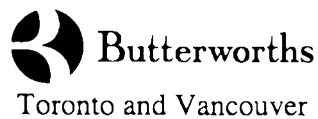
JOURNAL OF WOMEN'S HEALTH AND LAW

Volume 1, Number 1 November 1999

Cited as (1999-00) 1 J.W.H.L.

Editor-in-Chief
Lorraine E. Ferris

Associate Editor
Patricia J. Peppin



Toronto and Vancouver

COMPELLED PRODUCTION FROM THIRD PARTIES OF HEALTH RECORDS IN SEXUAL ABUSE CASES: LEGAL PRINCIPLES AND PROCEDURES AND GUIDELINES FOR HEALTH CARE PROVIDERS

Elizabeth K.P. Grace*

This article discusses the different legal tests and procedures employed in criminal and civil proceedings to determine whether access to confidential health records of victims of alleged sexual abuse which are in the hands of third parties will be granted to the defence and, if so, what conditions may be attached to minimize the infringement on victims' rights. The ramifications of records destruction in both criminal and civil sexual abuse proceedings are also considered. The author concludes that the trend in sexual abuse cases is that courts are ordering records be produced, subject to what can be stringent conditions, where they are satisfied the information the records contain may be required by the defence to make full answer and defence of the allegations of abuse and also, in the civil context, of the allegations concerning the resulting harms. Since health care providers treating victims of sexual abuse are likely to be embroiled in requests by the defence for production of their notes and records and must be careful to discharge their legal obligations to their patients and to the courts, the article concludes with proposed guidelines and tips for health care providers which address note taking and record keeping practices, requests for notes and records, and court proceedings in which access to health records is being sought by the defence.

INTRODUCTION

Since the early 1990s health care providers who treat victims of sexual abuse, such as family physicians, psychiatrists, psychologists and social workers, and the institutions in which they work, have found themselves embroiled in pitched legal battles over access to their patient or client records.[1] While the primary

---

* B.A.H., M.Phil., LL.B., Senior Associate Lawyer, Lerner & Associates, 130 Adelaide Street West, Suite 2400, Box 95, Toronto, Ontario, M5H 3P5; Phone: (416) 867-3076; Facsimile (416) 867-9192; E-mail: egrace@lerner.ca. The author gratefully acknowledges the contributions of Susan Vella and Lori Stoltz whose insights and comments regarding earlier drafts were most helpful.

[1] There is an important distinction to be made between pre- or mid-trial production of health records in the possession of third parties and the admissibility of such records at trial. This article considers only the former question, *i.e.*, the circumstances in which the defence will be granted access to the health records of a victim of sexual abuse. It does not examine the ques-

issue in such battles is the competing individual rights of the perpetrator and the victim of the alleged abuse,[2] the health care provider who created the records and/or is their custodian has his or her own legal obligations to discharge, as well as rights distinct from the patient's which must be respected. This article considers the legal principles that govern when a person charged criminally with a sexual offence, or sued in civil court for damages arising from sexual abuse, will be granted access to the confidential health records of a victim of alleged abuse who does not consent to their disclosure, where the records are in the hands of third parties.

This is a controversial area of the law in which, over the past decade, there has been considerable activity, debate and development.[3] While the law governing records disclosure in the civil context is now relatively settled in the wake of the Supreme Court of Canada decision in *M. (A.) v. Ryan*,[4] in the criminal context it remains in a state of some uncertainty as the criminal bar, trial courts and record makers and keepers (and their legal advisors) await the imminent release by the Supreme Court of Canada of its decision in *R. v. Mills*[5] on the constitutionality of the legislative provisions currently governing production of records in criminal sexual assault proceedings.[6]

---

tion that requires consideration of the relevance and reliability of the records and depends on the rules of evidence of what use, if any, these same records may ultimately be made at trial, assuming they have already been produced to the defence.

2 The words "victim" and "perpetrator" are used throughout this article as a shorthand to describe the primary players in criminal and civil court proceedings generally that involve sexual abuse allegations. However, where the allegations have not yet been proven, the players in a criminal proceeding are properly referred to as "complainant" and "accused", and in a civil proceeding as "plaintiff" and "defendant". In general, I use the pronoun "she" to refer to the victim and "he" to refer to the perpetrator, while I acknowledge that not all victims are women and not all perpetrators are men.

3 D. Oleskiw, in her paper, "The Impact of *O'Connor* Applications on Health and Counselling Practitioners: The Challenge of Maintaining Confidentiality", delivered at the 12th Biennial N.A.W.L. Conference, "Access to Justice for Women: The Changing Face of Inequality", Oct. 30-Nov. 2, 1997, Halifax, Nova Scotia, at pp. 1-2 describes a practice beginning in 1992 of defence counsel in criminal cases aggressively seeking pre-trial production of the private and personal records of complainants of sexual offences. Numerous articles have been published on records disclosure and destruction issues, including: B. Feldthusen, "Access to the Private Therapeutic Records of Sexual Assault Complainants" (1996) 75 Can. Bar Rev. 537; K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) 9 C.J.W.L. 148; D.M. Paciocco, "Bill C-46 Should not Survive Constitutional Challenge" (1996) 3 The Sexual Offences Reporter 185; and W.N. Renke, "Case Comment: Records Lost, Rights Found: *R. v. Carosella*" (1997) 35 Alta. L. Rev. 1083.

4 [1997] 1 S.C.R. 157.

5 [1998] 4 W.W.R. 83 (Alta. Q.B.).

6 There are a number of important distinctions between criminal and civil proceedings. In the former, the parties are the state, represented by the Crown prosecutor, and the accused. The alleged victim of the crime (the complainant) is simply a witness in the proceeding. The purpose is to punish an accused person who the Crown proves beyond a reasonable doubt committed a criminal offence. In civil proceedings, the parties are the alleged victim (plaintiff) and the alleged perpetrator (defendant). The purpose is to compensate monetarily the plaintiff who proves on a balance of probabilities not only that the defendant committed the abusive acts complained of, but also that she has suffered damages as a result of these acts.

There are a number of reasons why the defence in criminal and civil court proceedings seek access to victims' confidential health records. Since sexual assault generally occurs in private, without witnesses, the victim's credibility is usually critical to establishing culpability on the part of the alleged perpetrator. As a result, defence strategies typically rely heavily on challenging the victim's credibility, meaning not only her propensity to tell the truth or lie, but also her mental capacity to recount events in an accurate and reliable manner. To that end, the defence will want to review the victim's health records: (i) to determine if there are any inconsistencies (real or apparent) between what the health care provider has recorded about the abuse and the victim's description of the abuse in the court proceeding; (ii) for evidence of any improper motive on the victim's part, such as vengeance or greed; and (iii) to see whether the victim may suffer or has suffered from a psychiatric illness, or physical trauma to the head, which could affect her ability to perceive or recall events relating to the alleged abuse accurately. On the latter point, with the current debate in medical and legal circles regarding recovered traumatic memory, or as some have characterized it "false memory syndrome", the defence may also look for evidence in the records of improper therapeutic techniques, such as the victim having been subjected to undue suggestion of having been sexually abused, or treated with hypnosis or a mind-altering drug.[7]

In the civil context, there is an additional reason why the defence seeks production of a plaintiff's health records. Unlike in a criminal proceeding where the only issue is whether or not an illegal act was committed, in a civil proceeding there is the additional element of proving what harm and economic loss has been suffered by the plaintiff. This additional element can serve to broaden the scope of relevance and, therefore, the extent of the records which may be ordered produced. The defence is entitled to explore whether there are other potential causes of the damages the plaintiff attributes to the sexual abuse, such as prior or subsequent incidents of abuse by another perpetrator.

Irrespective of whether the forum in which access to a victim's health records is being sought by the defence is criminal or civil, a similar set of competing rights is involved — namely, the right of the alleged perpetrator (and in a civil case, sometimes also the institution being sued for the alleged wrongdoing by another over whom it exercised some control) to know the case against him (or it), to fully defend himself (or itself) and to have a fair trial, balanced against the alleged victim's right to privacy, security of the person and equality before the courts. Overlaid on these competing individual rights are broader public policy concerns consisting, on the one hand, of society's interest in maintaining the integrity of our legal system and preventing a miscarriage of justice from taking place, and on the other, of ensuring victims of sexual abuse are not deterred from seeking treatment and do not sacrifice recourse to the criminal and civil justice systems for fear their most intimate thoughts and feelings, as recorded in their doctor's or therapist's records, will be disclosed to their abusers and others.

---

7 See S.M. Vella, "Recovered Traumatic Memory in Historical Childhood Sexual Abuse Cases: Credibility on Trial" (1998) 32 U.B.C. L. Rev. 91.

However, the nature of the court proceedings involved will determine which set of rules govern what will or will not be ordered produced to an adverse party, and whether any limiting conditions will attach to production to minimize the intrusion into the alleged victim's confidential health information. In relation to criminal sexual offence proceedings, ss. 278.1 to 278.91 of the *Criminal Code*[8] apply (pending the anticipated release of the Supreme Court of Canada decision in *R. v. Mills*, and except where some or all of these sections have been struck down by courts as being unconstitutional, in which case, the defence must resort to the common law test and procedures laid down by the majority of the Supreme Court of Canada in *R. v. O'Connor*[9]). In civil sexual assault proceedings, where there is no overarching legislative regime analogous to ss. 278.1 to 278.91 of the *Criminal Code*, the common law guidelines set out by the Supreme Court of Canada in *M. (A.) v. Ryan*, together with the applicable rules of court governing civil proceedings in a particular province, are the starting point of the analysis.

After reviewing the different legal tests and procedures that govern disclosure and destruction of third party health records in criminal and civil sexual abuse proceedings, the author will propose some general guidelines and practical tips aimed at assisting health care providers who treat survivors of sexual abuse, and their legal advisors, to deal with the many challenges posed by this difficult and controversial area of the law. The suggested guidelines and tips are geared to ensuring that legal obligations to preserve patients' confidential information and to act in patients' best health interests are complied with, and health care providers are as prepared as possible to respond effectively when their patients become involved in court proceedings in which health records are targeted by the defence.

BALANCING THE COMPETING RIGHTS AND INTERESTS IN THE CRIMINAL CONTEXT

The criminal law governing access by the defence to complainants' health records is presently in a state of flux In 1995, the Supreme Court of Canada released its decision in *R. v. O'Connor*. Although the members of the Court were divided about how best to balance the competing individual rights and societal interests involved in the production of complainants' medical, therapeutic and other private records in the hands of third parties, the majority of the Court developed a test and a corresponding set of procedures for production of these records to apply in relation to all criminal offences.

In May 1997, Parliament passed legislation that amended the *Criminal Code* and provided for a test and set of procedures specific to sexual offences.[10] Since

---

[8] R.S.C. 1985, c. C-46, ss. 278.1 to 278.91 [en. S.C. 1997, c. 30, s. 1]; s. 278.2(3) [am. S.C. 1998, c. 9, s. 3] [hereinafter "*Criminal Code*"].

[9] [1995] 4 S.C.R. 411.

[10] S.C. 1997, c. 30, s. 1.

then, numerous challenges to the constitutionality of the new *Criminal Code* provisions have been brought by criminal defence lawyers.[11] These challenges have resulted in divergent court decisions, which in turn have contributed to uncertainty in the criminal law of records disclosure. On January 19, 1999, the Supreme Court of Canada heard the appeal of the decisions of the Alberta trial judge in *R. v. Mills*, who found the new *Criminal Code* provisions, in their entirety, to be unconstitutional and the common law (or judge-made) guidelines laid down in *R. v. O'Connor*, instead, to be the governing law. The decision of the Supreme Court of Canada on the constitutionality and, therefore, the applicability of the *Criminal Code* provisions in *R. v. Mills*, which at the time of writing was expected to be released very shortly, should bring greater certainty to the criminal law of records disclosure in cases involving sexual offences.

THE COMMON LAW: RECORDS PRODUCTION GUIDELINES IN CRIMINAL SEXUAL ASSAULT CASES

The O'Connor Test for Production of Third Party Records

The leading criminal case on records disclosure to date, which establishes the common law for records disclosure in relation to all criminal offences, is the Supreme Court of Canada's decision in *R. v. O'Connor*.[12] The accused, Bishop O'Connor, was charged in 1991 with a number of sexual offences that were alleged to have occurred over 20 years earlier when he was the principal of a residential school for First Nation children in British Columbia. The defence obtained a pre-trial order directing the Crown to disclose the identities and locations of all therapists, counsellors, psychologists and psychiatrists who had treated the four female complainants in relation to the alleged sexual abuse. The order also directed that the complainants were to authorize such persons to produce to the Crown the contents of their files and any related materials. The same order was made with respect to the complainants' school, employment and medical records. This order was obtained without notice to the complainants or the record holders.

When the case reached the Supreme Court of Canada on appeal, the Court set out a two-stage test with corresponding procedures (hereinafter the "*O'Connor* test") by which an accused may obtain at least some degree of access, either prior to or during trial, to confidential records relating to the complainant in the possession of third parties (as opposed to records already in the possession of the Crown, which are the subject of a different and less restrictive test for disclosure),[13] and which the complainant does not consent to release.[14]

---

[11] A recent article suggested there have been more than 50 such challenges mounted across the country. See C. Schmitz, "Rape Shield Law 'Two-Tier Justice'" (May 14, 1999), 19(2) *The Lawyers Weekly* 1.

[12] [1995] 4 S.C.R. 411.

[13] The common law governing Crown disclosure of records already in its possession is set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[14] A nine-judge panel of the Supreme Court of Canada heard the appeal in *R. v. O'Connor*. The joint reasons of Lamer C.J.C. and Sopinka J. on production of records in the possession of third

There is, unlike in the case of third party records already in the possession of the Crown, no presumption of relevance in relation to records in the hands of non-parties. Further, if the Crown has not had access to the information in preparing its case, and third parties such as health care providers are under no legal obligation to aid the defence, the onus is on the defence to establish as a first step the "likely relevance" of the records.[15] This, in turn, gives rise to a procedure that requires the defence at the outset to:

(1) File with the trial judge a formal written application supported by an affidavit setting out the specific grounds for production which demonstrate the reason(s) why the records are believed to be relevant and important to the proceeding (the Court, however, held that this requirement may be waived where it is in the interests of justice to do so);
(2) Give notice of the application to the custodian of the records and to the person(s) with a privacy interest in the records, including the subject(s) of the records; and
(3) Subpoena the custodian and the records to court.[16]

The grounds for the accused's application may be derived from a number of sources, including the accused's own knowledge, Crown disclosure and, where available, the evidence given at the preliminary inquiry. The Court recognized the disadvantaged position in which an accused is likely to be in having to make the application without ever having seen the records in question, and it accepted that a *voir dire* (a hearing conducted without the jury present) with oral testimony may be required where the trial judge is unable to decide the issue on the basis of only hearing submissions by counsel.[17] However, in practice, such hearings are rare. This is likely because neither the complainant nor the record holder can be compelled on a production application by the defence to give evidence that provides the grounds for why the records may be relevant.[18]

Although not specifically addressed by the Court, it follows from the fact the record keeper and the complainant are entitled to notice of a production application that both have a right to appear and make submissions on the application, either on their own behalf or through legal counsel. The reason the complainant is so entitled is that her privacy, security interests and equality rights under the Charter[19] are implicated and, as the subject of the health record, she has a right

---

parties were concurred with by Cory, Iacobucci and Major JJ. and, therefore, constitute the decision of the majority (hereinafter referred to simply as "the Court"). The minority, consisting of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ., favoured an approach that placed greater emphasis on the privacy and equality rights of complainants.

[15] *R. v. O'Connor, supra*, note 12, *per* Lamer C.J.C. and Sopinka J. at 431, 434-35.

[16] *Ibid., per* Lamer C.J.C. and Sopinka J. at 435.

[17] *Ibid.*

[18] The Court in *R. v. O'Connor, ibid.*, recognized that third parties have no obligation to assist the defence (indeed, if health care providers did so without their patients' or clients' consent, they would be exposing themselves to potential disciplinary and civil consequences).

[19] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

under normal circumstances to the information contained in the record and to block its release to third parties such as an accused. The custodian of a health record, on the other hand, not only has a proprietary interest in the physical record itself, but where regulated will also be subject to statutory rules governing the creation, maintenance and release of the record.[20] Where the custodian of the record is also the patient's treating health care provider, he or she may be able to speak to the irrelevancy of the record (*e.g.*, where treatment was for reasons entirely apart from the alleged sexual assault). The health care provider may also offer an opinion (if qualified to do so) that production of the record to the accused would be detrimental to the patient's mental and/or physical health. If production is to be ordered, the health care provider may be able to suggest practical conditions that could be attached to production so as to minimize any potential harm to the patient.

R. v. Chisholm[21] illustrates the important role a treating health care provider may play in limiting production of records and attaching conditions to their production. In that case, the 14-year old complainant was seen by a psychologist retained by the Crown for the purpose of providing an expert opinion regarding the complainant's behavioural changes in the aftermath of the alleged sexual assault and her delayed disclosure of the assault to her mother. The expert's notes of his interviews with the complainant, together with his report, were disclosed to the defence. Because the expert's notes revealed the complainant had been receiving ongoing therapy from a psychologist, the defence applied for production of the therapeutic records in the possession of the complainant's treating psychologist.

The treating psychologist attended in person at the hearing of the production application, bringing with her the original, unedited patient file. At the outset, she alerted the court to her concerns about production. Once directed to turn over the file to the court, she made additional submissions to help focus the court in its review of the file, which consisted of some 300 pages, one-third of which were handwritten notes. After the presiding judge reviewed the contents of the file, the psychologist then participated in the further submissions made regarding the various considerations involved in production and non-production. The psychologist emphasized the negative implications of production on the complainant's health and her continued therapy and stressed that release of the file contents was not, in light of her professional obligation to maintain patient confidentiality, voluntary on her part. The judge, who was clearly assisted by the psychologist's submissions, commented that she had conducted herself in a "highly professional fashion throughout the proceeding".[22] As a result, partial disclosure of the file was ordered in the interests of allowing the accused to make full answer and defence by being in a position to challenge the admissibility and validity of the Crown's expert psychologist's evidence. However, the

---

[20] Patients' and physicians' respective rights and obligations *vis-à-vis* health records are addressed in *McInerney v. MacDonald* (1992), 93 D.L.R. (4th) 415 (S.C.C.), as well as in provincial health care legislation, both of which are further discussed below.

[21] (1997), 34 O.R. (3d) 114 (Gen. Div.).

[22] *R. v. Chisholm*, *ibid.*, at 123.

Court imposed stringent conditions on the partial production of the file ordered so as to mitigate the harm caused by disclosure which the treating psychologist had addressed in her submissions.

The application for production of records under the *O'Connor* test proceeds in two stages. In the first, the accused bears the onus of establishing the records are "likely to be relevant", meaning there is a "reasonable possibility" the information they contain is logically probative to an issue at trial, such as the complainant's credibility, or the competence of a witness to testify.[23] The threshold of "likely relevance" does not require any balancing of rights and interests and is aimed at preventing purely "speculative, fanciful, disruptive, unmeritorious, obstructive, and time-consuming" requests for production by the defence, which appeared to be occurring with increasing frequency at the time the Court's decision in *R. v. O'Connor* was released.[24]

The Court suggested various ways in which private therapeutic records may be relevant in a sexual assault case. Specifically, they may contain information concerning the unfolding of events underlying the criminal complaint, reveal the use of a therapy which could have influenced the complainant's memory of the alleged offence, or include information bearing on the complainant's credibility, including testimonial factors such as the quality of the complainant's perception of events at the time of the offence and her memory since.[25] The Court also indicated there may be a temporal aspect to relevancy — *i.e.*, the test for "likely relevancy" is more likely to be satisfied where there is a reasonably close connection in time between the creation of the records and the date of the offence, or, in historical cases, a close connection in time between the creation of the records and the complainant's decision to lay charges.[26] These grounds of "likely relevance" tend to be routinely cited by the defence in their application materials, usually supported by excerpts from the transcripts of the preliminary inquiry (where such has occurred) or the documentary disclosure provided by the Crown, to satisfy the first stage of both the *O'Connor* and the *Criminal Code* tests. The threshold is not a high one and where there is doubt about the strength of the case put forward by the defence, courts tend to err on the side of the accused in finding "likely relevance" in respect of the records whose disclosure is being sought.

Once the court is satisfied the records are likely relevant, the second stage of the *O'Connor* test is triggered. The judge alone examines the records to determine whether and the extent to which they should be produced to the accused. In making these determinations, the judge is required to balance the complainant's constitutional rights to privacy, security of the person and equality without discrimination against the accused's constitutional rights to a fair trial and to make full answer and defence by weighing the beneficial and detrimental effects

---

23 *R. v. O'Connor, supra*, note 12, *per* Lamer C.J.C. and Sopinka J. at 436.

24 *Ibid.*, *per* Lamer C.J.C. and Sopinka J. at 436-38. See Oleskiw, *supra*, note 3 at 1-2, and Busby, *supra*, note 3 at 148, regarding the plethora of criminal defence applications beginning in 1992.

25 *R. v. O'Connor, supra*, note 12, *per* Lamer C.J.C. and Sopinka J. at 441.

26 *Ibid.*, *per* Lamer C.J.C. and Sopinka J. at 439.

of a production order.[27] In doing so, the judge should consider the following factors to determine whether and, if so, to what degree, the defence should be granted access to the records:

(4) The extent to which the record is necessary for the accused to make full answer and defence (referring to the accused's ability to uncover and explore every piece of evidence that may assist in putting forward a credible defence);
(5) The probative value of the record in question (*i.e.*, does the information in the record have a slight or substantial bearing on the issues before the court?);
(6) The nature and extent of the reasonable expectation of privacy in the record (this will tend to be greatest where the relationship between the complainant and record keeper is one that falls within the categories of recognized confidential relationships, such as a doctor or therapist and patient relationship);
(7) Whether production of the record would be premised upon any discriminatory belief or bias (*e.g.*, is the alleged relevance premised on myths and stereotypes, such as the misguided belief that women tend to make false sexual assault allegations);[28] and
(8) The potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record (a potentially devastating revelation, such as a past abortion that has no relevance to the alleged assault, would, for example, tend to militate against production).[29]

The Court found the extent to which production could frustrate reporting and treatment, and the effect on the integrity of the trial process of producing or failing to produce the record, two additional factors that the minority of the Court ruled should be considered by the trial judge in the balancing exercise (and a position Parliament subsequently adopted in enacting the *Criminal Code* provisions discussed below), were not relevant on the production application. The first factor, it held, could be taken into account by the trial judge in considering whether to order a ban on publication or a bar on spectators in the courtroom and by applying the rules of admissibility by excluding irrelevant evidence. The second factor was also more appropriately dealt with at the admissibility stage during the trial.[30]

---

[27] The Charter rights, *supra*, note 19, implicated in this balancing process include s. 7 (right to full answer and defence, fair trial, fundamental justice, and to privacy and security of the person), s. 8 (right to privacy), s. 11(*d*) (right to be presumed innocent until proven guilty and to a fair trial), and ss. 15 and 28 (right to equality without discrimination). See *R. v. O'Connor*, *supra*, note 12, *per* L'Heureux-Dubé J. at 480-90.

[28] See, for example, *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 *per* L'Heureux-Dubé J. (Gonthier and McLachlin JJ. concurring), at 369-70, 372-77, regarding the reliance on discriminatory myths and stereotypes in sexual assault cases.

[29] *R. v. O'Connor*, *supra*, note 12, *per* Lamer C.J.C. and Sopinka J. at 442.

[30] *Ibid.*, *per* Lamer C.J.C. and Sopinka J. at 442-43. The distinction between compelling production of records in a production application and their admissibility at trial is an important one in

In the context of sexual offences, the *O'Connor* test has largely been supplanted by the new *Criminal Code* provisions introduced in 1997. However, there are at least two situations involving sexual abuse allegations in which the common law test prescribed by the Supreme Court of Canada in *R. v. O'Connor* continues to govern access to third party records. The first occurs where a court rules the *Criminal Code* provisions are unconstitutional and of no force and effect, which means, pending the release of the Supreme Court of Canada's decision in *R. v. Mills*, that the *O'Connor* test serves as the "default" position.[31] The second occurs where the records sought do not fit within the meaning of "record" as defined by s. 278.1 of the *Criminal Code*, such as a complainant's confidential solicitor-client records in a parallel civil action for damages arising from the alleged abuse, where again the courts appear to be falling back on the two-step *O'Connor* test to determine whether production, first to the court for review purposes, and then to the defence is justified.[32]

R. v. Carosella: Records Destruction

In response to the sudden surge in defence applications seeking access to the private records of complainants, some record holders adopted defensive tactics. For example, one sexual assault crisis centre developed a policy of automatically shredding all files with any police involvement. This policy was scrutinized by the Supreme Court of Canada in *R. v. Carosella*.[33] The complainant in that case had gone to the crisis centre to find out how to lay charges against her alleged abuser and was interviewed by a social worker at the centre for almost two hours. During the interview, the social worker took approximately ten pages of notes and informed the complainant that whatever she said could be subpoenaed to court. The next day, the complainant contacted the police and gave a full

---

that relevant records whose production is compelled by court order may not ultimately be admitted into evidence if they contain hearsay that does not fall within a recognized exception to the hearsay rule, such as the business records exception found in federal and provincial Evidence Acts, or the common law exception provided for in *Ares v. Venner*, [1970] S.C.R. 608 which applies to hospital records

[31] See discussion below and the following cases: *R. v. Mills*, [1998] 4 W.W.R. 83 and 107 (Alta. Q.B.); *R. v. Lee* (1997), 35 O.R. (3d) 594 and 598 (Gen. Div.); and *R. v. E.H.*, [1998] O.J. No. 4515 (Gen. Div.)

[32] See, for example, *R. v. Roby*, [1998] O.J. No. 2820 (Gen. Div.) and the underlying rulings of Hawkins J. in *R. v. McClure*, unreported, Nov. 25, 1998 and Dec. 4, 1998 (Ont. Gen. Div.) and [1999] O.J. No. 1405 (S.C.), leave to appeal granted April 22, 1999, [1999] S.C.C.A. No. 71. It would appear that the files of civil lawyers representing plaintiffs who are concurrently or subsequently involved in related criminal proceedings are among the latest third party records being targeted for production by the criminal defence. This development poses a potential threat to solicitor-client privilege which, traditionally, has operated as virtually a complete bar to production and admissibility of records to which the privilege attaches (only giving way in narrow circumstances, such as where an accused's innocence is at stake, or the lawyer is complicit in the commission of a crime). See, for example, *R. v. O'Connor*, *supra*, note 12, *per* Lamer C.J.C. and Sopinka J. at 431, 433 and *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, *per* Lamer J. at 881, 893.

[33] [1997] 1 S.C.R. 80.

written statement. Shortly thereafter, the accused was charged with gross indecency.

Prior to the start of the trial, the defence applied for production of the centre's file concerning the complainant. The Crown, the complainant and the centre consented to production. However, when the centre's file was produced, it did not contain the notes of the complainant's interview. A *voir dire* was held which revealed the notes had been destroyed in April 1994, pursuant to the centre's policy of shredding files after the commencement of a police investigation, but *before* the centre received any subpoena or advice from the Crown, police or defence counsel that the records should be preserved.

The majority of the Court held that, to demonstrate prejudice to his right to a fair trial and to make full answer and defence, the accused had to show there was among the records now incapable of being disclosed material that had existed that was likely to be relevant to an issue in the trial (*i.e.*, would satisfy the first stage of the *O'Connor* test).[34] Because the notes destroyed in *R. v. Carosella* were of the initial interview and related to the very subject matter of the trial, they were held likely relevant because they may have shed light on the unfolding of events, or contained information bearing on the complainant's credibility. Even though the notes had not been created by the complainant herself, or their accuracy verified by her, the Court suggested the notes might also have contained inconsistencies that could have served as a basis for cross-examination by the defence.

Since the material destroyed met the *O'Connor* test for production,[35] the Court found the accused's constitutional right to full answer and defence had been breached. It was concerned that the absence of any remedy to redress or mitigate the consequences of deliberate destruction of the records, which had the effect of depriving the court and the accused of potentially relevant evidence, would damage the administration of justice. It, therefore, affirmed the trial judge's stay of the proceeding, with the result that the accused did not have to go to trial on the charges against him.[36] This case underlines, in the criminal context, the potentially serious consequences that a third party's intentional destruction of (and possibly also intentional failure to keep) records may have on bringing perpetrators of sexual abuse to justice.

It should be noted, however, that appellate courts following *R. v. Carosella* seem to be restricting stays of proceedings to extreme cases where the destruction of likely relevant records, or the failure to keep notes of likely relevant

[34] The majority decision in *R. v. Carosella*, was written by Sopinka J. (Lamer C.J.C. and Cory, Iacobucci and Major JJ. concurring) at 107-10 (and is hereinafter referred to as "the Court's" decision). The dissenting decision was written by L'Heureux-Dubé J. (La Forest, Gonthier and McLachlin JJ. concurring).

[35] The Court also found it met the lower standard for Crown disclosure set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, which it said should really be the applicable test on the facts of *R. v. Carosella* since the complainant had consented to the disclosure of the records and, as a result, if not destroyed, the records would have been disclosed to the Crown (*R. v. Carosella, supra*, note 33, *per* Sopinka J. at 107).

[36] *R. v. Carosella, supra*, note 33, *per* Sopinka J. at 111-14.

conversations, was informed by a desire to withhold information from the legal process. For example, in *R. v. Wicksted*,[37] the Ontario Court of Appeal found the failure by the investigating police officer (in a fraud case) to make notes of key Crown witness interviews did not warrant a stay. It observed there was no finding that the police officer had deliberately covered up evidence.[38] It held that it is for the trier-of-fact (in that case, a jury) to determine what weight, if any, to attach to the failure of the police officer to make complete notes of interviews.[39]

NEW LEGISLATION: CRIMINAL CODE AMENDMENTS

Following the release of the Supreme Court of Canada decisions in *R. v. O'Connor* and *R. v. Carosella*, Bill C-46 was passed by Parliament and proclaimed into force on May 12, 1997. The Bill, which amended the *Criminal Code* in a manner more in line with the approach taken by the minority of the Supreme Court of Canada in *R. v. O'Connor*, sets out in a detailed Preamble the concerns that motivated Parliament to pass legislation on access to victims' records in criminal sexual abuse proceedings.[40]

The new legislative scheme is found at ss. 278.1 to 278.91 of the *Criminal Code*. These provisions, which are currently under review by the Supreme Court of Canada in the *R. v. Mills* case, apply to criminal offences that have sexual violence and abuse as their underlying component.[41] The rules for production are triggered where the record is in the possession or control of any person, including the Crown prosecutor.[42] "Record" is defined as "any form of record that contains personal information for which there is a reasonable expectation of privacy", and includes medical, psychiatric, therapeutic and counselling records. It does not, however, include records made by persons responsible for the investigation and prosecution of the offence.[43] In addition, trial courts have treated solicitor-client records (specifically, records created by lawyers involved in parallel civil proceedings arising from the same or overlapping allegations) as

---

[37] (1996), 29 O.R. (3d) 144 (C.A.), affd [1997] 1 S.C.R. 307.

[38] *R. v. Wicksted*, *ibid.*, *per* Goodman J.A. at 157.

[39] *Ibid.*, at 159-60. Also see *R. v. Vu* (1999), 133 C.C.C. (3d) 481 (B.C.C.A.), leave to appeal to S.C.C. filed July 14, 1999, an unreasonable search and seizure case, where the British Columbia Court of Appeal ordered a new trial, holding a stay was not warranted in the circumstances.

[40] Bill C-46, *An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings)*, S.C. 1997, c. 30, s. 1. These concerns include the prevalence of sexual violence and abuse against women and children, the need to reconcile the equally legitimate but competing rights of accused persons and victims, and the detrimental impact compelled production of third party records may have on the reporting of sexual abuse, obtaining treatment for the harm it causes, and the work of those who provide services and assistance to its victims.

[41] *Criminal Code*, s. 278.2(1).

[42] *Criminal Code*, s. 278.2(2). The only time the rules do not apply to a record being held by the prosecutor is when the person to whom the record relates has "expressly waived" the application of the new sections of the *Criminal Code*. This means the person must have given her free and informed consent to disclosure of the records to the Crown, with a full understanding of the Crown's disclosure obligations to the defence.

[43] *Criminal Code*, s. 278.1.

falling outside the purview of the new *Criminal Code* provisions and as being subject to the *O'Connor* test for production of third party records.[44]

As with the *O'Connor* test, an accused who seeks production of a record must make an application to the trial judge, either prior to the commencement of the trial (the more usual course) or during the trial. The application must be in writing and identify the record sought and the name of the person who is believed to have possession or control of the record, as well as the grounds on which the defence relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.[45] The *Criminal Code* includes a list of assertions by the defence that, alone, are insufficient to establish that the record is "likely relevant". These are that the record:

(9) Exists;
(10) Relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
(11) Relates to the incident that is the subject matter of the proceeding;
(12) May disclose a prior inconsistent statement of the complainant or witness;
(13) May relate to the credibility of the complainant or witness;
(14) May relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
(15) May reveal allegations of sexual abuse of the complainant by a person other than the accused;
(16) Relates to the sexual activity of the complainant with any person, including the accused;
(17) Relates to the presence or absence of a recent complaint;
(18) Relates to the complainant's sexual reputation; or
(19) Was made close in time to a complaint or to the activity that forms the subject matter of the charge against the accused.[46]

The intent of these restrictions is to compel the defence to provide concrete reasons why it believes the record sought will reveal relevant information, to prevent production orders based on stereotypical assumptions alone (*e.g.*, that sexually active complainants are more likely to have consented to the conduct in issue) and to discourage fishing expeditions by the defence (*i.e.*, seeking production merely because the record "may" reveal what could be relevant information).[47]

The defence must serve the application record on the Crown prosecutor, the person who has possession or control of the record, and the complainant (or other witness) who has a privacy interest in the record and, at the same time,

---

[44] See, for example, *R. v. Roby*, *supra*, note 32, and *R. v. McClure*, *supra*, note 32.
[45] *Criminal Code*, s. 278.3(3).
[46] *Criminal Code*, s. 278.3(4).
[47] B. Feldthusen, "Access to the Private Therapeutic Records of Sexual Assault Complainants" (1996) 75 Can. Bar Rev. 537 at 561.

serve a subpoena on the person in possession or control of the record requiring the record to be brought to the court.[48] The trial judge then conducts an *in camera* "production hearing" to determine whether to order the record keeper to produce the record *to the court* for review by the judge alone.[49] The record keeper, complainant or other witness, and any other person who is the subject of the record may appear and make submissions at the hearing. However, they are not compellable as witnesses at the production hearing,[50] meaning they cannot be forced to submit to examination and cross-examination (as they may be at the trial proper), and no order for costs may be made against these persons in respect of their participation in the hearing.[51]

Although the *Criminal Code* provisions do not address the matter of legal representation for those whose privacy rights are in issue and for the custodians of the records in question, legal counsel may appear and make submissions on behalf of such persons. As a practical matter, where the Crown prosecutor on behalf of the provincial Attorney General consents, courts are granting orders that provide for funding (albeit at legal aid rates) of counsel for complainants whose constitutional rights to privacy, security of the person and equality before the courts are being threatened by an access request and who wish to resist production.[52]

Unlike the *O'Connor test*, the new *Criminal Code* provisions direct courts to balance the constitutional rights of the accused and the complainant *before* the trial judge looks at the records, thereby implicitly acknowledging the violation of the complainant's constitutional rights at the point at which the records are inspected by a judge.[53] Thus, production of a record, or a part of it, to the court for review by the judge will be ordered only if the accused has established:

(20) The record is likely relevant to an issue at trial or the competence of a witness to testify; and

---

[48] *Criminal Code*, s. 278.3(5).

[49] *Criminal Code*, s. 278.4(1).

[50] *Criminal Code*, s. 278.4(2).

[51] *Criminal Code*, s. 278.4(3)

[52] The author is aware of several instances in Ontario where funding orders of this nature have been made against the Attorney General of Ontario, including in favour of the multiple complainants in *R. v. Roby, supra*, note 32, which involved one of the accused eventually convicted of a number of sexual offences involving boys at Maple Leaf Gardens. Because the motions giving rise to such orders have not been contested, the author is unaware of any rulings on the matter. In Ontario, efforts are underway to have the provincial legal aid plan specifically recognize this as a necessary legal service warranting legal aid funding. The recent Supreme Court of Canada decision in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, where it was held that, in child protection proceedings initiated by the state, the parent is entitled to funded counsel on the basis that failure to receive legal aid funding (or "state-funded counsel") would amount to a violation of the parent's s. 7 Charter rights, may force provincial legal aid plans to fund counsel for complainants (and other types of witnesses) whose personal records are being sought by the defence.

[53] *R. v. O'Connor*, [1995] 4 S.C.R. 411, *per* L'Heureux-Dubé J. at 501.

(21) The production of the record is necessary in the interests of justice.[54]

In determining whether to order production of the record or part of it at this first stage, the judge is required to consider the beneficial and detrimental effects of the determination on the accused's right to make full answer and defence and to a fair trial and the right of the complainant (or other type of witness) to privacy, security of the person and equality. In so doing, the judge is required (without actually reviewing the records) to take the following factors into account:

(22) The extent to which the record is necessary for the accused to make full answer and defence;
(23) The probative value of the record;
(24) The nature and extent of the reasonable expectation of privacy with respect to the record;
(25) Whether production of the record is based on a discriminatory belief or bias;
(26) The potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
(27) Society's interest in encouraging the reporting of sexual offences;
(28) Society's interest in encouraging the complainants of sexual offences to obtain treatment; and
(29) The effect of the determination on the trial process.[55]

If the judge orders production to the court after weighing the positive and negative effects of production, he or she then reviews the record in the absence of the defence and the Crown prosecutor to determine whether the record or any part of it should be produced *to the accused* and, if so, whether any conditions should attach to such production. The same eight factors set out above must be taken into account in making this determination, although this time with the benefit of the actual record being before the judge.[56]

Where satisfied the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interest of justice, the judge may order the record be produced to the accused, subject to conditions, such as editing, production of a photocopy rather than the original, a requirement that the accused and defence counsel not disclose the contents of the record to any other person, except with the approval of the court, or that the record only be viewed at the court, restrictions placed on photocopying, and the removal of identifying information regarding any person named in the record.[57]

Where the judge orders the production of the record or a part of it to the accused, the Crown is also to receive a copy, unless the court determines it is not

---

[54] *Criminal Code*, s. 278.5(1)(*b*) and (*c*).
[55] *Criminal Code*, s. 278.5(2).
[56] *Criminal Code*, s. 278.7(1) and (2).
[57] *Criminal Code*, s. 278.7(3).

in the interest of justice that the Crown do so.[58] The record or the part of it produced to the accused cannot be used in any other proceedings.[59] This is significant where there are concurrent or subsequent related civil or disciplinary proceedings. Where production is not ordered, the record is kept in a sealed package by the court (unless the court orders otherwise) until the expiry of the time for any appeal or the completion of any appeal, at which point the record is to be returned to the person lawfully entitled to its possession or control.[60]

The judge making the determination whether to order production is required to provide reasons for his or her decision.[61] The media is expressly prohibited from publishing anything relating to the production application, including the judge's decision, unless the judge determines it is in the interest of justice that the decision be published.[62] If either the complainant or the record keeper, both of whom have the standing of intervenors on the production application since they are not actual parties to the criminal proceeding, are dissatisfied with a production order, which is deemed under the new *Criminal Code* provisions to involve a question of law,[63] they may seek leave to appeal the order directly to the Supreme Court of Canada pursuant to s. 40 of the *Supreme Court Act*.[64] They may also apply for a stay of the order pending the appeal, either directly to the trial judge who made the order in issue, or to the Supreme Court of Canada pursuant to ss. 65 and 65.1 of the *Supreme Court Act*. In *A. (L.L.) v. B. (A.)*,[65] a records disclosure case released simultaneously with *R. v. O'Connor*, the hospital and the sexual assault centre whose records had been subpoenaed by the defence and ordered produced, successfully applied to the Supreme Court of Canada for leave to appeal the order against them.[66] Their application to the court for a stay, however, was remitted back to the trial judge for a decision.[67]

The Constitutional Challenges to the Criminal Code Provisions

Since 1997, when ss. 278.1 to 278.91 of the *Criminal Code* came into force, there have been over 50 constitutional challenges seeking declarations that the new provisions are of no force and effect.[68] Some courts have upheld the consti-

---

58 *Criminal Code*, s. 278(4).
59 *Criminal Code*, s. 278.7(5).
60 *Criminal Code*, s. 278.7(6).
61 *Criminal Code*, s. 278.8(1).
62 *Criminal Code*, s. 278.9(1).
63 *Criminal Code*, s. 278.91.
64 R.S.C. 1985, c. S-26, as amended.
65 [1995] 4 S.C.R. 536.
66 *Ibid.*, *per* Lamer C.J. and Sopinka J. at 547 and L'Heureux-Dubé J. at 550, 555-58.
67 *Ibid.*, *per* L'Heureux-Dubé J. at 550. Also see *R. v. McClure*, [1999] O.J. No. 1405 (S.C.), involving a production order in a criminal sexual assault proceeding of a civil solicitor's records, in which the complainant successfully applied to the judge who made the order under appeal for a stay pending the appeal decision of the Supreme Court of Canada.
68 See C. Schmitz, "Rape Shield Law 'Two-Tier Justice'" (May 14, 1999), 19(2) *The Lawyers Weekly* 1.

tutional validity of the new *Criminal Code* provisions.[69] Others have struck down the provisions in their entirety on the basis that they violate the ss. 7 and 11(*d*) Charter rights of accused persons and cannot be justified under s. 1 of the Charter. These advocates have reverted back to the test and procedures favoured by the majority of the Supreme Court of Canada in *R. v. O'Connor*.[70] Still others have found only some of the provisions to be unconstitutional and have struck down only these provisions, with the result that the test and procedures provided for in the *Criminal Code* are applied, except to the extent that they involve any of the provisions found to be of no force and effect.[71]

The chief criticisms of the new *Criminal Code* provisions have centred around their departure from the aspects of the *O'Connor* test which protect the rights of accused persons to a fair trial and to make full answer and defence. In particular, the obligation on the accused, without having reviewed the contents of the record, to satisfy an elevated initial threshold that addresses not only the record's likely relevance, but also why its production to the court is in the interests of justice, has been seen by some courts as violating an accused's ss. 7 and 11(*d*) Charter rights.[72] The inclusion of factors expressly rejected by the majority of the Supreme Court of Canada in *R. v. O'Connor* in the balancing exercise required at both stages of a production application under the *Criminal Code* has also been found to violate the Charter rights of an accused person.[73] The aspect of the new legislative scheme which has most consistently been found wanting and declared of no force and effect, however, is that which requires the court, without having seen the records in question, to undertake a weighing of rights and interests to determine whether production should be ordered to the court.[74]

BALANCING THE COMPETING RIGHTS AND INTERESTS IN THE CIVIL CONTEXT

A civil proceeding is governed by the court's rules of practice[75] and the common law. During the discovery process, which occurs prior to trial, defence counsel usually requests full production of the plaintiff's health records (if these have not already been voluntarily produced) on the basis the plaintiff has placed her

---

69 See, for example, *R. v. Curti*, [1997] B.C.J. No. 2367 (S.C.); *R. v. Hurrie* (1997), 12 C.R. (5th) 180 (S.C.); and *R. v. Weeseekase*, [1998] 5 W.W.R. 473 (Sask. Q.B.).

70 See, for example, *R. v. Mills*, [1998] 4 W.W.R. 83 and 107 (Alta. Q.B.); *R. v. Lee* (1997), 35 O.R. (3d) 594 and 598 (Gen. Div.); and *R. v. E.H.*, [1998] O.J. No. 4515 (Gen. Div.).

71 See, for example, *R. v. Boudreau* (1998), 71 O.T.C. 269 (Gen. Div.) where ss. 278.5(1)(*c*) and 278.5(2) were struck down, and *R. v. Stromner*, [1998] 1 W.W.R. 333 (Alta. Prov. Ct.) where s. 278.5(2) was struck down.

72 See, for example, *R. v. Mills*, *supra*, note 70, at 83 and *R. v. Lee*, *supra*, note 70, at 594.

73 These factors are set out at s. 278.5(2)(*f*)-(*g*) and repeated again at s. 278.7(2). See *R. v. Mills*, *supra*, note 70, at 83; and *R. v. Lee*, *supra*, note 70, at 594.

74 See, for example, not only *R. v. Mills*, *ibid.*, but also *R. v. Boudreau*, *supra*, note 71 and *R. v. Stromner*, *supra*, note 71.

75 See, for example, the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, passed pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

mental and sometimes also her physical health in issue by claiming compensation for the injuries and losses occasioned by the alleged sexual abuse. The request typically includes records where the sexual abuse in question is not discussed since the defence in a civil case is entitled to explore other potential causes of the difficulties that the plaintiff attributes to the sexual abuse, such as traumatic or stressful incidents unrelated to the abuse.

M. (A.) v. Ryan: Case-by-Case and Partial Privilege in Sexual Abuse Cases

In *M. (A.) v. Ryan*,[76] the Supreme Court of Canada considered the issue of disclosure in a civil sexual abuse proceeding of a plaintiff's health records in the hands of third parties, where the plaintiff refused to consent to their disclosure.[77] The plaintiff alleged that her former psychiatrist, Dr. Ryan, had engaged in non-consensual sexual relations with her when she was his 17-year-old patient. She later sought treatment from another psychiatrist, Dr. Parfitt, and sued Dr. Ryan for damages. At the plaintiff's examination for discovery, the defence sought production of all of Dr. Parfitt's notes and records, but was advised they would not be produced without a court order. The defence subsequently brought a motion for production of the records, naming Dr. Parfitt as a responding party on the motion. Dr. Parfitt agreed to release her reports, but asserted privilege with respect to her notes, a position supported by the plaintiff.

The Court framed the issue to be decided as: "should a defendant's right to relevant material to the end of testing the plaintiff's case outweigh the plaintiff's expectation that communications between her and her psychiatrist will be kept in confidence?"[78] It started with the proposition that, in a civil action, there is a general duty to give evidence relevant to the matter so the truth may be ascertained. To this fundamental duty, the law permits certain exceptions known as "privileges".[79] To create a legal privilege, it must be shown that the privilege is required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth".[80]

In some situations, the law has recognized a blanket or "class" privilege that attaches to all communications of a specific nature that occur within a particular relationship. This privilege protects only a very limited class of communications, such as solicitor-client communications.[81]

---

[76] [1997] 1 S.C.R. 157.

[77] The majority decision was written by McLachlin J. and concurred in by La Forest, Sopinka, Cory, Iacobucci and Major JJ. (hereinafter described as the decision of "the Court"), while L'Heureux-Dubé J. wrote dissenting reasons.

[78] *M. (A.) v. Ryan, supra*, note 76, *per* McLachlin J. at 164.

[79] Privilege is different from confidentiality. Where confidential records may be ordered produced, privileged documents will generally not have to be produced.

[80] *M. (A.) v. Ryan, supra*, note 76, *per* McLachlin J. at 170.

[81] However, even solicitor-client privilege can be overridden in certain exceptional circumstances, including where the privileged information is necessary for the accused to make full answer and defence This has been described as the "innocence-at-stake" exception. See, for example, *R. v. O'Connor*, [1995] 4 S.C.R. 411, *per* Lamer C.J.C. and Sopinka J. at 431, 433; *R. v. Roby*,

In *P. (V.) v. L. (F.)*,[82] the British Columbia Court of Appeal held there is no class privilege that attaches to a sexual assault victim's communications with her therapist or counsellor.[83] In doing so, it relied on the Supreme Court of Canada decision in *A. (L.L.) v. B. (A.)*,[84] a criminal case released at the same time as *R. v. O'Connor*, in which a hospital's sexual assault care centre and a women's outreach centre had their records subpoenaed to court. In that case, the minority of the Court concluded that, at least in criminal proceedings where the *O'Connor* test is being applied, class privilege could not be extended to records kept by those who have treated sexual assault victims.[85] However, in both *A. (L.L.) v. B. (A.)* and *P. (V.) v. L. (F.)*, it was accepted that "case-by-case" privilege may arise in the circumstances of a specific case. This was subsequently confirmed by the Supreme Court of Canada in *M. (A.) v. Ryan*.[86]

To determine whether, in the case of records that the defendant has established are relevant to the issues in the litigation, case-by-case privilege will attach to the communications between a health care provider and a sexual abuse victim (and, therefore, to the records that record or summarize these communications), the Court in *M. (A.) v. Ryan* relied on the common law "Wigmore test". This test necessitates that the following four requirements be satisfied:

(30) The communication must originate in a confidence;
(31) The confidence must be essential to the relationship in which the communication arises;
(32) The relationship must be one that should be "sedulously fostered" in the public good; and
(33) If the above criteria are met, the interest served by protecting the communications from disclosure must outweigh the countervailing interest in getting at the truth and disposing correctly of the litigation.

As a practical matter, the real dispute between the parties in sexual abuse cases centres around the fourth requirement, since traditional confidential relationships, such as a therapist/patient relationship, are generally presumed to fulfil the first three requirements. Thus, in *M. (A.) v. Ryan*, the first and second requirements for privilege were satisfied because the plaintiff's communications with Dr. Parfitt were made in confidence, and it was accepted that confidentiality is essential to the continued existence and effectiveness of therapeutic rela-

---

[1998] O.J. No. 2820, at paras. 11-20 (Gen. Div.). On April 22, 1999, the Supreme Court of Canada granted leave to appeal to the complainant in *R. v. McClure*, whose civil lawyer's records were ordered produced to the defence: *R. v. McClure*, [1999] S.C.C.A. No. 71.

[82] [1996] 7 W.W.R. 19.

[83] *P. (V.) v. L. (F.)*, *ibid.*, *per* Southin J.A. (Gibbs J.A. concurring) at 24 and Rowles J.A. at 26-28.

[84] [1995] 4 S.C.R. 536.

[85] *A. (L.L.) v. B. (A.)*, *ibid.*, *per* L'Heureux-Dubé J. (La Forest and Gonthier JJ. concurring) at 579-81. The decision of the majority of the Court, written by Lamer C.J.C. and Sopinka J., and concurred in by Cory and Major JJ., did not disagree but simply held that the procedure and substantive law to be followed was set out in *R. v. O'Connor*.

[86] [1997] 1 S.C.R. 157. The Court in *M. (A.) v. Ryan* relied on the common law "Wigmore test" set out in J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 8 (Boston: Little Brown, 1961).

tions between psychiatrists and their patients.[87] With respect to the third requirement, the Court acknowledged that victims of sexual abuse often suffer serious trauma which, if left untreated, may mar their entire lives. Therefore, it is in the public good that the victim obtain treatment.[88]

With respect to the fourth requirement, the Court held that when assessing the interests served by not disclosing the plaintiff's confidential communications with her psychiatrist, the following factors should be considered:

(34) Injury to the plaintiff's ongoing relationship with her psychiatrist and her future treatment;
(35) The effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society; and
(36) The privacy and equality interests of the person claiming privilege, which are informed by Charter values and particularly implicated given the highly intimate nature of sexual abuse.[89]

Whether the benefit of nondisclosure is ultimately outweighed by the need to dispose correctly of the litigation is a matter that the Court described as "essentially one of common sense and good judgment".[90]

The Court made it clear, however, that privilege does not have to be an all-or-nothing proposition and distinguished between "absolute" and "partial" privilege. It described partial privilege as follows:

> In some cases, the court may well decide that the truth permits nothing less than full production. This said, ... an order for partial privilege will more often be appropriate in civil cases where, as here, the privacy interest is compelling. Disclosure of a limited number of documents, editing by the court to remove non-essential material, and the imposition of conditions on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth.[91]

Drawing on the distinction between the criminal and civil justice systems, the Court suggested access to a victim's records by the alleged perpetrator may be more limited in the civil context:

> [T]he interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant's interest in privacy may be struck at a

[87] *M. (A.) v. Ryan, ibid., per* McLachlin J. at 173-74.
[88] *Ibid., per* McLachlin J. at 174.
[89] *Ibid., per* McLachlin J. at 175-76.
[90] *Ibid., per* McLachlin J. at 176.
[91] *Ibid., per* McLachlin J. at 177.

different level in the civil and criminal case; documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production.[92]

The Court firmly rejected the traditional notion that, by claiming damages, a plaintiff forfeits her right to confidentiality and, in effect, grants her opponent a licence to delve into all private aspects of her life.[93] It suggested privilege may attach to documents of questionable relevance, or which contain information available from other sources.[94] The Court even ventured to say that the majority of the communications between a psychiatrist and his or her patient will, in most cases, have little or no bearing on the litigation and can safely be excluded from production.[95] In short, disclosure of private records should be limited to the greatest degree possible, without compromising access to justice by the defendant. This represents a significant clarification of the law since it was previously believed by many that, as soon as a personal injury plaintiff put her health in issue in any way, virtually all records relating to her health had to be produced.[96] In light of *M. (A.) v. Ryan*, it now appears that where, for example, a family doctor played only a minor role in treating a patient with respect to sexual abuse issues (*e.g.*, sporadic supportive counselling), a good argument is made for producing only those limited parts of the doctor's chart that relate to the supportive counselling. Records of treatment for unrelated physical ailments should not be required to be produced under the principles laid down in *M. (A.) v. Ryan*.

The Court in *M. (A.) v. Ryan* held that, when ascertaining whether absolute or partial privilege should attach to a particular document, courts should consider the circumstances of the privilege alleged, the documents and the case.[97] As compared with criminal cases, there is a greater flexibility in the procedures that may be followed in a civil case for determining whether, and on what conditions, production of a plaintiff's health records should be ordered. For example, it is not essential in a civil case that the judge examine every document at issue (although he or she may do so if necessary). Instead, the judge may base his or her decision regarding privilege on affidavit material that explains the nature of the information at issue and its expected relevance.[98]

Ultimately, the Court in *M. (A.) v. Ryan* determined that while the interest in preserving confidentiality was compelling, the communications between the plaintiff and her psychiatrist might bear on the critical issue of the extent to which Dr. Ryan's conduct (as opposed to other factors) caused the difficulties the plaintiff was experiencing. The Court, therefore, endorsed the approach of the British Columbia Court of Appeal in refusing to order production of one

---

[92] *Ibid.*, *per* McLachlin J. at 179.

[93] *Ibid.*, *per* McLachlin J. at 180.

[94] *Ibid.*, *per* McLachlin J. at 179.

[95] *Ibid.*

[96] The case generally relied upon in support of this proposition was *Cook v. Ip* (1985), 52 O.R. (2d) 289 (C.A.).

[97] *M. (A.) v. Ryan*, *supra*, note 86, *per* McLachlin J. at 180.

[98] *M. (A.) v. Ryan*, *ibid.*, *per* McLachlin J. at 180-81.

group of documents (*i.e.*, Dr. Parfitt's notes to herself), which addressed issues not relevant to the alleged sexual assaults because the plaintiff had undertaken not to call Dr. Parfitt as a witness at the trial. The Court also imposed stringent conditions on who could see the other documents (only the defendant's lawyers and expert witnesses and not Dr. Ryan himself) and the use that could be made of them (no copies, no disclosure of their content to other persons, and to be used only for the purposes of the immediate litigation).[99]

As a result of this decision, plaintiffs' counsel should carefully review health records (with the assistance, if possible, of the creator of the records or some other equally qualified person), with a view to determining what portions may legitimately be withheld on relevance and privilege grounds. Counsel should also think creatively (again with the assistance of a health care professional) about possible conditions on production to suggest to a motions court so as to minimize the detrimental impact on the plaintiff of whatever level of production is adjudged appropriate by the court. The conditions approved by the Court in *M. (A.) v. Ryan* were by no means exhaustive.

Records Destruction in the Civil Context

Although there is no comparable case to *R. v. Carosella* in the civil context, there have recently been a number of decisions by civil courts (unrelated to sexual abuse) addressing the effects of destruction or "spoliation" of evidence. These cases have a direct bearing on the destruction of records by "primary party spoliators" (*i.e.*, the parties to the litigation) and "third party spoliators" (such as counsellors and therapists who create and maintain potentially relevant records, and the institutions in which they work) in sexual abuse cases.

While the leading case remains an 1895 decision of the Supreme Court of Canada which confirmed that the destruction of evidence carries a rebuttable presumption that the evidence destroyed would have been unfavourable to the party who destroyed it,[100] there has recently been a flurry of conflicting decisions in which courts have considered whether an independent tort of spoliation exists (or should exist) in Canadian law.[101] In the United States, where courts in several

[99] *Ibid.*, *per* McLachlin J. at 167, 181.

[100] *St. Louis v. The Queen*, [1896] 25 S.C.R. 649.

[101] *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C.C.A.), leave to appeal granted to the S.C.C. (1998), 235 N.R. 400*n* (rejecting the existence of an independent tort of spoliation); *Rintoul v. St. Joseph's Health Centre* (1998), 42 O.R. (3d) 379 (Div. Ct.), under appeal to the Ont. C.A. (although the majority of the Divisional Court followed the B.C. Court of Appeal in *Endean v. Canadian Red Cross Society*, *supra*, and rejected the existence of the tort, there was a strong dissent); *Spasic Estate v. Imperial Tobacco Ltd.* (1998), 42 O.R. (3d) 391 (Gen. Div.) (Cameron J. striking the plaintiff's spoliation tort pleading on the basis he would bound by the Divisional Court's majority decision in *Rintoul*, *supra*); *Coriale (Litigation Guardian of) v. Sisters of St. Joseph of Sault Ste. Marie* (1998), 41 O.R. (3d) 347 (Gen. Div.) (allowing the claim for damages for the tort of spoliation because it was not plain and obvious that spoliation could not form the basis of an independent tort). Also see R.J. Sommers and A.G. Siebert, "Intentional Destruction of Evidence: Why Procedural Remedies Are Insuffi-

states have approved the tort, the following elements must be proven to make out the tort of spoliation: (i) the existence of a potential lawsuit; (ii) the defendant's knowledge of the potential lawsuit; (iii) the destruction or significant alteration of potential evidence; (iv) intent on the part of the defendant to disrupt or defeat the lawsuit; (v) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (vi) damages.[102]

The issue of whether litigants harmed by the destruction of evidence are limited in Canada to a procedural remedy in the form of an evidentiary rebuttable presumption,[103] or have a substantive right of action that permits them to sue for damages is a matter that will have to be resolved by the Supreme Court of Canada. If an independent tort of spoliation is ultimately found to exist in Canadian law, or at a minimum, such a tort is held to apply in the case of third party "spoliators",[104] then health care providers could be sued for damages arising from the intentional destruction of their records or their intentional failure to keep appropriate records, where such destruction or failure was intended to defeat a defendant's access to the records. However, even if the law does not develop so far as to allow for a right of action against third party spoliators, there are a number of sanctions (in addition to the evidentiary rebuttable presumption described above that would operate against the plaintiff or defendant, depending on whose records were destroyed) that may be imposed against a third party who destroys evidence. These include:

(37) In the case of provincially regulated health care providers, disciplinary action by their governing bodies as a result of non-compliance with statutory obligations to create, maintain and preserve appropriate health records;[105]

(38) Prosecution for criminal and civil contempt of court;[106]

(39) Prosecution for obstruction of justice or fraudulent concealment under the *Criminal Code*;[107]

---

cient" (1999) 78 Can. Bar Rev. 38 for a review of recent case law on spoliation and an argument in favour of such a tort.

[102] Sommers and Siebert, *ibid.*, at 50-52.

[103] Although the Court in *L.H. v. W.U.*, [1998] B.C.J. No. 1132, para. 89 did not expressly rely on the doctrine of spoliation, it drew an adverse inference against the plaintiff, whom it described as "an avid journal writer", who did not produce any of her writings and claimed she had destroyed some or all of them. The Court held that the missing evidence (which included other items) was "essential" to the Court's assessment of the reliability of the plaintiff's recovered memories of abuse and would have disclosed material facts unfavourable to the plaintiff.

[104] The issue of a tort of third party spoliation was expressly "left for another day" in *Rintoul v. St Joseph's Health Centre*, *supra*, note 101, *per* O'Driscoll J. (Then J. concurring) at 384.

[105] For example, in Ontario, see O. Reg. 114/94, as amended, and O. Reg. 856/93, as amended, pursuant to the *Medicine Act, 1991*, S.O. 1991, c. 30 and R.R.O. 1990, Reg 965, pursuant to the *Public Hospitals Act*, R.S.O. 1990, c. P.40, as amended.

[106] Sommers and Siebert, *supra*, note 101, at 48, 50. Also see *Spasic Estate v. Imperial Tobacco Ltd.*, *supra*, note 101, at 397-98 and, for example, r. 60.11 of the Ontario Rules of Civil Procedure.

[107] *Criminal Code*, ss. 139(2) and 341. Also see Sommers and Siebert, *supra*, note 101, at 48-49 and *Spasic Estate v. Imperial Tobacco Ltd.*, *supra*, note 101, at 398.

(40) Exclusion at trial of the health care provider's report or evidence concerning the plaintiff;[108] and
(41) A cost award.[109]

CONCLUSION

The private records of sexual assault victims in the possession and/or under the control of health care providers and institutions may, depending on the circumstances, be wholly or partially producible to the defence. In the criminal context, where competing constitutional rights are involved, either the test and procedures provided for under ss. 278.1 to 278.91 of the *Criminal Code* or the common law *O'Connor* test apply. When the Supreme Court of Canada releases its decision in *R. v. Mills*, there is likely to be further refinement of the approach to be followed in criminal cases. In the civil context, the common law Wigmore test for case-by-case privilege as developed by the Court in *M. (A.) v. Ryan* applies and the precise procedures for ascertaining privilege, while somewhat flexible, will include a motion to the court, on notice to the record keeper, in which evidence in the form of affidavits and cross-examinations on the affidavits may be adduced and the records or contested portions of the records may be produced in a sealed format to be examined by the court.[110]

Because the state has a great deal more power and resources at its disposal than an individual charged with a criminal offence, and the potential consequences of a criminal conviction are so serious (*i.e.*, loss of liberty), there appears to be a lower threshold that must be satisfied by the defence to gain access to a victim's records in criminal than civil cases. As a result, the criminal courts tend to err on the side of providing greater access to a victim's records to ensure the accused can make full answer and defence to the charges against him. While a victim's privacy interests may attract a greater degree of protection in the civil context where the defendant is not at risk of imprisonment, because a plaintiff must prove not only that the defendant sexually assaulted her, but also that she has suffered damages as a result, the scope of relevant matters is necessarily broader than in a criminal case. Thus, a wider range of records is likely to be ordered produced to the defence in civil sexual abuse cases, albeit in an edited and restricted format.

To the extent any general trend can be discerned in the evolving area of the law of records disclosure, it is that victims' records are being produced to the

---

[108] *Endean v. Canadian Red Cross Society*, *supra*, note 101, at 472. Also see Craig Jones, "The Spoliation Doctrine and Expert Evidence in Civil Trials" (1998) 32 U.B.C. L. Rev. 293 at 301-304.

[109] See, for example, *Spasic Estate v. Imperial Tobacco Ltd.*, *supra*, note 101, at 397; *Endean v. Canadian Red Cross Society*, *supra*, note 101, at 471-72; and, in Ontario, s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 [am. S.O. 1994, c. 12, s. 45] and r. 57.01 of the Ontario Rules of Civil Procedure [am. O. Reg. 627/98, s. 6].

[110] See *R. v. C. (K.M.)* (1998), 170 D.L.R. (4th) 322 (Nfld. C.A.) at 336 for a clear statement of the different approaches to records disclosure in civil and criminal proceedings.

defence in both criminal and civil proceedings whenever there is a reasonable possibility that they contain information that may be required by the defence to answer the allegations of sexual abuse, and in the civil context, also that the abuse is the cause of the plaintiff's difficulties. However, stringent conditions aimed at minimizing the infringement to victims' privacy interests and the negative impact production may have on ongoing therapeutic relationships are often attached.[111]

PROPOSED GUIDELINES FOR HEALTH CARE PROVIDERS TREATING SEXUAL ABUSE VICTIMS

What follows are some proposed guidelines for health care providers who treat sexual abuse victims and whose records, as a result, may be the subject of court proceedings in which the perpetrators of the alleged sexual abuse, and/or the institutions with which they were associated, seek access to these records. These guidelines are not intended in any way to constitute legal advice, or to be relied upon in any specific situation. As the discussion above indicates, the law pertaining to access to a sexual abuse victim's medical, therapy and counselling records is an evolving one. Where there is a particular case or concern, legal advice should be sought by the health care provider in advance of doing anything to ensure the pitfalls of premature, unnecessary or unauthorized disclosure are avoided. Such advice may be available through an insurer or a protective association to which the health care provider belongs, or through the institution or hospital with which he or she is associated.

NOTE TAKING AND RECORD KEEPING

Good note taking and record keeping practices are important not only in bolstering a health care provider's credibility as a competent and conscientious professional, but also in ensuring that misunderstandings do not arise as a result of disclosure to the defence of the documents generated in treating victims of sexual abuse. What follows are some practical tips aimed at achieving both of these objectives, bearing in mind, of course, that statutory note taking and record keeping obligations must, where these apply, always be complied with.

(42) Advise a patient who seeks treatment in relation to sexual abuse, as part of the obligation to obtain informed consent to the treatment being provided, that the patient's records may be subject to disclosure obligations if there are court proceedings. At the same time, reaffirm the

[111] For examples of civil cases, other than *M. (A.) v. Ryan*, where conditions have been attached, see *P. (L.M.) v. F. (D.)* (1994), 34 C.P.C. (3d) 172 (Ont. Gen. Div.); *Saskatoon (District) Health Board v. Bryden* (1999), 174 D.L.R. (4th) 336 (Sask. C.A.) at 339-40; and *P. (D.E.) v. P. (N.J.)*, [1998] 1 W.W.R. 296 (B.C.S.C.) at 308. Criminal cases where conditions have been attached include *R. v. Chisholm* (1997), 34 O.R. (3d) 114 (Gen. Div.) at 129-32 and *R. v. White* (1999), 42 O.R. (3d) 760 (C.A.) at 769-75.

commitment to keeping the communications confidential. In this way, the discussion about the possibility of court-ordered production should not be taken as reducing the patient's expectations of confidentiality and privacy.

(43) Make notes at or shortly after each consultation or session with a patient and ensure these are written in ink (and pens are not changed in the middle of writing) and signed.[112] Signing the notes and writing in pen will reduce the effectiveness of an attack which suggests the notes were subsequently altered or authored by someone else.

(44) Keep notes and records in a manner that is uniform, consistent and systematic. This will minimize attempts to attribute unintended meanings to the text.

(45) Avoid pinning a patient down in terms of the exact details of the abuse (*e.g.*, dates, places and ages). Instead, make note of events that inform the general timing of the abuse (particularly for historical cases). This will reduce the effectiveness of a cross-examination aimed at attacking a victim's credibility through arguably prior inconsistent statements recorded in the notes.

(46) Avoid recording speculation or making editorial comments in notes since a victim's disclosures of her experiences are likely to be refined, legitimately, as she works through the therapeutic process.

(47) Avoid trying to quote a patient. Quotations are rarely complete and can be taken out of context years later when the notes are produced and/or the health care provider is trying to refresh his or her memory by reviewing the notes. This is critical since defence counsel will try to use the contents of the notes as reliable out-of-court statements to impeach or cast doubt on the truthfulness of the patient. Generally, quotations will not be necessary for diagnostic or treatment purposes.

(48) If a patient has some or complete memory of the abuse that pre-dates entry into therapy, make a note of this fact. This will reduce the effectiveness of a suggestion that improper therapy was employed, which had the effect of tainting the patient's memory.[113]

---

[112] As one judge in a medical malpractice case observed in relation to a nurse's failure to chart contemporaneously with her interactions with the patient and her completion of note taking after the psychiatric patient in question had escaped from the hospital and been struck by a car:

> ...Nurse Oberle's charting is vulnerable to the attack that, arguably, it lacks the objectivity that one would expect to find in a document prepared during the ordinary course of business ... Another unfortunate consequence of the *ex post facto* "charting" is that it deprives the record of that pristine quality that one can usually ascribe to a document prepared in the ordinary course of business. In the circumstances, that infirmity in the charting has focused an issue of credibility that needs resolution... .

DeJong (Litigation Guardian of) v. Owen Sound General, [1996] O.J. No. 809 (Gen. Div.) paras. 75 and 161.

[113] *A.J. v. Cairnie Estate* (1999), 136 Man. R. (2d) 84 (Q.B.) at 96-97; *R. v. Woolford* (1995), 82 O.A.C. 49 (C.A.) at 52; *R. v. E.F.H.*, [1994] O.J. No. 452 (Gen. Div.) at para. 30, affd (1996), 105 C.C.C. (3d) 233 (Ont. C.A.).

(49) If a patient is the one who identifies that she has been abused, record this fact. This will reduce the effectiveness of a suggestion that it was the therapist who encouraged the patient to believe she was abused.

(50) If repressed or disassociated memories are involved, record as early as possible which memories have always been held and which have been recovered.[114]

(51) Record any triggering events that may have led the patient to recover traumatic memories. Triggering events are valuable pieces of evidence that tend to confirm the accuracy of the recovered memory.[115]

(52) Record any forms of implicit memory that the patient has experienced and whether this type of memory pre-dated entry into therapy. Implicit memory can be relied upon by a court to confirm the accuracy of the recovered memory.[116]

(53) Avoid suggesting to a patient that she sue or charge the perpetrator of the alleged abuse. If this is not done, defence counsel will use the fact the suggestion was made to try to impugn the health care provider's objectivity and integrity.

(54) If considering referring a patient to a hypnotist, ensure there is a record of all of the recollections (whole or fragmented) held by the patient prior to hypnosis, and ensure the hypnotist is qualified and familiar with the *Clark* guidelines that will inform a court's assessment of whether or not hypnosis has tainted memory.[117] Also, ensure the patient understands that her recall subsequent to hypnosis and/or the use of mind-altering drugs may be attacked as unreliable before a court.[118]

(55) Avoid "charting by exception" (*i.e.*, being overly selective in what is recorded, such as only recording significant events and not making note of normal observations). Ensure all statutory obligations relating to the contents of notes and records specific to a profession or institution are complied with. For example, all information that is relevant and important to treatment and ongoing diagnoses (if qualified to make a diagnosis) should be recorded. Enough information should also be recorded to refresh one's memory of what occurred in particular consultations or therapy sessions in case there is a need to testify in court at a later time (often years later).[119] Even if a health care provider is not legally re-

---

[114] *R. v. Woolford*, *ibid.*, and *R. v. E.F.H.*, *ibid.*

[115] *D.M.M. v. Pilo*, [1996] O.J. No. 938 (Gen. Div.) at para. 122.

[116] *R. v. E.F.H.*, *supra*, note 113.

[117] The "*Clark* guidelines" are those developed in *R. v. Clark* (1984), 10 D.L.R. (4th) 303 (Alta. Q.B.) at 311.

[118] See S. Vella, "Recovered Traumatic Memory in Historical Childhood Sexual Abuse Cases: Credibility on Trial" (1998) 32 U.B.C. L. Rev. 91 at 108-12, for a discussion of the difficulties that may arise in court proceedings where an alleged victim has been the subject of hypnosis.

[119] Poor note taking and record keeping practices may suggest substandard care has been provided. For example, omissions from a hospital record in *Kolesar v. Jeffries* (1974), 59 D.L.R. (3d) 367 (Ont. H.C.J.), vard (1976), 12 O.R. (2d) 142 (C.A.), affd [1978] 1 S.C.R. 491, a medical malpractice case, gave rise to the inference that nothing had been charted because nothing had been done to check a patient's vital signs during a seven-hour period prior to the patient's death. The

quired to take notes, notes should still be taken and these guidelines considered. Courts will be unimpressed with a counsellor who takes the stand and purports to give evidence concerning one of many clients he or she has treated, without the aid of notes.[120] Further, the notes may serve as a visual aid to a trial judge who may refer back to them after the trial has concluded, but before judgment is rendered.

(56) Avoid recording legal advice that has been received from, or legal strategies that have been discussed with, a patient's lawyer, which are then relayed by the patient during the course of a therapy or counselling session. Such comments are unlikely to pertain to the treatment of the patient and, therefore, not required to be part of the notes. The danger is that the note taker, by recording such information, may inadvertently waive the patient's privilege over solicitor-client discussions.

(57) Where there are ongoing or pending court proceedings, always keep correspondence from the patient's lawyer and notes of any conversations and meetings with the patient, his or her lawyer, and/or the Crown prosecutor or police which relate to the court proceedings in a separate folder apart from the patient's chart. If the health care provider has his or her own legal counsel, any notes and correspondence with this person should also be stored separately. These are not properly part of the patient's clinical chart and should not be covered by a request for (or a production order in relation to) the clinical notes and records of the patient.

(58) Always bear in mind any mandatory statutory reporting obligations, such as the requirement in Ontario to report suspected child abuse under s. 72 of the *Child and Family Services Act*,[121] and sexual abuse of patients by other health care practitioners under ss. 85.1 to 85.5 of the *Regulated Health Professions Code*.[122]

Requests for Notes and Records

The following are practical tips for what a health care provider should consider and do when he or she receives a request to produce his or her notes and records regarding a particular patient.

(59) Ensure the request includes a properly executed and current written consent to provide the person making the request with copies of the

---

omissions also negatively affected the credibility of the nurse who had failed to record information ordinarily recorded.

[120] See, for example, *G. (R.) v. Christison*, [1997] 1 W.W.R. 641 (Sask. Q.B.) at 666-67, where an unregulated children's counsellor was successfully sued in negligence and for defamation by the father of two children who was alleged (together with his second wife) to have abused his children. The court was highly critical of the counsellor's failure to take any notes during interviews and her claim to remember "everything her hundreds of interviewees tell her and what she has observed".

[121] R.S.O. 1990, c. C.11, s. 72 [am. S.O. 1993, c. 27, Sch.].

[122] Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

notes and records.[123] Notes and records should never be disclosed on the strength of a lawyer's letter alone, nor through a telephone call by anyone, including the patient. There have been instances where health care providers have sent confidential patient information under the mistaken belief that the lawyer's letter was sufficient authorization and ended up inadvertently sending the material to defence counsel. Such an error can have serious implications not only for the patient (who may be precluded from asserting privilege over the records, or otherwise resisting production of them), but also for the health care provider who may be sued for damages arising from the breach of confidentiality and/or face disciplinary proceedings. Note that where the Crown is the one to make the request of the complainant to release medical records, it must inform the complainant that the records will likely be disclosed to the accused. If the Crown fails to do so, the complainant's consent can be subsequently challenged as not having been "informed".[124]

(60) For those working in psychiatric facilities governed by the Ontario *Mental Health Act*,[125] or other equivalent provincial statute, a recently executed Form 14, or equivalent form depending on the statute, should form part of all requests for records compiled in the facility. This form is also generally used and accepted by psychiatrists and psychologists in private practice.

(61) If the written request is not from the patient's own lawyer (or it is unclear), it is prudent to call the patient first to ensure he or she has really authorized the transmittal of his or her confidential information to the requester (meaning the patient has given his or her free and informed consent to disclosure). Even where the request comes from the patient's own lawyer, it may be prudent to double check with the patient to make sure he or she understands the ramifications of production. This is particularly important where a patient has not been seen in some time, there has been no prior discussion of the issue with the patient, or there is a concern that the patient may not appreciate the consequences of disclosure.

(62) If the health care provider has access to legal counsel, it is prudent to briefly review the request with counsel, particularly if the health care provider is uncomfortable for any reason with the request or the potential implications of production. For example, if the health care provider suspects a patient is not properly informed about the ramifications of

---

[123] What is "current" depends on the circumstances of a particular case, but generally where a consent is dated more than a few months before the request, consideration should be given to asking for a more up-to-date consent since the patient may have changed her mind in the intervening period. Section 22, R.R.O. 1990, Reg. 965, pursuant to the *Public Hospitals Act*, R.S.O. 1990, c. P.40, provides for no disclosure without written consent. Also see s. 1(1) of O. Reg. 856/93, as amended, made pursuant to the *Medicine Act, 1991*, S.O. 1991, c. 30, for the requirement of patient consent (form not specified).

[124] *R. v. O'Connor*, [1995] 4 S.C.R. 411, *per* Lamer C.J.C. and Sopinka J. at 430-31.

[125] R.S.O. 1990, c. M.7.

production, or has been pressured into signing a consent, he or she should obtain legal advice concerning the obligations and options.

(63) A physician must also consider the exception to the requirement to disclose with the patient's written consent that exists at common law where there is "a significant likelihood of substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party".[126] There may also be exceptions provided for by statute. For example, in Ontario, s. 35(6) of the *Mental Health Act* provides that where the disclosure, transmittal or examination of a clinical record is required by a court and the physician states in writing the disclosure is likely to result in harm to the treatment or recovery of the patient, or is likely to result in mental or physical injury to a third person, the requirement to disclose the clinical record shall not be complied with, without a hearing first being conducted on notice to the attending physician. The court will examine the record and, if satisfied that such a result is likely, will not order disclosure unless it finds it is essential in the interest of justice to do so.

(64) If the requesting party is the patient's own lawyer, and the authorization is broad and involves disclosure of ongoing therapeutic and counselling information, it may be appropriate to alert the lawyer to sensitive or irrelevant areas in the notes and records, or concerns about the implications of production on the patient's health and well-being. The lawyer is unlikely to appreciate all of the issues raised by the notes and records and may need to be alerted to the possibility of editing irrelevant and/or highly personal matters which, if disclosed, could harm the patient.

(65) Where the patient has provided free and informed consent, in writing, to disclosure, the health care provider should bear in mind the patient's legal right to the information contained in the records,[127] and avoid being unreasonable about producing the notes and records. For example, some health care providers insist on providing a summary of the notes in the patient's file, or providing a report in place of the notes themselves. An after-the-fact written summary or report cannot be a substitute for the notes and records created contemporaneously with the treatment or therapy provided. If the health care provider fails to produce the records, or insists on providing a summary or report instead of the actual notes and records, he or she may later be compelled by court order to disclose the notes and records and, in the civil context, to pay a cost award if the court proceeding would not have been necessary but for the non-compliance.[128] Such a proceeding to compel production may be

---

[126] *McInerney v. MacDonald* (1992), 93 D.L.R. (4th) 415 (S.C.C.) at 430.

[127] *Ibid.*

[128] In the civil context in Ontario, see r. 30.10 of the Rules of Civil Procedure, which provides that the court may order production for inspection of a document in the possession of a non-party. See, for example, *P. (L.M.) v. F. (D.)* (1994), 34 C.P.C. (3d) 172 (Ont. Gen. Div.), where the Court ordered the plaintiff's physician to produce his clinical notes and records in a sexual abuse case.

brought not only by the Crown or the plaintiff, but also by the accused or the defendant and, if successful, the patient could lose the opportunity to make arguments regarding relevance or privilege because the court may simply order that the record keeper produce the entire file, without any conditions being attached. If a summary or report has been prepared, the court may require it to be disclosed together with the original notes and records. If there are any inconsistencies (real or apparent) between these documents, the health care provider's credibility as well as that of the patient may be attacked.

(66) If a health care provider is subject to legislation governing note taking and record preserving procedures, this legislation must be followed. If there is no such legislation, then it should be borne in mind that if no notes are taken or they are destroyed after being taken, then this may have adverse implications not only for the health care provider and the patient's credibility, but also may result in criminal charges being stayed, as in *R. v. Carosella*,[129] the health care provider being sued for the tort of spoliation, or an adverse inference being drawn against the patient and/or health care provider in court proceedings.

COURT PROCEEDINGS

What follows are some practical tips for health care providers for whom production of their records becomes the subject matter of a court proceeding.

(67) If served with court materials, such as an application record and subpoena in the criminal context, or a motion record and summons to witness in the civil context, do not turn over records to anyone until ordered by the court, or given the appropriate permission in writing by the patient to do so. Typically, service of these materials triggers dates by which things must be done, and it is essential that one act promptly and immediately obtain legal advice. Avoid speaking with defence counsel about anything except, at most, the timing of the contemplated proceeding and any accommodations of one's schedule which may be required (note: there is often flexibility regarding the date and time on a subpoena or summons to witness, and counsel and the courts will generally be reasonable in trying to accommodate schedules and providing advance notice of when actual attendance in court is necessary).

(68) If unknown, determine what position the patient is taking on disclosure of her records. If the patient consents to production, then it may not be necessary to respond formally to the materials served. If the patient does not already know, advise her that she is entitled to a copy of the records in question, irrespective of any court proceeding.[130] The health care provider's duty of confidentiality to the patient will generally mean

[129] [1997] 1 S.C.R. 80.

[130] *McInerney v. MacDonald*, *supra*, note 126, at 430.

the patient's position with respect to production or non-production of the records and any privilege attaching to them should be supported (or at least not opposed), bearing in mind that it is the patient's, and not the health care provider's, privilege to assert and to waive. This support can be in the form of a letter or oral submission to the court (preferably by counsel), by affidavit or by oral testimony.

(69) If the health care provider does not believe it is necessary to attend in court to make submissions because he or she feels there is nothing to add to what the Crown prosecutor and/or the patient (or her counsel) will be submitting, then arrangements can often be made to have the records in question delivered to the presiding judge in a sealed envelope. For example, the Crown prosecutor in a criminal case may be prepared to receive, in a sealed and clearly labelled envelope, the records the defence is seeking to have produced and to deliver the envelope directly to the judge if so ordered. A cover letter should accompany the sealed envelope indicating the Crown is not to review the contents and confirming the complainant is not waiving privilege over the enclosed records. This option should be used only where it is not possible to attend in person or by agent (such as a lawyer) to deliver the records. Further, the sealed envelope should be delivered as close to the return date of the application as possible to minimize the possibility of the records being misplaced in the interim. Alternatively, it may be possible to have another person from the office of the record holder attend at court with the sealed envelope. If any of these options is being contemplated, the Crown prosecutor and defence counsel should be consulted in advance to make sure they have no objections.

(70) If a copy of the complete, unedited records as opposed to the original chart is delivered to the court, be sure to have the original available in case it is required, and to alert the court to the fact a copy and not the original is being provided. If, instead, the original chart is delivered to the court, be sure to maintain a copy at the office so ongoing care of the patient is in no way jeopardized (since the chart may be with the court for years if the judge's ruling with respect to production or non-production of the records is appealed). Do not, in an effort to assist the court and/or the parties to the proceeding, make extra copies of the records, prepare typewritten transcriptions of handwritten notes, or create an inventory or summary of the chart's contents.[131] Wait for direction from the court as to how matters such as copying and transcriptions are to be handled.

(71) If the health care provider is prepared to become actively involved on the patient's behalf in resisting disclosure of the records, then he or she should ensure the evidence provided in support is compelling and nec-

[131] See, for example, *R. v. Chisholm*, *supra*, note 111, at 123, where the Court noted that a physician is under no obligation to copy her file or prepare an inventory or summary of its contents.

essary to establish the legal claim for non-production or privilege.[132] The health care provider must, however, ensure that in the course of giving evidence, he or she does not inadvertently testify about matters he or she is not authorized to disclose.

(72) If no consent to disclosure and production of confidential health care information is forthcoming from the patient, access to such information as well as any conditions that are to attach to such access must be determined by a court. The health care provider should insist there is a clearly worded court order, which has been issued and entered with the court, requiring him or her to produce the records (and if there is ambiguity in the wording of the order, should seek legal advice). So long as the terms of the order are fully complied with, he or she should be protected from any subsequent allegation by the patient (or former patient) that the duty of confidentiality owed was breached. Any disclosure or production of records made pursuant to a court order is "required by law" and, therefore, obligatory.[133]

---

[132] In *P. (V.) v. L. (F.)*, [1996] 7 W.W.R. 19, the plaintiff's claim to privilege failed because there was no evidence any harm would be suffered in the event the sexual assault counselling centre's records were produced. In *P. (L.M.) v. F. (D.)*, *supra*, note 128, the Court was critical of the general nature of the evidence provided by the plaintiff's psychotherapist. In his affidavit, the psychotherapist had simply stated that "production of my notes and records would be an invasion of the therapy process and cause a serious setback in the treatment and recovery of [the plaintiff]. It may also create a serious risk to [the plaintiff's] future health and present safety" (at 174). The Court concluded the psychotherapist's concerns about the effects of disclosure did not, in the circumstances, outweigh the need for the defendants to have access to his clinical notes and records, which spanned some 17 years, to assess the damages being claimed.

[133] *Halls v. Mitchell*, [1928] S.C.R. 125; *R. v. Dyment* (1988), 55 D.L.R. (4th) 503 (S.C.C.). Also see s. 22(1), R.R.O. 1990, Reg. 965, pursuant to the *Public Hospitals Act*, R.S.O. 1990, c. P.40, and s. 1(1), O. Reg. 856/93, as amended, pursuant to the *Medicine Act, 1991*, S.O. 1991, c. 30. Section 22 of the Code of Ethics of the Canadian Medical Association dated October 15, 1996, provides that a patient's right to confidentiality must be respected, "except when this right conflicts with ... [the physician's] responsibility to the law".