SEX, LAWS AND VIDEOTAPE: THE AMBIT OF SOLICITOR-CLIENT PRIVILEGE IN CANADIAN CRIMINAL LAW AS ILLUMINATED IN *R. V. MURRAY*

Rachel Fogl*

Introduction

Sources of Solicitor-Client Privilege

Definition of Privilege

Besides their frequent appearances in Internet jokes, doctors, lawyers and priests share a duty to guard the secrets of those who come to them seeking help. This professional duty may conflict with their legal duty to produce evidence relevant to a matter before the court.[1] The law, however, recognises the priority of certain professional relationships and the importance of confidentiality in maintaining them. While both doctors[2] and priests[3] enjoy a limited right to withhold information communicated to them in confidence, the courts recognise a *prima facie* privilege,

---

* B.Sc. Joint Major in Mathematics and Computer Science from McGill University and an LL.B. from Queen's University. Rachel is currently articling with the law firm of Stikeman Elliott in Ottawa, Ontario, and expects to be admitted to the Ontario Bar in 2002.

[1] *A. M. v. Ryan*, [1997] 1 S.C.R. 157 [hereinafter *Ryan*] at para 19. As a general rule (subject to the exceptions discussed in this paper) any competent witness is compellable to appear before the court to give evidence. *R. v. Barnes* (1921), 61 D.L.R. 623 (Ont. C.A.).

[2] There is a statutory privilege in Quebec civil law accorded to the doctor-patient relationship: *The Medical Act*, R. S. Q. 1977 c.M-9, s. 42. In Ontario, O. Reg. 856/93 under the *Medicine Act*, S. O. 1991, s.1 para. 10 prohibits a doctor from giving up patient-information except on consent or as required by law.

[3] English and Canadian courts have not compelled members of the clergy to disclose confidential information obtained in the course of religious duties. *R. v. Gruenke*, [1991] 3 S.C.R. 263. There is no reported case in either Canada or England in which a priest has been forced to disclose secrets of the confessional. J. Sopinka et al., *The Law of Evidence in Canada* 2nd ed. (Toronto: Butterworths, 1999) [hereinafter Sopinka] at 784. Newfoundland and Quebec are the only Canadian provinces with statutory privilege enacted to protect the clergy-parishioner relationship in civil lawsuits. Newfoundland: *Evidence Act*, R. S. N. 1990, c. E-16, s.8. Quebec: *Charter of Human Rights and Freedoms*, R. S. Q. 1997, c. C-12, s.9.

only[4] for confidential communications with lawyers.[5] Solicitor-client privilege belongs to the client[6] and is a substantive right[7] to prevent disclosure of confidential communications concerning legal advice or assistance.

Origins of Privilege

The common law has protected communications between client and solicitor as far back as the sixteenth century.[8] At that time, members of the legal profession qualified as gentlemen[9] and could invoke the "obligations of honour among gentlemen"[10] to ensure the lawyer was "duty-bound to guard closely the secrets of his client."[11]

---

[4] The courts have occasionally protected other relationships, recognising privilege on a case-by-case basis. This flexible approach was bolstered in the 70s by the Supreme Court of Canada decision in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 [hereinafter *Slavutych v. Baker*] where a "a tenure form sheet" given to a university authority in confidence was privileged. The decision was based on the principle of breach of law, originating in the law of equity, and the evidentiary principles related to privilege (see *Origins of Privilege* concerning the distinction between these two grounds). In *obiter dicta*, the court adopted Wigmore's four criteria for determining applicability of privilege [see discussion of Wigmore's conditions at *The Advent of Principled Analysis*]. The approach based on Wigmore's criteria has been used in evaluating communications between priest and parishioner. (*R. v. Church of Scientology* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.)). In *R. v. Gruenke*, [1991] 3 S.C.R. 263, testimony of a pastor that the accused had planned a murder was heard and proved instrumental in securing a conviction for first degree murder.

[5] Sopinka, *supra* note 3 at 714.

[6] The lawyer has no right to unilaterally waive privilege on behalf of the client. Canadian Bar Association, Ontario Branch, *Report of the Special Committee of the Canadian Bar Association – Ontario Regarding Solicitor-Client Privilege* (Toronto: The Association, 1985), Appendix A at 1.

[7] The right to confidentiality is no longer only a rule of evidence, but a substantive rule. When it was a rule of evidence alone, it did not prevent parties, other than the solicitor or his agent, from disclosing confidential solicitor-client communications. *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 [hereinafter *Descoteaux v. Mierzwinski*] per Lamer J. As a substantive right, confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent; there is a presumption in favour of confidentiality; and any legislation interfering with this right should be enacted in a way that minimises interference.

[8] *Solosky v. R.* (1979), 50 S.C.C. (2d) 495 [hereinafter *Solosky*] at 506. Privilege makes an appearance in *Berd v. Lovelace* (1577), 21 E.R. 33 and *Dennis v. Codrington* (1580), 21 E.R. 53.

[9] J. H. Baker, *An Introduction to English Legal History* 3rd ed. (London: Butterworths, 1990) at 46.

[10] R. J. Delisle, *Evidence: Principles & Problems* 5th ed. (Toronto: Carswell, 1999) [hereinafter Delisle] at 663.

[11] *Solosky, supra* note 8 at 506.

By the 18th century, a lawyer's honour no longer formed the basis of privilege - not because doubts about lawyers' honour arose - but because the courts deemed this privilege too obstructive to the search for truth.[12] Instead, they introduced a new rationale, pertinent only to the attorney:[13]

> The foundation of [the privilege] rule ... is ... regard to interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings.[14]

Thus privilege, divorced from the lawyers' honour, now belongs to the client and protects him from disclosure of communications that fall within the ambit of solicitor-client privilege.[15] Only the client, and not the solicitor, can waive privilege.[16]

It must be noted that there is another type of privilege originating in equity[17] and distinct from solicitor-client privilege relating to the law of evidence.[18] The equitable doctrine of confidential communications is based on the notion that "a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication."[19] In other words, using a person's confidences against him is unfair. A party cannot claim solicitor-client privilege through reliance on the equitable doctrine; the party asserting privilege must establish, on a balance of probabilities, existence of the necessary evidentiary criteria to claim solicitor-client privilege.[20]

---

[12] Delisle, *supra* note 10 at 663.

[13] *Ibid.*

[14] This oft-quoted statement of policy was articulated in *Greenough v. Gaskell* (1833), 39 E.R. 618 at 620.

[15] Delisle, *supra* note 10 at 664.

[16] This proposition is discussed in more depth in *Waiver of Privilege*, p. 205.

[17] *Ibid.*

[18] Sopinka, *supra* note 3 at 717. See *Slavutych v. Baker, supra* note 4, where privilege was found on both grounds.

[19] *Seager v. Copydex* [1967] 2 All E.R. 415 at 417 per Lord Denning, adopting the statement of Roxburgh J. in *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd. et al.*, [1960] R.P.C. 128.

[20] *McCarthy Tetrault v. Ontario* (1993), 95 D. L. R. (4th) 94 (Ont. Prov. Div.).

Rationale for Solicitor-Client Privilege

The rules of solicitor-client privilege were originally restricted to an exemption from testimonial compulsion,[21] ensuring that the court could not compel the lawyer to divulge a clients confidential communications. Gradually, privilege extended to communications made during litigation or in contemplation of litigation, and finally, it expanded to cover any consultation for legal advice, whether litigious or not.[22] In fact, the legal profession recognized the importance of protecting the relationship between the accused and his lawyer[23] long before the practice of retaining counsel became uniform.[24]

Members of the legal community generally acknowledge that, without guaranteed secrecy, an effective relationship between the lawyer and his client would be impossible, and without this relationship the adversarial system would lie a-shambles:

> If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.[25]

For some, protecting the relationship between the client and his advocate was paramount to the search for truth:

> The ... mischief of prying into a man's confidential consultations with his legal advisor, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself. [26]

---

[21] *Solosky, supra* note 8 at 506.

[22] *Ibid.*

[23] *Ibid.*

[24] By 6 & 7 Will. IV, c. 114, all prisoners accused of felony were permitted to make full defence by counsel. In 1758, however, there was the embarrassing trial of Lord Ferrers, *William Barnard's Case*, 19 S.T. 815, where the prisoner was obliged to cross-examine witnesses without the aid of counsel, in order to prove the defence of insanity. A. T. Carter, *A History of English Legal Institutions* (London: Butterworth & Co., 1906) at 58.

[25] *Greenough v. Gaskell, supra* note 14 at 620.

[26] *Pearce v. Pearce* (1847), 16 L.J. Ch. 153 at 159.

Solicitor-client privilege is the oldest privilege known to common law.[27] It protects "the integrity of the relationship most vital to the continuing operation of the legal system."[28] In Canada, privilege is constitutionally protected for the purposes of criminal law:

> In the criminal context the principles embodied in the rules of privilege have gained constitutional protection by virtue of the enshrinement of the right to full answer and defence, the right to counsel, the right against self-incrimination and the presumption of innocence in ss. 7, 10(b), 11(c) and 11(d) of the *Canadian Charter of Rights and Freedoms*.[29]

Although privilege is entrenched in the common law, it is neither "lightly created [nor] expansively construed,"[30] because it is an "exception to the demand for every man's evidence"[31] and thereby derogates from the search for truth.

The Advent of Principled Analysis

Under the traditional law, privilege afforded to solicitor-client communications was subject to specific exceptions. Privilege only attached when the lawyer was acting in his professional capacity[32] and when the client intended a communication to be confidential.[33] Privilege did not apply for communications made to facilitate the commission of a crime or fraud.[34] This treatment of solicitor-client privilege evolved gradually on a case-by-case basis and did not result from a single principled approach.

In 1975, the Supreme Court of Canada expressly adopted[35] Dean Wigmore's four-part analysis for determining whether privilege should attach to a communication:

---

[27] *Upjohn Co. v. United States*, 449 U.S. 383 at 389 (C.A. 6th Cir., 1981).

[28] R. D. Manes & M.P. Silver, *Solicitor Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) [hereinafter Manes & Silver] at 1.

[29] *Smith v. Jones*, [1999] 1 S.C.R. 455 at para 7 per Major J.

[30] *Ibid.*

[31] *United States v. Nixon*, 94 S. Ct. 3090 at 3108 (1974).

[32] *Solosky, supra* note 8 at 508.

[33] *O'shea v. Woods*, [1891] P. 286 at 289, cited in *Solosky, supra* note 8 at 507.

[34] *R. v. Cox and Railton* (1884), 14 Q.B.D. 153.

[35] *Slavutych v. Baker, supra* note 4 at 228.

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Although Wigmore's test was applied in *Slavutych v. Baker* to decide whether communications between people other than a lawyer and his client were privileged, we can apply the same reasoning to solicitor-client communications. It has long been established that solicitor-client communications for obtaining legal advice meet the four criteria.[36] There are circumstances, however, when communications between a client and his lawyer are not protected. These circumstances can be memorized as enumerated exceptions, or derived from a single set of principles represented by the Wigmore criteria. The courts have noted these circumstances as exceptions to the rule of solicitor-client privilege, and their exclusion flows from the application of Wigmore's test. The advantage of using the principled approach is the relative ease of deriving all exceptions from a single set of rules, instead of referring to a compendium of exceptions:[37]

---

[36] Manes & Silver, *supra* note 28 at 21. Sopinka, *supra* note 3 at 728.

[37] In *R v. Starr*, [2000] S.C.J. No. 40 (S.C.C.) online: QL (S.C.C.), Iacobucci J. preferred the principled approach to the traditional "pigeon-hole" exception approach in the context of the hearsay rule. In para. 201, he states that "In addition to improving trial fairness, bringing the hearsay exceptions into line with the principled approach will also improve the intellectual coherence of the law of hearsay." In her dissent, McLachlin C.J. confirmed that while the common law exceptions to the hearsay rule remain the law, they are "interpreted and updated to conform" to the principled approach manifest in "the twin requirements of necessity and reliability." [para 3] The law of solicitor-client privilege can be approached in the same way by aligning the existing exceptions with Wigmore's principled approach. L'Heureux-Dube, dissenting in *Starr*, says that the principled approach to hearsay was adopted to supplement, rather than replace the existing common law exceptions [para 22]. This assertion runs contrary to the reasoning of McLachlin J. (as she then was) writing for the court in *R. v. Khan*, [1990] 2 S.C.R. 531. McLachlin J. summarised four tests for the admission of hearsay as "necessity and reliability." The four tests came from the dissenting decision of Lord Pearce in *Myers v. Director of Public Prosecutions*, [1965] A.C. 1001, in which he characterised the tests as "the principle which underlines all exceptions." An identifiable principle underlying exceptions cannot be construed as a mere supplement to the exceptions. As an aside, I would add that treating a general principle as an

> The Wigmore criteria ... provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court.[38]

Solicitor-Client Privilege in the Trial of Ken Murray

Background Facts

The scope of solicitor-client privilege has recently received considerable attention in connection with the trial of Ken Murray, Paul Bernardo's former lawyer. Paul Bernardo and Karla Homolka made six videotapes that Bernardo secretly conveyed to Murray after Bernardo was charged with the murders of Leslie Mahaffy and Kristen French. Two of the videotapes show dreadful acts perpetrated by Bernardo and Homolka on the young women. The tapes also show the sexual assaults of both Jane Doe and Tammy Homolka. Two other videotapes portray Homolka in sexual scenes, and while pornographic, do not depict any illegal acts.

After Bernardo was arrested, he retained Ken Murray as his lawyer and gave him a map and letter stating that Murray could find something in Bernardo's former residence that he would need for the defence.[39] Following instructions, Murray discovered the videotapes hidden in a bathroom pot light. Murray copied and kept the tapes to use them to prove that Homolka was a willing participant in the assaults, rather than a compliant abused spouse. Apparently, Murray planned to use the tapes either to discredit Homolka or to negotiate a resolution of charges by threatening to discredit the Crown's principal witness.[40] Since the tapes do not show the actual murders, it is possible that, on seeing Homolka's enthusiasm in the videotapes, the jury could reasonably doubt that Bernardo (rather than Homolka) was the

---

additional exception, defeats the purpose of deriving a general principle. Notably, the criteria of necessity and reliability, set out in *Khan*, can be applied to evaluate statements of persons not available to give evidence; the approach is not limited to statements made by children even though *Khan* dealt with statements of a child witness. *R. v. Smith*, [1992] 2 S.C.R. 915. Lamer C.J. noted in *Smith* that the decision in *R. v. Khan* "should be understood as the triumph of a principled analysis over a set of ossified judicially created categories."

[38] Manes & Silver, *supra* note 28 Sopinka, *supra* note 3 at 21.

[39] *R. v. Murray* (2000), 186 D.L.R. (4th) 125 at para 7 [hereinafter *R. v. Murray*].

[40] *Ibid* at para 35.

murderer.[41]

When Murray found himself unable to represent Bernardo, he turned the case (but not the tapes) over to Mr. Rosen, retained counsel for himself, and contacted the Law Society of Upper Canada seeking advice.[42] The Law Society advised Murray to deliver the materials in his possession to the presiding judge; Murray informed Bernardo of the Law Society's instructions, and Bernardo informed Rosen of the tapes and their contents. Once Rosen gained possession of the tapes, viewed them and decided the best course of action, he turned the tapes over to police.

The Privilege Arguments

In the wake of Bernardo's trial, Ken Murray was charged under subsection 139(2) of the *Criminal Code*[43] with obstruction of justice:[44]

> Everyone who wilfully attempts in any manner other than a manner described in subsection (1)[45] to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Legal justification for concealment of the videotapes, such as solicitor-client privilege, would have provided Murray a complete defence to the charge of obstruction of justice.[46] Murray, however, did not claim that the confidentiality of the tapes was protected "under the umbrella of solicitor-client privilege."[47] Instead, he was acquitted because the Crown did not establish the necessary *mens rea*, failing to prove beyond a reasonable doubt that Murray's intention was "wilfully" to

---

[41] C. Blatchford, "Ken Murray's Not-So-Excellent Adventure" (2000) 24:10 *Canadian Lawyer* 28 at 28.

[42] *R. v. Murray, supra* note 39 at para. 69.

[43] R.S.C. 1985, c.C-46.

[44] *R. v. Murray, supra* note 39.

[45] s.139(1) provides, "Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,
(a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or
(b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,
is guilty of
(c) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
(d) an offence punishable on summary conviction."

[46] *R. v. Murray, supra* note 39 at para 112.

[47] *Ibid.*

obstruct the course of justice. Interestingly, Bernardo intervened to request that any communications made to Murray during their relationship be protected from disclosure by solicitor-client privilege.[48]

The Scope and Limitations of Solicitor-Client Privilege

Overview

Whether or not litigation is pending, privilege will attach (in the absence of waiver) to all direct confidential communications between a solicitor and client (including agents/ employees) made to obtain legal advice not intended to facilitate the commission of a crime or fraud.[49] If any of these conditions are not satisfied, privilege will either not attach or be limited in scope depending on which condition is not met. Each condition can be treated either as an evidentiary exception to the rule that confidential communications between a lawyer and client are privileged, or can be evaluated in light of Wigmore's criteria.

Common Law Qualifications of Solicitor-Client Privilege

Direct Communications

To attract unconditional privilege, a communication must pass directly between solicitor and client (an agent may represent each).[50] When a lawyer or client communicates with third parties other than agents or employees, privilege does not attach, unless the communications are made for the dominant[51] purpose of reasonably contemplated litigation.[52] At stake is the preservation of the adversarial system in which counsel control fact-presentation unburdened by an obligation to disclose material acquired in preparation for trial:[53]

---

[48] *R. v. Murray [Evidence-Solicitor-Client Privilege]*, [2000] O.J. No. 685 [hereinafter *R. v. Murray [Evidence-Solicitor-Client Privilege]*]. The issues raised in Bernardo's applications are limited in scope and do not offer as good an opportunity to determine the ambit of solicitor-client privilege as whether or not solicitor-client privilege should have protected the Bernardo tapes.

[49] *Solosky, supra* note 8 at 506.

[50] Manes & Silver, *supra* note 28. Sopinka, *supra* note 3 at 9.

[51] *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169.

[52] *Wheeler v. Le Marchant* (1887), 17 Ch. D. 675 at 682; *Flack v. Pacific Press Ltd.* (1970), 14 D.L.R. (3d) 334 at 336 (B.C.C.A.).

[53] Sopinka, *supra* note 3 at 745.

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel.[54]

It is possible to argue that when Bernardo turned the tapes over to his solicitor, he intended to show Homolka's culpability. The tapes could, presumably, convey the message that Homolka was not cowing and unwilling but keen and capable of murder.[55] In *R. v. Murray*, Gravely J. pointed out that the tapes are not similar "for example, to a sketch, which might be prepared by a client to illustrate a point to his counsel, or even a videotape prepared for that purpose. ... Murray's discussions with his client about the tapes are covered by the privilege; the physical objects, the tapes, are not."[56] But why not? Leaving aside for the moment the characterisation of the tapes as physical evidence, one can suppose that the information on the tapes formed a direct communication between Bernardo and Murray made to discredit Homolka:

> A series of physical acts on being observed serve to communicate to the observer the fact that the actor is capable of their performance. ... In this sense, the acts or gestures are "communications."[57]

Confidentiality of Communications

Unless communication is made with the expectation of confidentiality, privilege is not applicable. The mere fact that a communication took place between solicitor and client is not enough to attract privilege;[58] confidentiality must be established and the solicitor must be acting in his professional capacity.[59] An intention that a

---

[54] *Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co.* (1990), 74 O.R. (2d) 637 at 643.

[55] The description of one of Homolka's taped "performances" in *R. v. Murray, supra* note 39 at para 25 certainly gives that impression.

[56] *Ibid* at para 115.

[57] *Paquet v. Jackman* (1980), 24 B.C.L.R. 287 (S.C.).

[58] *Hamelyn v. Whyte* (1874), 6 P.R. 143 (Ch.); *Hoffman v. Crear* (1897), 17 P.R. 404 (C.A.) held in Ontario that communications between solicitor and client were confidential by nature, but these were overturned by subsequent cases.

[59] *Zielinski v. Gordon* (1982), 40 B.C.L.R. 165 (S.C.); *R. v. Bencardino* (1973), 2 O.R. (2d) 351.

communication should remain secret can be inferred from the circumstances.[60]

To find the tapes, Murray used a map given to him by Bernardo in a sealed envelope; to inform Bernardo that the operation was successful, he used an agreed-on "code."[61] Not surprisingly, the tapes were conveyed in secret and with every expectation of confidentiality.

Recipient of Communications

To attract privilege, communications must be made to a lawyer acting in his professional capacity.[62] It is no longer required that the lawyer be competent to practice in the jurisdiction relevant to the issue in question; if one party to the communication is a lawyer[63] then the communication is privileged.[64] The lawyer must, however, be a qualified legal adviser, or at a minimum, the client must reasonably believe the lawyer to hold such qualification.[65] Equal protection is provided for communications with a lawyer's agents or employees, such as articling students, law clerks or secretaries, made to facilitate the obtainment of legal advice.[66] If unnecessary third parties are present when the communication takes place, the privilege is vitiated.[67] Yet, the client need not worry about merely being overheard by third parties; if they intended the communication to be confidential and took

---

[60] Sopinka, *supra* note 3 at 730. Privilege may be vitiated by the presence of unnecessary third parties when communication takes place, and certain subject matter, such as the identification or address of the client is generally not covered by privilege.

[61] Murray was to ask Bernardo during their scheduled telephone conversation "How about those Jays" if he found the tapes, and "How about those Leafs" if he did not. *R. v. Murray, supra* note 39 at paras 8, 12.

[62] *Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328, [hereinafter *Greymac*] wherein communications with a solicitor in his capacity as president of the company were not privileged.

[63] Assuming there exist no other bars to privilege.

[64] *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)* (1989), 28 C.P.C. (2d) 101 at 104. It was held in *U.S. v. Mammoth Oil Co.*, [1925] 2 D.L.R. 966 (Ont. C.A.) that no privilege attached when an American citizen consulted a Canadian lawyer on American law since a Canadian lawyer is not qualified to practice in the U.S. This decision proved too restrictive (consider, for example, difficulties this approach would cause multi-national corporations).

[65] *R. v. Choney* (1908), 17 Man. R. 467, 13 C.C.C. 289 (C.A.).

[66] *Descoteaux v. Mierzwinski, supra* note 7.

[67] Wigmore, *Evidence* (McNaughton Rev., 1961) at 601-603.

reasonable steps to ensure this, then it will be privileged.[68]

Material to which Privilege Can Attach and the Meaning of "Communication"

Communications Versus Physical Objects

Photographs, films and tapes have all received protection from disclosure in past cases. In *General Accident Assurance Company et al. v. Chursz et al.*,[69] a videotape prepared by a third party for the plaintiffs' lawyer was treated in the same way as the written documents.[70] Film secretly made by the defendant of the plaintiff, who claimed that injuries sustained in a car accident had immobilized him, were held to be privileged.[71] The court treated the videotapes as written documents and applied the same test to decide whether privilege attached.[72] In *R. v. Nikolovski*,[73] the Supreme Court of Canada spoke to the admissibility of videotape evidence, emphasising that "tapes could provide cogent and convincing evidence of culpability or equally powerful and convincing evidence of innocence."[74] For the purposes of solicitor-client privilege, it appears that the communicative value of videotape is often equated with that of documents, and in instances where documents qualify for privilege, so do videotapes.

In *R. v. Murray*, Gravely J. distinguished between "Murray's discussions with his client," which were privileged and "the physical objects, the tapes,"[75] which were not. There exists no precedent for this contrast and it is questionable whether privilege should be distinguished based on the communication media. If a written document or conversation is privileged, so too should be a videotape containing the

---

[68] Manes & Silver, *supra* note 28. Sopinka, *supra* note 3 at 81.

[69] [1999] O.J. No. 3291 (Ont. C.A.).

[70] The videotape and other documents were not privileged because they were not created, by the third party, in contemplation of litigation. The same approach was employed in *McIntyre v. Canadian Pacific Ltd.* (1984), 43 C.P.C. 59 (Ont. H.C.J.) where photographs of an accident site were treated, for the purposes of determining privilege, as any other document.

[71] *Paquet v. Jackman* (1980), 24 B.C.L.R. 287 (S.C.).

[72] *Ibid.*

[73] [1996] 3 S.C.R. 1197.

[74] *R. v. Nikolovski, ibid* at para 15.

[75] *R v. Murray, supra* note 39 at para 115.

same information.

"Facts or Acts" Exclusion

It remains to consider whether the tapes were "facts" or "acts" since both are excluded from solicitor-client privilege. When a communication is limited to a disclosure of fact that exists independently, such as information readily available to the solicitor about funds passing through a client's trust account, it is not privileged.[76] In other words, "a party cannot conceal a fact merely by revealing it to his lawyer."[77] The United States Supreme Court attempted to clarify the distinction between legal advice and fact in *Upjohn Co. v. United States:*[78]

> The client cannot be compelled to answer the question, "what did you say or write to the attorney?", but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.[79]

A solicitor must disclose the client's actions performed in his presence.[80] In *Re Ontario Securities Commission and Greymac Credit Corp,*[81] the court characterised a transfer of money from the client to solicitor as an act and refused to allow a claim of privilege. In *Madge v. City of Thunder Bay,*[82] where the issue was whether or not the defendant had delivered minutes of a meeting to her solicitor, the court ruled that *Greymac* was confined to its facts, and that the defendant was protected by solicitor-client privilege and did not have to reveal visits her lawyer's office. *Madge* was followed in *R. v. Nusca*[83] where the court did not allow disclosure of whether the lawyer sent a letter to the accused, because disclosure in this instance "would result in a communication between solicitor and client being used to the detriment of the accused in his defence of the charge and a denial of his constitutional protection

---

[76] *Greymac, supra* note 62.

[77] *Upjohn Co. v. United States,* (1981), 449 U.S. 393 (C.A. 6th Cir. 1980).

[78] *Ibid.*

[79] *Ibid* at 396.

[80] Manes & Silver, *supra* note 28. Sopinka,, *supra* note 3 at 133.

[81] *Greymac, supra* note 62.

[82] (1990), 72 O.R. (2d) 41 (H.C.J.).

[83] [1999] O.J. No. 1691.

under the Charter of Rights."[84]

Conveyance of the video tapes was an "act", but one analogous to the conveyance in *Madge* or *R. v. Nusca*? Given the criminal law context of Bernardo's case (normally associated with a higher evidentiary threshold), it is unlikely that privilege would have been lifted. Similarly, characterisation of the content as "factual" is insufficient to remove privilege. An accused testimony, shielded by the right not to testify[85] and the right to remain silent,[86] should not be garnered from confidential communications with a lawyer. The question remains whether the tapes constitute a solicitor-client communication. If so, their classification as statements of fact is unlikely to vitiate privilege.

Characterisation of the Tapes

The Bernardo tapes are problematic because they can be treated both as communications in preparation for litigation and as physical evidence of his terrible crimes. Lawyers have a duty to turn over evidence relevant to a criminal offence.[87] This duty transcends both the evidentiary rules of solicitor-client privilege[88] and the duty of confidentiality owed to the client.[89] It is, however, limited in Canada to "the apparent instrumentalities of crime – such as weapons – and the apparent products of crime – such as stolen money or property."[90]

The tapes depicting the monstrous acts perpetrated on Bernardo's captives, while

---

[84] *R v. Nuska, supra* note 83 at para 14. Note that in the criminal context, solicitor-client privilege is protected by the rights in ss.7, 10(b), 11(c) and 11(d) of the *Charter*. *Smith v. Jones, supra* note 29.

[85] ss.11(c) of the *Charter,* Sopinka, *supra* note 3 at 821.

[86] s.7 of the *Charter*, *Ibid* at 822.

[87] Derek Lundy ed., *Barristers & Solicitors in Practice* (Toronto: Butterworths, 1998) [hereinafter Lundy] at para 5.113.

[88] *State ex. rel. Sowers v. Olwell*, 64 Wash. (2d) 828 (1964), cited in *R. v. Murray, supra* note 39 at para 118.

[89] Lundy, *supra* note 87 at 5.39 – 5.40.

[90] *Clarkson v. Eckardt* (1924), 26 O.W.N. 105. Paciocco and Stuesser in their book *The Law of Evidence* 2nd ed. (1999), Chapter 7: Privilege; on-line QL: db PASE [hereinafter Paciocco & Stuesser], appear to endorse a broader exclusion to privilege than mere "instrumentalities or products of crime," stating that privilege does not apply to "physical objects." However, the only examples of exclusion Paciocco and Stuesser provide are "smoking gun" and "stolen property." Since a "smoking gun" is an "instrument of crime," and "stolen property" is a "product of crime" Paciocco and Stuesser have not, in fact, broadened the exclusion.

not instruments of crime, are undoubtedly the products of criminal activity. Privilege does not protect criminal communications. No English or Canadian court has been required to decide whether solicitor-client privilege attaches to evidence that is both a product of crime, and a confidential communication made in preparation for litigation. It is reasonable therefore, at least for the present purposes, to characterise the tapes as "communications."

Legal Advice

Wigmore explains the modern rule[91] concerning the purpose of communications that merit solicitor client privilege as follows:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance protected from disclosures by himself or by the legal adviser, except the protection be waived.

Privilege attaches to all communications made within the ambit of the solicitor-client relationship, starting from the time when the client first approaches the lawyer. It may be invoked in circumstances where confidential communications are likely to be revealed without the client's consent.[92] Privilege is, consequently, very broad. However, – and here was Bernardo's problem – privilege only attaches to communications made for legal advice.[93] It is generally agreed that,

> Documents existing before litigation was conceived and not brought into existence for the purpose of obtaining legal advice are not free from duty to produce ... merely because they are in the possession of a solicitor for the purposes of an action. There must be a real expectation of litigation before there is a privilege from production.[94]

The tapes were not created with a view to obtaining legal advice; the apparent purpose was prurient and voyeuristic; and Bernardo never attempted to claim otherwise. In fact, Mr. Rosen, who succeeded Murray in Bernardo's defence, acknowledged that "he had to turn over the tapes, although his research team was

---

[91] Sopinka, *supra* note 3 at 733.

[92] *Descoteaux v. Mierzwinski, supra* note 7.

[93] Sopinka, *supra* note 3 at 735, "... the communication must be made in order to elicit professional advice from the lawyer based upon his or her expertise in the law."

[94] Willston & Rolls, *Law of Civil Procedure* v.2 (1970) at 917 cited in *Mitchell et al. v. Canadian National Railways* (1973), 38 D.L.R. (3d) 581. See also Paciocco & Stuesser, *supra* note 91 "The privilege does not apply to documents that existed prior to the solicitor-client relationship."

trying to find authority to allow him to keep them."[95] Don Stuart writes in "Annotation: *R. v. Murray,*"[96] that "it had been rightly conceded that the physical evidence of the tapes was not protected by solicitor-client privilege which only protects communications between solicitor and client." The tapes constitute physical evidence because they were not created to communicate with a solicitor, and, as such, cannot be covered by solicitor-client privilege.[97]

Exceptions to Solicitor-Client Privilege

Communications for Criminal Purpose or Fraud

Criminal purpose or fraud vitiates privilege that normally applies to solicitor-client communications:

> If a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged, and it is immaterial whether the lawyer is an unwitting dupe or a knowing participant.[98]

The crime/fraud exception has two branches:

(1) Where a solicitor-client communication itself constitutes a crime; and

(2) Where the purpose of the communication is to obtain legal advice to facilitate the commission of a crime.[99]

The distinction between the two branches should be maintained whenever a given set of facts is considered.[100] Merely alleging that the purpose of a communication is fraud or the commission of a crime is insufficient; more is required to negate

---

[95] *R. v. Murray, supra* note 39 at para 78.

[96] (2000), 34 C.R. (5th) 290 at 291.

[97] Destruction of solicitor-client privilege did not oblige Murray to turn the tapes over to police to assist in their investigation. Rather, as Gravely J. points out at para 120-121, the "turn-over obligation to the prosecution arises from the dilemma counsel faces once improperly in possession of incriminating physical evidence," and not from a positive obligation to disclose incriminating evidence. There is no duty to assist police in criminal investigations. *R. v. P. (M.B.)* (1994), 113 D.L.R. (4th) 461 (S.C.C.).

[98] *Solosky, supra* note 8 at 757 (D.L.R.).

[99] *R. v. Murray [Evidence-Solicitor-Client-Privilege], supra* note 48 at para 47.

[100] *Ibid.*

privilege:[101]

> There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a dupe or a conspirator. ... It is not enough if the lawyer merely advised about the legality of the conduct on which the advice was sought. In that event, the lawyer would have made himself neither a dupe nor a conspirator.[102]

In some cases, the court has required *prima facie* proof of the criminal purpose,[103] while in others the test was whether there was "something to give colour to the charge"[104] meaning that "there are matters which require exploration and explanation."[105] The courts of British Columbia have held that besides evidence "giving colour to the charge," it must shed light on whether or not the client committed the acts alleged.[106]

The exception was considered in *R. v. Murray [Evidence-Solicitor-Client-Privilege]*[107] when Bernardo intervened to stop disclosure of past communications with his ex-lawyer. Following *R. v. Graham*,[108] Quinn J. held that, even if Bernardo's communications with his solicitor had been criminally motivated, motivation alone was insufficient to vitiate privilege; there had to exist an act in furtherance of this intention, and the court could find no such act.

While the court concluded that communications between Bernardo and Murray were not made for criminal purposes, it did not consider whether the communications were a crime. The question would need only have been addressed if the tapes that Bernardo passed to Murray qualified as "communications." The issue arises in a scenario where, for example, a physician makes videotapes, intended for litigation purposes, that depict criminal acts. When one balances the evidentiary

---

[101] *Finers (a Firm) v. Miro*, [1990] N.L.J.R. 1387 (C.A.); *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.).

[102] *Smith v. Jones, supra* note 29.

[103] Sopinka, *supra* note 3.

[104] *K-West Estates Ltd., v. Linemayr et al* (1984), 54 B.C.L.R. 60 (S.C.).

[105] *Ibid* at 66.

[106] *Middlekamp v. Fraser Valley Reasl Estate Board* (1992), 71 B.C.L.R. (2d) (C.A.) 273 and *Pax Management Ltd. v. C.I.B.C.*, [1987] 5 W.W.R. 252 (B.C.S.C.).

[107] *Murray [Evidence-Solicitor-Client Privilege], supra* note 48.

[108] (1985), 20 C.C.C. (3d) 210 (Ont. C.A.).

value of videotape against its criminal content, the weakness of exception-based analysis is revealed – the outcome is difficult to predict in new situations. Employing the principled analysis within the framework of Wigmore's criteria, is the best way to ensure reliability.[109]

The Public Safety Exception

The Supreme Court of Canada recently examined another exception to privilege in *Smith v. Jones*.[110] The factors considered in determining whether public safety outweighs privilege were summarised as follows:

(1) Is there a clear risk to an identifiable person or group of persons?

It is important the people in danger be identified, otherwise the threat of violence may be too obscure to pass muster. However, if the threat of harm appears "extremely serious, compelling or imminent," then even a general threat may satisfy the test.

(2) Is there a risk of serious bodily harm or death?

(3) Is the danger imminent?

To qualify for a waiver of privilege, the threat must entail a sense of urgency. The necessity of imposing a temporal qualification of the risk depends on the seriousness of the threat.

The majority in *Smith v. Jones* held that if a clear and imminent threat of serious bodily harm to an identifiable group exists, and the threat conveys a sense of urgency, then privilege must be set aside. Major J., speaking for the dissent, supported the test for waiver of privilege, but insisted that "a limited exception which does not include conscriptive evidence against the accused would address the immediate concern for public safety ... while respecting the importance of privilege." In other words, disagreement between members of the court was not related to the

---

[109] See *Case Study*, p. 210.

[110] *Smith v. Jones, supra* note 29.

test *per se* but rather to the scope of disclosure.[111]

The public safety exception does not apply to the Bernardo tapes since they record a *fait accompli* rather than actions representing any future threat. The tapes, however, would have met the requirements of the public safety exception, if privilege had been raised during the trial to declare Bernardo a dangerous offender.[112]

Waiver of Privilege

Since privilege stemming from the solicitor-client relationship belongs to the client, waiving privilege should be the client's prerogative. Legal advisers do, however, have authority to bind clients to matters arising in or incidental to litigation,[113] and this authority can extend to waiver of privilege.[114] Although Canadian courts acknowledge a solicitor's authority to act for his client, they are reluctant to allow solicitors to disclose information for their client. In fact, they have "assumed for themselves the role of ensuring that without the client's express consent the solicitor may not testify."[115]

Waiver is effected when the client makes a voluntary disclosure, consents to disclosure of any material part of a communication,[116] or gives evidence of a confidential communication.[117] Waiver in the interests of fairness can occur when a party adopts a position inconsistent with privilege, as in *Land v. Kaufman*,[118] where the statement of claim contained information later claimed to be privileged. Waiver

---

[111] For an analysis of *Smith v. Jones, supra* note 29 see Wayne N. Renke, "Case Comment: Secrets and Lives – The Public Safety Exception to Solicitor-Client Privilege: Smith v. Jones" (1999) 37:4 Alta. L. Rev. 1045.

[112] *R. v. Bernardo [Dangerous offender application]*, [1995] O.J. No. 3866. Bernardo was found to be a dangerous offender who "constituted a threat to life, safety, physical and mental well-being of other persons."

[113] Sopinka, *supra* note 3 at 755.

[114] *Derby & Co. Ltd. v. Weldon (No. 8)*, [1991] 1 W.L.R. 73 at 87 (C.A.); *Great Atlantic Insurance Co. v. Home Insurance Co.*, [1981] 1 W.L.R. 529 at 590 (C.A.).

[115] *Geffen et al. v. Goodman et. al.* (1991), 81 D.L.R. (4th) 211 (S.C.C.) at 232.

[116] Sopinka, *supra* note 3 at 756.

[117] *Smith v. Smith*, [1958] O.W.N. 135 (H.C.J.).

[118] (1991), 2 W.D.C.P. (2d) 259 (Ont. Gen. Div.).

based on fairness was applied in *R. v. Campbell*[119] when the R.C.M.P. brought into issue a good faith belief in the legality of a reverse-sting operation based on advice received from lawyers at the Department of Justice. The Supreme Court of Canada held that the R.C.M.P. had waived its right to solicitor-client privilege with respect to the advice they relied on.

When the court applied these principles to the advice Bernardo received, it concluded[120] that there was no support:

> for applying the doctrine of waiver or implied waiver to proceedings other than where the client, either by his conduct in those proceedings of by this pleadings, has expressly or impliedly waived the privilege. ... The conduct leading to a finding or a waiver would include the conduct of the client either as a party or a witness. The conduct of Bernardo does not satisfy any of these requirements.[121]

Right to Make Full Answer and Defence

As demonstrated, while solicitor-client is the maximum privilege recognised by the courts, it is not absolute. Specifically, it gives way to a party's right to make full answer and defence to criminal accusations. The Supreme Court of Canada explained it this way in *A. (L.L.) v. B. (A.)*:[122]

> When the enforcement of a privilege means that the accused will be limited as to his or her right to make full answer and defence to criminal accusations, this Court has strongly tended to favour disclosure. ... the solicitor-client privilege ... will be overridden to allow the accused to make full answer and defence to a criminal charge.

The override is not automatic; in *R. v. Mills*,[123] the Supreme Court of Canada recommended a contextual balancing process, in which the right to make full answer and defence "must be defined in a context that includes other principles of fundamental justice and *Charter* provisions."

---

[119] [1999] 1 S.C.R. 565.

[120] *R. v. Murray [Evidence-Solicitor-Client-Privilege], supra* note 48.

[121] *Ibid* at para 73.

[122] [1995] 4 S.C.R. 536, sub nom. *R. v. Beharriell* at para 69.

[123] (1999), 139 C.C.C. (3d) 321 at 364.

In balancing these factors, the court in *Re Murray and The Queen*[124] considered both Bernardo and Murray's rights before concluding that the prejudice to Murray resulting from solicitor-client privilege would outweigh that experienced by Bernardo in the absence of privilege. Gravely J. held that,

> Apart from Mr. Bernanrdo's right in principle to preserve solicitor-client privilege ... having lost his appeal to the Court of Appeal, any prejudice he might suffer by way of invasion of his privilege is largely theoretical and is dependent upon his obtaining leave to appeal to the Supreme Court of Canada and eventually ending up with a new trial. I view the chances of that happening as remote. On the other side of the scale, Mr. Murray's ability to defend himself on this very serious charge is threatened and indeed his very liberty is at stake. There is no doubt that Mr. Bernardo's privilege must give way to the overwhelming importance of Mr. Murray's right to full answer and defence. To what extent must the override occur? Mr. Bernardo's privilege does not disappear but only yields to full answer and defence as necessary. ... to adequately conduct the defence, I am satisfied that the invasion of Mr. Bernardo's solicitor-client privilege must be extensive.[125]

Principle-Based Analysis of Exceptions to Solicitor-Client Privilege

Solicitor-client privilege for obtaining legal advice meets Wigmore's four conditions:[126]

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

---

[124] (2000), 144 C.C.C. (3d) 322.

[125] *Ibid* at paras 14–16.

[126] Manes & Silver, *supra* note 28 at 21.

If the solicitor is acting in his professional capacity, the first three conditions of Wigmore's test are satisfied for solicitor-client communications. To satisfy the fourth requirement, the advantages of protecting a communication from disclosure must first be weighed.[127] Adverse effects to be considered, include injury to the relationship between parties claiming privilege, or injury to other relationships of a similar nature.[128] Effects of non-disclosure must be examined in light of their impact on society[129] and the analysis must reflect *Charter* values.[130] Finally, to balance competing interests, the court must exercise common sense and good judgement.[131]

Operation of the Rules of Solicitor-Client Privilege

The principles of application were articulated by the Supreme Court in *Descoteaux v. Mierzwinski*[132] as follows:

> (1) The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> (2) Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> (3) When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> (4) Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

---

[127] *Ryan, supra* note 1 at para 29. The privilege in question was between doctor and patient.

[128] *Ibid.*

[129] *Ibid.*

[130] *Ibid* at para 30.

[131] *Ibid* at para 32.

[132] *Descoteaux v. Mierzwinski, supra* note 7 at 875.

Confidentiality is not merely a rule of evidence but a substantive rule as well.[133] It can be raised in *any* circumstances where the client's communications are likely to be disclosed without his consent. There exists a general presumption in favour of confidentiality by which legislation that interferes with this right must be drafted in the least intrusive way.[134] Privilege has a protracted-temporal aspect; in many cases protection has been extended beyond situations when admissibility normally arises (i.e. trial and discovery) to cover early investigative stages when a solicitor is faced with a search warrant.[135] This development was narrowed in *Solosky v. Canada,* to ensure that an evidentiary connection remained and that privilege did not become a rule of property. Once privilege attaches to a document, it remains attached for the benefit of the client[136] so that "once privileged, always privileged."[137] However, privilege is definite and once a party asserting privilege no longer has an interest to protect, the privilege may cease to exist.[138]

It is regrettable that, given the complexity of the rules governing solicitor-client privilege, professional organisations in Canada have not provided more guidance for lawyers by clearly delineating the scope of privilege. Neither the *Rules of Professional Conduct* published by the Law Society of Upper Canada (L.S.U.C), the *Code of Professional Conduct* of the Canadian Bar Association nor the professional codes of any other province address the scope of solicitor-client privilege. In the wake of Murray's trial, the L.S.U.C. has appointed a special committee[139] to create a code of professional conduct for lawyers put in circumstances comparable to Murray's.[140]

---

[133] *Descoteaux v. Mierzwinski, supra* note 7 at 875.

[134] *Ibid.*

[135] Sopinka, *supra* note 3 at 739.

[136] Delisle, *supra* note 10 at 668.

[137] *Ibid,* citing *Calcraft v. Guest,* [1989] 1 Q.B. 759 at 761 (C.A.).

[138] *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 at 42 (Ont. C.A.).

[139] Scheduled to report back to Convocation on January 25, 2001.

[140] D. Gambrill, "Murray Free and Clear" (2000) 11: 42 *Law Times* 1 at 1.

Conclusion

Case Study

Although privilege could not attach to the Bernardo tapes since they are obscene materials and not legal communications, our examination of solicitor-client privilege is not entirely academic. It is likely that litigation will soon arise concerning the status of videotapes allegedly containing evidence of a crime but created for obtaining legal advice and thereby constituting legitimate solicitor-client communications. The question of whether to characterise the tapes as "physical evidence of a crime" or "solicitor-client communications" and which characterization should prevail will eventually need to be addressed to fill the gap left by the decision in *R. v. Murray*.

It is common practice among surgeons to videotape operations they perform, and introduce the tapes as evidence in medical malpractice suits.[141] Videotaping sessions with patients may also be sound practice for psychiatrists concerned about allegations of misconduct.[142] Although psychiatrists may be reluctant to videotape sessions because of patient confidentiality issues,[143] they can use such videotapes to mount a defence either,

(1) because an implied waiver of confidentiality arises when the patient makes his

---

[141] In *Mok v. Wong*, [1996] O.J. No. 1971 a videotape showing the precise cosmetic procedure performed by Dr. Wong on Mrs. Mok was viewed by an expert witness to determine if the procedure was appropriate.

[142] In a recent case, *P.V.M. (Re)*, [1995] O.C.P.S.D. No. 2, Dr. P.V.M., a psychiatrist was accused by a former patient of forcing a sexual relationship on her. The patient alleged numerous instances of sexual misconduct. One difficulty dealing with incidents alleged to have happened more than twenty years previous, was creating an accurate reconstruction of events. Dr. P.V.M. testified from his written records. Ultimately, the allegations failed because the court did not find the complainant a credible witness.

[143] In a recent sexual assault case, *R. v. Mills*, [1999] 3 S.C.R. 668, the Supreme Court of Canada confirmed that there is no absolute privilege protecting therapy records. The accused would not have access to the complainant's records containing irrelevant information that might distort the search for truth. But the rights of the accused must prevail where the lack of disclosure would render him unable to make full answer and defence. In *Smith v. Jones, supra* note 29, a psychiatrist evaluation (prepared for litigation) of the accused finding him to be dangerous was held not to be privileged through an operation of the public safety exception.

or her medical condition an issue in the case;[144]

(2) because the accused psychiatrist would not be able to make "full answer and defence" without the tapes;[145] or

(3) because it is trite law that once a document is relied upon[146] as evidence, privilege which would otherwise attach is waived.[147]

If a complainant seeks to introduce records of sessions made by a defendant psychiatrist, the psychiatrist may successfully claim privilege for the records. To date, there is no reported Canadian case in which the issue has arisen; doctors appear eager to release information in their possession to clear themselves of charges.[148] It is conceivable that a doctor might videotape sessions to limit liability and that he might be reluctant to disclose those tapes where they hurt his case.

Application of the principled approach to balance competing interests is preferable to sifting through a list of execptions.[149] Ordering disclosure of the tapes would clearly injure the solicitor-client relationship by removing privilege crucial to the relationship. However, if the tapes are not disclosed, the Crown is prevented from obtaining evidence that may settle the case. While the *Charter* ensures

---

[144] When an allegation of sexual misconduct is made against a psychiatrist, the patient's mental health becomes an issue in the case because the perceived sexual conduct might be a result of the patient's delusion or the entire story may be fabricated by a depressed patient. See, for example, *P.V.M. (Re), supra* note 142.

[145] *R. v. Mills, supra* note 143.

[146] If the patient seeks to introduce the record of a session into evidence, he waives any right of confidentiality with respect to the record.

[147] *Edwards v. Law Society of Upper Canada*, [1995] O.J. No. 2900 at para 13.

[148] A doctor was unwilling to volunteer information in *G.A.B. v. Sampath*, [1999] N.J. No. 164 (Nfld. S.C.) where the plaintiff alleged that she was forced to have a sexual relationship with the defendant who was her psychiatrist for a substantial part of the relationship. Dr. Sampath maintained that the relationship was consensual and opposed the production of his notes made during sessions. When he consulted his own psychiatrist, the plaintiff went after those records as well. The court concluded that the records of sessions between Sampath and his psychiatrist were privileged and would remain so since the records were irrelevant to the allegations at issue. [The court cited *Ryan, supra* note 1 as the relevant authority. The same test was reiterated in *R. v. Mills, supra* note 143.]

[149] Since it is solicitor-client privilege that is claimed for the tapes, Parts 1-3 of Wigmore's test are satisfied.

people's liberty, the right is not absolute[150] and restrictions according to the principles of fundamental justice are permitted.[151]

The answer, in this case, lies in the fact that the injury to the interests of justice is relatively small, because in the vast majority of cases there is no videotape evidence available to resolve allegations. Despite the limited number of people who keep videotape records, the justice system has continued to work unimpeded. However, when a person decides to make videotapes to protect his interests, should litigation arise, he implicitly relies on the protection of solicitor-client privilege assuming that the evidence he creates will remain in his control. Law enforcers should not reap where they have not sown. Privilege should rest with the creator of videotape evidence.

Summary

Solicitor-client privilege is a long-standing rule of law that protects confidential communications between a client and lawyer. Solicitor-client privilege only attaches to confidential communications that pass between a client and lawyer when seeking legal advice. Solicitor-client privilege does not protect the tapes that Bernardo conveyed to Murray because they were not prepared for the dominant purpose of seeking legal advice. It is my position, however, that the tapes were "communications" for the purposes of privilege, and that privilege should attach in situations where videotapes of alleged crimes are created to seek legal advice (such as when a surgeon or a psychiatrist videotapes operations or sessions with a patient).

Privilege can be removed if the client waives it, or if maintaining the privilege poses a threat to public safety. A more difficult exception in the context of dual-characterisation videotape evidence is the "criminal purpose or fraud" exception. For a videotape that is both a communication for the purposes of mounting a defence and evidence of a crime, the determination of whether privilege should attach is best made through principled analysis. Application of principled analysis to decide whether privilege attaches leads to the conclusion that videotapes made for protection from litigation should remain privileged no matter what they depict. Since most cases are prosecuted without videotape evidence, preventing disclosure of videotapes will not seriously impair the justice system. Conversely, disclosure of communications made in full expectation of confidentiality will harm, both the

---

[150] *Canadian Charter of Rights and Freedoms*, s.1.

[151] *Ibid*, s.8.

solicitor-client relationship, and the ability of the accused to mount the best possible defence.

R. v. Murray shows how technological advances create new difficulties in time-hallowed areas of the law. To prepare for these dilemmas, lawmakers must either create an exhaustive list of guidelines that will account for any future situations – an impossible task – or construct a simple principle that will yield logical and predictable results. Questions concerning privilege will continue to surface as the use of video recorders becomes more widespread. It may be a good idea to come up with some answers.