affirming the experiment had not a curative, but a solely scientific aim[678]. French and Belgian courts have distinguished between experimental methods of treatment, as such, which may be beneficial for the patient, and are conducted for healing purposes, and experimental treatment, which is provided for the means of conducting research – in the latter case, the treatment methods were usually published in magazines, scientific journals or were presented in special exhibitions (i.e. in the shape of photographs)[679]. Such unauthorized experiments are subject to criminal liability in Belgian law: in 1983, the Correctional Court of Charleroi found physicians liable for unauthorized brain biopsies conducted for the sole aim of biomedical research and observation on basis of assault/battery[680]. As we have observed from the passage above, the French and Belgian legal doctrine and case law have established the main principles of patient's autonomy in respect with medical experiments, and the quintessence is applicable in respect with biobanks, which are dealing with biomedical research. In fact, in the older times, unconsented experimental acts were frequent in Europe in the XIX and the XX centuries, though very little legal precedents have survived, are discovered (i.e. in the historical archives within the court decision catalogues), or are virtually known in legal scholarship, and the Nuremberg trial No. 1 (1947) has seemingly impacted it as well[681]. We may notice this problem while examining the

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[677] *Demarche c. Dechamps* / *Dechamps c. Demarche* , 27 Nov. 1889, Trib. Civ. de Liege; Cour d'Appel Liege, 30 juillet 1890, reported in: Journal des Tribunaux (Belge) 1890 (Vol. IX), p. 5-7 (trial court report); Revue judiciaire (Lausanne), Anno 1890, p. 85; Pasicrisie 1890 III 83, 83-85 (trial court); Pasicrisie 1891 II 78, 78-80 (appeal); Dall. Per. 1891 II 281 (appeal); Recueil Sirey 1895 II 237 (concise case report); Belgique Judiciaire 1890.471 (trial court); Belgique Judiciaire 1891.699 (appeal).

[678] *Consorts Chavonin c. K., Admin. d'assistance Publique et soc., des laboratoires Thorande* , Trib. Civ. de la Seine (1 Chambre), 16 mai 1935, Dall. Heb. 1935.390,390-392; Dall. Per. 1936 II 9 (first instance); *L. c. Consorts Chavonin et Cie des produits chimiques de la Sorbonne* , Cour d'Appel de Paris, 1 Chambre, 11 mai 1937, Dall. Hebd. 1937.340, 340-431 (appeal).

[679] See the following:
- in doctrine: Tart, I., *De la responsabilite des persones. Art du guerir*. (20.07.1894). La Belgique judiciaire (Bruxelles) Ann. 1894, p.p. 1057-1072, see in particular 1070-1072; Demogue, R. *Traité des obligations en general*, Tome VI (1932). Paris, Bibl. A. Rousseau, p.p. 186-187; Hennau-Hublet, C. *L'activité médicale les délits d'atteinte à la vie, à l'intégrité physique et la santé des personnes*, Rev. dr. pén. & Crim. 1986, p.p. 571-597, see in particular p.p. 591-597. Jasson. G., *La Responsabilite Medicale*, Rev. Belg. Domm. Corp., 1990, p.p. 47-53, see in particular p. 52.
- in jurisprudence: *Min. publ. c. Guyenot et Gailleton*, Trib. Corr. de Lyon, 15 dec. 1859, Dall. Per. 1859 III 87, 87-88; *R. c. P*., Cour d'Appel de Lyon, 1 Ch., 23 juin 1913, Dall. Per. 1914 II 73, 73-74; *Consorts Chavonin c. K., Admin. d'assistance Publique et soc., des laboratoires Thorande*, Trib. Civ. de la Seine (1 Chambre), 16 mai 1935, Dall. Heb. 1935.390,390-392 (see in particular the reasoning of the trial court).

[680] *M.P. et D. c/ D., L., P. et V.*, Trib. Corr. de Charleroi, 29 mars 1983, Rev. Reg. Droit 1983, p. 248 (p.p. 248-253)

[681] See. Ducruet, J., *Protection des personnes qui se prêtent à des recherches biomédicales*, Laennec 2008/3 (Tome 56), p.p. 6-24, see. in particular p.p. 6-9; 13-19.; as to the Nuremberg trial No. 1, see the condensed report: *Etats-Unis d'Amérique c/ K. Brandt et consorts (médecins)*, Tribunal militaire américain de Nuremberg, 10 aout 1947, Jugement No. 1, Première Chambre, Rev. Dr. Pen. & Crim. 1949, p.p. 845-863

earlier legal scholarship in respect with, for instance, unconsented surgery, which was a very popular topic in American and Canadian legal scholarship of early and mid-20th century. For instance, Vincent MacDonald (1933), a Canadian lawyer, commenting on an early authority on informed consent in Canada, *Marshall v. Curry*[682], mentioned that very little authority in respect with the expression of patient's will existed in Anglo-American law, as such[683]. Was it dictated by medical paternalism, a great authority of doctors (as a profession), which precluded people from litigating against doctors and/or hospitals, or by unwillingness of the citizens to go to courts suing for medical malpractice – we will probably never know the answer[684]. Seemingly, the situation was identical with human organ and other biological specimen retention, maintained in private collections, medical institutions and museums. For instance, if we reckon up *Dobson & Ors. v. North Tyneside Health Authority & Anor* (1996), where the deceased patient's brain was extracted during the post-mortem, the case authorities, except from *Doodeward* (see below), used as a legal analogy, were aged and did not consider cases regarding medical malpractice; the Court, however, found that since there are no property rights in a dead body, the brain could not be returned[685].

Property rights in body parts and right to know one's origin. Another aspect of the modern biobanks operation, having much relative to their historical predecessors, is apparently the maintenance of biological specimen, arising the issues of property rights in them, as such. At common law, a dead body could not be property in a general sense[686]; the only aim for what it could be kept in custody was burial, dictated seemingly by Christian tradition[687] (notwithstanding sanitary norms). In Canadian law, however, the courts recognized a limited property right of a dead body, but only in the sense of its preparation to a decent burial (case of *Miner* in 1911)[688]. At the same time, there was no dispute relating to the use of a body or body parts for needs differing from the necessity of burials. However, an Australian case of *Doodeward v. Spence* (1907-1908) has cast some light upon the legal status of a biological object, kept in custody for the means, other from burial. This was an action for

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[682] *Marshall v. Curry*, Supreme Court of Nova Scotia, 15 May 1933, 1933 D.L.R. 2d. 260. (Dominion Law Reports, 2nd Ser., p.p. 260–276, Ann. 1933; operation performed to cure hernia upon a crippled, literally rottening-alive mariner; the surgeon removed his testicle finding it would be necessary to cure the hernia, and the testicle was also grossly diseased, thus causing damage to plaintiff's health, had it remained. The action was dismissed, the court found the doctor's acts to be justified).

[683] Macdonald, V.C., *Consent of patient as justification for surgical assault*, The Canadian Bar Review, 1933 (No. 7, September 1933), p.p. 506-510

[684] The author has reseached over a dozen of unconsented surgery cases in Canada since 1899 to 1980, collected and commented in a recent paper, see: Lytvynenko, A.A., *Unauthorized medical intervention and informed consent in the common law of Canada prior to the Supreme Court's decision of Reibl v. Hughes (1899–1980)*, 2020 (4) Law Review of Kyiv University of Law, p.p. 260-282, 2021

[685] *Dobson & Ors v North Tyneside Health Authority & Anor* [1996] EWCA Civ 1301 (26 June 1996), [1996] 1 W.L.R. 596, 600-602. [England and Wales Court of Appeal]

[686] *Body Snatching* (Anonymous), The Law Journal, Vol. LXVII (67), p. 105 (Feb. 9, 1929); P. D. G. Skegg, *Human Corpses, Medical Specimens and the Law of Property*, 4 Anglo-Am. L. Rev. 412, 412-421 (1975).

[687] Davies, C., Galloway, K., *The Story of Seventeen Tasmanians: The Tasmanian Aboriginal Centre and Repatriation from the Natural History Museum*, 11 Newcastle L. REV. 143, 148-151 (2008).

[688] *Miner v. Canadian Pacific Railway*, 3 Alta L. R. 408 (Alberta Supreme Court, June 17, 1911 - 18 W. L. R. 476, et al.), at p. 415

detinue (and conversion on appeal to New South Wales Supreme Court[689]), against a police sub-inspector, who ceased plaintiff's "exhibit" – a body of a two-headed child born and died in the late 1860s, preserved in a bottle (jar) with spirits and kept by plaintiff as a curiosity, which, upon the view of the police sub-inspector, violated public decency[690]. The lower court did not uphold plaintiff's appeal, finding the "exhibit" a *corpse,* and hence not being subject of property, but the High Court of Australia found that such a "Kunstkamera" could be a subject of property (especially, if he had applied sufficient skill to maintain it in a good condition), and there may be cases, when a corpse is legitimately kept for a reason, different from burial, finding for plaintiff[691]. The said case became a valuable precedent in terms to property rights in human organs, or other biological materials, such as semen samples, most recently in the case of *Re Cresswell* (2018) in Australia[692], which was appraised by the Supreme Court of Queensland and received its renewed fame in modern legal scholarship[693]. Respect with maintenance of biological samples (i.e. like gametes and spermatozoa), which are also preserved in biobank-like institutions, is, in fact, very timely. For instance, in France, a woman, being conceived by donation of gametes, attempted in determine the identity of her biological "forbearer" – i.e. the donor, but did not manage to prevail in action owing to law on donor anonymity, as ruled by the Council of State; similar claims were also rejected by administrative courts of lower instances in the 2010s as well[694]. In a similar case from the Netherlands, a woman strived to discover the identity of her biological father, whose DNA data was allegedly kept at the Erasmus Medical Center after he had participated in a medical-scientific study relating to epilepsy. She instituted paternity proceedings

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[689] *Doodeward v Spence* [1907] NSWStRp 104, 104-107; (1907); 7 SR (NSW) 727 (7 November 1907, New South Wales Supreme Court)

[690] Upon the facts represented in the court reports (i.e. the one of the New South Wales Supreme Court, and the one of the High Court of Australia (citation in the footnote below), the baby with two heads was born in New Zealand in ~1868, never lived independently, and the body was taken away by the medical attendant of his mother. When he died in 1870, the jar with the body was sold on an auction, and was bought by plaintiff's father. The question is: could the mother of the two-headed child sue the doctor for taking the corpse, i.e. for a trover? The New South Wales Supreme Court clearly recognized that it *was* a corpse (*Doodeward v Spence* [1907] NSWStRp 104, 104-107; (1907)), and I find no objection from the Australia High Court's judgment it *wasn't* a corpse; instead, the court found that there could be legitimate aims for maintaining a corpse other than for burial (which is crucial at the moment), admitting the plaintiff's skills for preserving it in a good condition, *Doodeward v Spence* [1908] ArgusLawRp 91; (1909) 15 Argus LR 105, 106-108 (31 July 1908) [per Griffith, C.J.]. The situation with the possession of the unusual corpse, which was taken from the mother of the baby who delivered it is quite unique, especially for the law of New Zealand as it was in the 1860s.

[691] *Doodeward v Spence* [1908] ArgusLawRp 91; (1909) 15 Argus LR 105, 106-108 (31 July 1908) [per Griffith, C.J.]. See additional reporting at: [1908] HCA 45; (1908) 6 CLR 406; [1908] NSWStRp 60; (1908) 9 SR (NSW) 107; see also

[692] *Re Cresswell*, [2018] QSC 142 (20 June 2018) [Supreme Court of Queensland], see in particular at para 96-ff (regarding Doodeward as authority); see also: *AB & Ors v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB) (26 March 2004), para. 132-160. (England & Wales High Court, Queen's Bench Division).

[693] Falconer, K., *An Illogical Distinction Continued: Re Cresswell and Property Rights in Human Biological Material*, 2019 UNSWLJ FORUM 1, 3-5 (2019).

[694] *Tribunal administratif de Montreuil,* 14 juin 2012, n° 1009924 (first instance); *Cour Administrative d'Appel de Versailles*, 1ère Chambre, 02/07/2013, 12VE02857 (appeal); *Conseil d'État*, 12 novembre 2015, n° 372121 (Decision of the Council of State). Also note two similar judgments with the same claim: *Tribunal administratif de Paris*, 6 décembre 2013, n° 1116202/6-3; *Cour administrative d'appel de Paris*, 7ème chambre, 22/01/2016, 14PA00493 (both rejected). The latter claim was somewhat unusual in the scope and amount of data requested: two plaintiffs desired not only to have the information regarding the gamete donor communicated to them but also the photograph of the donor. Despite claims to disclose sensitive data for the means of discovering one's origins (and not always the plaintiff's purpose for disclosure is evident), the plea to obtain the donor's photograph was really somewhat unusual.

before the District Court of Amsterdam for a judicial determination of the parentage. Seeking for additional evidence, she applied for a court order at Rotterdam District Court, desiring the Center to hand over the biological materials, which would be likely to be transferred to an institution, specialized in kinship investigations (upon the Center's choice) in order to establish his paternity. The alleged father had signed a consent form, upon which he willed to treat his medical data confidentially. Plaintiff claimed there was no other direct means to establish paternity; despite she possessed a number of unspecified written documents (though it could not be declared precisely that the court would accept them as sufficient evidence in paternity proceedings), as well as witness testimony from the immediate family of the alleged father. The court ruled not to grant the order for producing the DNA samples: firstly, in the opinion of the judge, the privacy considerations invoked by Erasmus Medical Center (defendant in the case) were weighted higher, and next, it was not clear at the time of the hearing whether the existing evidence in the paternity proceedings brought before the court of Amsterdam was sufficient to establish the deceased man's paternity in relation with the plaintiff[695]. At this point, the court of Rotterdam considered the patient's privacy rights and the duty of maintaining the information relating to biological samples in secret, which was in equipoise with plaintiff's desire to establish the deceased man's paternity. The author outlines, that *not* in all proceedings relating to production of biobank records the courts thoroughly consider the potential impact on the "patient" (that is, the person, whose biological samples were once collected and are requested to be produced for the needs of certain court proceedings.

Medical confidentiality, maintenance of medical records, the right to privacy and biomedical research. The third already-existing legal doctrine upon which the biobanks are founded is medical confidentiality. As the European Court of Human Rights wittily mentioned in *S. & Marper v. United Kingdom* (2009), biological samples (in this case, plaintiffs litigated with law enforcement agencies to expunge fingerprints, cellular samples and DNA-profiles, both were suspects and both were not convicted), which are available to be identified by techniques, should be considered as personal data – not necessarily they should be written records[696]. The Latvian Supreme Court (Senate) in its judgment No. SKA-166/2020 adopted the same position[697]. Since such information, coded or not, may be identifiable by machines, there may be no doubt, that the rules of privacy should be applicable in the case of maintenance of biological specimen by biobanks. A paper on personality rights in "*Biobanking and genetic research with human tissue*" attracted the author's attention by the

[695] *Rechtbank Rotterdam*, 12.12.2019, C/10/583910/KG ZA 19-1062, Section 3-4.
[696] See. *S. & Marper v. United Kingdom*, [2008] ECHR 1581, App. No. 30562/04, Judgment of 4 December 2008, at para. 74-75: "*As regards DNA profiles themselves, the Court notes that they contain a more limited amount of personal information extracted from cellular samples in a coded form...* [...] *The Court observes, nonetheless, that the profiles contain substantial amounts of unique personal data. While the information contained in the profiles may be considered objective and irrefutable in the sense submitted by the Government, their processing through automated means allows the authorities to go well beyond neutral identification...* [...]"
[697] *A pret. Veselības ministrija*, Latvijas Republikas Augstākās tiesas, Senāta Administratīvo lietu departamenta, 2020 gada. 30.septembrī, Lieta Nr. A420260716, SKA-166/2020, at para. 11-12; 14-15

following interrogation: could the general right to privacy with its old routes be applicable in such context[698]? The author does not see any obstacles to say it could. It apparently depends on what is implied under the right of privacy. French law drew this right from a multitude of different legal doctrines of the XVIII-XX centuries – from personality rights (i.e. right in a name and likeness) and defamation to rights in artistic and literary property, notwithstanding professional secrecy[699]. In terms of aged legal precedents, the French-originating right to privacy involved general personality rights, such as right in one's name and likeness, as well to insult to honor, which could be found in the XIX an early XX century precedents, which are even more aged, than their common law counterparts are[700]. It is quite natural that human rights expand owing to technological advances, and the right to privacy is hereby not an exception; therefore, it is sound to respond affirmatively upon the question, which was cited hereinabove.

Advancements in the issues of confidentiality, like the privacy of donors, have also contributed much to the issues of secrecy in terms of maintaining biobank samples. Blood banks are also biobanks by their nature, as firstly, one cannot argue that blood samples are biological samples (and are quite valuable for access for the patient himself – see judgment of the Latvian Senate No. SKC-13/2008[701]), and secondly, maintenance of such samples is undisputable. May a blood bank avoid being plunged into litigation? Obviously not – whether its supervisory board would desire that or not. For instance, American jurisprudence of the 1980s and 90s shows that the blood banks and associate healthcare bodies were repeatedly sued for negligence in screening procedures, owing to which a citizen to whom blood was transfused contracted HIV/AIDS, which later brought to his deterioration of health and subsequent death; plaintiffs requested records relating to the blood donor, or requested to produce the donor in order to question him concerning the aforesaid screening procedures. In most of the cases, the courts allowed a discovery, also issuing a protective order anonymizing the donor's identity in further proceedings[702]. The Norwegian jurisprudence would allow production of biobank data for such reasons, as searching for a missing person, presumably

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[698] Beier, K., *Privacy, Confidentiality and Personality Rights in Biobanking and Genetic Research with Human Tissue*, Second International Status Conference of the Tiss.EU Project Göttingen, 16-18 July 2009 in: *The Ethical and Legal Regulation of Human Tissue and Biobank Research in Europe* / Beier, K., Schnorrer, S., Hoppe, N. Lenk, C. (eds.), Gottingen, 2011, p. 52

[699] See., for instance, Weeks, J. K. Comparative Law of Privacy, 12 Clev.-Marshall L. Rev. 484, 495-502 (1963).

[700] For instance, let us name a few more-or-less outstanding cases from France and Belgium here: *Dumas c. Liebert*, Cour d'Appel de Paris, 25 mai 1867, Recueil Sirey 1868 II 41, 41-42; Jour. du Pal. 1868 I 216, 217; 2 Pan. Chr. 157, 158-159; *Société Liébig's extract of Meat Company et héritiers Liebig c. Houlekiet et Ànderson*, 10 decembre 1884, Trib. comm. de Bruxelles, 1884 Jour. de. Tribunaux (Bruxelles) 1511, 1511-13 *Peltzer c. Castan*, Cour d'Appel de Bruxelles, 26 Nov. 1888, Pas. 1889 II 94, 1889 Jour. de Tribunaux (Bruxelles) 1889.18,19-21; 25-27; Sirey 1891 IV 35, 35-37; *Doyen c. Parnaland et Societe Generale des Phonographes et Cinematographiques*, 10 fev. 1905, Trib. civ. de la Seine, Dall. Per. 1905 I 389, 389-390; *T c. Du Laar*, 4 mars. 1905, Trib. de paix. Narbonne, Dall. Per. 1905 I 390, 391.

[701] *Māris D. pret BO VAS „Paula Stradiņa klīniskā universitātes slimnīca" un BO VAS „Iekšlietu ministrijas poliklīnika"* , Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta, 2008. gada 9.janvāra, Lietā Nr. SKC – 13, p.p. 2-3; 7-10.

[702] See., for instance, the following American cases: *Rasmussen v. South Florida Blood Service*, 500 So. 2d 533, 535-538 (1987), *Otto Boutte v. Blood Systems, Inc*, 127 Fed. R. Dec. 122, p.p. 123-126 (D.C.W.D. Louisiana 1989) [Civ. A. No. 88–1812]; *Stenger v. Lehigh Valley Hospital Center*, 530 Penn. 426; 609 A. 2d 596, 800-804 (1992)

deceased, upon a plea of the police authorities *in case of the explicit consent of the person concerned*[703], as well as in paternity claims, where the state interest in protecting minors, or an adult individual's interest in seeking his origins would prevail over the individual interest in maintaining confidentiality[704]; in paternity claims, the consent of the "patient", whose DNA-samples are requested, is not necessary neither according to acting Norwegian legislation, nor such necessity is established in case-law[705].

May the biobanks maintain medical records as an object of their research, but not biological samples, which are not available for identification without specialized techniques? Yes, they do. Legal scholarship tends to believe that biobanks may be also treated as medical databanks, in case they are research biobanks[706]. One of the most well-known legal cases involving this problem was the judgment of the Supreme Court of Iceland in the case of *Ragnhildur Guðmundsdóttir gegn íslenska ríkinu* (in English it would be spelt: *Ragnhildur Guðmundsdóttir v. The Icelandic State*), adjudicated in 2003. In 1998, a special law founding a centralized database of medical records was adopted, allowing a private company "deCODE Genetics" to benefit from such medical data for exercising it in its genetic research activities. In order to decline the transfer of medical records, the Icelandic citizens needed to lodge special notifications to the state bodies to decline the transmission of the medical records into the database[707]. And not always such applications were granted in a pious manner. The case started because of the same reason. Plaintiff, a woman, brought an action before the first-instance court of Reykjavik, demanding to annul an administrative decision declining her request for denying the transfer of the medical records belonging to her deceased father to the said database. When the case came to the Supreme Court, it ruled for the plaintiff, having admitted that the said law does not sufficiently safeguard her privacy rights, and the plaintiff's legal interest in preventing the transfer of her deceased father's medical data to the said database is conceivable[708]. It has to be augmented, that the consent of the data subject was already presumed for such transmission, which has nothing to do with the contemporary principles of biobank functioning in respect with

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[703] *Oslo tingrett*, 2020-11-17, TOSLO-2020-165075 (trial court decision); *Borgarting lagmannsrett*, LB-2020-182273, 2021-01-08 (appellate court confirming the trial court decision); *Norges Høyesterett*, LB-2020-182273, 2021-07-01 (the Supreme Court reverses the decision for biological samples production because of no consent of the semen donor, which could not be legitimate upon presumption in the sense of the Norwegian Biobank Act). At the same time, courts are not eager to order to disclose biobank data of a deceased person, especially minor for the need of criminal proceedings: *Norges Høyesterett*, HR-2020-1776-A, 2020-09-14, para. 16-40; see additionally my comment on this judgment in the following conference paper: Lytvynenko, A.A. *Disclosure of Personal Data Maintained in Biobanks in Civil and Criminal Proceedings: an Example of Nordic States*, Proceedings of International scientific and practical conference "Legal Science, Legislation and Law Enforcement: Traditions and New European Approaches", Wroclawek, 9-10 July 2021, p. 198-202 (at p. 200-201).

[704] *Norges Høyesterett,* HR-2018-2241-U, 2018-11-23, para. 10-33

[705] See, for instance, *Agder lagmannsrett*, 25.07.2012, LA-2012-106881 (Adger Court of Appeal). [appellate court decision to the judgment of the Supreme Court No. HR-2013-868-A – Rt-2013-565.

[706] Kaye, J., Bell, J., Briceno, L., Mitchell, C., *Biobank Report: United Kingdom*, 44 J.L. MED. & Ethics 96, 97-98 (2016).

[707] See more information concerning the law and this database in Arnason, V., Bioethics in Iceland *Special Section: International Voices 2010*, 19 Cambridge Quarterly of Healthcare Ethics 299, 300-303 (2010)

[708] *Ragnhildur Guðmundsdóttir gegn íslenska ríkinu*, Hæstiréttur Íslands, 27. Nóv. 2003, Mál nr. 151/2003, Sec. II, IV

medical records or biological samples – all of them (especially in Scandinavian law) are based upon the principle of informed consent of the data subject[709].

Biobanks have an apparent duty to maintain confidentiality of medical records and other data, which may be deduced from biological samples. In some jurisdictions, this duty of confidentiality is even underlined by legal neologisms, designating a name for the confidentiality of biobanks. For instance, in France, the biobanking secrecy was named as "secret biobancaire", merging the term "secret bancaire" ("banking secrecy" in French) and "biobanque" ("biobank" in French)[710]. The authors of the book alleged that the provisions of the German Criminal Code, Art. 203 (the book was written about Germany and interpreted into French) should be amended in relation with biobanks, as they found that a multitude of biobank staff would be confidants of sensitive medical records[711]. The author does not see for what reason the obligation of professional secrecy should not be applicable to all personnel, involved in work with medical records. The obligation of professional secrecy (currently – Art. 203 of the Criminal Code, previously, Art. 300 upon the 1851 and 1871 Prussian Penal Law[712]) is general and absolute, apart from any legitimate exceptions, not only hospital doctors are subject to professional secrecy, but other hospital staff, for instance, nurses[713]. Upon the already established principle, it is inconceivable, for what reasons the provisions of professional secrecy should not be applied for a hospital staff member other than a physician. In 1993, the Brussels labor court rejected the appeal of a medical researcher, whose contract was terminated after he had conducted a video recording of the conduct of the in-patients, made without their prior consent or knowledge[714]. The liability of plaintiff in respect with his research work (i.e. the university ethics committee found plaintiff had made unauthorized acts) was rather disciplinary; the court report did not disclose whether the said in-patients sued plaintiff afterwards, or whether they knew that he conducted such recordings. But the gist is the same – researchers possess various types of liability, and apparently will be liable for unauthorized acts within their research, as well as disclosure of data they are operating with. Over a century ago, the French Court of Cassation established a principle, upon which a plenipotentiary person or official, acquainted with facts that constitute a medical secret,

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[709] Hoeyer, K., *The Role of Privacy and Informed Consent in Danish and Swedish Biobank Practices: Exploring Donor Perspectives*, 10 MED. L. INT'l 269, 280-281 (2010).

[710] *Les biobanques humaines destinées à la recherche*, Conseil d'éthique allemand, Hamburg, 2010, p.p. 31-41. It is also notable, that there is an identical neologism in German legal scholarship, which is designated as "*Biobankgeheimnis*", also merging "*Biobank*" and "*Geheimnis*" (en. "Secret"). For instance, such neologism is used in the doctoral dissertation of N. Koch regarding the legal aspects of biobank functioning and the protection of personality rights in respect with their operation: Koch, N. (2013) *Das Biobankgeheimnis: Schutz der Persönlichkeitsrechte in der biomedizinischen Forschung*, Dissertation zur Erlangung des Grades eines Doktors der Rechte des Fachbereichs Rechts- und Wirtschaftswissenschaften der Johannes Gutenberg-Universität Mainz vorgelegt von Nicole Koch, LL.M. 2013, p.p. 208-217.

[711] *Ibid*, p. 32-33.

[712] See the interpretation of the Art. 300 of the Prussian Penal Code by the German Supreme Court in its 1885 judgment: *Reichsgericht*, III Strafsenat, Urt. v 22 Oktober 1885 g. B. Rep. 2421/85, ERG St. Bd. 13, S. 60, 61–64.

[713] See the judgment of the German Federal Supreme Court: *Bundesgerichtshof*, Urt. v. 20 Februar 1985 – 2 StR 561/84, para. marg. 7-11; 13-14

[714] *Cour du Travail de Bruxelles*, 23 mars 1993, Tijdschrift voor Gezondheidsrecht 1995, p. 296, 296-300. The case name was referred to as "(a.s.b.l. C.S.-P. c. / M.)".

being not a doctor by profession, is liable for illegitimate disclosure of such communications (i.e. the facts concerning a citizen with a dangerous or contagious disease) bears the same responsibility in respect with revealing such facts illegally, as the doctor, thus becoming a confidant of confidential communications, and henceforth is liable under the penal law (i.e. Art. 378 of the French Penal Code, acting 1810-1994)[715]. The author does not observe any sound distinction between the biobank employee's duty of confidentiality and the examples cited in German, French and Belgian cases. The principle is well founded: once a person, connected with a profession requiring a duty to maintain professional secrecy, becomes a confidant of such communications, no matter what his position is, is hereby bound to professional secrecy. Therefore, the author's consideration is that general provisions of professional secrecy are applicable, and no special provisions in terms of biobank confidentiality are strictly necessary. The case law of Norway deals with the issue of legitimacy of subpoenaing biobank records for various reasons, and such are not, generally speaking, inadmissible from the point of civil procedure or criminal procedure law, however the legislative policy provides for a limited disclosure of such data, especially in criminal proceedings[716].

Contractual relationships between patients and hospitals. The nature of patient-physician relationships has received a thorough view of the civil law and common law courts way over a century ago, when the courts attempted to determine the liability of physicians for the imprudence they committed. The old case law originating from England depicts that it was not uncommon for patients to conclude contracts between them and their attending physicians – the English legacy includes a number of disputes relating to remuneration of bills for treatment of some person, originating from an express contract[717]. At the same time, in early English cases on medical malpractice, the aggrieved parties based their claim on tort (i.e. negligence) and not on contract[718]; since the tort of negligence defined itself as an independent tort in the early XIX century case law, one of those early actions against a physician was based on an "action on the case"[719], one of the earliest English common-law remedies, originating from the Medieval times[720]. In earlier Scottish jurisprudence, the Court of Sessions held in *Edgar v. Lamont* (1914), that the liability *ex contractu* may sometimes be hardly distinguishable from liability *ex delicto,* but in case the negligence has been committed, that does not mean it is unrecoverable unless there is no express contract between the patient and physician[721]. The

[715] *Procureur General c. Dijon,* Cour de Cassation, Arrêt Cass. Crim. 13 mars 1897, Pandectes Francaises, Ann. 1898, Partie I, p. 25., p.p. 25-28
[716] See the most recent judgment of the Supreme Court of Norway: *Norges Høyesterett*, LB-2020-182273, 2021-07-01
[717] *Dent v. Bennett*, (1839) 4 Mylne & Craig 269, 271-272; 274-276; 41 Eng. Rep. 105, 106-107. Note, that the English courts have recognized, that the relationships between patients and physicians possess confidence, *Billage v. Southee*, 9 Hare 532, 539-541; 68 Eng. Rep. 623, at p. 626 (1852)
[718] *Pippin and Wife v. Sheppard*, (1822) 11 Price 400, at p. 405-406; 408-410; 147 Eng. Rep. 512, 514; *Gladwell v. Steggall*, (1839) 5 Bing. N.C. 733, 734-735, 736-737; 132 Eng. Rep. 1283, 1283-1284
[719] *Seare v. Prentice*, (1807) East 348, 348, 350-351; 103 E.R. 376, at 376-377
[720] Silver, T., *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 Wis. L. Rev. 1193, 1196-1199; 1205-1206 (1992)
[721] *Edgar v. Lamont*, Scottish Court of Session, 17 Jan. 1914, [1914] SLR 208, p.p. 208 – 210.

earlier French court practice also displayed that the contracts for treatment between patients and physicians or hospitals was known in the XIX and early XX centuries[722]. Since the late 1940s, the contractual form of legal relationships between patients and physicians was anchored in French and Belgian law, and the legal scholarship accepted this position[723]. In has to be denoted, that such form of legal relationships between patients and physicians (or hospitals) was known in the 1920s and 30s in Central and Eastern Europe, as it was discussed by the Supreme Court of First Czechoslovak Republic[724], and the Supreme Court of the Republic of Estonia[725].

In 1982, the Federal Supreme Court of Germany held, that the access to the patient's medical records derives from a contract between the patient and physician, and generally recognized the existence of such a right[726]. In fact, the nature of patient-physician relationships was discussed in the well-known judgment of the German Supreme Court (Reichsgericht) in 1894, which was a criminal trial against a surgeon, who conducted a bone resection operation upon a girl, desiring to conduct a bone resection in order to terminate a tubercular suppuration of the tarsal bones against the will of the father (co-plaintiff); the operation was nevertheless conducted, and was unsuccessful; a foot amputation was conducted subsequently. The doctor was tried and acquitted, but the Supreme Court found him to be guilty of battery, remanding the case (the lower court, according to the subsequent notes, acquitted him). Discussing the patient-physician relationships, the court said the following: "*Whether you call it an order, a power of attorney, a service lease, work contract, or whatever else – in any case, it is the will of the patient, or his relatives and spiritual representatives, who, in general, call this doctor to take over the treatment of this patient*…", and "*Consequently, the doctor who deliberately commits a physical abuse for healing purposes, without being able to derive his right to do so from an existing contractual relationship, or the presumptive consent* […] *acts unjustifiably, i.e. unlawfully, and is subject to the norm of §223* [of the Penal Code] *which prohibits such offenses*"[727]. These sentences may have been the very beginning of what we currently call "the right to autonomy", two decades before it was discussed in the case of *Schloendorrf* in New York (1914)[728]. In early Swiss jurisprudence, the Federal Tribunal has explicitly stated that the relations of patient

[722] See, for instance, *Beltzer c. Hospices de la ville d'Auxonne*, Cour d'Appel Dijon, 18 mars 1903, Sirey 1906 II 17, 17-18.
[723] See. *Epx De Busschere c/ Docteur X*., Trib. civ. De Bruxelles, 6 fevr. 1946, Revue Générale des Assurances et des Responsabilités (1946), No. 4104; Carril, M., *Le consentement du malade ans le cadre du contrat medical*, Revue Générale des Assurances et des Responsabilités (1966), No. 7677.
[724] *Nejvyšší soud Československé republiky*, Rozhodnut z dn. 23. dubna 1936 (23.04.1936), Rv I 1203/34, Rozhodnutí nejvyššího soudu československé republiky ve věcech občanských, Ročník osmnáctý, <od čísla 14.834 do čísla 15.723, obsahující rozhodnutí z roku 1936 / F. Vážný (Vol. XVIII) – Praha, 1937.; Čís. 15141 (p.p 444 – 447).
[725] 1923 a., 8. Juunil. *Riigikontrolli vanema kontrolöri k. t.. Johan Adamsi kaebus Riigikontrolli otsuse peale 21. dets. 1921. a. tema naise arstimiskulude väljamaksmisest keeldumise asjas*, Riigikohus Administratiiv-Osakond, Nr. 43, Riigikohtu otsused 1923. a., "Oiguse" valjaanne. Tartus, 1924, pp. 91 – 92.
[726] *Bundesgerichtshof*, 23.11.1982; VI ZR 222/79, para. 15.
[727] *Reichsgericht*, III Strafsenat, Urt. v. 31 Mai 1894 g. B. Rep. 1406/94 = RGSt Bd. 25, S. 375, at p. 380-382.
[728] *Schloendorff v. New York Hospital*, 105 N.E. 92, 211 N.Y. 125, 130 (N.Y. 1914)

and physician are contractual in the case of *Dr. Dormann gegen Hochstrasser* (1892)[729]. Considering such aged case law, I may deduce that the relationships of patients and physicians should be treated as contractual ones, and the rights and obligations of the parties, even if they are unwritten in special contractual provisions, still derive from the contract between the patient and the physician; in the 1980s, the German courts held that, e.g., to gain a right to insight to medical records, no special provisions in the contract are necessary[730]. What may be said in terms of the biobank data? Biobanks are not hospitals; they are not healthcare institutions, but rather repositories of biological materials. However, priorly to handing over the biological samples to the biobank representatives, the patients usually sign documents, referred as "consent forms" or similar ones. In civil law, such "consent form" is unlikely to be observed as a covenant (contract), but rather as an unnamed bilateral deed. Concerning actions related to negligence of biobanks, for instance, in Germany, these were actions for damages based on *negligence*, not breach of contract[731].

As we may behold from the first chapter of the paper, the functioning of biobank structures (or hospitals and other healthcare institutions, which are *de-facto* acting as biobanks for various reasons), is based upon a number of legal theories, which are well established in medical law: informed consent, property rights in biological samples and medical confidentiality. These doctrines have never been empirical, being a result of a centuryfold precedent chain at both common law and civil law. These doctrines, upon the currently existing jurisprudence, are applicable towards biobanks. At the same time, the issue of legitimate disclosure of biobank data is very sensitive, requiring precise legislative and jurisprudential answers, which is well illustrated in the case law of the Nordic states. As to the legacy in international law relating to biobanks, there seems to be far more questions, than answers. The Oviedo Convention, being the only binding international legal instrument, has not much to say in the field of biobanks, apart from the protocol on biomedical research, which may be attributed to research biobanks. It also cannot be deduced that according to the provisions of the Oviedo Convention, or the additional protocols, that biobank data may enjoy more legal protection, than the usual hospital records do. In the absence of an appropriate interpretation, the national courts have to act either upon the principle of proportionality, defining whose interest is more important, or to act strictly upon the legislative norms, allowing or inhibiting such production, if such are adopted by the legislative bodies.

Latvian Senate's judgment No. SKA-166/2020 and inferences from it. Relatively few scholarship relates to the issues of biobanking in Republic of Latvia. Relatively recently, the Latvian authors S. Mezinska and others (2020), have published a work relating to the public awareness in the

[729] *Dr. Dormann gegen Hochstrasser*, Bundesgericht, Urt. v. 10 Juni 1892, BGE Bd. XVIII, Teil. VII (Obligationsrecht), Urt. Nr. 63, S. 336-342 [339-341].
[730] *Bundesgerichtshof*, 31.05.1983 – VI ZR 259/81, para. 12
[731] *Bundesgerichtshof*, Urt. v. 09.11.1993, Az.: VI ZR 62/93, at para. 7 – 15.

biobanks in the Republic of Latvia[732]. The same year, Senate of Latvia ruled in the case No. SKA-166/2020, which dealt with the plaintiff's right to expunge the blood samples belonging to his deceased father, kept in a forensic biobank years after his death. In original, the judgment is named "*A pret. Veselības ministrija*", or "*A v. Ministry of Health*" in English. The cases are commonly referred to by the designation of the case number by the Latvian Senate's department, which is SKA-166/2020 for the case discussed below.

The facts of this case were the following. A man, whose deceased father's blood samples were maintained in a forensic biobank, previously utilized for the needs of a criminal investigation, applied to the said biobank (named as "State Forensic Medical Examination Center") with a plea to expunge the biological specimen of his deceased father, which refused to satisfy his request. He turned to the Ministry of Health, asking the same. However, the Ministry rejected his request, and he decided to resolve the dispute in a court order. The regional administrative court upheld his claim, instructing the forensic biobank to destroy the blood samples within one month. The court did not dispute that the blood samples were obtained legitimately in the course of criminal proceedings on basis of the decision of the prosecuting authority, and concluded that the human tissue samples are a source of biometric data, but are not biometric data *per se*. The court also emphasized that Art. 17 of the Forensic Experts Law does not apply to biological samples, but to results, records, inscriptions and illustrative materials, etc., which were obtained in the course of the forensic examination. It was not disputed, that the Latvian Criminal Procedure Law provides for a re-examination in case of necessity in general, but there was a lack of legal basis for storing a tissue sample for more than two years after the closure of criminal proceedings. The appeal in cassation from the side of the defendant (the Ministry of Health) invoked that the lower court incorrectly found that blood samples are not personal data *for the means of* the Data Protection Law, and that before March 2016 (the case started in early 2015), the provisions of the Forensic Experts Law did not specify the time period of biological sample retention, and it believed that plaintiff's rights were not infringed by the mere fact that the blood samples were collected in the course of criminal proceedings[733].

The object of the dispute was henceforward whether the relatives of a deceased person have a legal right to request for destruction of their biological samples, which were obtained during a forensic examination. The administrative procedure law of the Latvian Republic provides for establishing whether the person's rights or other legal interests have been infringed in order to assess whether plaintiff may prevail in action, and it is necessary to assess whether such right arises from a legal norm. The Senate turned to discuss the dispute in relation to Art. 96 of the Latvian Constitution,

[732] Mezinska, S., Kaleja, J., Mileiko, I. et al, Public awareness of and attitudes towards research biobanks in Latvia, BMC Medical ethics (2020) 21:65

[733] *A pret. Veselības ministrija*, Latvijas Republikas Augstākās tiesas, Senāta Administratīvo lietu departamenta, 2020 gada. 30.septembrī, Lieta Nr. A420260716, SKA-166/2020, para. 1-4

which protects the right to privacy. The Senate has denoted that privacy is a very broad right, inter alia, encompassing the issues of DNA profiles, tissue samples and fingerprints; thus, tissue samples appear to be a part of the human body and they are covered by the concept of privacy, and so is the issue of their handling and storage. In the case at bar, we are dealing not with the personal right to privacy, as the blood samples belonged not to plaintiff, but his father, but rather a so-called "relational" right to privacy, as it was tentatively designated by American scholars of the 20th century, who were dealing with privacy violations in state courts[734]. The Senate ascertained the same: the right to privacy is a personal right and is non-transferrable in a classical meaning of the concept, and is not transferred to successors in title, but there may be exceptions. The maintenance and custody of a deceased person belongs to the sphere of human dignity, which is of great constitutional value for the Latvian State. The Court underlined that the obligation to treat the body of the deceased with respect is not only applicable to the body as a whole, but to the tissue samples as well, and such right is not something intangible, but must have a practical outcome, and thus there must be a person which may exercise such right. Upon such a view, the Senate found it would be correct to give recognition to a subjective right to demand respect for the deceased person's body. The conjunction between personal and relational privacy, upon the view of the court, may also be ascertained by the fact that biological samples may reveal facts concerning congenital diseases or a predisposition to certain ailments[735].

Defendant ascertained that the maintenance of biological samples is necessary before the criminal proceedings are terminated, and before the decision of closing the criminal case is received, the biological samples, as all other recorded data, are kept for ten years according to Section 17 (12) of the Forensic Experts Law. The Senate had examined the provisions of the said law, including its draft, and deduced that the blood samples are to be considered rather research objects (from which

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[734] See, for instance, *Torts—Right of Privacy—No Right of Recovery for Publication Concerning Deceased Relatives (Comments)*, 1953 Wash. U. L. Q. 109 (1953); Kennedy, R.P., *The Right to Privacy in the Name, Reputation and Personality of a Deceased Relative (Notes)*, 40 Notre Dame L. Rev. 324, 325-329 (1965); *Claim of Relational Right of Privacy Denied (Comments)*, 12.1 Catholic Lawyer 78, 79-82 (1966). The case law authorities of the 20th century US law allowing or not allowing redress for violating the privacy of a close deceased (usually lately deceased) relative, could be accounted in the treatise of R. Kennedy (1965), who provides for a great analysis of the case authorities. Herein, the author invitse the reader to check the case of *Bazemore v. Savannah Hospital*, 171 Ga. 257, 260-263; 155 S.E. 194 (Ga. 1930), where the Supreme Court of the State of Georgia (United States of America), in a per curiam decision decided for plaintiffs, whose child, which was born in Savannah Hospital with a rare pathology of *ectopia cordis*, that is the heart of the infant was located outside the body. The baby died shortly thereafter, as there was no medical solution for such severe congenital condition in 1927 (when the baby was actually born). The hospital staff allowed a newspaper photographer to take photograph of the child's body and a newspaper later reported it. The parents of the child did not consent to such exposure, and sued the hospital, the photographer and the newspaper ("Savannah Press"), prevailing in action. Among a wide variety of privacy actions, which became very common in the 20th century US common law, there were few cases associated with exposing rare medical conditions, see. e.g *Douglas v. Stokes*, 149 Ky. 506, 506-509 (Ky. Ct. App. 1912), which was an action against a photographer, who was asked to make twelve photographs of a dead body of the Siamese twins, delivering them to the father, but the photographer made more photographs and file one to the US Copyright Office, which was apparently done against the will and consent of the parents, who brought an action (defendant's appeal to the Court of Appeals of the State of Kentucky was dismissed). The case authorities used by the courts in those cases were mainly common-law ones, for instance, see the English case of *Pollard v. Photographic Co*., 40 Ch. D. 345, 348-351 (1888); Keener's Selection of Equity Cases, Vol. 1 (1895), p.p. 76 – 95.

[735] SKA-166/2020, para. 5-11.

data may be extracted by special techniques, obviously). The Senate held, that neither the jurisprudence, nor the academic literature could clearly define whether the blood samples should actually be considered as personal data (that is, all the provisions of the Personal Data Protection Law would apply to their maintenance and other activities regarding them), but the pre-existing blood samples should not be regarded as such, as blood samples do not meet the definition of personal data, as it is impossible to whom they belong without special technologies. However the tissue samples as research objects may provide sufficient amount of private information – not only about the person itself, but his/her relatives as well, and such techniques allowing to extract such information do exist. The Senate held, that it would be disproportionate to say, that documented records would grant a greater level of protection than for biological samples – that is, "…*a source of such information that can already provide very specific and unique information about a person*". On this basis, the Senate held that biological samples should be considered as "personal data" in the broadest sense of the term, especially taking into consideration they were definitely collected for data processing. Since the Senate deduced that the biological samples are personal data, and therefore, the principles of privacy and data protection should be taken into account while dealing with the justification of storage of such data. The restriction of right to privacy, held the Senate, is in accordance with the Satversme (the Constitution of Latvia), in case it is established by the law, has a legitimate aim, and is proportionate; and when the proportionality issues are observed, it is necessary to determine whether the general principles of data protection have been observed. It was undisputed, that the personal data of plaintiff's father were collected in a legal way (i.e. in the sense of the Criminal Procedure Law). However, neither the Criminal Procedure Law, nor the Law on Forensic Experts provided neither for the procedure for storage of the tissue samples, nor for the procedure of their destruction, nor for the terms after the completion of the medical examination. The Constitutional Court of Latvia in Judgment No. 2015-14-0103 emphasized, that in order for the data processing to in order to be in conformity with the Satversme, the regulatory provisions must have a sufficient legal remedies, and their sufficiency depends, inter alia, on whether it has been determined for how long the personal data is stored, and used [for legitimate activity], and when it must be destroyed[736]. The Senate applied an analogy for maintaining material evidence and documents: upon Art. 329 (1) of the Criminal Procedure Law, they must be kept before either before the court judgment regarding the criminal case enters into force (and the term for appeal thus expires), or after the criminal investigation is terminated. The Senate held, that applying the analogy, the legal basis of maintaining tissue samples expires upon the same reasons. Consequently, after the legal basis is lost, the tissue samples must be destroyed. In terms of overall data protection principles, the data are to be maintained as long as there is a reason for it. The Senate also emphasized that the storage of personal data is not justified only as

[736] *Court of Satversme (Constitutional Court of Latvia)*, Judgment of 12 May 2016, Case No. 2015-14-0103, para. 23.3

there is a theoretical possibility of it being useful once in the future for an unspecified reason. So, the Senate held, that in case the terminal proceedings are terminated, and there is no indication they are going to be continued or reopened in the near future, there is no reason to maintain such personal data. The criminal case was terminated in June 2015, so the Senate found, that the reason for further maintenance of such data was long lost. Thus, the Senate ruled to leave the lower court's judgment unchanged, dismissing the appeal in cassation[737].

At present time, there is no special law on biobanks or on biobank data privacy in Latvia, despite biobanks apparently exist in it; the only close law, which may relate to biobanks, is the Human Genome Research Act, adopted in 2002[738]. Biobanks are not only research-oriented institutions, and research biobanks are also not confined only to genomic research, but general provisions, i.e. issues of data protection (Art. 9, see also Art. 18 relating to destruction on tissue samples – in the case above, this was obviously not a research biobank, but a forensic one), or the rights of the gene donors (Section II, Art. 10-12), are basically the same in typical biobank laws covering the main principles of biobank functioning. To date, the author has not found any Latvian case, where a genomic research biobank was brought to the court for an alleged violation of Personal Data Protection Law, or a violation of the rights of the donors, but I predict we may behold such cases in the near future. Since Art. 9 of the Human Genome Research Act (2002) stipulates that the provisions of the Personal Data Protection Law are applicable for the issues of genomic research, it seems to be a sound solution for all the biobanks as well. The Senate's solution by utilizing an analogy for destruction of tissue samples, which were collected by a forensic medical center with all material evidence preserved for criminal proceedings, seems also logical. At the same time, it is not possible to expect that the tissue samples will be always destroyed as soon as the criminal proceedings are terminated, or when the respective court judgment enters into force. Thus, we may expect that plaintiffs will have to decide it in an administrative order (i.e. by requesting the destruction from the ministry of health); if such measures were ineffective, than nothing would prevent to resolve it in a court order.

The experience of Nordic states in relation to legitimate biobank data disclosure. In 2010, Otlowski, Nikol and Stranger addressed virtual concern towards production of biobank data for the needs of justice, prompting such production should be performed in accordance with the law[739]. The author finds that production of biobank data is not likely to be something, which would be radically different from a blood bank, technically being a biobank as well[740]. Biobanks are under the jurisdiction of the courts in any way like hospitals are; and the law has not changed for ages in respect with the liability of medical practitioners and hospitals: in older times, it was rather established by

[737] SKA-166/2020, para. 12-17 and operative part.
[738] *Latvijas Vēstnesis*, 99, 03.07.2002
[739] Otlowski, M., Nicol, D., Stranger, M., *Biobanks Information Paper* (2010), 20 Journ. L., & Inf., & Sc. 97, at p.p. 163 and 212
[740] *Stenger v. Lehigh Valley Hospital Center,* 530 Penn. 426; 609 A. 2d 596, 800-804 (1992)

statute (for instance, Art. 3 of the Medical Ordinance of 1818 in the free city of Lübeck, see the annotation an texts of the court decisions of all three instances in the matter of *Dr. Albrecht*[741]), or interpreted by courts in a way that doctors and hospitals are liable for their professional misconduct, as anybody else, had it been proved[742]. Has it changed in the course of the centuries? The author does not see how. A biobank, as any other legal entity, may be sued for negligence in maintaining biological samples[743]. Biobanks are under the same jurisdiction of courts as the hospitals or any other medical institutions are, and the author has no reasons to see, for what aim the court should not order a biobank to produce biological samples, necessary for court proceedings, in both civil and criminal cases. Such boundaries, however, could be established in case law, as it is in Norway, where Art. 15 of the Biobank Act does not explicitly specify in which cases biobank data may be legitimately requested to be handed in to the court as evidence (e.g. for paternity proceedings), and circumstances under which they may be, are decided by courts in each situation separately. Upon the existing case law, biobank data may be ordered for disclosure in paternity claims, but the use of such records in criminal proceedings is very limited, or not permitted – the same applies to requests of police authorities to investigate on biological samples for cases of missing persons.

The 2013 and 2018 judgments of the Norwegian Supreme Court cast a light on the legitimacy of disclosing biobank data containing biological samples in paternity claims. The 2013 case was an inheritance dispute. A 67-year-old man (1944-2011) died in September 2011, and the son, born 1982, registered as the heir. The man's surviving spouse (as recorded by the appellate court judgment), contested their relationship. The son and his mother filed a summons to the district court against the probate regarding the determination of paternity. The deceased man was cremated, and the son did not wish to submit any biological material for DNA analysis. However, some biological material belonging to the deceased man was still maintained at a biobank at the Oslo University Hospital at a pathology department. The hospital agreed to hand over the necessary biological material upon a court order, but the other party claimed this was illegal, as the condition for releasing biobank data was not met (Art. 11; 13; 15 of the Biobank Act), meaning, in short, that the consent of the deceased person had not been obtained. The district court of Larvik found that the order for disclosure should be made as Art. 24 (2) of the Barneloven (Children's Act in Norwegian – A.L.) would allow to demand the disclosure of biobank data in paternity cases, even despite it contradicts the provisions of the Biobank Act, as stated hereinabove. The decision was appealed, but the appellate court rejected the complaint, finding that Art. 24 (2) of the Barneloven provided sufficient basis for disclosure, and

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[741] *Carl Joachim Christian Bracker, Klager, gegen Dr. Juris Albrecht, mand. nom*, Oberappellationsgericht zu Lübeck, 30 Dezember 1856, Sammlung von Erkenntnissen und Entscheidungsgründen des Ober-Appellationsgerichts zu Lubeck, etc. Band 3, 1re Abteilung, Sache No. 16, S. 172, 173-175

[742] *Trib. civ. de Ypres*, 10 mars 1843, *Belgique Judiciaire* Vol. 1843, at p. 552

[743] See, for instance, the judgment of the German Supreme Federal Court of 1993, *Bundesgerichtshof*, Urt. v. 09.11.1993, Az.: VI ZR 62/93, see. Entscheidungsgründen, II (para. 7–15). [negligence in maintaining spermatozoa samples, plaintiff entitled to damage].

neither the Biobank Act, nor the existing case law provided any necessity for the consent of the person concerned in such cases. The probate estate and surviving spouse (designated as parties upon the materials of the cassational complaint and the court report of the Supreme Court) again impugned the judgment, demanding the annulment of the judgments of the lower courts claiming the histological material of the deceased man's (referred in the Supreme Court's report as "A.") shall not be handed over for using it as evidence in paternity proceedings. The son and his mother asserted that the lower court judgments were correct. The Supreme Court weighted the aforementioned provisions of the Biobank Act and the Children's Act, finding that the latter must prevail in a paternity claim (in fact, the dispute was not a paternity claim initially, but an inheritance dispute – A.L.). Among the aforesaid legal provisions, the Court analyzed the provisions of the Medical Practitioners Act of 1980 and norms relating to the obligation of confidentiality (Art. 37). The comment of 1979-1980 to the act (seemingly, it was written before the law was adopted), provided that doctors could disclose information regarding a deceased individual, when legitimate reasons exist for him to do so[744]. Analyzing the provisions of Art. 15 of the Biobank Act and the comments to the law (i.e. preparatory work), the Supreme Court found that there was no indication that the consent of the individual concerned is necessary in the scope of paternity claims. Had even such a rule existed, the Court held that a number of special considerations in favor of disclosure of such data in paternity proceedings would nevertheless prevail[745]. The court admitted that such dispute rises quite a lot of controversy in terms of prevalence of one act over the other, and decided to reject the appeal[746]. This judgment became a very valuable precedent in terms of disclosure of biobank data in paternity claims, but the Norwegian jurisprudence has much to offer in other instances, too.

The next Supreme Court's judgment was a more trivial dispute, namely a claim for determining paternity with the issue of the legitimacy of disclosing biobank data of a potential biological father in paternity proceedings. In 2016, an infant was born to plaintiff, who was his mother, and was married to a man named B., and was registered as the child's father. In 2017, the plaintiff brought an action to the district court in order to deny the paternity of Mr. B., and asked the court to issue an order to obtain records from a police DNA register, which was collected in connection with an earlier criminal conviction. Mr. B. no longer stayed with plaintiff, and by that

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[744] *Norges Høyesterett*, HR-2013-868-A – Rt-2013-565, para. 40 (translation of the author): "*After a person's death, a doctor may disclose confidential information about him when there are compelling reasons to do so. The assessment takes into account the nature of the information in question, the presumed will of the deceased and the interests of the relatives and society*."

[745] Rt-2013-565, at para. 60: "…*it would be to be expected that the special considerations that apply – especially the child's fundamental interest in having a legal determination of who his father is - would have been drawn out and weighed against the considerations behind the consent rule*…". At this point, it is obvious that the word "child" does not strictly mean "a minor", but any person who is a biological child of the person, whose biological samples are necessary to define paternity: in this case, the son was 28-29 years old at the moment of his father's death and was 30-31 (the birth date was referred as "0-0-1982") at the time of the Supreme Court's judgment.

[746] Rt-2013-565, para. 28-75.

time had already moved from Norway (thus, it was practically impossible neither to obtain his consent, nor was he available to be present at paternity proceedings). The district court and the court of appeals rejected plaintiff's claim, so plaintiff filed an appeal in cassation, claiming that the acting Norwegian legislation (i.e. the Children's Act, the Police Register Act and other laws), and the principles adopted in case law would allow the disclosure of DNA data kept in the register for the needs of paternity proceedings. The provisions of two named laws collided: the former would allow the production of biobank data kept in a DNA register if the presumed father is deceased, or unavailable, while the provisions of the latter provided that the information, which is kept in police registers, may be used only for the needs of criminal justice. The Supreme Court assessed the provisions of each law, and found that the provisions of the Children's Act must be given priority in this case. By a vote of 2-1, the Supreme Court judged to annul the decisions of the lower courts[747].

The Supreme Court's 2020 and 2021 judgments give a substantial background for the issue of disclosure of biobank data for the needs of criminal investigation. In the first case, the prosecuting authorities attempted to obtain the biological samples of an infant to determine the cause of his death, and in the second, upon which the decision was handed down on July 1, 2021, the police authorities strived to obtain the biological samples of a missing person, which were maintained in a biobank as well. So, let us examine the both judgments.

An infant, being 15 months old, deceased in November 2013 under suspicious circumstances, and the both parents were put on charge. However, the forensic experts were unable to define the cause of the infant's death, and the criminal case was thereby temporarily suspended. The biological material from the infant's body was collected twice: the first was for the needs of the prosecution, and the second was procured for the needs of a research project named "Transformation and redistribution of chemical substances (alcohol, narcotics, drugs) in the body after death", which was conducted at the Norwegian University of Sciences and Technology and the biological samples were hereinafter maintained at the research biobank of the said university. As of the case facts, the body of the infant was cremated, thus making an exhumation of the body impossible, had it been necessary[748]. The biological samples, which were stored on behalf of the police and the prosecution at St. Olav's Hospital, were later destroyed in January 2017. In 2019, the criminal case was reopened again, and the surviving father (the mother was already deceased by the time of the reopening of the case) was put on charges. By 2019, the preserving biological samples of the deceased child were kept in the university's research biobank, and the police filed a request to obtain the necessary biological material so as to proceed with the criminal case, pointing out that the given biological samples could assist the determination of the cause of the infant's demise, and thus could help with proceeding the criminal

[747] *A (advokat Elias Christensen) mot B., Norges Høyesterett*, HR-2018-2241-U, 2018-11-23, para. 10-33.
[748] Norges Høyesterett, HR-2020-1776-A, 2020-09-14, para. 3-6 (case facts)

case. The University refused, and so the prosecution authority decided to file an action to the district court to obtain them. The district court rejected the claim on basis of Article 27 of the Medical and Health Research Act (2008), and the prosecution body impugned the judgment at the court of appeals, which held, that Art. 27 of the aforesaid law could only give rise to request such data in very exceptional cases, where (literally) major societal interests are at stake (though, in fact, the abovesaid provision did not clarify, for instance, what type of civil or criminal cases would constitute it), and dismissed the appeal. The prosecution body filed an appeal in cassation to the Supreme Court, and the Court discussed the correct interpretation of Art. 203-204 (1) and 210 (1) of the Criminal Procedure Code, dealing with obtaining evidence, which is required for procuring a criminal case, and it held, that ordering to obtain any biological samples is admissible in principle. Art. 27 of the Medical and Health Research Act of 2008, said the Supreme Court, did not generally allow to disclose medical data for prosecuting purposes. However, the last provision of Art. 27 of the abovesaid law provided for additional regulations that may be adopted to legitimize such disclosure with considerable interests (be it public or a private one), but no such regulations were ever developed and adopted by the legislator. Next, the Court mentioned its view relating to the application of Art. 15 of the Biobank Act, that possessed a similar norm, and reckoned up its earlier practice, when the same Court held that biological samples obtained in the course of the person's treatment, should not be handed over the law enforcement agencies for the necessity of investigation, and emphasized that substantial privacy considerations are related to the medical data that are stored in biobanks. The given approach, used by the Court, makes it hardly possible to obtain such biological samples for the needs of procuring a criminal case. The Court did not deny there may be some situations when the request for biological samples may be satisfied, but still chose to reject the prosecution body's appeal. The Court admitted that the case really arises contraversial legal issues. Indeed, on one hand, the case had very specific circumstances (the death of a child), and the Constitution and Criminal Procedure Act indeed was up to investigate sudden and unexpected demises, and it may sound adequate in relation to the legal security of the child. On the other hand, the Court gives a substantial weight to the wording of the law, when it is promulgated as an "absolute rule", wherein all exceptions are clearly indicated (in this case, they were not). Next, such revelation with an absence of such precise indication in Art. 27 of the Health Research Act of 2008 would undermine the general confidence in all medical research and the biobanks themselves, found the Court. Therefore, the Court rejected the appeal of the prosecution office[749].

The most recent Norwegian case (as of 2021) concerned the legitimacy of use of a person's semen samples kept in a biobank for the needs of searching a missing person (including abroad), upon which, despite the reversal of the judgments where the lower courts upheld it is admissible in the

[749] *Norges Høyesterett*, HR-2020-1776-A, 2020-09-14, para. 10-33.

view of the Treatment Biobank Act, Art. 15, the Supreme Court acknowledged that the request for such data is admissible in case the person's consent for it exists. So, the facts of this case were the following. Person A., was missing since January 2010. Before disappearing, he handed over semen samples before undergoing treatment, which could cause sterility, having agreed for a long-term storage of the semen samples for assistive reproduction for a future spouse or partner in a stable cohabitation. The circumstances under which he disappeared led the police to open a criminal investigation; it was suspected that person A. could have been killed, but his body was never found. The police obtained his mother's DNA profile, and have asked the European states and the USA to use the said samples to conduct a search in their registers of unidentified bodies, and some of the states responded, that such search is permissible under the law only in case they transfer the DNA sample of the missing person. The police decided to seize the semen sample from Oslo University Hospital, and Person A.'s mother agreed, but the hospital opposed to it, claiming that they cannot hand over the said samples without the donor's consent pursuant to Art. 15 of the law mentioned above (i.e. Treatment Biobank Act). The police applied to the Oslo District Court for an order to disclose the necessary biological samples, and the court upheld the claim, stating that the Art. 15 of the Treatment Biobank Act has to be interpreted restrictively, and the lack of consent was not an obstacle for disclosing the biological material in such a case. In a per curiam decision, the Borgarting Court of Appeal had dismissed the appeal of the hospital, which filed an appeal in cassation to the Supreme Court, which found it would be sound to uphold the appeal.

The position of the parties was, in brief, as follows:

1) Claimant (the prosecuting authority was designated as claimant): the Borgarting court of appeal did not commit any procedural errors, and the Art. 203, 204 and 210 are a sufficient authority for ordering a biobank to disclose the necessary biological samples, and the proportionality principle (pursuant to Art. 170 of the Code of Criminal Procedure) is met. The provisions of Art. 15 of the Treatment Biobank Law provide for presumed consent, and thus the consent requirement is also met; the patient's rights law (originally – the Patient and User Rights Act, Art. 4-6 (2) and 11) support this view. The prosecution authority admitted that the law was silent in regard to presumed consent in such cases; it could not be held that a presumed consent is generally excluded.
2) Defendant (the Oslo University Hospital): the Treatment Biobank Act, Art. 15, sets up an absolute rule of the donor's voluntary and informed consent, which does not allow any exceptions. The appellate court, upon the view of defendant, made several procedural errors, and claimed that the principle of proportionality was not fulfilled (Art. 170 of the Criminal Procedure Law)[750].

[750] *Norges Høyesterett*, LB-2020-182273, 2021-07-01, para. 13-20; 2-12 (facts).

The Supreme Court summarized, that the dispute is, whether it is admissible for the police authorities to order a biobank to hand over the biological samples of a man, who is missing for ten years so as to file requests abroad for the search of this person in the registers of unidentified bodies, had he died elsewhere abroad. Since the Court is essentially a court of cassational instance, its competence lies in determining whether the appellate court tried the case and interpreted the legislation in a correct manner (see Art. 388 of the Code of Criminal Procedure). The Supreme Court held that the most contraversial point of the case is whether Art. 15 of the Treatment Biobank Act may allow disclosure upon a presumed consent. Despite the trial and appellate courts held it would, the Supreme Court held, that it would not. Judge Bergsjø, speaking for the Supreme Court, outlined that the privacy issues relating to biobanks are very sensitive, and that issues of disclosure are regulated by a blanket provision of the last paragraph of Art. 15 of the Treatment Biobank Act, which holds as follows: "*The King may, in regulations, decide that the disclosure of human biological material to the prosecuting authority or court may very exceptionally take place, if very weighty private or public interests* [exist to] *do so lawfully*.". No such regulations were adopted by July 1, 2021 (the date of the judgment). Then, held the Court, the rule of consent still remains to be absolute. The Court reviewed the previous case law, involving different situations – from paternity cases to criminal investigations (these cases were described above), and did not uphold the view of the claimant that the rule of presumed consent could apply, as it could apply within other laws in the sphere of medical law and healthcare – the Court found that no such conclusion could be drawn based on other laws, governing any other branch of healthcare services. The Court found, that Art. 15 of the Treatment Biobank Act leaves no space for presumed consent, which must be "*voluntary, express and informed*", augmenting that it may be up to the legislator to provide an addendum to the regulations for relaxation of the disclosure rules in respect with the treatment biobanks, but such regulations did not exist at the time, when the judgment was handed down. The Supreme Court decided for defendant, ruling unanimously (5-0); the Oslo University Hospital won the case and was awarded the legal costs according to the Dispute Act, Art. 20 (2)[751].

Swedish legal scholarship observes production of biobank data as a coercive act in civil or criminal procedure, and thus necessitates a strict conformity with the acting legislation, as well as pursuing a legitimate aim for doing so[752]; and the decision of the district court's judgment in "Allmän åklagare mot Karolinska Universitetssjukhuset Huddinge", adjudicated by the Swedish Supreme Court in 2018 (*Attorney General v. Caroline University Hospital of Huddinge* in English) mentions that the production of biobank data in a criminal case would necessitate a serious crime to occur so

[751] *Norges Høyesterett*, LB-2020-182273, 2021-07-01, para. 22-35; 35-48; 49-50 (conclusion); see also the judgments of the trial court and the appellate court: *Oslo tingrett*, 2020-11-17, TOSLO-2020-165075 (trial court decision); *Borgarting lagmannsrett*, LB-2020-182273, 2021-01-08 (appellate court confirming the trial court decision).

[752] Bergman, G., Rannsakan av diskretionära beslut omhusrannsakan, En kritisk utredning av institutet husrannsakanur ett rättssäkerhetsperspektiv, Lunds universitet, 2021, p.p. 27-32

the court would decide to request it; the conclusions of the district court judgment emphasized that the Swedish Biobank Act of 2002 takes precedence of other legislation[753]. Sweden is one of the few states to possess a broad law on professional secrecy, namely the 1980 Secrecy Act[754], whereas many states have never enacted any special laws on secrecy, limiting such provisions to norms of the Penal Code (i.e. Italy, Germany, France). The judgment of the Swedish Supreme Court of 2018 somewhat reflects the policy towards a very limited, or a completely absent possibility of disclosure of biobank data in regard with criminal proceedings. The dispute in this case did not seriously vary from the ones in Norway. The public prosecutor's office filed a request to the district court to grant a search in Stockholm Medisinska Biobank, located in Caroline University Hospital in Huddinge (a district of Stockholm, Sweden) for the necessity of searching for tissue samples, which were submitted by a person, who was a [civil] plaintiff in an ongoing preliminary investigation. The prosecutor's position was that due to the investigation on an aggravated assault, access to parts of two tissue samples was needed; and these were stored in a biobank; and there was no other means to obtain them; and the purpose for obtaining them was to compare the viruses in these samples with the viruses from the analogous samples of the suspect; and the plaintiff had already consented towards the production of the said biological samples thereto. The biobank and the Healthcare Inspectorate objected to the search. The Falun District Court found, that the plaintiff's case is already supported by many facts, and considered the position of the defendant biobank, whose counsel claimed, that a criminal investigation is not the type of activity under which the biobank tissue samples may be used, in accordance with Art. 2 of the Biobank Law of 2002[755]. The new biobank law drafts (law drafts and comments to them seem to be considered as a credible source of law in Nordic law) also hinted that the biobank data should not be utilized for criminal investigations. The district court of Falun concluded that the order should not be granted. It held, that in order to grant such a search, a very serious crime should occur, and concluded that civil plaintiff's consent is not decisive, doubting that the crime happening in the plaintiff's case was of such nature that it was a major crime that would make the court grant an appropriate order for such search. The prosecutor's office filed an appeal, and the Svea Court of Appeal found that the search could be granted. The appellate court found that the prosecutor reported sufficiently concrete circumstances that the plaintiff's tissue samples are of great importance for the ongoing preliminary investigation. Concerning the search, the Court of Appeal held the following: if there is a reason to assume that a crime which was committed would toll to an imprisonment to the accused (which in fact could toll to it taking into account it was an aggravated assault), than the search may be conducted for the objects, which may be seized.

753 *Allmän åklagare mot Karolinska Universitetssjukhuset Huddinge*, Högsta Domstolen, 2018-11-01, Mal. No. Ö2397-18, NJA 2018, p. 852 (see conclusions of the Falun District Court: Falu tingsrätt / Domskäl [26.03.2018]).
754 Sekretesslag (1980:100).
755 Lag (2002:297) om biobanker i hälso- och sjukvården m.m. [in English: The Act on Biobanks in Healthcare, etc.]

According to the house search rules, "*the house search may only be decided if the reasons for the measure outweigh the intrusion or otherwise that the measure entails for the suspect or for some other opposing interest*". The court found, that the requirements for a special reason were met. The defendant impugned the judgment to the Supreme Court, claiming, inter alia, that the Biobank Act takes precedence over the Code of Judicial Procedure. The Swedish Supreme Court reviewed the legislation on biobank operation as well as rules of the Code of Judicial Procedure in respect with the house searches, finding that the relationship between the Biobank Act and the Code of Judicial Procedure has never been touched explicitly by the legislator, but the Biobank Act had to be taken into consideration in respect with the principle of proportionality of interference relating to a house search. The draft laws did not possess any suggestions concerning it, but the Court concluded in the test on proportionality, that biobanks are likely not be used for criminal investigative purposes; while at some point, there truly may be instances when such could happen, however, the Supreme Court emphasized that the criminal investigation interested must be very strong. Thus, the Supreme Court overturned the appellate court's decision and rejected the claim for search[756].

As we may deduce from Swedish and Norwegian court judgments, the courts are not very eager to allow production of biobank tissue samples for the needs of criminal proceedings, though Norwegian courts allow it for the needs of civil proceedings in limited occasions. There is no strict statutory prohibition for producing biobank tissue samples for the needs of criminal proceedings neither in Norway, nor in Sweden, but the courts usually claim that the reason for such production would necessitate to be much more substantial than the criminal cases at stake. Even a search of a missing man, presumably deceased by the time of the proceedings before the Norwegian Supreme Court in 2021, was not a valid reason for production of biobank data without his free and informed consent. However, Norwegian courts would allow the production in civil claims, such as paternity proceedings. Therefore, it may not be concluded, that biobank data are exempt from production for the necessity of administering justice.

Conclusions to Chapter 3

The third chapter dealt with a number of complicated issues of the interconnection of medical law and the fourth generation of human rights. It involved the discussion of the following rights in terms of medical confidentiality:

- HIV-status data;
- Psychiatric records;
- Anonymous childbirth;

[756] *Allmän åklagare mot Karolinska Universitetssjukhuset Huddinge*, Högsta Domstolen, 2018-11-01, Mal. No. Ö2397-18, NJA 2018, p. 852, para. 22-36.

- Biobanks and biorepositories.

HIV-status data are highly-sensitive, as they reveal the fact that the patient is sick with a very serious, frequently thanatoid disease, which is hardly curable, despite modern medical science already allows efficient medical treatment in order to support the patient's condition. The data relating to the patient's HIV-status is occasionally protected in the scope of the legal institute of medical secrecy, or the data protection act, however some laws, i.e. in Canada allow transferring such data to healthcare authorities and allow physicians to legitimately inform members of the patient's family concerning his, or her HIV-status. Lawsuits relating to breaches of HIV-status information confidentiality are more seldom than the lawsuits on breaches of medical confidentiality, but they still do exist; a number of such cases were also adjudicated by the European Court of Human Rights and the European Court of Justice.

Psychiatric records are distinguished from ordinary medical records because of their highly-sensitive nature and the fact that they frequently constitute records on the thoughts and hypotheses of doctors relating to patient's health among the objective findings. The right to production of such records, or an insight to them by the patient, or his legal representative is usually accepted by the courts, but the plaintiffs need to provide legitimate reasons for production of psychiatric records. Hospitals may oppose the production and insight of such records because physicians consider the possible damage to the health of the patient, once he or she inspects them. At the same time, in some cases, these records are asked to be produced for various civil litigation, i.e. for challenging the validity of a will. In other cases, the plaintiffs sought to produce these records for the necessity of employment or concluding insurance contracts. Because of the peculiar nature of psychiatric records (and nevertheless, patients may prove their right to access them), they should be considered as highly sensitive ones.

The right to anonymous childbirth presupposes the anonymity of the biological forbearers to their offspring, who is usually deprived from inheritance rights as well (though, not always). Some of the plaintiffs, who willed to receive a court order for the production of their birth records, that would reveal the identity of their parents. This is a very old right, originating from France, which received its recognition in case law in the middle of the XIX century, where the courts allowed the physicians to conceal the information relating to the biological forbearers of a neonatal child, which was born out of wedlock; this position was not accepted in older Belgium case law. The right to anonymous childbirth was firmly re-established in France, as well as a number of other European states (see. e.g. the clarification of the European Court of Human Rights in the case of Godelli v. Italy (2012)). In United States, the courts allowed the plaintiffs the production of such records in case they demonstrated a valid reason for it (plaintiffs were able to prevail in action in several cases).

The interaction of *biobanks* and the courts rarely becomes an object of scientific scholarship, despite worldwide jurisprudence shows that biobanks were not once sued for various malpractice (i.e. for mishandling of biological samples, or illegal collection and possession of them). One of such seldomly-reviewed aspects is the production of biobank data for the necessity of civil and criminal proceedings. Despite such cases are still rare in the Continental legal system, the Nordic states already possess a decent body of judge-made law relating to it, as the acting legislation usually does not provide an explicit answer concerning the production of biobank data for the needs of justice. Many biobanks oppose the production upon the request of the courts or the prosecution authorities, impugning the judgments to the higher courts with variable success. The courts also are occasionally reluctant to order the production of biobank data. In some instances, Norwegian courts had to deal with the clash of legal provisions of various laws, deciding which one takes prevalence over the others in a distinct legal case. In Latvian law, the problem of biobank data maintenance is reflected in the judgment no. SKA-166/2020 of the Latvian Senate, where the plaintiff litigated with the Ministry of Health in order to expunge the biological samples of his deceased father, which were kept in a forensic biobank long after the criminal investigation was already closed. At the same time, no lawsuits against Latvian biobanks (whatever their role and operation is) have been found in the court case databases, though such lawsuits may be a matter of time. In the author's view, there should be no legal obstacles for ordering a biobank to produce certain types of biological samples both in civil and criminal cases. As the Norwegian jurisprudence shows, biobank samples may be legitimately produced for the needs of paternity proceedings. The author does not see any fundamental difference between the production of biological samples from a biobank and the production of medical records from a hospital. Nobody encroaches upon the issues of confidentiality of the biological samples by asking for a court order to produce it for a peculiar trial. If we hold that biobank samples maintenance invokes very sensitive privacy issues, is it not the same for hospital records, or mental asylum records? The aims for what they are produced (i.e. paternity claims, search for missing persons, evidence for criminal cases) has nothing to deal with the concerns, which were expressed by the European Court of Human Rights in *S. & Marper v. United Kingdom* (2008): the tissue samples are not ordered for production to, roughly speaking, spy on someone's genome, or conduct an unauthorized research. Therefore, the concern for an additional privacy protection than the one for ordinary medical records seems to be overrated. What is more, even if we pretend that the tissue samples, once legitimately produced upon a court order, may be misused, nothing but a lawsuit would happen, had it disturbed the plaintiff – a similar situation already occurred in the Latvian Senate's judgment SKA-166/2020. Upon the abovegiven inferences, I make a conclusion that biobank data, whatever the form of it may be, is a type of medical records, that are able for their identification (i.e. it should be regarded as personal data) according to special techniques, is subject to medical confidentiality, as any other medical records, and there

should be no legal obstacle for producing them for the needs of administering justice, but applying either the principle of proportionality in civil and criminal proceedings, or the already existing legislative provisions concerning medical records production. At present day, there is no uniform solution relating to a legitimate production of biobank records, and thus, the national courts usually reach the decision on a case-by-case basis, as a legal case may possess peculiar circumstances, which should be assessed by the court properly, and which may change the outcome of the case. Since the European Court of Human Rights has not dealt with the issues of biobank data production to date, the national court judgments are currently the only engine of a legal solution of this problem.

Corollary from the promotional work

Having reached the concluding part of the promotional work, the author hallmarks its corollary. In all the three chapters, the institute of medical confidentiality was analyzed from its historical, contemporary, general (i.e. breaches of confidentiality by healthcare institutions and doctors) and special terms (i.e. production of biobank data, confidentiality of HIV and psychiatric records, patient's right to access to medical and psychiatric records etc.). Therefore, it would be sound to summarize the material as underwritten:

1. Medical confidentiality is an institute of civil and criminal law with a dual nature of origination. Firstly, it protects the patient's privacy and the privacy of his (her) relatives and next of kin. Secondly, confidentiality of patient-physician relations is an inalienable attribute of medical profession, the absence of which would undermine the trust in medical profession and the healthcare system in general. The Latvian Senate came to the same conclusion in the case SKA-41/2020, and the same principles were established by the French courts in the late XIX and early XX century cases.
2. Medical data are classified as 'sensitive' not merely because they are classified as such traditionally, but owing to the fact that their disclosure could harm the plaintiff's working career and his (her) personal life. So, there is nothing strange that the aggrieved party seeks redress at a court, suing physicians or hospitals for an unlawful disclosure of medical personal data. A classical example of the court's views on the potential damage for an unlawful disclosure of medical data is the European Court of Human Rights judgment in *Z. v. Finland* (1997). It is also worth denoting, that the sensitivity of medical data may be also different. In particular, the third chapter of the promotional work revealed, how peculiar are the HIV and psychiatric medical records, and for which reason mental health records have a very special regime of insight (though are not banned for it, as such). Therefore, it would be logical to conclude, that some types of medical data form 'highly-sensitive' personal data, which are much more sensitive than ordinary medical records owing to their special characteristics, as well as a high potential damage to the prospective plaintiff, in case such medical records are unlawfully disclosed.
3. Contemporary international law opts for a high degree of safeguarding patient's personal data. Art. 8 of the European Convention of Human Rights, establishing a guarantee of the right to private and family life, encompasses confidentiality of patient's medical data, which was repeatedly mentioned by the European Court of Human Rights. This court has repeatedly dealt with lawsuits relating to breaches of medical confidentiality in various ECHR state-signatories, and thus has to consider the peculiarities of the state-defendant's national legislation on the subject, which may be diverse. Upon the current jurisprudence of the Court,

the issues of medical confidentiality were touched upon the following categories of cases: 1) legitimacy of testifying in court, where testimony contains a medical secret; 2) legitimacy of transferring personal data containing medical records to other institutions (i.e. insurance companies, like *M.S. v. Sweden* (1997)); 3) the legitimacy of using medical information within biomedical research, i.e. in the case of *Gillberg v. Sweden* (2012); 4) leakage of medical data from hospital registers, which were not provided with a sufficient regime of confidentiality (i.e. I. v. Finland (2008); 5) disclosures of medical information by non-medical personnel, but, for instance, by publications in the press or books (i.e. *Societe Plon c. France* (2004); *Biriuk v. Lithuania* (2008)). The jurisprudence of the ECJ (Court of Justice of European Union) also represented a number of disputes, where ex-employees of EEC institutions litigated against their former employers because of having no possibility to have access to their medical records and the reports to learn the reason for which they were held physically unfit for work. Such cases occurred mostly in the 1970s and 80s. In international law, the issue of medical confidentiality was first risen in the case of *Dame Cote* (1906) in France, where the court found it admissible for Swiss doctors to testify on facts containing medical secrets they learned in Switzerland, as the court held, that the obligation of confidentiality applies only to facts learned in France.

4. Latvian medical law developed in the early 1920s, primarily upon the basis of laws containing medical treatment regulations. The 1920s and 30s Latvian case law featured disputes on the remuneration of treatment costs between various private and/or public parties, as well as medical malpractice cases, most of which were heard before the justice of peace or district courts. Medical malpractice was a criminal misdemeanor, and since 1933, an unconsented medical intervention was punishable under Art. 218 of the 1933 Criminal Code. However, archival materials did not contain any judgments related either to unconsented operations, or to breaches of medical confidentiality. The discovered archival judgments were related either to medical negligence, or to abortions. The Latvian Senate has also announced a number of judgments relating to medical malpractice in the late 1920s and 1930s. At the same time, disclosures of medical information by hospital personnel had very little precedent in Latvian law. Judgment No. SKA-41/2020 is a very valuable case for systemizing and generalizing the future court practice relating to medical confidentiality breaches.
5. The issue of patient's rights in Latvia is of relatively recent origin, when the Law on the Rights of the Patient was enacted in 2009, and came into force in 2010. In the First Period of Independence (1918-1940), the problem of patient's rights occurred mainly in case law – in cases on remuneration on treatment costs (i.e. from hospital sickness funds, municipality funds, charity institutions), as well as in medical malpractice cases. The current Patient's

Rights Law provides that the processing and maintenance of medical records should be regulated by the Data Protection Law; the patients have the right to access their medical records; in some occasions, their relatives and legal representatives also have such right, as provided in the appropriate provisions of the said law. The information relating to deceased patients is also confidential, and may be disclosed to a very limited amount of institutions, as well as to the relatives or legal representatives of the patient under certain conditions.

6. The history of medical confidentiality has two jurisdictional sources of origin: common law and civil law states. In common law, medical confidentiality was primarily attributed to testifying upon the facts relating to patient's health. In United States, statutes were enacted to exclude physicians from testifying to such facts in criminal or civil proceedings (depending on the states). The application of such statutes, as well as various civil litigation, where medical records were used (or, at least, were intended to be used) as evidence in civil disputes, was diverse, and bore a substantial body of case law. In some US states, medical records (i.e. mental asylum records or hospital records featuring information on the patient's state of health) were considered to be privileged communications, and were found to be inadmissible evidence. In civil law jurisdictions, most of the prominent case law on medical secrecy originated from France and Belgium, encompassing both judicial and extrajudicial disclosures. The body of French case law was firm enough already by the beginning of the 20th century to hold what does the term 'medical secret' embrace, and what are the types of its violations, and what are the legitimate exceptions to it. Moreover, the concept of anonymous childbirth was already well developed in the mid-XIX century case law of France, whereas Belgian courts discarded the concept in general.
7. There may be a wide variety of records which belong to medical personal data. These should not only include written or electronic medical records, but any other (i.e. blood samples) information, which could be identified by means of special techniques. The Latvian Senate has arrived to this position in Judgment No. SKA-166/2020, which is described in the promotional work in details. A similar view could be found in the European Court of Human Rights judgment *S. & Marper v. United Kingdom* (2009), where the court made such a statement in regard with maintenance of DNA-samples. This conclusion is of paramount importance for the issues related to biobank data confidentiality, as the biobanks may preserve not only medical records (i.e. see the Judgment of Supreme Court of Iceland of 2003), but blood, tissue and DNA samples.
8. In the mid-20th century, a right to insight to medical records was recognized in case law. United States courts started allowing production of medical records for the need of medical negligence cases back in the late 1930s, whereas courts in England, France, Belgium and

Germany started recognizing this right in the 1970s. The right to access to medical records became the progenitor of the 4th generation of human rights in relation to medical confidentiality, though as a general rule, the access to medical records is usually bound to factual findings (though many patients would not expect or desire more). In the 1970s, English courts found that medical records are not permissible to be handed in directly to the plaintiff, but mainly to his solicitors or medical advisers, who would later assist him in his future medical malpractice lawsuits. As the years went, the aim for producing medical records became much more diverse, though the primary purpose of insight to medical records remained for the production of necessary evidence for medical malpractice claims and other civil disputes (i.e. divorce lawsuits, impugning the validity of testaments, etc.).

9. The issues of the fourth generation of human rights have much to say concerning medical law and medical confidentiality in particular. Courts recognize the right of the patient to have insight to medical and occasionally psychiatric records, in case he would provide an adequate substantiation for such necessity. The topic of access to psychiatric records was one of the least discussed in medical-legal scholarship to day, despite some scholarship could be found in 1980s and 90s, though relatively many judgments could be found upon the said subject in the last decades. Medical professionals and lawyers consider that the content of the psychiatric records may be very different from ordinary medical records, and the purposes for accessing it may be also diverse, and some of them may lie in the patient's attitude to his ailment, though in some cases, patients and their relatives would desire to obtain such records for litigation (i.e. to impugn the validity of a will, in case a patient, for instance, died at a psychiatric hospital and plaintiffs consider that the testament is invalid due to the testator's ill mental health), or to receive a court order to expunge them, in case the hospital would not consent to it upon request (or in case such procedure exists, as such, or in case a court order would be mandatory for the expungement of such records). Though asylum records were bound to be disclosed in the past nearly in each occasion (litigation concerning production of such records in the XIX and early XX century existed in USA), currently the courts do not find that they are banned for production at all, but there may be a number of prerequisites for it. For instance, the will of a psychiatric patient not to produce such medical records was crucial for denying access to a relative in the case of Christelle (2016), adjudicated by the Belgian Court of Cassation.
10. Special categories of medical records, like HIV records or psychiatric records require an enhanced regime of confidentiality. HIV records are more sensitive than ordinary medical records, as they provide information concerning a disease, which is potentially lethal to the patient and may cause substantial restrictions in his life, not mentioning his working career.

However, since the 1980s, the issue of legitimate disclosure of such records to special institutions arose in Canada and United States of America, and then arose in Europe as well. In the late 80s and early 90s, plaintiffs had not once sued hospitals for contracting HIV/AIDS within blood transfusion in United States of America, and plaintiff's counsel demanded to receive information relating to the donor, who could inform them relating to screening procedures, where potential negligence could take place. In some occasions, courts allowed the production of such information, issuing a protective order relating to all the information on the donor's identity, which was apparently anonymized in the proceedings. The leakage of HIV-related data was illustrative in the European Court of Human Rights judgment of *I. v. Finland* (2008), where a HIV-positive nurse sued the hospital for malpractice in handling the medical records, as she was treated from HIV at the same hospital she used to work in, and her colleagues nevertheless learned of her ailment.

11. Another topic relating to confidentiality of medical records, which has got a long history, is the concept of anonymous childbirth, which is a French civil law concept allowing the biological parents of the child not to be identified in the birth records. This usually deprives the adoptee from any inheritance right, apart from the possibility to know his (her) origin. The first recorded legal cases from France date back to 1840s, though the European Court mentioned in *Odievre v. France* (2003), that such tradition existed since the XVII century. Occasionally, the adoptees strived to obtain a court order to reveal the identity of biological forbearers, and were successful in several US cases of the 1970s and 80s. In the United States, 'sealed records' statutes prohibited the disclosure of such records, though in case of a specified legal interest, plaintiff could gain access to them upon a court order. Such legislation was adopted in Italy in early 1980s, making it nearly impossible to learn the parents' identity by an adoptee. After the Godelli v. Italy (2012) judgment, the courts adopted a more liberal approach in terms of pleas relating to the 'sealed records' disclosure, occasionally in an anonymized form.
12. Biobank data may be disclosed by a court order, in case there is an overriding interest. In Norway, where a substantial body of case law relating biobanks was formed in the last decade, courts held that it is permissible to produce biobank data for the needs of establishing paternity, but the Supreme Court did not uphold the aforesaid view in terms of search of missing persons or for the necessity of collecting evidence for procuring criminal cases. Still, such litigation is rare, and there is no uniform view in relation with the disclosure of biobank data for the needs of administering justice, and the biobanks themselves opt for the highest degree of confidentiality of data they preserve.

Proposals for legislative amendments

As an outcome of the findings from the promotional work, the author proposes a number of legislative amendments to the Law of the Rights of Patients, which are expected to amend the following issues.

1) the limitations of patient's right to access to his/her medical records;

2) the patient's right to access to highly-sensitive records, and the right of insight of the patient's duly authorised legal representatives;

3) the erasure of medical records, including psychiatric asylum records;

4) the inclusion of non-recorded personal data (i.e. DNA-data) to the scope of personal data in the interpretation of the judgment of the Supreme Court of the Republic of Latvia in the case No. SKA-166/2020.

Article 9 of the Law of the Rights of Patients stipulates that the patients should have the right to access to their medical records. According to worldwide jurisprudence this right is subject to a number of limitations, and at the same time, highly-sensitive personal data (i.e. psychiatric asylum records) should not be exempt from insight of the patient, but are subject to peculiar conditions of access. The author has made a number of solutions for the regime of access to highly-sensitive medical records (in terms of psychiatric asylum records), as well as the issue of erasure of medical records. Article 10 of the Law on the Rights of Patients provides for the clarification of patient's data confidentiality issues, and the author finds it necessary to amend the provisions in terms of non-recorded medical data.

Upon the findings of the promotional work, the author proposes the following amendments to Law of the Rights of Patients:

"Article 9 (2). The patient's right to access to medical records is limited to the objective findings, contained in the patient's medical record."

To amend Art. 4 (7) of the Law on the Rights of Patients, and to shape the norm in the following way:

"Article 4 (7). When the information, contained in the patient's medical record contains data, which may cause damage to the patient's health and mental condition in case of its disclosure to the patient, the physician may decide to grant a refusal of the access to such medical record to the patient – either to a part of it, or in full."

(*The author proposes to shape this norm in the body of Article 9, namely Article 9 (5). The numbers of the provisions of proposed amendments to the Law on the Rights of Patients will subsequently continue with number 9*).

"Article 9 (6). In case the physician refuses to grant access to the patient's medical record, in full, or in part, the physician has an obligation to provide a written justification of such refusal. The refusal of access to medical records may be appealed to an administrative court of first instance."

Upon the findings of Chapter 2, in terms of the patient's right to information on his or her medical records in terms of highly sensitive medical records, the author proposes the following legislative amendments:

"Article 9 (7). The patient has a right to information relating to his or her HIV-status. The physician may not withhold the information on the patient's HIV-status."

"Article 9 (7) 1). The physician may not notify the patient's immediate members of family concerning an adult, legally-capable patient's HIV-status, unless the patient priorly provides a written, and informed consent to such disclosure."

"Article 9 (7) 2). The physician may provide information on the HIV-status of a patient under age 18 only to the patient's forbearers, as natural guardians, or a person, which is a duly authorised minor's legal representative. The patient under age 18 has a right to be present during the consultation of the physician, and the patient's duly authorised legal representative, where the disclosure of such information will take place".

"Article 9 (7) 3). The physician may provide information on the HIV-status of a legally incapable, or a partially legally incapable person to the person's duly authorised representative. The legally incapable, or partially legally incapable patient has a right to be present during the consultation of the physician, and the patient's duly authorised representative, where the disclosure of such information will take place".

"Article 9 (7) 4). In case the persons, referred to in Article 9 (7) 2 and 3 express a wish to be present during the consultation, where the disclosure of such information will take place, the physician may not oppose to their presence, or prevent it during the consultation."

"Article 9 (7) 5). The presence of the legal representative of the persons, referred to in Article 9 (7) 2 and 3 during the consultation, where the disclosure of information, referred to in Article 9 (7) 1, will take place, is essential for the safeguarding the legal interests of the person whom they represent; hence, the persons, referred to in Article 9 (7) 2 and 3, who have expressed a wish to be present during the consultation with the physician for the purpose referred to in Article 9 (7) 2, should be accompanied by their duly authorised legal representative in any case."

"Article 9 (8). The patient has a right to access to mental asylum records, which may be granted upon a court order, in case the patient, or his/her legal representative, provides a legitimate justification of such insight. The right to access to such medical records should be limited to objective findings of the treating physician(s), pursuant to Article 9 (2) of the Law on the Rights of Patients".

Upon the findings of Chapter 3, the author proposes the following legislative amendments:

“Article 10 (1) 2). Data, which are not recorded electronically, or manually (i.e. DNA samples), but after the processing of which by special techniques, the identity of the patient may be identified, should also be considered personal data”.

“Article 10 (1) 3). The provisions of the Personal Data Processing Law, apply to non-recorded data of the patients in the same way, as any other personal information of the patient, pursuant to Article 10 (1) of the Law on the Rights of Patients”.

“Article 9 (9). The patient has a right to request the erasure of medical records, which are maintained in healthcare institutions pursuant to the conditions of erasure of personal data, provided by the Personal Data Processing Law.

“Article 9 (10). The patient has a right to request an administrative court order for the erasure of medical records, which are kept in mental asylum institutions. The patient, or his/her legal representative, should provide a legitimate justification for the erasure of such medical records to the court, which will hear the respective case”.

“Article 10 (4). The maintenance of medical records, excluding mental asylum records, should not exceed 5 years after termination of patient-hospital relationships, and the said medical record should be erased upon the patient’s, or the patient’s duly authorised legal representative’s legitimate request priorly to the termination of the period, referred to in this section”.

“Article 10 (5) 1). Under ordinary circumstances, the maintenance of psychiatric asylum records should not exceed 5 years after the termination of patient-hospital relationships, which supposes that the former psychiatric patient was excluded from the dispensary accounting.”

“Article 10 (5) 2). After the termination of the time fragmenton of maintaining the psychiatric asylum records, referred to in Article 10 (5) 1), unless the data were priorly erased upon a court order pursuant to Art. 9 (10) of the Law on the Rights of Patients, the governing board of the healthcare facility, where the former psychiatric patient underwent treatment, should apply to the administrative court of first instance to receive an order, approving the erasure of the psychiatric asylum records.

“Article 10 (5) 3). In case there is firm and convincing evidence, that the patient, regarding whom the governing board of the healthcare facility had applied to the court to receive an order for data erasure, by his/her mental condition and behavior, may pose a threat to his/her own health and life, or the health and life of others, the court may order to prolong the maintenance of such psychiatric asylum records for an another period of 5 years.

“Article 10 (5) 4). If the administrative court ordered the prolongation of the maintenance of the records, referred to in Article 10 (5) 3), for an another period of 5 years, the governing board of the healthcare facility should apply to the court for the erasure of the data after the termination of an another 5-year-period, unless the data was erased by a court order upon the request of the patient

before. The same should apply to all subsequent periods, in case the court would decide not to order the erasure."

"Article 10 (5) 5). The 5-year-period, mentioned in Article 10 (5) 2-5, is deemed annulled in case the patient was hospitalized to a psychiatric asylum facility after the termination of patient-hospital relationships in the meaning of Art. 10 (5) 1) of the Law on the Rights of Patients."

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