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A Patient's Right of Access to Medical Records

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INTERNATIONAL COMMENTARIES

A PATIENT'S RIGHT OF ACCESS TO MEDICAL RECORDS

*The Honorable Michael D. Kirby**†*

I. An Exemplar of Comparative Law

Issues of health law and policy present quandaries which are common to societies at roughly the same stage of economic and social development. Such quandaries must be solved within the framework of each country's legal tradition and societal values. There are dangers in assuming that a solution considered right for one country will be automatically appropriate for another. This is especially so where differing legal systems intervene to make the borrowing of ideas awkward and, occasionally, inappropriate.

Sadly, it is rare to find an author who is equally at home in the world of the common law and in the civil law tradition which dominates the European legal scene. But such an author is Dieter Giesen. Astonishingly enough for us who have been brought up in the common law, most scholars and practitioners of the civil law tradition look down on our techniques as primitive: an arrested stage of legal development which has never quite advanced to the codifiers who propelled the civil law into what they see as a higher stage of development. We are berated for the fuzziness of our thinking. If the intensely practical nature of our discipline, as a problem-solving system of law, gains occasional words of admiration, our general reluctance to embrace theory and our manifest discomfiture in the presence of a broad concept produces a sense of irritation which is scarcely disguised. The dogged insistence upon the solution of the particular case, and the rearguard resistance to extrapolating

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from many cases to conceptualizing the legal principles involved, turns a typical civil lawyer into a frenzy of displeasure at what we, the common lawyers, look upon as our mighty works of legal craftsmanship.

Into this chasm of misunderstanding and mutual distaste occasionally wanders a scholar who strives to bridge the gap between these two great legal traditions of the world. Although both traditions began in Europe (that is, if the British Isles are truly part of Europe), their legacy is now to be found in the four corners of the world where they compete for influence in the legal régimes of humanity. To bridge the gap between the two requires a subtlety of mind, a command of language and a willingness to learn, which is all too often absent from the discipline of law. By its nature, law tends to be jurisdiction bound. It ordinarily attracts people who are content with the intellectual constraints of their particular discipline. It is this feature of law that makes the achievements of a scholar such as Professor Giesen all the more remarkable.

His writing in comparative law, particularly in health law and policy, is legendary. Equally at home in Berlin, Boston, Birmingham and Brisbane, he is truly an international scholar. I have had the privilege of being his guest at the Free University of Berlin and of teaching a class with him, myself occasionally lapsing into faulty German. His insight, tolerance, and extraordinary knowledge of the detail of Australian jurisprudence command admiration bordering on astonishment. His ready welcome to foreign visitors from common law countries is legendary. Notably, he counts among his close friends and colleagues in Berlin members of the German judiciary who have always enjoyed a close link to the famous universities in which German law has long been taught.

It is perhaps appropriate that, in this volume dedicated to Professor Dr. Dieter Giesen, I should write about the decision of the New South Wales Court of Appeal in *Breen v. Williams*.[1] The case concerned the right of a patient under Australian law to have access to the patient's medical records. Professor Giesen has made significant contributions to the debate on this issue. Indeed, I began my judgment in *Breen* by citing Professor Giesen's comparative analysis in his grand authoritative work, *International Medical Malpractice Law*.[2]

A. The Facts of the Case

The litigation in *Breen* was a by-product of the widely publicized ac-

1. [1994] 35 NSWLR 522.
2. J. C. B. Mohr, Tübingen, (1988). Cited in above n 1 at 525.

tions over defective silicon breast implants. The appellant in the case, Ms. Julie Breen, was an Australian patient who had undergone bilateral augmentation mammaplasty in October 1977. Subsequently, she noticed the development of breast capsules. It was then that Dr. Cholmondeley Williams, a specialist plastic surgeon of Sydney, Australia (the respondent before the Court of Appeal), came into the picture. Concerned about the breast capsules, Ms. Breen consulted Dr. Williams. After noting complaints of severe pain, occasioned by the application of pressure to the capsules, Dr. Williams decided to operate. The operative procedure was carried out in November 1978. After the operation, Ms. Breen discussed the removal of the implants with Dr. Williams. However, there were no further consultations with, or operations by, Dr. Williams.

In 1984, seven years after they had originally been inserted, the silicon implants began to leak. Ms. Breen was alerted to the leakage of the silicon gel by a lump under her left breast. The leak necessitated an operation, which was performed by another surgeon, Dr. I. A. McDougall. He removed the offending implants.

Ms. Breen was not alone in the difficulties which she encountered after having the silicon breast implant inserted. Thousands of women in many countries of the world have experienced similar problems. The result has been a large enterprise of litigation against, *inter alios*, the manufacturer of the breast implants, the Dow Corning Company. This became known as the "Silicon Gel Breast Implant Products Liability Litigation." The principle vehicle for this litigation is *Lindsey v. Dow Corning Co.*,[3] a class action that began in the United States District Court for the Northern District of Alabama. The case was assigned to District Court Judge S. C. Pointer.

Ms. Breen wished to participate in that class action. So did some 2,000 Australian women who claimed to be in a like position. The number of litigants in the United States class action was naturally considerably larger. The defendants in the United States proceedings eventually succumbed. They conceded liability and agreed to settle. Under the terms of the settlement, U.S. $4.2 billion was set aside as a settlement fund. Overseas litigants were originally thought to be an "opt out class" who could share in this settlement if they elected to do so. Australian litigants were to be entitled to share in the fund unless they specifically chose to opt out and pursue alternative remedies. However, on September 1, 1994, Judge Pointer made an order whereby the Australian litigants

3. Civ. A. 94-P-11558-S (N.D.Ala. Sept. 1, 1994) (case was settled).

(among others) were excluded from the settlement. But the judge gave these litigants the right to share in the settlement fund on condition that they were to "opt in" to the United States litigation before December 1, 1994, which was later extended. To do so, the Australians were required to file with the Alabama court copies of the medical records supporting their claims. It was this requirement which eventually brought Ms. Breen's proceedings before the New South Wales Court of Appeal.

In August 1993, Ms. Breen's Australian attorneys wrote to Dr. Williams. On her behalf they requested that he provide them with copies of all primary medical records which he held concerning her case. They stressed that they were not interested in obtaining a new medical report or any other type of summary. In line with the hitherto standard practice of medical practitioners in New South Wales, Australia, Dr. Williams refused the request. He stated that it was a "longstanding legal tradition"[4] that such records were the "property" of the medical practitioner. They were, he claimed, "an *aide memoire* to [his] treatment of the patient."[5]

There is no doubt that under the law of New South Wales, and indeed throughout Australia (and countries of a like legal tradition), access to medical records may be secured by compulsory court process. Judges of relevant courts may make orders for the compulsory production of medical records. Judges of the Supreme Courts of the States of Australia may do so at the request of a judge in specified jurisdictions, including the Federal District Courts in the United States of America. Letters rogatory were secured from Judge Pointer in the case of several Australian litigants for this very purpose. Clearly, however, this is a time-consuming and costly process. It places obstacles in the path of the plaintiffs who had been seeking compensation from the United States implant manufacturers for many years. It was allegedly for this reason that the solicitors who had been acting for Ms. Breen (as well as the 2,000 other Australian women involved in the Australian part of the litigation) decided to launch a "test case." The issue in the case was not whether patients could eventually access their medical records by enforceable legal process. It was whether they had *a right* to access such records without court orders.

Ms. Breen's legal proceedings began when, in May 1994, she issued a summons out of the Supreme Court of the State of New South Wales. The summons came for hearing before Justice Bryson in the Equity Division of the State Supreme Court. Ms. Breen submitted that there were

4. Above n 1 at 528.

5. Above n 1 at 528.

four bases upon which Justice Bryson might find that she had a right of access to her medical records. These were (1) that there was a right of access under the common law of Australia; (2) that the common law would provide such a right in furtherance of the fundamental rights contained in the *International Covenant on Civil and Political Rights*[6] which Australia has ratified and which may thereby influence Australian common law in the case of an uncertainty or ambiguity; (3) that the right arose as an incident of the fiduciary duty owed by a medical practitioner to a patient; and (4) that the right was necessarily implied in the patient's common law right to know relevant information about treatment before, during, and after the treatment was given.

Before analyzing the way in which Justice Bryson and the Judges of the New South Wales Court of Appeal approached each of these alleged bases of the right of access, it is worth briefly reviewing the developments of this area of law in two other common law countries, the United Kingdom and Canada. Such a review is important for two reasons. First, it places the Australian approach to this issue in its international context. More importantly, it provides a background to the approach taken by the Australian judges in this case, for each of them, in varying degrees, examined, criticized or relied upon the developments in the other common law countries.

II. Developments in the United Kingdom and Canada

In the United Kingdom the issue of a patient's right of access to their medical records has now been approached by the enactment of legislation. The general Data Protection Act of 1984,[7] was followed by the more robust and specific Access to Health Records Act of 1990.[8] For this reason, developments in the United Kingdom are only of limited assistance to Australian courts because there is no relevant general access legislation in Australia. Following the enactment of the Access to Health Records Act, the English Court of Appeal in *Regina v. Mid Glamorgan Family Health Services Authority; ex parte Martin*[9] appears to have recognized an innominate common law right of patient access to their medical records. In *Mid Glamorgan*, a patient sought access to medical records which had come into existence before the enactment of the Access to

6. Centre for Human Rights, Geneva, *Human Rights: A Compilation of International Instruments*, United Nations, New York, 1988, p 18.

7. *Data Protection Act* 1984 (UK).

8. *Access to Health Records Act* 1990 (UK).

9. [1995] 1 WLR 110 (CA).

Health Records Act. His claim, therefore, had to be determined on the basis of the common law. At first instance, Justice Popplewell dismissed the claim on the basis that, prior to the Act, there was no right at common law to secure access to medical records of a public health authority.[10] The English Court of Appeal rejected the appeal. However, in doing so, each of the judges made remarks favorable to a patient's right of access to medical records. For example, Lord Justice Evans said:

> In my judgment, there is no good reason for doubting either that a right of access does exist or that it is qualified to [the extent at least expressed now in the statute section 5(1)(c)]. The record is made for two purposes which are relevant here: first, to provide part of the medical history of the patient, for the benefit of the same doctor or his successors in the future; and, secondly, to provide a record of diagnosis and treatment in case of future inquiry or dispute. Those purposes would be frustrated if there were no duty to disclose the records to medical advisors or to the patient himself, or his legal advisers, if they were required in connection with a later claim. Nor can the duty to disclose for medical purposes be limited, in my judgment, to future medical advisers. . . .[11]

Both Lord Justice Nourse and Sir Roger Parker, concurring, made comments in a similar vein. However, each of these judges disposed of the case by affirming that patients have no right of access to their medical records if such access is likely to endanger their physical or mental health. Thus, they were able to avoid spelling out the jurisprudential basis of the common law right which they had recognized (a typical common law solution, the civil law might lament). In my opinion in *Breen* I observed:

> The most that can be derived from *Regina v. Mid Glamorgan* is that it is an indication, at a high level of the English courts, and outside the obligations of statute, that an assertion by a medical practitioner of absolute ownership and control of "his" medical records concerning a patient, is unacceptable to the common law of England. But *Mid Glamorgan* fails to provide the conceptual explanation, by reference to a known legal classification, which will support the conclusions expressed in a way that is coherent and convincing in terms of legal principle.[12]

For this reason the decision in *Ex Parte Martin* remains somewhat un-

10. See (1993) 16 BMLR 81.

11. Above n 9 at 119.

12. Above n 1 at 541.

satisfying.[13] It did not provide an appropriate or convincing basis on which to build a general common law right of patient access in Australian law.

The Canadian Supreme Court adopted a different approach to this issue, relying on the equitable law of fiduciaries. In both *McInerney v. MacDonald*,[14] and *Norberg v. Wynrib; Women's Legal and Action Fund, Intervener*,[15] the judges of the Supreme Court of Canada held that there existed a fiduciary relationship between medical practitioner and patient, and that this duty supported the right of the patient to access medical records about them. Building on a line of United States decisions,[16] Justice La Forest, writing for a unanimous Supreme Court in *McInerney*, held that the fiduciary duty of a medical practitioner to provide access to medical records was ultimately grounded in "the nature of the patient's interests in his or her records."[17] He stated further:

> Information about one's self revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. The doctor's position is one of trust and confidence. The information conveyed is held in a fashion somewhat akin to a trust. While the doctor is the owner of the actual record[,] the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue. . . . The trust-like "beneficial interest" of the patient in the information indicates that, as a general rule, he or she should have a right of access to the information and that the physician should have a corresponding obligation to provide it.[18]

The application of the fiduciary nature of the patient-doctor relationship to the issue of access to medical records seemed to me to be a very persuasive approach. As I shall show, the approach of the Canadian Supreme Court was closely scrutinized in *Breen*, both at first instance, and before the New South Wales Court of Appeal.

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13. See "Access to Medical Records: Breen v Williams" [1995] Med L Rev 102 at 105 - 106.

14. (1992) 93 DLR (4th) 415.

15. (1992) 92 DLR (4th) 449.

16. See e.g. *Emmett v Eastern Dispensary and Casualty Hospital* 396 F 2d 931 (1967); *Cannell v Medical and Surgical Clinic* 315 NE 2d 278 (1974).

17. Above n 14 at 424.

18. Above n 14 at 424 - 425.

III. The Primary Judge's Decision in *Breen*

Justice Bryson was not impressed by the claims that there was a right of access to be found in the common law. His Honor was not persuaded by the decision of the English Court of Appeal in *Ex Parte Martin*. He felt, I think with some justification, that the decision was largely influenced both by the later legislative developments in the United Kingdom, and by the European and international human rights covenants, rather than by any purely common law right easily defined and enforced.

Justice Bryson was also unimpressed by the argument put forward by Ms. Breen on the basis of the *International Covenant on Civil and Political Rights*.[19] She had relied on the fundamental rights embodied in the *Covenant*, and in particular, the peoples' right to self-determination mentioned in Article 1. Ms. Breen also referred Justice Bryson to the decision in *Gaskin v. United Kingdom (Access to Personal Files)*,[20] in which the European Court of Human Rights had disapproved of an English Court of Appeal decision on the basis that it breached Article 8 of the *European Convention on Human Rights*.[21] In rejecting this limb of Ms. Breen's arguments, Justice Bryson noted that neither of these conventions was in force as *part* of Australian domestic law.

Turning to the third argument put forward by Ms. Breen, that based on the alleged fiduciary duty which a medical practitioner owes to the patient, Justice Bryson was not persuaded by the Canadian authority. His Honor felt that in *McInerney*, Justice La Forest had "dealt dismissively with the concern that disclosure would lead to a decrease in completeness, candour and frankness."[22] Justice Bryson was unwilling to extend the fiduciary principle so as to encompass the right of access claimed before him.

The final argument put forward by Ms. Breen in the proceedings before Justice Bryson relied on a patient's implied right to know any relevant information concerning his or her treatment. This point was pressed before Justice Bryson by the Public Interest Advocacy Center (PIAC), which had intervened in the case as an *amicus curiae*. The PIAC submitted that the patient's "right to know" was to be inferred from the reason-

19. Above n 6.

20. (1989) 12 EHRR 36.

21. This decision occasioned the amendment of English law by the enactment of the *Access to Health Records Act*.

22. *Breen v Williams*, Supreme Court of New South Wales, Bryson J, 10 October 1994, unreported, at 51.

ing of the High Court of Australia in *Rogers v. Whitaker*.[23] In that case, the High Court of Australia, the Federal Supreme Court of Australia, had upheld a patient's right to know about the risks involved in particular surgical procedures. It had rejected the alternative, implying that it amounted to a kind of medical paternalism. Justice Bryson rejected this argument. He did not consider that the reasoning in *Rogers* could support a general legal right of access to medical records.

In conclusion, Justice Bryson rejected each of the alleged bases for Ms. Breen's right of access to the medical records. His Honor said:

> In my opinion there is no ground in the facts of this case on which the defendant's ownership of the documents should not be recognised as entitling him to control access to them. The existing legal process for compelling production of documents for the purpose of the conduct of litigation is not inadequate.[24]

IV. The Case Before the New South Wales Court of Appeal

In the proceedings before the New South Wales Court of Appeal, the arguments of the parties were somewhat refined. Ms. Breen confined her argument based on fundamental rights to the suggestion that where there is an ambiguity of legislation, or a gap in the Australian common law affecting basic rights, it was now legitimate for Australian courts to have regard to international human rights jurisprudence in resolving the ambiguity or filling the gap.[25] In this sense, Ms. Breen urged that the Court should consider Article 17.1 of the *International Covenant* as a proper influence upon the development of the general law of Australia—not as part of that law but as an indication of how it should be developed when that could be legitimately done.

Ms. Breen submitted a further ground on which the Court might find a right of access to medical records. It was argued that it was an implied term of the contract between Ms. Breen and Dr. Williams that he would provide her with access to the information contained in his medical records on demand.

In addition, there was a slight softening in the extreme attitudes and

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23. (1992) 175 CLR 479.

24. Above n 22 at 77.

25. This view is now widely accepted in Australian law. See *Mabo & Ors v Queensland* [No 2] (1992) 175 CLR 1, 42; *Chu Kheng Lim & Ors v The Minister for Immigration, Local Government and Ethnic Affairs & Anor* (1992) 176 CLR 1, 38; *Young v Registrar, Court of Appeal & Anor* [No 3] (1993) 32 NSWLR 262 (CA), 274, 290. Cf *Derbyshire County Council v Times Newspapers Limited* [1992] QB 770 (CA), 811, 829.

absolute positions which the parties had taken before the primary judge. Just as the Canadian Supreme Court in *McInerney*, and the English Court of Appeal in *Ex Parte Martin*, had recognized that limitations existed on the right of access, Ms. Breen acknowledged that certain classes of information of the kind likely to be held by Dr. Williams would need to remain confidential. Ms. Breen reformulated her claim to allow Dr. Williams to maintain the confidentiality of the records in three specific situations: (1) where the information had been created, or obtained, solely for his own benefit (*e.g.*, fees and administrative records); (2) where the disclosure would, in the reasonable belief of Dr. Williams, be likely to cause serious harm to the physical or mental health of Ms. Breen (the so-called "therapeutic privilege" exception); or (3) where the disclosure would found an action for breach of confidence; *i.e.*, by a third person.

It was agreed that, in Ms. Breen's case, the first exception would encompass only the communications between Dr. Williams and his insurer, the New South Wales Medical Defence Union. It had been accepted before Justice Bryson that the "therapeutic privilege" exception had no application to the actual facts before the Court. It was included and acknowledged by Ms. Breen to reflect the nature of the proceedings as a test-case relevant to other cases where patients were not as robust as Ms. Breen. The third exception was formulated to meet one of the main policy objections that had been put forward by Dr. Williams: the undesirability of third parties who had communicated with Dr. Williams (or a person in a like position) while relying on the traditional expectation of confidentiality between doctor and patient, later being exposed to harm, embarrassment, or the possibility of litigation where that confidentiality is breached.

V. Rejection of the Common Law Claims

The Court of Appeal was unanimous in rejecting each of the common law claims brought by Ms. Breen to justify the right of access to the medical records. These claims were, the asserted contractual right, the claim of proprietary right, the reliance on fundamental human rights, the assertion of an innominate common law right, and a claim that the right of access was founded on a patient's "right to know."

The claim in contract was swiftly dismissed by the Court of Appeal. In my opinion, I said:

> It would not be consonant with the rules binding on this Court

> for the finding of an implied term in a contract between a patient and a specialist medical practitioner in 1978 to hold that it included an implied term that the patient would have direct access to the information in the raw material of the medical practitioner's files. . . . Such a term was not necessary to give efficacy to the arrangement between the parties. It was far from self-evident.[26]

In a similar vein, Justice Mahoney, the senior Judge of Appeal, held that although a medical practitioner might be contractually bound to make the medical information in his or her files available to the patient, no term should be implied that the patient is to have the legal right to compel inspection of the file itself. Justice Mahoney reasoned that regardless of the approach taken in arguing for an implied term, an implied right to compel inspection does not exist.[27]

The claim of a "proprietary right and interest" in the actual information contained in the records was similarly unsuccessful. I pointed out[28] that the information in question could not be disembodied from the medium in which it is contained; *i.e.,* the paper with typed or handwritten notes. Since this paper belonged exclusively to Dr. Williams, it was his to use in whatever manner he so pleased. Justice Meagher, the other Judge of Appeal participating, also dismissed this claim, noting that both the High Court of Australia, and the New South Wales Court of Appeal had each earlier held that mere knowledge cannot be property.[29]

Although he reached a similar conclusion, Justice Mahoney discussed the claim of a proprietary right in more detail than either Justice Meagher or myself. Justice Mahoney discussed the principles which have been applied in Australia to determine the ownership of the various documents which have come into existence as a result of the relationship between what he termed "professionals" and their clients. He discussed the rights of ownership in light of three particular factors: the nature of the relationship between the parties; the purpose to be achieved by that relationship;

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26. Above n 1 at 538.

27. For a discussion of the attempt to imply a contractual term in this case, the problems with basing Ms. Breen's claim on contract, and possible future developments in the use of contract law in a non-commercial context see R. S. Magnusson, "A Triumph for Medical Paternalism: *Breen v Williams*, Fiduciaries, and Patient Access to Medical Records" (1995) 3 *TLJ* at 31-32.

28. Above n 1 at 538.

29. Justice Meagher cited the decisions in *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 (HC) at 534-536; and *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1982) 64 FLR 387 (NSWCA).

and the particular terms of the contract between them. His conclusion, in general terms, was that the ownership of documents will vary depending on each of the particular factors. In the case of a medical practitioner, Justice Mahoney concluded that *prima facie* a medical file kept by a medical practitioner was the property of the practitioner. However, certain documents, such as specialist reports paid for by the patient, might, in some circumstances, become the property of their patient. Importantly, Justice Mahoney determined that notes taken by a medical practitioner, where they included particular observations made by the practitioner (what Dr. Williams described as his "musings"), remained the property of the medical practitioner.

The third common law claim asserted by Ms. Breen relied, in the revised way which I have described, on what she described as "fundamental human rights."[30] I dealt with this submission only briefly. The other judges ignored it altogether as outside orthodox legal reasoning in Australia, where there are few constitutionally guaranteed rights and none which were relevant to the issue. In my view, Ms. Breen could not rely on the *International Covenant* to assert any common law right because that instrument has not been incorporated into Australian domestic law. The *Covenant* could influence the development of the law, but it could not provide a cause of action where previously none existed.

The main basis on which Ms. Breen sought to find a common law right of access to the medical records was the assertion of an innominate common law right. In this way, Ms. Breen sought to rely on the English decision in *Ex Parte Martin*. Until recently, such English decisions of general common law exposition were often regarded uncritically in Australia and applied with almost automatic diligence. As I have pointed out above, the decision in *Martin* was unsatisfying, as well as being an inappropriate basis upon which to build a right of access, because it lacks a solid jurisprudential foundation. Rather than explaining why such a right might exist, the members of the English Court of Appeal simply assumed its existence. In fact, the decision in *Ex Parte Martin* appears to have been largely influenced by both the passage of statutory rights of access in England, and the criticism which the European Court of Human Rights in *Gaskin* had directed at the English common law.

Justice Mahoney concluded that the decision in *Ex Parte Martin* was more about a right of access to the information held in medical records than a right of physical access to the medical records, such as was claimed

30. Above n 1 at 539.

by Ms. Breen. Viewed in this manner, Justice Mahoney was inclined to support the decision. However, his Honor did not think that Ms. Breen could rely upon it to assert the particular right which she was claiming. So this claim too was rejected.

The final common law claim asserted by Ms. Breen was that a right of access to medical records was implied by the obligation of a medical practitioner to provide information to a patient concerning a medical procedure. This obligation was confirmed by the High Court of Australia in *Rogers v. Whitaker*.[31] I did not accept that the right of access could be drawn from the decision in *Rogers*. I was unwilling to confine the decision in *Rogers* in the manner suggested on behalf of Dr. Williams. He suggested that *Rogers* spelt out the entire parameters of a medical practitioner's obligation to provide information to a patient concerning a medical procedure. On the other hand, I was also unable to accept that Ms. Breen could successfully maintain her claim on the basis of the decision. I said:

> I cannot derive from *Rogers* the general "right to know" which Ms. Breen asserts. It would be curious and unconvincing to derive that right from the law of negligence, via a case of such peculiarity and then embellish it to provide the foundation for an asserted right of access to information in private medical records. There is a quantum leap from the entitlement of a proper explanation by a medical practitioner about the dangers of medical procedures as incidental to treatment to an affirmative obligation to give access to information in records by a medical practitioner who has not been sued and who has never been said to have failed in his duty of explanation to his patient.[32]

VI. The Right of Access as an Incident of a Fiduciary Relationship Between Doctor and Patient

On the fiduciary issue, each of the members of the Court of Appeal reached a different conclusion. I concluded that the medical practitioner-patient relationship could properly be characterized as fiduciary in nature, and that one incident of this relationship was that the patient has a right of access to his or her medical records as held by the medical practitioner. On the other hand, while Justice Meagher was willing to concede that the medical practitioner-patient relationship could be classed as fiduciary, his Honor did not think that the practitioner's duties as a fiduciary

31. Above n 23.
32. Above n 1 at 541 - 542.

would extend so far as to generate in the patient a right to inspect the medical notes and records. Hence the reasoning of Justice Meagher and of myself diverged on the issue of the content of the fiduciary obligation. Finally, Justice Mahoney rejected the idea that the relationship between a medical practitioner and his or her patient could be characterized as fiduciary in nature.

Justice Mahoney examined the decision in *McInerney v. MacDonald* in some detail. He concluded that, although it was not the function of Australian courts to consider the correctness of the reasoning of the Supreme Court of Canada, insofar as it stated the law of Canada, all of the premises relied upon by Justice La Forest in *McInerney* did not correctly state the law of fiduciaries in New South Wales, Australia. Nor did Justice Mahoney agree that the conclusions drawn by the Canadian court followed from those premises. In particular, he thought that it was wrong to infer that a fiduciary relationship existed between a medical practitioner and a patient merely because of the requirement that a medical practitioner acts with the utmost good faith and loyalty towards his or her patient and holds information given by the patient in confidence. Justice Mahoney was also troubled by what he perceived as the failure of the Canadian Supreme Court in *McInerney* to distinguish between the duty of the medical practitioner to convey information to the patient, and what the court termed "the obligation to grant access to the information the doctor uses in administering treatment."[33] While he thought the former duty would ordinarily exist, Justice Mahoney was unwilling to recognize the latter.

I began my analysis of this issue by reviewing the law of fiduciary obligations as it currently stands in New South Wales, and indeed, throughout Australia. I conducted this review by stating six propositions. First, I stated that "the fiduciary principle is in a state of development whose impetus has not been spent to the present day."[34] This, I think, is uncontroversial. Secondly, I noted that the development of society has necessitated an expansion of the scope of the fiduciary principle. Furthermore, "it is to meet new circumstances that the criteria of fiduciary relationships, and the duties thereby imposed, remain rather vague."[35] Thirdly, I pointed out that the trustee-beneficiary relationship recognized in *Keech v. Sandford*,[36] had been extended, by analogical reasoning, to other relationships involving trust and confidence.

33. Above n 14 at 424.
34. Above n 1 at 543.
35. Above n 1 at 543.
36. (1726) Sel Cas Ch 61; 25 ER 223.

The fourth proposition which I noted was that, although fiduciary obligations were first developed in a commercial context, the fiduciary principle should not be limited to commercial relationships. These were mere *species* of the *genus*. They could not possibly define and limit the application of the fiduciary principle. The search, therefore, was for a unifying notion, common to all the relationships which the law considered to be fiduciary in nature. In this regard, I accepted Professor (now Justice) Finn's analysis:

> What must be shown . . . is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence and dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role the alleged fiduciary had, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that the foundation exists for the "fiduciary expectation."[37]

Fifthly, I dealt with the significance of a contractual relationship to the recognition of fiduciary duties. I pointed out that a fiduciary relationship may coexist with a contractual relationship. In doing so, it will neither distort the contract nor be distorted by the implication of terms adverse to continuing fiduciary obligations.

The final point I made in my opinion was that a person may be in a fiduciary relationship in some aspects of his or her activities and not in other aspects. Again, this proposition is in no serious doubt. Even where a fiduciary relationship between two parties has been established in certain circumstances, it will be necessary to regard the facts surrounding the particular transaction to see whether it requires the application of fiduciary duties.

Having examined the general state of law of fiduciary obligations, I turned to consider whether any such obligations could be read into the relationship between Ms. Breen and Dr. Williams. I traced a line of United States decisions[38] which had recognized the existence of a fiduciary relationship between a medical practitioner and his or her patient. I

37. P Finn, "The Fiduciary Principle" in T Youdan, *Equity, Fiduciaries and Trusts* (1989) 1 at 46f.

38. See above n 16.

then examined the judgment of Justice La Forest in *McInerney* which built upon these United States decisions. I was impressed by his Lordship's reasoning. I said:

> I find this analysis wholly convincing. It does not stand alone. Both in New Zealand and indeed in this Court, it has been stated, or inferred, that for some purposes the relationship of medical practitioner and patient is a fiduciary one or can give rise to applicable fiduciary duties. *See, e.g., Duncan v. Medical Practitioners Disciplinary Committee* [1986] 1 N.Z.L.R. 513 (H.C.), 520f; *Smith Kline and French Laboratories Ltd. v. Attorney-General* [1989] 1 N.Z.L.R. 385, (H.C.) 396; *Wickstead and Ors v. Browne* (1992) 30 N.S.W.L.R. 1 (C.A.), 19. A court of common law may not be able to disentangle the ownership of the paper or other medium in or on which intimate personal information about the patient is kept and the right of access to that information against the reluctance of the owner. But a court of equity can do so. It can do so in an established fiduciary relationship, out of regard to the special and intimate interests of the patient in the content of the medical information which concerns nobody more directly than the patient.[39]

Having concluded that a fiduciary relationship existed between Dr. Williams and Ms. Breen as medical practitioner and patient, I then turned to examine the duties which arose from that relationship, and specifically, the question of whether a right of access to the medical practitioner's files was an incident of the fiduciary character of the relationship.

What are the policy considerations which are relevant to the courts when deciding whether to recognize a right of access to the practitioner's files? The considerations which favor the rejection of such a right are (1) the possibility that any information secured might actually harm the patient; *i.e.,* the so-called "therapeutic privilege;" (2) the fact that such access might sometimes expose the practitioner to the risk of being sued; and (3) the fact that, since it had not been previously thought that a patient could gain access to their medical records, certain of these documents may have been written or prepared in a more guarded manner had the right of access then existed and been recognised. Expectations should not be disappointed. Moreover, it was suggested that the provision of the right claimed by Ms. Breen, given its wide-reaching consequences, was properly a matter for Parliament and not the courts.

Ranged against these considerations are the factors which support the

39. Above n 1 at 545.

recognition of the right as an attribute of the fiduciary duty owed by a medical practitioner to a patient in some circumstances. These include (1) the recognition that the duty of the medical practitioner to act in the patient's best interests would limit and control any unnecessary collection of information harmful, or prejudicial, to a patient. Furthermore, the medical practitioner would retain the "therapeutic privilege" and the obligation of protection of the confidences of third parties; (2) the primacy of the patient's interest in information which concerns their personal integrity and autonomy; (3) the inadequacy of summaries as a substitute for a right of access, especially in today's more mobile society; (4) the advances in information technology, which have made the provision of access to a patient's information file both a realistic and a generally inexpensive option; (5) the recent changes in the medical practitioner-patient relationship, at least in Australia, whereby patients are now less blindly trusting and more assertive of their entitlements to information about themselves and medical care and to legal and other redress where this is not adequately provided; (6) the fact that information about a patient is lawfully provided to a great profusion of health professionals and paramedicals involved in the treatment of the patient. It was argued that it is a trifle unpersuasive that access should be denied to the person most intimately involved (the patient) when so may others may gain that access; (7) legislative developments in Australia, both Federal and State, which have afforded a right of access to medical records held on a patient in a public hospital or in other public records. The common law should develop in general harmony with these statutory provisions; and (8) the fact that a patient can invoke court procedures to secure access to the information in the original records and can therefore ultimately enforce a right. In response to the claim that medical records would probably become briefer and less candid, the response of Justice La Forest in *McInerney*[40] was convincing. Knowledge of a right of access, and the resultant increase in accountability may, in fact, improve the accuracy, contents, and sufficiency of the medical records. The burden of any additional time and costs would, if reasonable, be borne by the patient.

This examination of the competing policy considerations affecting the development and extension of the current state of the law in Australia on this topic led me to the conclusion that the Court of Appeal should recognize the right of a patient to gain access to his or her original medical records as an incident of the fiduciary relationship between a medical

40. Above n 14 at 429.

practitioner and his or her patient. Once this had been established, it was clear that, in failing to provide Ms. Breen with proper access to the information which she sought, Dr. Williams had been in breach of his fiduciary duty. The unacceptable character of his breach was demonstrated, it seemed to me, by Dr. Williams' clear indication that he would provide access, but only if he were completely released from all legal liability to Ms. Breen. This indicated that Dr. Williams' concerns were ultimately to protect himself, not to advance the interests of the patient. Indeed, if the patient wanted the records she could get them—provided she went to the cost and suffered the delay and inconvenience of securing letters rogatory from the United States court.

VII. Conclusion: The Future for the Asserted Right of Access in Australia

My view on the nature and incidents of the relationship between Dr. Williams and Ms. Breen was not shared by the other judges in *Breen*. My purpose here is not to reargue our judicial debates for that is found in the law reports. Under our conventions, judges do not reargue their professional opinions in public debate. Rather, my purpose is to describe the controversy and to call attention to the issue; one pertinent to the relationship between medical practitioners and their patients in the world today. As I stated above, Justice Meagher was willing to recognize the existence of a limited fiduciary relationship between a medical practitioner and his or her patient. He was not, however, willing to recognize a right of access to medical records as an incident of this relationship. Justice Mahoney was not even prepared to characterize the medical practitioner-patient relationship as fiduciary in nature. Therefore, by majority, Ms. Breen's claim was dismissed by the New South Wales Court of Appeal.

However, the story does not end there. After her initial appeal was rejected, Ms. Breen sought special leave to appeal to the High Court of Australia. On May 12, 1995, the High Court of Australia granted special leave to appeal—the first step on the way to appellate review. It did, however, reserve the right to revoke the grant of special leave, in particular, if any legislative intervention made the determination of the issues in the case redundant. The appeal to the High Court will otherwise probably be heard some time in early 1996.

I conclude this note, with all due modesty, with a reference to some of my closing remarks in *Breen*. These remarks reflect the importance of

the issue before the Court and the need for fundamental rights, such as the right of access to medical records, to be recognized and enforced, and released from expensive and time-consuming legal procedures:

> The fulfillment of the right asserted by a patient ought not to be frustrated by requiring cumbersome, dilatory and expensive court process to be issued. It ought not to be withheld in a purported bargain to provide it only if the patient, who is vulnerable, provides the medical practitioner with a release from all possible claims, whatever they might be. This Court should uphold the patient's right in the present case by appropriately precise equitable relief.[41]

Professor Giesen, whom we honor in this volume of the *Journal*, is a great teacher of comparative law in the context of medical law. By studying the decisions of the courts and other legal writers in other countries, we can learn useful analogies for the approach to the general principles which should govern the rights and duties of medical practitioners. In the universal environment we have much to learn from each others' legal systems. Professor Giesen is a notable exemplar in this regard. But in the end, the willingness of judges, or indeed any lawyer, to derive lessons from other legal traditions depends upon their willingness to refer to the experiences of others and an open-mindedness to learn from their approaches.[42]

41. Above n 1 at 550.

42. In addition to those articles cited above, the decision in *Breen v Williams* was critically discussed in P. Parkinson, "Before the High Court - Fiduciary Law and Access to Medical Records: *Breen v Williams*" (1995) 17 *Sydney Law Review* 433.