A MEDICO-LEGAL ANALYSIS OF CONFIDENTIALITY: DISCERNING PUBLIC INTEREST AND WHAT IS INTERESTING TO THE PUBLIC

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Abstract

In medico-legal parlance, an astute consideration of the concept of confidentiality appears to suggest that its analysis is such as does not easily lend itself to a simplistic approach. Being a lexicon that is not exclusive to the register of medical science, it has very significant bearing on law owing to the fact that a significant number of the issues that must be resolved in its practice are legal in nature and as such, is regulated by law at various levels. This article examines the concept of confidentiality and distils the indices of public interest from that which is interesting to the public. It discusses the exceptions to the duty of medical confidentiality in the light of public interest and suggests that confidentiality is founded on the inalienable fundamental human right to privacy. It argues that the fluidity in the tension between what is interesting to the public and that of public interest requires a case by case consideration with sound legal justification.

Keywords: Confidentiality, Public interest, Medico-legal

1. Introduction

There are certain relationships that, by their very nature, require one or both party's consent before information can be disclosed to a third party. Perhaps the most common of these relationships include that of doctor to patient, therapist to patient, priest to penitent and attorney to client. Because these types of relationships often involve very personal and sensitive information (such as medical conditions or personal finances), confidentiality serves to facilitate open and forthright communication between both parties thereby serving the best interest of all involved.

The gravity of the requirement of confidentiality that medical practitioners owe their patients is more than a demand of normative permisiveness which may cursorily be glanced up. It is actually a grave obligation the breach of which would mean more than a civil wrong but would as well spell a crime in the right circumstances. This is because of the integrity of confidentiality as being founded on the inalienable fundamental human right to privacy. This paper analyses the concept of confidentiality in a bid to distill the indices of public interest from that which is in the interest of the public. It discusses the variations or exceptions to the duty of medical confidentiality in the light of public interest. The work is aimed at encouraging discussions in medical ethics. It made generous use of the several literatures in the broad area of confidentiality and in medico legal jurisprudence, thereby adopting the doctrinal approach.

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The legal protection of confidentiality imposes a duty on medical practitioners to respect the confidence reposed on them. The public reasonably expects the good of the society to be done at all times even in medically confidential matters. This creates a tension expressed in Lord Wilberforce's words: interest of the public and what is interesting to the public. The dividing line between the two is like a sea of tempest, there seems to be some good either side. The courts remains the *forum conveniens* (The court in which an action is most appropriately brought, considering the best interests and convenience of the parties and witnesses) for discerning public interest from what is interesting to the public, however, literary works aimed at encouraging discussions with a view to shaping the law cannot be overemphasised. This work shall discuss the legal duty of medical confidentiality, the exceptions to the duty of medical confidentiality, with particular focus on public interest and what is termed interesting to the public.

2. Concept of Medico-Legal Confidentiality and Privacy

The term 'medico-legal' is used to refer to issues pertaining to the fields of law and medicine. It often involves any injury in law or a medical condition involving law enforcement agencies to investigate and apportion responsibilities.[1] Medico-legal is the study of, and application of medical and scientific methods as evidence in a legal case.[2] It is used to refer to medical jurisprudence as the application of medical knowledge to various branches of the law, including criminal and civil law.[3] It is therefore, a jurisprudential reflection on medical incidences.

Confidentiality means secrecy *simpliciter*. It is the state of having the dissemination of certain information restricted. Confidential information is often characterised by trust and a willingness to confide in the other, invariably the obligation is owed someone who understands what it means to place trust. Such forms of communication are termed privileged, meaning that they are legally protected and therefore cannot be compelled to make disclosure in legal proceedings.[4]

Medical confidentiality therefore, is the ethical, professional and legal obligation of a physician not to disclose what is communicated to him or her in the physician patient relationship.[5] Although, medical confidentiality is a branch of the long standing, broad, basic right to privacy, there is however a difference in saying someone's privacy has been infringed versus saying someone's right to confidentiality has been infringed. An infringement of a patient's right to confidentiality only occurs if the person, to whom the patient disclosed the information in confidence, deliberately discloses the information without the patient's consent, or fails to adequately protect it. The information must be given in a confidential relationship, before the person or the institution can be sued for breaching confidentiality. Confidentiality is characterised by a relationship between two or more people, of which one or more has agreed

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1 M Madadin, A A Algarzaie, R S Alzahrani, F F Alzahrani, S M Alqarzea, K M Alhajri, M A Al Jumaan, 'Characteristics of Medico-Legal Cases and Errors in Medico-Legal Reports at a Teaching Hospital in Saudi Arabia' *Dove Medical Press, 2021 Vol.*13 p521-526. <https://doi.org/10.2147/OAEM.S341893> accessed on 7/12/2023.

2 Medical Dictionary, What Does Medicolegal mean? <https://www.to pdoctors.co.uk/medical-dictionary/medicolegal?amp=1> accessed on 7/12/2023.

3 J M Cameron, 'Medico-Legal Expert- Past, Present and Future'*Medicine, Science and The Law* (1980) 20[1].

4 B A Garner (ed), *Black's Law Dictionary* (8thedn 2004) pp. 296 & 318.

5 H Bloom, M Bay, *A Practical Guide to Mental Health, Capacity and Consent Lawof Ontarrio.* Eds.(Carswell 1996) p.370.

either explicitly or implicitly not to reveal to third parties any information revealed during the course of the relationship.

Privacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private. Privacy allows individuals to keep certain facts to themselves if they so choose. It means that no one is obliged to tell anything about himself or herself to any person. However, a breach of confidentiality in this sense means the release of medical information without the patient's consent and without legal necessity or legal authorisation for the release.

The concept of medical confidentiality has its origin in antiquity. It arises from doctor patient relationship.[6]Due to the content of several professional ethical codes, it is generally assumed that health care workers have a duty to respect the confidentiality of medical information. If the person whom it concerns consents to the release of the information or requests that the information be released to third parties, then such disclosure does not breach the confidentiality.

The need for confidentiality in medical practice cannot be over-emphasized as information concerning one's health is often of a very sensitive or delicate nature. If the information is released without the consent of the person concerned, it may give rise to serious emotional and material harm. This is especially so, where for instance the material is released to third parties such as insurers, bankers, or employers who may discriminate against the applicant by refusing an applicant on the basis of their medical health status. Information concerning certain intimate parts of the body or certain medical conditions may harm the person it may concern and cause them both embarrassment and ridicule.[7]Release of certain medical data, for example genetic data, can lead to patients and sometimes their family being discriminated against. Many kinds of discrimination are difficult to detect and prove and therefore laws against discriminatory practices provide only limited remedies. Harm may also be difficult to prove.

Respecting individual autonomy is another reason for confidentiality. This question of autonomy is two sided. Firstly, it has to do with considering people to be the master of their own well being. The person, to whom the information pertains, is in the best position to decide whether or not revealing certain information to certain people may benefit or harm them. The kind of information that a person will pass on to relatives would normally differ from the kind of information passed on to others. The kind of information passed on to others is indicative of the relationship they share. By controlling the kind of information that is passed on, one can in turn control the kind of relationship one has with others.[8] Secondly, respecting autonomy is an expression of respect for the dignity of individual people. This leaves people free to make choices and act morally right or morally wrong.

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6 D Giesen, *International Medical Malpractice Law* (Dordrecht: Marthinus Nijhoff 1988).

7 R Bennett, C Erin, *Hiv And Aids: Testing, Screening And Confidentiality*. Eds. (Oxford University Press, 1999).

8 Ibid.

Recognising a patient's right to privacy is a form of respect, which in turn promotes communication and enhances treatment. For the patient to maintain trust in the doctor, the doctor has to respect the patients' confidentiality. The main ground for honouring medical confidentiality is utilitarian. It encourages people to seek treatment who might otherwise avoid doing so out of shame or embarrassment[9]. If the doctor breaches the patients trust it could lead to situations where patients avoid going to the doctor for fear of their condition being reported. This in the long run could endanger public health. It has been observed that families of HIV/AIDs sufferers often face ostracism and discrimination when the death certificate of loved ones state that they died from Aids related illness. Insurance benefits are also not always paid out once it becomes known the person died from HIV/AIDs.

The doctor patient relationship is a fiduciary relationship of the highest degree. This in turn involves every element of trust, confidence and good faith. This is reiterated by the Supreme Court of Canada in *McInerney v MacDonald*[10]. Picard[11] has however explained that not every doctor patient relationship is fiduciary and that exceptions do exist. An example would be where a doctor at the request of the defendant examines a plaintiff in a personal injury case. No real doctor patient relationship is established. Neither is the nature or extent of the fiduciary obligations the same in every case. The doctor is there to protect the patient's best interests and this involves a duty to protect the confidentiality of patient's information.[12] However, a doctor patient relationship must be established, before such a duty arises.

In France for instance, the French Civil Code provides specifically for the right to privacy. Protection of health information, however, stems chiefly from the Penal Code.[13] It follows therefore that it is an offence under the French Law to breach health information protection. The information conveyed by the patient to a medical practitioner is treated as highly personal nature (intuitu personae). Furthermore, whereas most obligations of a physician are what are known as "an obligation of means" medical secrecy is one of such. This is important since the ambit of the medical secret extends beyond what is heard, observed, or confided to what is understood. Thus, simple proof of breach is sufficient to constitute a fault.[14] According to the 1978 Law on Informatics, Records and Freedoms every person has the right to object to the collection and storage of personal data and to access to such data.

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9 M A Hall, I M Ellman and D Orentlicher, *Health Care Law and Ethics In A Nutshell* (West 3rd edn 2011)

10 [1992] 93 DLR (4th) 415 9SCC).

11 E I Piccard, G B Robertson, *Legal Liability Of Doctors and Hospitals In Canada* (Toronto, Carswell 3rd edn 1996 p.15).

12 W J Curran, *Health Care Law and Ethics* (Aspen 5th edn 1998) p.187.

13 Article 226-13 and 14.

14 M Gérard, *International Encyclopedia of Laws: Medical Law*, France, 1–160, at 138–146.

2.1. The Basis for Confidentiality

2.1.1 Contract

A legal relationship ensues when a person accepts an offer with the intention to create legal relations. Generally, it is an implied term of contract that a doctor will exercise reasonable care and skill in the treatment of his patient.[15] This obligation equally extends to the duty of confidentiality. If he fails to do so, he will come under an obligation to compensate the patient for damages caused by breach of contract[16]. In a case of disclosure of patient's information, the New Zealand High Court held the defendant liable for breach of confidentiality.[17]

2.1.2 Negligence

Negligence according to the Restatement of Tort[18] refers to a conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm and thereby giving rise to a remedy in the law of tort. Salmond put it succinctly when he said that it is a form of *mens rea*, standing side by side with wrongful intention as a formal ground of responsibility.[19] In medical practice, the issue of negligence amounting to the breach of confidentiality is considered according to the facts of each given circumstance. In the Canadian case of *McInerney v. MacDonald*,[20] it was held that health care providers have an obligation to maintain the confidentiality of patient information as part of their duties of care.

2.1.3 A criminal offence

A crime is any act or omission which renders the person doing the act or making the omission liable to punishment. Confidential relationships are invariably trust based relationships the breach of which can spell a crime. A medical practitioner may be held criminally liable if his conduct show disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment.[21] The Penal Code provides for the offence of criminal breach of trust[22.] The criminal Code which applies to Southern Nigeria has similar provisions. Guideline 44 of NMA provides;

> The medical records are strictly for the ease and sequence of continuing care of the patient and are not for the consumption of any person who is not a member of the profession. Practitioners are advised to maintain adequate records on their patients so as to be able, if such a need should arise, to prove the adequacy and propriety of the methods, which they had adopted in the management of the cases

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15 O F Emiri, *Medical Law and Ethics in Nigeria*. [Malthouse Press Limited, 2012] P 271.

16 D Giesen and I Fahrenhorst, Civil Liability From Medical Care: Principles and Trends [1984*] J. of International Legal Practitioner*. 84; *Myers v Abrahamson* [1951] 3 SA 121 (C).

17 *Furnish v Fitchett* [1958] NZLR 396.

18 *Restatement, Torts* [1934] cited by F James JR, Nature of Negligence, [1953] 3 (3) *Utah Law Review* P 275.

19 *Salmond on Jurisprudence* 9th edn. [1937] cited by F James JR, Nature of Negligence, [1953] 3 (3) *Utah Law Review* P 275.

20 [1992] 2 S.C.R 138.

21 *R v Bateman* (1925) 19 Cr App R 8 AT 10-11.

22 Penal Code, Laws of the Federation of Nigeria, 2004, s. 311.

According to Titilayo and Bankole[23], a doctor technically has not committed an offence of breach of confidentiality, if a disclosure occurs involving other information about a patient that is known to a doctor outside of his duty as a medical doctor. Also, guideline 32 of the NMA Code stipulates that it is the institution a medical doctor works for or a colleague who can bring cases of malpractice known about another colleague to the attention of the disciplinary Tribunal. This will greatly inhibit litigation especially as a patient cannot access his own medical record, under the NMA Guideline.

The National Health Act[24] imposes a duty on health personnel in charge of health records and provides for the protection of health records. These underpins the importance of confidentiality and the need to reinvigorate medical confidentiality protections as an objective in building patient trust necessary for successful health outcome.

2.1.4 A breach of a statutory obligation

In Canada,[25] like Nigeria, privacy is protected by a network of legislation, constitutional provisions, and various aspects of common law. In the case of *McInerney v. MacDonald,*[26] it was held that health care providers have an obligation to maintain the confidentiality of patient information as part of their duties of care and fiduciary duties. A breach of privacy may also be grounds for other types of tort actions such as trespass, libel, slander, defamation, assault, or battery.[27] A contractual relationship between the provider and the patient places a duty of confidence impliedly.

Most of the legislations on privacy in Canada are either as part of freedom-of-information and protection-of-privacy legislation or as a separate statute. However, in response to international developments and to increasing public cognition and concern, there have been recent developments in two main areas: the expansion of legislative protection of personal information to include the private sector and the development of comprehensive legislation specific to health information. The Federal Bill C-6 (formerly C-54)[28] is an example of the first; new health information legislation in Manitoba, Saskatchewan, and Alberta, and draft legislation in Ontario, are examples of the second. In *R. V. Mills,*[29]the Supreme Court of Canada confirmed that section 8 of the Canadian Charter of Rights and Freedoms provides protection for such confidential information and indirectly for the therapeutic relationship.

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[23] T. O Aderigbe, B Sodipe, 'Patient's Medical Records, Privacy and Copyright in Nigeria: On -Going Research' (2017) 42(2) *University of Western Australia Law Review.*

[24] NHA 2014, s 29 (1).

[25] See generally Marshall M. and B. Von Tigerstrom, "Confidentiality and Disclosure of Health Information" in Downie J. and Caulfield T. (eds.), *Canadian Health Law and Policy* Toronto: Butterworths, (1999) 143.

[26] [1992] 2 S.C.R. 138.

[27] G H L Fridman, *The Law of Torts in Canada*, Toronto: Carswell, (1990)[2] 192; L N Klar, *Tort Law,* Toronto: Carswell, (1996) [2] 66–67.

[28] Bill C-6, Personal Information Protection and Electronic Documents Act, 2nd Sess., 36th Parl., 1999, Part 1.

[29] [1999] SCJ 68(QL) 79-82.

Similarly, in Nigeria, statutory laws have been duly enacted for the good governance of the country.[30] In the wisdom of the legislature, several laws have been made in this direction, chief among them is contained in the Constitution[31], the National Health Act (NHA)2014, the Medical and Dental Practitioners Act (MDPA) LFN 2004, the Freedom of Information Act (FOIA) 2011 etc. The NHA made copious provisions protecting health records and confidentiality of users information. The MDPA also empowered the Medical and Dental Practitioners Council to make rules of professional conduct or ethics to regulate the conduct of the medical profession. It prohibits the falsification of death certificate, Doctor's report on the sick or birth certificates, etc[32]

2.1.5 A breach of a professional code of practice

The Code of Medical Ethics in Nigeria[33] which regulates medical practice prohibits the falsification of death certificate, doctor's report on the sick or birth certificates etc., and protects the confidential information and medical records of patients.[34] This is drawn from the Hippocratic Oath which states that 'all that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal'.[35]

The World Medical Association's International Code of Medical Ethics (1949) states that:

> a doctor shall preserve absolute secrecy on all he knows about his patient because of the confidence entrusted in him."Moreso, the Declaration of Geneva (as amended in 1994) states: "[I] will respect the secrets which are confided in me even after the patient has died.

Medical ethics does not stand separate from the law. It is interwoven with and has a constant influence on the doctor - patient relationship. Medical ethics can be defined as an analysis of choices in medicine.[36]Ethical considerations are inextricably linked with considerations of a legal nature, and what the rules of medical ethics demand of a doctor, will to a large extent also be the legal obligations that have to be fulfilled.[37]One moral base for the obligation that medical professionals maintain confidentiality is an implied promise to do so, for which the basic moral

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30 Constitution of the Federal Republic of Nigeria, 1999 (as amended),s. 4.

31 Ibid, s. 37.

32 The Code of Medical Ethics in Nigeria, r 33.

33 Ibid.

34 Ibid. Rule 44.

35 See (n7) P 670.

36 Yasmin Al-Atrache, Naja Wilson, Medical Ethics, the Law, and Cultural Competency, *The Emergency Department Technician Handbook*, 2024.

37 See (n7).

principle is fidelity or promise keeping. The principle of fidelity possibly provides the best foundation for the duty not to disclose information learned in personal relations.

Four principles of ethics, developed by Beauchamp[38] have notably influenced much of Western thinking and action, especially in the medico legal jurisprudence. These four principles are autonomy, beneficence, non-malfeasance, and justice. Beauchamp explains that it is not inherently or intrinsically wrong for one person to disclose information received from another in a special relationship, and he believes there are three types of arguments to support the need for confidentiality namely: consequentialist-based arguments, rights-based autonomy and privacy arguments, and fidelity-based arguments.

3. The Right to Privacy and the Duty of Confidentiality

The word privacy is derived from the Latin word *privatum*, meaning, apart from the state; peculiar to one's self; of or belonging to an individual; private. Historically, the concept was designed to prevent unnecessary state incursion into an individual's private affairs. Thus, William, Earl of Chatham once declared:

> The poorest man may in his cottage bid defiance to the crown. It may be frail, its roof may shake, the wind may enter but the king of England cannot enter, all his force dares not cross the threshold of the ruined tenement.

The right to privacy is a legal principle that protects people's privacy from governmental and private actions. The Universal Declaration of Human Rights (UDHR) guarantees individual rights, including the right to privacy and even though the Right to Privacy is not expressly stated therein, people generally interprete Article 12 (which provides that no one should be subjected to arbitrary interference with their privacy, family, home or correspondence, nor to attacks on their honour and reputation.) to cover for it. Attempts have been made to redefine privacy as a fundamental human right, whose social worth is crucial to the operation of democracies. Thus, the Nigerian constitution[39] in sections 34 & 37 jointly forbids the unfair or degrading treatment of its citizen through such incursion to their privacy.

It becomes apposite here to mention that the constitutional right of privacy that subsumes the protection of citizens' dignity is not entirely equivalent to the duty of medical confidentiality; rather the right of privacy is like a multifaceted diamond and the duty of medical confidentiality only assumes one of its facets. Common law imposes a duty on doctors to keep and respect the confidence of their patients. Lord Goff in *A.G v GUARDIAN NEWSPAPER (NO 2)*[40] stated that:

> [A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances, where he has notice or is held to have agreed, that the information is confidential, with the effect that it

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[38] T L Beauchamp and J F Childress, *Principles of Bio Medical Ethics* (4th Edn New York: Oxford University Press 1994).

[39] CFRN1999 (as amended).

[40] [1988] 3 ALL ER 545-658.

> would be just in all the circumstances that it should be protected from disclosing the information to others.

The duty imposed on doctors to keep the confidential information received or observed from patients finds expression in the Hippocratic Oath. It provides in part that: whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.[41]

The Code of Medical Ethics in Nigeria[42] largely reflects the regulations of the World Medical Association which has similar provisions placing doctors under obligation to respect confidence reposed on them. The professional duty of confidentiality covers not only what a patient may reveal to the doctor, but also any opinions and conclusions the doctor may form after having examined or assessed the patient, as well as communications between the patient and the doctor. Generally, this also includes communications between the patient and other professional staff working with the doctor. The National Health Act,[43] provides for the confidential treatment of all information concerning or relating to a user's health and treatment. It also provides for protection of health records, prevents inappropriate disclosures and reinforces the patient's right to confidentiality.[44]Confidentiality covers all medical records (including medical history, pre-existing medical conditions, x-rays, lab-reports, etc.). Development in technology means that operation of our laws must exhibit dynamism. Telemedicine and the increase use of computerized documentation results in faster and wider distribution of information with an increased risk of unauthorized access. Unauthorized breaches may also occur when emailing colleagues. Data de-identification problems makes data protection difficult. Pre operation assessment and patient consultation notes should be discarded by paper shredding, while electronic data shredding should be used when disposing of computer hardware. Health professionals must also be vigilant to the potential risks of inadvertent breaches when using social media such as Facebook to communicate either personally or professionally. In all of these, it is in the public interest to have patient confidentiality protected. Consequently, it is a crime under the National Health Act[45]to be involved in health records malpractice.

3.1. What Constitutes a Breach of Confidentiality

A breach of confidentiality occurs when a patient's private information is disclosed to a third party without his or her consent. There are limited exceptions to this, including disclosures to state health officials and court orders requiring medical records to be produced, that is, clearly for official purposes.

> Patient's confidentiality is protected under law. If a patient's private information is disclosed without authorization and causes some type of harm to the patient, he or she

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41 See (n7) P 670.

42 Code of Medical Ethics in Nigeria, r 44

43 National Health Act, 2014, s 26(1).

44 Ibid., s 25, 27 to 29.

45 S 29 of NHA, 2014.

could have a cause of action against the medical practitioner under negligence, breach of right to privacy, breach of contract, defamation, breach of fiduciary duty, etc. However, if the patient consented to the disclosure, no breach occurred. One of the most difficult problems in medical ethics is deciding when to breach confidentiality. Three situations can be distinguished, in which the justification for overriding confidentiality becomes relatively stronger:

1. A benefit considerations, where some form of good would be made.
2. A risk prevention considerations, where it would enable save a unknown person.
3. Or where it is geared towards preventing harm upon a known person.

There are many grey circumstances and mute areas where doctors will be faced with tough decisions in deciding whether to breach patient confidentiality for the sake of a greater public interest. Sometimes the public interest may be so convincing that the doctor is not just justified in breaching confidentiality, but is required to do so, and failure may result in the doctor being held liable in damages if somebody is injured.[46] The case of *Tarasoff v Regents of University of Carlifonia*[47] serves as a good example of the above, where the court described the duty of confidentiality as ending where the public peril begins. The question which agitates the mind is what guiding test is available to discern public perils?

Thus, under common law the information must not already be in public domain. It must have quality of confidence attached to it. *SeeCampbell v Mirror Group Newspapers*.[48] It is also pertinent to note that the said information must have been passed in circumstances importing an obligation of confidence and to sustain an action in court there must be an unauthorized use of that information to the detriment of the party in question.[49] A successful action in court is generally awarded with damages. However, an interim injunction, followed by interlocutory and perpetual injunctions may also be devised

4. Exceptions to the Duty of Medical Confidentiality

4.1 Consent

It is a settled law that no legal injury is done to a consenting party. This is aptly expressed in the legal maxim of *volenti non fit injuria* (a person is not wronged by that to which he or she consents). In the absence of any vitiating element consent serves the objective of an absolute defence to any action in court.

An incompetent adult however cannot give consent except such a person is within his lucid interval.[50] Accordingly, the family and the court may give consent in this regard.[51]In the

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[46] K Blightman, S E Griffiths, C Danbury, Patient Confidentiality: when can a breach be justified? *Continuing Education in Anaesthesia Critical Care & Pain*, [2014](14)2, pp52–56, <https://doi.org/10.1093/bjaceaccp/mkt 032> Accessed on 7/19/2023.

[47] [1958] NZLR 396.

[48] [2004] 2 AC 457.

[49] *See Z v Finland* [1998] 25 EHRR.

[50] *Re L* [1994] 1 All ER 819; [1993] 15 BMLR 77 cited by F O Emiri, *Medical Law and Ethics in Nigeria*, [Malthouse Publishers, 2012] P 365.

Canadian case of *R. v. Dyment*,[52] where a body sample taken without consent for medical purposes was used in criminal proceedings, the court held that the individual had a reasonable expectation of privacy in part because of the relationship of confidence with the health care provider.

The case of children[53] is governed by the principle of best interest of the child because the parent is the person who can best protect the child from risk of harm. However, in the case of a mature minor where it can be shown that the child can make a clear and informed decision then, consent must be sought from the child in question.*[54]*

It is also imperative to add that the duty of confidence does not evaporate simply because a patient is dead. An executor or administrator as the case may be, can recover claim of a breach of confidence which occurred during the lifetime of the patient if they can show that the disclosure has brought injury to the estate. Disclosure is therefore not permissible without the prior consent of the estate first had and obtained and where such disclosure offends the sensibility of the survivors, an action can rightly be taken.[55]

Clearly, the law does not allow for approbation and reprobation, to do so will be against public policy. However, the use of standard forms by hospitals calls for concern. This is because these forms are largely ambiguous and at best gives no room for protection envisaged by law. It is suggested that the Medical and Dental Practitioners Council in conjunction with the Nigerian Bar Association should intervene and proffer appropriate regulation on the use of standard forms. In the final analysis, consent is a nonvariable except the limitations set by statutory provisions and case law and should therefore be observed.

4.2. Anonymous Data

Clinical researchers in their pursuit of health improvements for all must respect the obligation to maintain confidentiality. In this regard, anonymous data with patient's name deleted are usually used.*[56]* There are four main classes of information which have traditionally been protected by the enforcement of confidences: trade secrets, personal confidences, government information and artistic and literary confidences. Generally, patients are assumed to give implied consent for use of personal data for medical purposes.[57] Despite this assumption, express written consent is required for identifiable personal data for research. It must be noted that explicit consent for new

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51 F O Emiri, *Medical Law and Ethics in Nigeria,* [Malthouse Publishers, 2012] P 365.

52 [1988] 2 S.C.R. 417; *R. v. Dersch,* [1993] 3 S.C.R. 768.

53 A child is any person who has not attained the age of 14 years. S 2 of the Criminal Procedure Act Cap 80 LFN 1990. Children can sue by next friend and defend action by guardian *ad litem* see Order 11 Rules 10 & 12 High Court of FCT Abuja Civil Procedure Rules.

54 *See Okeraru v Tanko* [2002] 15 NWLR (PT 791) 657. See also *Gillicks* case where the principle was first evolved. [1986] AC 112, [1985] All ER 402 HL.

55 Blue Book Para 91 cited by F O Emiri, P 365.

56 *R v Dept of Health Ex p Source Informatics* [2000] 1 All ER 786.

57 The UK Data Protection Act, 1998 which permits use of sensitive personal data for medical purposes which includes medical research provided the user is subject to the same duty of confidentiality.

research on pre existing data which consent had originally been obtained may not always be practicable.

In the United States, items excluded from a dataset to de-identify it includes names, addresses, identity numbers, date of birth and other dates and genetic profiles. Concerns have been raised on anonymisation such as risk of losing critical data arising from duplication of records or inappropriate record matching. Furthermore, some nearly identifying characteristics are valuable for research, such as date of birth, ethnicity, occupation etc. Some data may be medically important but absolutely identifying, such as facial or body photographs or voice recording. Therefore, data items need to be considered in their social context, that is, the degree to which information makes a patient recognizable and the possible harm or ridicule it will cause.[58] This clearly indicates the difficulty of a marked case and fact specific situations. From the above, it has become necessary to have a shift towards de-identification of data for progressive medical innovations, albeit with much circumspection.

4.3. The Proper Working of The Hospital/ Research

Confidentiality in a hospital setting is a fluid concept. There may be large number of people who may have access to information contained in a patient's file, all of whom will have valid reasons for requiring that access. They may include doctors, nurses, other treating practitioners, administrative staff and social workers.[59]Consequently, the law creates an exception in this regard. Moreover, most patient accept that information needs to be shared within the healthcare team to provide optimal patient care or learning opportunities. Alternatively, it could be argued that non disclosure may result in negligence on the part of the doctor for omitting important facts relevant to care. Disclosures should however be limited to reveal only the relevant and appropriate information.

In France, the treatment of health care information in a research project generally requires the individual to be personally informed of the nature of the transmitted data and his or her right to access and correct the information the intended recipient of the information and the end use of the information. The Computerized Processing of Name-Linked Data for the Purpose of Research in the Health Sector[60] set out restrictions on the automatic treatment of personal information for the purpose of health care research. This statute sets up a new body of data protection oversight, establishes substantive principles for data protection in medical research, and specifies important individual interests that must be respected before personal information can be used in a health care research project. Each request to process information for medical research is to be submitted first to the Consultative Committee on the Treatment of Information

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[58] D Kalra, R Gertz, H M Inskip, 'Confidentiality of Personal Health Information Used for Research', (2006) *BMJ* <http://www.ncbi.nlm.nih. gov/pmc/articles/PMC1513443/> Accessed on 28/01/2017.

[59] FitzroyLegal, *The law handbook* [2015] <www.lawhandbook.org.au/ 09_01_04_privacy_and_confidentiality_/>Accessed on 28/01/2017.

[60] Law No. 94-548.

in Research Health Care sector of experts, who are then to notify the National Commission on Information and Liberties (CNIL).[61]

Be that as it may, the importance of research in systematic surveillance, outbreak investigations, program evaluations, quality assurance efforts in public health and management of clinical care cannot be overemphasized. This is also true for research into genetic variation because it aims to understand how genes function and requires the comparison of DNA samples from groups of individuals to identify variations that might have importance for health or disease. Accordingly, Annas[62] argued that much progression could be achieved if the samples are linked to accurate medical records and genealogic information. The Code of Medical Ethics in Nigeria provides a blueprint into new areas of research in essence, the relevance of informed consent and privacy of human subject is of utmost importance and such research must conform to generally acceptable scientific principles.[63]

Indeed, the utility of information by employers, insurance companies and lawyers are also regulated by privacy law, as such; the use of privileged information in a hospital setting or for purposes of research should only be used for the particular purpose and with great care. Public interest ranges from public health to prevention of serious crime and morals. This justification is more subjective and in contentious cases, the courts may be required to decide on the merits of each case. Consider a scenario where a patient admits to a crime while under the influence of sedative medication. What should one do with the information? The confession could easily be dismissed as delusional but could also be considered meaningful as sometimes people do make truthful comments when inebriated. It depends partly on what crime has been admitted to. A breach in confidentiality would be difficult to justify for a minor offence such as a parking infringement compared with that involving gun or knife crime where there is a statutory requirement to disclose the information.

Finding the balance between confidence protection and achieving proper working in a hospital setting is a case of two equities, therefore great care should be exercised in handling patient information among health professionals and health researchers.

4.4. A Threat of Serious Harm to Others

The legal protection for duty of confidentiality is varied when the legal duty conflict with overriding interest of the public to prevent identifiable individuals from serious, credible threat of harm if they have information that could prevent the harm. The determining factor is whether there is good reason to believe specific individuals or groups are placed in serious danger depending on the medical information at hand.[64]The case of *Tarasoff v Regents of University of*

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[61] Schwartz P. M., *European Data Protection Law and Medical Privacy* at pp. 403–404 in Genetic Secrets, Rothstein, M., (ed.), supra, note 2, 1997.

[62] G J Annas, 'Rules for Research on Human Genetic Variation: Lessons from Iceland' (2000) *Mass Medical Soc*, 1830-1833.

[63] Code of Medical Ethics in Nigeria, r 19 (b) and 31(a).

[64] J D Bord, W Burke, D M Dudzinski, *Confidentiality*, (2013)University of Washington <http://depts.washington.edu/bioethx/topics/confiden.html> Accessed on 27/01/2017.

California[65] serves as a good example of the above, where the court described the duty of confidentiality as ending where the public peril begins.

Personal information may be disclosed in public interest where the benefits to an individual or to society of the disclosure far outweigh the public and the patient's interest in keeping the information confidential.[66]Forexample, revealing confidential information that would avoid child abuse.

A point to emphasise is that, simply because it may be justified to make a disclosure does not mean a doctor can disclose the information to anyone.[67]However, it should be noted that the obligation to report now covers all foreseeable victims. *See Volk v DeMeerleer*.[68] In that case a psychiatrist was sued after a patient of his, Jan DeMeerleer, shot and killed an ex-girlfriend and her 9 year old son before killing himself(Mr Jan also stabbed another son, who survived). The ruling of the lower court was reversed by the supreme court of the state of Washington asserting that doctors could be required to warn all forseeable victims of potentially dangerous patients in their care.

It seems controversial as to whether the need to prevent the spread of HIV/AIDS by making mandatory disclosure to sexual partners is a matter of public interest capable of overriding the competing interest of the patient. Odunsi[69] submitted on the position of absence of obligation in Nigeria and maintained that the violation of patient rights to medical confidentiality may not be an effective measure in controlling the spread of HIV/AIDs. Social resistance may set in, when people realize that their serostatus would be made public and that would run counterproductive to existing government efforts at encouraging voluntary testing.

Breaching patient confidentiality could be self defeating. Mentally ill patients may not seek treatments and psychiatrists saddled with new legal liabilities may decline to treat them. Hence, caution is required; harm is likely to minimize if the confidence of patients at the greatest risk for violence is maintained.[70] Such discrete approach is a better view to the author.

4.5. Police Investigations

The Police is given broad powers under the Police Act to undertake the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and they are also empowered to perform such military duties within and outside Nigeria

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65 [1976] 17 Cal.3d 425

66 *W v Egdell [1990] Ch 359.*

67A K Edwin, Non-Disclosure of Medical Errors an Egregious Violation of Ethical Principles, *Ghana Med J* (2009)[43]1 pp 34-39.

68 [2014] 184,Wn.App.389.

69 B Odunsi, 'Should Caregivers be Compelled to Disclose Patients' HIV infection to the Patients' Sex Partners Without Consent?' (2007) 38 (4) *Studies in Family Planing;297-306.*

70 S Jauhar, 'Protect Doctor Patient Confidentiality' *The New York Times* (New York, 19 November 1999).

as may be required of them or under the authority of any Act.[71] In the discharge of their duties, the use of intelligent information is a *sine qua non*. However, tensions exist between the rights of the society as represented by investigating parties and the rights of individuals within that society. This is compounded by the fact that there is training and retraining of the police, while members of the public are not systematically taught and generally know little about their rights and obligations.[72] In effect, this situation produces arbitral exercise of power on the part of the police.

The law on confidentiality however contains sweeping exceptions. In this regard, it does not require consent, authorization or informal agreement for access to medical records in situations involving, for instance: law enforcement, national security and intelligence.[73] It is an offence to cause obstruction to the lawful exercise of police power. Warrants can be issued in this respect and where there is reasonable cause to believe or suspect then in such rare occasions search could be conducted without warrant. The law in certain situations expects doctors to report information that may lead to the prevention of crime.[74]

The exception created to assist in the prevention and detection of crime is one that must be exercised with all sense of professionalism and in situations which require utmost public interest. This requirement is against the backdrop of arbitral exercise of wide discretionary powers of the police. The floodgate of police abuse of power must be closed by the courts. The courts in this regard must balance public interest and the interest of individual in preserving confidentiality.

4.6. Press Freedom

Modern constitutions of the world protect the right of all humans to free speech and the press. Freedom of expression is thus a fundamental human right and of great importance in any democratic society which includes the right to receive and access information. It is believed by making available of information on government activities and operation would reduce corruption and abuse of power by the government officials. It shows that the government sectors are ready to provide information required as long as it does not fall within the exemption clause. It improves transparency and benefits government sectors as it can develop and assist the public to trust the government. This can also allow the public to participate and influence decision making. They can also become whistle blowers to hold those in public establishments accountable for their actions.[75]

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[71] The Police Act, Cap P19, Laws of the Federation of Nigeria, 2004, s. 4.

[72] D. H Frazer, 'The Complete Handbook of Investigations and Privacy Rights' (2012) <www.dewittross.com/docs/doug-frazer-publication/the-complete-handbook-of-investigations---december-2012.pdf?sfvrsn=0> Accessed on 29/01/2017.

[73] Yinka Olomojobi, 'Right to Privacy in Nigeria'(October 31, 2017) <https://ssrn.com/abstract=3062603> Accessed on 18/07/2023.

[74] The Terrorism (Prevention) Act, 2013, Laws of The Federation of Nigeria, 2004, s 1A (1) (c), (5) paras (a-f) and (h); *Hunter v Mann* [1974] 2 All ER 414; The Criminal Code Act, Cap C38, Laws of The Federation ofNigeria,2004, s 515; The Code of Medical Ethics in Nigeria, r 18.

[75] J B Ahmad and A M Dian, 'Freedom of Information: Practices and Challenges in Selected ASEAN Countries' [2011] *Humanities, Science and Engineering (CHUSER)*<http//10.1109/CHUSER.2011.6163812> Accessed on 28/01/2017.

In Nigeria, besides the constitutional protection of freedom of speech, the Freedom of Information Act of 2011 now reinforces press freedom and upholds the right of every individual to access information.[76] An action can be brought against an official who refuses information. However, exemptions are made for personal information, third party information and patient-doctor privilege.[77]

4.7. Court Ordered Disclosure

The judiciary is the arm of government responsible for the dispensation of justice to all. Both the government and its citizens are subject to the jurisdiction of the courts. The courts are vested with inherent power to compel the appearance of any person and can issue the production of documents by subpoena *duces tecum*. Therefore, confidential information could be disclosed by an order of court of competent jurisdiction.

An application for disclosure of confidential medical information may be ordered if an applicant satisfies the court on the need thereof. The court will take account of the overriding objective of dealing with the justice of each case. If an order is made, failure to comply with the said order can amount to contempt of court in facie or ex facie. The consequences of contempt are usually very severe, the court could make an order for committal.

The courts remain the *forum conveniens* for discerning public interest from what is interesting to the public in the proper exercise of adjudicatory powers which inures by virtue of the Constitution of the Federal Republic of Nigeria 1999.[78]

5. Discerning Public Interest and What is Interesting to the Public: A Discourse

In our discussion on the variations to the duty of confidentiality, it has been shown that there is communitarian public interest in the protection of confidences on the one hand and disclosure of personal information for overriding public interest on the other hand. In *W v Edgell*[79] the court held that personal information may be disclosed in public interest where the benefits to an individual or to society of the disclosure far outweigh the public and the patient's interest in keeping the information confidential. Therefore, it can be distilled that there is a difference between what is interesting to the public and what is in the public interest to make known.[80] However, the difference is not necessarily wide rather, it is a thin and fluid one which requires a case by case consideration. It is respectively submitted that this falls within the judicial and judicious exercise of the inherent powers of the courts.

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[76] Freedom of Information Act 2011, s. 1 and 2 (6).

[77] Ibid., s 14, 15 and 16; A Ojebode, 'Nigeria's Freedom of Information Act: Provisions, Strength, Challenges' [2011](4)2 *Africa Communications Research*. <www.unescoafricom.com/wp-content/uploads/2012/11/The-State-of-Media-Freedom-in-Africa.pdf#page=51> Accessed on 28/01/ 2017.

[78] CFRN 1999, s. 6

[79] *[1990] Ch 359.*

[80] See *British Steel Corporation v Granada Television* [1981] 1 ALL ER 455. Per Lord Wilberforce.

Public interest is something in which the public as a whole has a stake, especially an interest that justifies governmental regulation. It also means the general welfare of the public that warrants recognition and protection.[81] In the case of *British Steel Corporation v Granada Television ltd,*[82] the defendant had broadcasted a TV programme using material confidential to the plaintiff, who now sought disclosure of source. The House of Lords recognizing the importance of protecting certain confidences while also recognizing that it had a discretion to order disclosure, ordered Granada to disclose the identity of an informant. The majority saw Granada's conduct as irresponsible in using leaked confidential information on national steel strike. HL held that although the courts had a wish to respect journalistic sources, no public policy immunity existed which would override the public policy of making relevant evidence available to the court. Lord Wilberforce was anxious to make it clear, when he said*: 'There is a wide difference between what is interesting to the public and what is in the public interest to make known'.*

The point is that, what is interesting to the public might not have a legal standpoint from which publication could be made. In fact, publication for public pleasure could rightly be termed as what is interesting to the public; this may sometimes portend a ground for an action in damages. It is mundane; sometimes it brings embarrassment and public ridicule when personal health information is put to public discourse. It is like the river between emotions on the one side and law properly so called on the other side. Therefore, in determining whether a matter of legitimate public interest is in issue, the court should ask if the information disclosed, would likely be offensive to a reasonable man. The court usually applies test of whether there is a need to know. For instance, the question of whether a diabetic or someone who is suffering from flu, headache or is infected with Ebola or HIV be made public can be assessed to find the presence of a need capable of being upheld by court is not dependent on whether or not the information in question is trivial or that the information is harmless, but the benefit it might bring to the public or a section of the public.

In the above class of medical diagnosis, one fundamental thread discernible is the phenomenon of its communicability. However, Nigeria current public policy towards contagious diseases has so considered Ebola as matter of public interest, but considers HIV and flu not so desirable. It therefore follows that a medical practitioner is precluded from informing a sexually involved partners without consent of the sterostatus of the other partner. In essence, where events disclose or occur that affect the individual alone, and do not touch the sphere of public concern, they are not within the public interest.

Perhaps a case study of the discussion on the health condition of the President Federal Republic of Nigeria, General Muhammadu Buhari, might just elucidate the point under consideration. This is because, the perceived health condition of President, Asiwaju Bola Ahmed Tinubu clearly draws serious concern. It is of utmost interest to everyone to have knowledge of the President's state of health despite the provisions of the general law on the confidentiality of personal health

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[81] B A Garner (n1) P.126.

[82] [1981] 1 All ER 455

information. An argument for disclosure of the health of the. President is not sustained by mere desire or a mere interest to know, rather it stems from constitutional[83] provision on resignation where by reason of ill health it is determined that the President is unable to carry out his functions.

The importance of this discourse is informed by the bad precedent already set by the former President Umaru Musa Yar'dua's health saga. The constitution was breached when the kitchen cabinet frustrated the then vice president, Dr Goodluck Ebele Jonathan from assuming acting capacity. The cabinet equally withheld information as to the eventual death of former President Yar'dua and continued with the unconstitutional perpetuation of holding on to power and state affairs.

Does the Constitution confer an exercisable right? Could this pass for political question?[84] The relevant provision in the constitution provides for a resolution supported by 2/3 majority of members of the Federal Executive Council determining whether the president (or vice president) is incapable of discharging the functions of his office.[85] This is followed by a medical confirmation by a panel of five (5) appointed by the Senate President, one of whom must be a personal physician to the President. A confirmed notice will also require the signature of both heads of the National Assembly. The final act in the process is done when an Official Gazette of the Federation is published.

It is clear that the first act must be triggered by cabinet members, however, does the law by so doing envisage a stalemate? This is imperative because the appointees may be unwilling to reveal the critical health condition of their appointor. This is made more difficult where the President is on medical vacation abroad (the case of Buhari), as we have seen medical tourism features predominantly in our nation's Presidents. In the event that the President transmits power to his Vice President before proceeding on medical trip, there is still a strong possibility of an impasse if Federal Executive Council decides to withhold knowledge of the President's implacable health status in perpetuity?

The point has been made that what constitutes public interest is that which affects the general welfare of the public that warrants recognition and protection, that which the public as a whole has a stake. It would appear that the argument on public interest lends credence to a right being conferred on citizens under the Freedom of Information Act 2011 and recourse can also be made to the doctrine of necessity, since in political jurisprudence the presidency is the stake of the whole populace, invariably of public interest, something beyond mere mundane or just interesting to the public. The reason being that, a situation of deadlock means a state of impossibility, and, it is neither in the character nor spirit of law to envisage an impossible

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[83] CFRN 1999 (as amended), s. 144.

[84] A O Sambo, S A Aziz, 'The Court: Insulating Itself From Politics Through The Doctrine Of Political Questions: A Critical Exposition' [2012](4) *Journal Of Law, Policy and Globalisation*. (*The courts cannot insulate itself from political questions. More problems will be created when a bona fide controversy is not resolved only because the nature of question posed is political in nature).*

[85] CFRN 1999 (as amended),s 144 (1) (a).

situation. The law disavows uncertainty, and certainty is intrinsically the bedrock of legality. The Freedom of Information Act[86] provides that a public institution can be compelled to make information available on application by citizens.[87] The doctrine of necessity which is applied in situations of *ex improviso* and was successfully applied by the Senate (after 80 days of refusal by the invisible hands of Late President Yar'dua to transmit power to then vice president) during the Yar'dua imbroglio may also be adopted.

Therefore, the dividing line in determining interest of the public and what is interesting to the public is one that must be considered on a case by case basis, on the need-to-know basis, the merits of each case examined in the light of that which the public as a whole has a stake, especially a strong interest with sound legal justification. It also means the general welfare of the public in relation to national security, public health and matters of serious national welfare as in the case of the health status of the President.

6. Conclusion

Doctor-patient confidentiality is based on the notion that a person should not be worried about seeking medical treatment for fear that his or her condition will be disclosed to others. The objective of this confidential relationship is to make patients feel comfortable enough providing any and all relevant information. This helps the doctor to make a correct diagnosis, and ultimately to provide the patient with the best possible medical care.

As a result, once a doctor takes a patient on, there is an expectation that the physician will hold that special knowledge in confidence and use it exclusively for the benefit of the patient. He or she cannot divulge any medical information about the patient to third parties without the patient's consent, though there are some exceptions e.g. issues relating to serious public health, where it is intended to assist the police in investigation of a serious crime, if confidential information is at issue in a lawsuit, or where the court makes an order for disclosure, or if a patient plans to cause immediate harm to others or that the information is of such a quality that by all intents and purposes, no intention exist to hold such an information in confidence. However, the underpinning consideration is whether or not the confidant understands the implications of reposing trust and confidence, where this is lacking, no duty is owed.

In any case, the right to privacy and the duty of confidentiality remains a complex issue. Every case needs to be handled on its own merits, because the right to privacy is not absolute and a careful weighing up of interests always needs to take place. The most reasonable solution is what should always be considered in every circumstance as this promotes equity and fairness. Overall, the author submits that the court remains the best *forum conveniens* for the determination of this subject matter.

Hence, it is recommended that:

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[86] 2011.

[87] FOI Act 2011, s 12 (2).

1. Health professionals and their support staff should be trained and retrained on the need to protect confidentiality. The use of social media or the internet otherwise known as telemedicine for personal or professional communication of health information should be done with utmost care.
2. Hospital consultation rooms should be built in such a way that will foster the protection of confidential information.
3. The courts which serve as *forum conveniens* should continue to balance competing public interests from what is merely interesting to the public.