

Case Name:
R. v. Hundle

Between
Her Majesty the Queen, respondent, and
Jasbir Singh Hundle, applicant

[2003] A.J. No. 898

2003 ABQB 618

58 W.C.B. (2d) 344

Action No. 016264954Q1

Alberta Court of Queen's Bench
Judicial District of Edmonton

Veit J.

Heard: June 30, 2003.

Judgment: July 11, 2003.

(38 paras.)

Criminal law -- Evidence and witnesses -- Documents and reports -- Psychiatric or counselling records.

Determination of whether records of the complainant's psychiatrist and group home were producible to the accused. The complainant's psychiatrist was scheduled to testify at the trial. Some of the records related to the complainant's hyper-sexuality. In one record, the complainant's caregiver gave an opinion as to the complainant's credibility.

HELD: Certain of the records were to be produced. The records for which the evidence could be better provided by the complainant's psychiatrist were not to be produced. The records about the complainant's hyper-sexuality were not probative of the issues at trial and the complainant's psychiatrist could better provide evidence about the matter. The caregiver's opinion was not supported and should not be released. Records that were not probative of the issues at trial were not

released. Neither the accused nor his counsel were to disclose the contents of the records to any other person or make copies of the records without prior court approval.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 278.5, 278.7.

Counsel:

P. Hebert, for the complainant.

W.L. Gutter, for Catholic Social Services - Group Home.

J.J. Heelan, by way of written submissions, for Dr. Swanson.

C.P. Cobban, for the Crown.

Brij Mohan, for the accused.

MEMORANDUM OF DECISION

VEIT J.:--

Summary

1 In an earlier decision, the court had ordered that certain records be made available to the court to allow the court to decide whether they should be produced to the accused. From amongst the records produced, the court had determined that some clearly did not meet the Mills test for onward transmission to the accused. The court had also identified another group of records which might qualify for onward transmission; this hearing was held to give the complainant and the holders of the records the opportunity to make further submissions on the issue of disclosure.

2 The complainant argues that:

- certain records have no probative value relative to the issues at trial;
- certain records are not necessary since her psychiatrist will be testifying at trial and can provide the information that is contained in the records;
- certain records are more therapeutic than probative.

3 From amongst the records identified as possibly meeting the Mills test, and having regard to the factors set out by Parliament in s. 278.7 of the Code, the court has concluded that certain records should be produced to the accused. Those records will be produced subject to the conditions outlined hereunder. The totality of the records made available to the court will be sealed.

Cases and authority cited

4 By the court: Hundle [2002] A.J. No. 1549 (Q.B.)

1. Background

5 The general background to this decision has been set out in an earlier decision: see citation above.

6 The general principles relating to the disclosure of confidential medical and similar records were also reviewed in the earlier decision.

7 After the issuance of the earlier decision, the records of the complainant's psychiatrist and of the complainant's group home were produced to the court for further review and potential production to the accused. The court determined that most of the records were not producible. However, the court informed the parties by letter of some portions of the records which might have to be produced to the accused; the court then received additional oral submissions from the complainant's lawyer and from the complainant's group home as to whether the records identified in the letter should be produced to the accused. The complainant's psychiatrist made submissions in writing.

2. Factors to be considered in determining whether records should be produced to the accused

8 Parliament has set out the factors which the court must consider in determining whether private records should be produced to an accused. Section 278.5 is reproduced for ease of reference:

(2) Factors to be considered - In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:

- (a) the extent to which the record is necessary for the accused to make a full answer and defence;
- (b) the probative value of the record;
- (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
- (d) whether production of the record is based on a discriminatory belief or bias;

- (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- (f) society's interest in encouraging the reporting of sexual offences;
- (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- (h) the effect of the determination on the integrity of the trial process.

9 Of these factors, the complainant's lawyer has emphasized the following:

- * some of the identified records are not necessary. They do not fill any gap, particularly having taken into account the fact that the complainant's psychiatrist will testify at trial;
- * some of the identified records are not material. They are not probative of any issues before the court;
- * some of the identified records are essentially hearsay - that is they are the record of what a group home employee understood the complainant's psychiatrist to be stating;
- * some of the records are more therapeutic than probative.

3. Application of the factors in this case

10 The references to pages numbers in this section are the page numbers assigned by the court to the various portions of the files which had previously been culled.

11 As to the group home files, the complainant emphasizes that they are replete with detail available only because she is a resident of a group home where her every movements are subject to scrutiny. In such a situation, the court must be particularly alert to ensure that the complainant's privacy is not needlessly invaded.

12 The complainant has not objected to the introduction of certain material. Therefore, pp. 6 to 8 and the part of p. 10 dealing with the DATS complaint, all of p. 16 and the top of p. 17, pp. 19, 20 and 21, pp. 27 to 29 and p. 31, p. 41, should all be released to the accused.

13 Page 3 should not be released: the information there is not probative on the issues at trial, and the medical information provided concerning the nature and symptoms of the complainant's hyper-sexuality can be better provided by the psychiatrist.

14 Pages 4 and 5 should not be released: although they related to potential suggestibility of the complainant, that evidence can better be provided by her psychiatrist.

15 Pages 9 and 10 should not be released, except for the portion of p. 10 referred to above: these again are mere examples of hyper-sexuality that are not probative of the issues at trial and about

which the complainant's psychiatrist can provide general information to the trier of fact.

16 Pages 11 and 12 should not be released: this is private information that is not probative of the issues at trial.

17 Page 15 should not be released: this is information that can better be provided by the complainant's psychiatrist. This is an example of a situation in which the care providers at the group home are not applying - in their dealings with the complainant - information they have received from the complainant's family physician or psychiatrist; they are not adding facts about the complainant's ability to testify or about her motive to fabricate or about her ability to distinguish between fact and delusion. Therefore, this is an example of the kind of information that is better obtained direct from the psychiatrist.

18 Page 22 should not be released: the care giver's impression of the complainant's credibility is not supported in any way. The law is very cautious about admitting into evidence opinions concerning a witness's truth telling; the comments by this care-giver do not meet the criteria of the law.

19 Pages 23 and 24 should not be released: this is material relating to general inter-actions between the complainant and her peers, which material is too peripheral to the issues at trial to justify the invasion of the complainant's privacy.

20 Page 38 should not be released: the material has only a tenuous connection to the issues that will be raised at trial. There is nothing in the material about lying, and nothing in the material about consequences for behaviour; therefore, this material could not assist the trier of fact in determining trial issues.

21 Pages 39 and 40 should not be released: this is material which can better come direct from the complainant's psychiatrist.

22 Page 48 should not be released: the information about medication can be obtained from the complainant's psychiatrist, and the information about the complainant's behaviour can also be obtained through the psychiatrist.

23 Page 59 should not be released: the information about the symptoms of the complainant's illness, and her progress as a result of treatment, are all issues that can be adequately explored through the complainant's psychiatrist.

24 As to the psychiatric records, the court reminds itself that the psychiatrist is a treating psychiatrist, that there exists a patient-doctor bond between the psychiatrist and the complainant, as well as an ongoing therapeutic relationship which must be recognized and nurtured. However, some of the information recorded by the psychiatrist must be disclosed to the accused in order to allow him to make full answer and defence to the charge. In particular, the record at p. 60 should be

provided, as well as the entries at pp. 61, 65, 66, 70, 72, 76, 80, 108, 130, and 171.

25 Page 13 should not be released: it is a review prepared by the psychiatrist in preparation for his testimony at preliminary. We will have the actual evidence of the psychiatrist before the court and his actual notes; therefore, this information is not required.

26 A portion of the record on page 22 should be disclosed. However, the portion which had been originally highlighted by the court, which begins "she has been worse", should continue past the "re" to include the reference to missing food and down to the comment at the end of the line drawn by the psychiatrist to distinguish between the caregiver's comments and the doctor's impression. Although this entry is hearsay insofar as the psychiatrist is concerned, the psychiatrist does form an impression of the complainant's medical progress based on the information that he receives from the group home care giver; the information can be included, partly because it is presumptively reliable, but more importantly, because the psychiatrist comes to some impressions on the emotional and mental health of the complainant based on that information.

27 I would ask the lawyer for the psychiatrist to provide legible copies of pp. 166 and 167 of the psychiatrist's notes; the copies that were made available to the court, even the second copies, were illegible. Until a legible copy of those notes has been provided, the court will not be in a position to make either a stage 1 or a stage 2 assessment concerning the production of this information.

28 The top portion of page 28, concluding with item 6, should be disclosed. This information has previously been disclosed to a stranger - Air Canada; there is no reason why it should not be disclosed to the accused. Moreover, it provides information about what the complainant's psychiatrist thought was appropriate information to provide to strangers concerning the complainant's non-conventional sexual behaviours.

29 Page 41 should not be released: this is information that is not probative. To the extent that this entry contains information about the complainant's general behaviour, evidence can be obtained on that issue from the complainant's psychiatrist.

30 The remainder of the records provided to the court for determination on the production issue will be sealed.

4. Conditions on Production

31 The conditions set out hereunder apply to the production of those records which have earlier been identified.

32 The records shall be edited so that only the pages which have been identified, and only the portions within those pages that have been identified, shall be produced to the accused.

33 Only a copy of the extracts, rather than the original records themselves, shall be produced.

34 Neither Mr. Hundle nor Mr. Mohan will disclose the contents of the records to any other individual or person, for example to any expert who may be retained by the defence, except with the prior approval of the court.

35 Neither Mr. Hundle nor Mr. Mohan will make a copy of the records provided, except with the prior approval of the court.

36 Although I believe that the records have been edited so as to remove identifying information with respect to any individual mentioned in the records, if such identifying information has not been removed, it shall be edited out of the records before the records are produced to the accused.

5. Publication of Reasons

37 The same factors in support of publication apply here as applied in the earlier decision:

5. Publication of reasons

[para68] Parliament has legislated that a court may order that its determination concerning whether records should be produced may be published if the court so orders, after taking into account the interests of justice and the right of privacy of the person to whom the records relate. It is important for the public to have the opportunity of assessing the approach taken by the courts to the complex task of balancing opposing rights; therefore, I order that these reasons may be published. As no preliminary inquiry publication ban is in effect, and these reasons do not identify the complainant, there is no cause not to permit these reasons to be published.

6. Conclusion

38 or the reasons set out above, the court orders the production of the records identified herein to Mr. Hundle.

LEE J.

cp/e/nc/qw/qlmmm