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A QUESTION OF PRIVILEGE: VALID PROTECTION OR OBSTRUCTION OF JUSTICE?

By S. A. TACON*

I. INTRODUCTION

It is almost a tradition in dealing with the issue of professional privilege to begin with a recitation of Wigmore's four criteria justifying a testimonial privilege¹ and then, depending on one's point of view, to demonstrate that the arguments support or deny the extension of a privilege to medical professionals in general or psychiatrists in particular. The literature on privilege is substantial² and this paper attempts as far as possible to avoid repetition of propositions presented elsewhere. Particular attention, however, is given to the relevant recommendations of the Canada Law Reform Commission as embodied in the proposed Evidence Code.³

Within these bounds, though, the paper presents a case for statutory recognition of a modified privilege for mental health professionals in both the civil and criminal spheres. With regard to compulsory psychiatric examinations, it is argued that the statutory privilege should be buttressed in two ways. First, inculpatory statements and admissions made during such psychiatric examinations should be inadmissible in court either as proof of guilt or as the foundation for the opinion evidence of expert witnesses. Secondly,

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¹ Wigmore, 8 *Evidence*, rev. McNaughton (Boston: Little, Brown, 1961) s. 2285 at 527.

² For a partial list of relevant articles, see Tollefson, *Privileged Communications in Canada (Common Law Provinces)* (1966-67), 4-5 *Colloque int. dr. comp.* 32; Slovenko, *Psychiatry and a Second Look at the Medical Privilege* (1959-60), 6 *Wayne L. Rev.* 175; Slovenko and Usdin, *Psychotherapy, Confidentiality and Privileged Communication* (Springfield: C. C. Thomas, 1966); Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope* (1973-74), 23 *Cath. U. Am. L. Rev.* 649; Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978); Orland, *Evidentiary Privileges in the United States* (1966-67), 4-5 *Colloque int. dr. comp.* 18; Louisell, *The Psychologist in Today's Legal World: Part II* (1956-57), 41 *Minn. L. Rev.* 731; Kirkpatrick, *Privileged Communication in the Correction Services* (1964-65), 7 *Crim. L.Q.* 305; Kennedy, *Exclusion of Relevant and Admissible Evidence—Doctors and Priests* (1964-65), 13 *Chitty's L.J.* 41; Hammelmann, *Professional Privilege: A Comparative Study* (1950), 28 *Can. B. Rev.* 750; Guttmacher and Weihofen, *Comment: Privileged Communications Between Psychiatrist and Patient* (1952-53), 28 *Ind. L.J.* 32; Freedman, *Medical Privilege* (1954), 32 *Can. B. Rev.* 1; Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications* (1963-64), 10 *Wayne L. Rev.* 609; Dickens, *Legal Protection of Psychiatric Confidentiality* (1978), 1 *Int. J. of Law and Psych.* 255; and Baldwin, *Confidentiality Between Physician and Patient* (1962), 22 *Maryland L. Rev.* 181.

³ In *Report on Evidence* (Ottawa: Law Reform Commission of Canada, 1975) at 13 ff. [hereinafter Evidence Code].

several procedural changes are recommended to reduce further the possibility of unfairness to the accused arising through the exercise of the state's powers to order a psychiatric examination. Support for these propositions is drawn, *inter alia*, from the *First Annual Report of METFORS*⁴ and interviews with mental health professionals.⁵

The format of the paper is as follows: the common law position, including Canadian case law, is presented; arguments favouring and opposing the adoption of a modified privilege are considered, including the necessity for a statutory rather than common law basis for such a privilege; and the proposals themselves are then detailed.

II. PRIVILEGE AND THE COMMON LAW

The foundation of rational adjudication in civil and criminal disputes is the requirement that all relevant and reliable evidence be laid before the triers of fact and law. The common law has evolved a number of doctrines to exclude information considered irrelevant (i.e., not tending to prove or disprove a fact in issue) or unreliable.⁶ The exclusion of hearsay and involuntary confessions, for example, is based on the supposedly unreliable nature of such evidence. The common law also has recognized that the judicial policy of full evidentiary disclosure conflicts at times with other policy considerations and might well require the subordination of the evidentiary process to such competing interests. This recognition forms the basis of the common law concept of privilege—the right or obligation of the witness to refuse to answer questions in court without risk of the judicial sanction of contempt proceedings.

A common law privilege has been established with regard to matters of national security,⁷ as well as communications between solicitor and client

⁴ The Metropolitan Toronto Forensic Service (METFORS), created by an Order-in-Council (Ontario Gazette, 1977, Vol. 110-27, OC 1417/77, at 2351) provides psychiatric services to the courts of Metropolitan Toronto. The bulk of remands from the courts are for three days and are handled in the Brief Assessment Unit (BAU) by a team of mental health professionals including a psychiatrist, psychologist, social worker, psychiatric nurse and corrections officer. Facilities are also available in an inpatient unit for thirty or sixty day remands where additional time is required for assessment. METFORS reports annually to the Attorney General. Reference is made to data compiled by METFORS and published in the Statistical Supplement to the First Annual Report.

⁵ Some of these professionals are attached to METFORS. It must be stressed, however, that the interviews constituted a random sample of opinions regarding privilege. Nevertheless, the information as to actual practice in the BAU and the courts and personal responses to the privilege issue were most helpful in evaluating the legal arguments. The writer also was permitted to observe the brief assessment process (i.e., the interview with the accused and the subsequent team discussion and evaluation of the individual, including the findings to be reported to the judge). The opportunity to consider the concept of privilege in the context of actual court referrals was of considerable assistance as well.

⁶ The "law of evidence," of course, comprises a vast body of often contradictory case law. See, generally, Wigmore, *supra* note 1; and Cross, *Evidence* (2d ed. London: Butterworths, 1963).

⁷ See *Duncan v. Cammell Laird & Co.*, [1942] A.C. 624, [1942] 1 All E.R. 587 (H.L.), *aff'g* [1941] 1 K.B. 640 for a discussion of the basis for a privilege regarding matters of national security.

and between husband and wife. The rationale for privilege in the case of matrimonial communications is based on the public interest in upholding the marital relationship—compelling one spouse to testify to such matters would undermine the stability of marriages. This common law privilege has been codified at both the provincial⁸ and federal⁹ levels. The justification for a solicitor-client privilege rests on the premise that trained legal representation is essential to a just adjudication. Absent such a privilege against disclosure, “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.”¹⁰ Rather than thwarting the court’s search for truth, the protection of solicitor-client confidence thus actually supports the proper administration of justice.¹¹

Beyond these privileges, the common law requires disclosure of relevant testimony despite the confidential nature of the communications.¹² Thus, testimonial privilege has not been extended to confidences between physician and patient, social worker and client, or priest and penitent.¹³ While acknowledging that such matters may well be so confidential as to render the attending physician liable if he discloses those communications to third parties, the judiciary has stressed that a medical practitioner is required to testify to such confidences and violates no ethical standard in so doing.¹⁴

It should be noted at this point, however, that the common law position denying a medical privilege represents a clear judicial policy choice not paralleled in most European codes, which do recognize the special nature of the physician-patient relationship.¹⁵ In Germany, the privilege is that of

⁸ *Ontario Evidence Act*, R.S.O. 1970, c. 151, s. 11.

⁹ *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 4(3). It should be noted that s. 4(2) specifies certain offences under the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3; and the *Criminal Code*, R.S.C. 1970, c. C-34, where a spouse is a competent and compellable witness. The proposed Evidence Code would enlarge matrimonial privilege to include other family relationships but would rely on the discretion of the judge in balancing the nature of the relationship, the probable probative value of the evidence, the importance of the question and the need for the person’s testimony with the public interest in privacy, possible disruption of the relationship and the harshness of compelling disclosure. *Supra* note 3, s. 40. The “privilege,” then, would be discretionary, not absolute.

¹⁰ *Greenough v. Gaskell* (1833), 1 My. & K. 98 at 103, 39 E.R. 618 at 621 (Ch. D.) *per* Lord Brougham.

¹¹ *Id.* Also see Ont., 2 *Royal Commission Inquiry into Civil Rights (McRuer Report)* (Toronto: Queen’s Printer, 1968) at 817-19. The proposed Evidence Code would codify the common law solicitor-client privilege only with respect to confidential communications made in contemplation of litigation. *Supra*, note 3, s. 42(1). The privilege at common law included all confidential communications except those involving future criminal or fraudulent conduct.

¹² *Wheeler v. LeMarchant* (1881), 17 Ch. D. 675 *per* Jessel M.R. represents the *locus classicus* of the common law position.

¹³ A statutory privilege is recognized between priest and penitent in Québec and Newfoundland: *Code of Civil Procedure*, S.Q. 1965, vol. II, s. 308; *The Evidence Act*, R.S.N. 1952, c. 120, s. 6. See, generally, *McRuer Report*, *supra* note 11, at 820-21.

¹⁴ *The Duchess of Kensington’s Case* (1776), 1 Leach 146, 168 E.R. 175 (K.B.); *Halls v. Mitchell*, [1928] S.C.R. 125 at 136-38 *per* Duff J.

¹⁵ See Hammelmann, *supra* note 2.

the patient who may consent to disclosure.¹⁶ In contrast, the French courts have determined that the "duty of secrecy is a general and absolute duty from which doctors cannot be freed, either by express order of the court or by the consent of the patient."¹⁷ The common law in the United States does not recognize a medical privilege. However, in 1928, New York enacted a statute conferring a physician-patient privilege. Since then, almost two-thirds of the states have promulgated some form of a medical privilege law.¹⁸

The harshness of the common law regarding medical privilege may be mollified somewhat by the operation of two other common law doctrines: "without prejudice" statements and judicial discretion. Many professionals such as social workers, doctors and clergy are involved in attempts to reconcile marriage partners. Given the state interest in promoting reconciliation rather than divorce, such communications have been held, even tacitly, to be without prejudice and, therefore, inadmissible in a court of law.¹⁹ It may well be that the courts would recognize other circumstances wherein communications would be considered implicitly to be "without prejudice."²⁰

Judicial discretion has been utilized frequently by the courts to confer, in practice, a "privilege" against disclosure of confidential matters where, for example, a clergyman indicates a reluctance to testify.²¹ Indeed, in one Ontario decision,²² Stewart J. stated his clear opposition, at least in that case, to forcing a psychiatrist to testify as to the confidential communications of a patient. The basis of the discretion rests on rather vague criteria. In the words of one commentator, "a judge or magistrate has a discretion to exclude relevant and admissible evidence when it is not in the *interests of justice* to admit it or when it would be *unfair* to one of the parties to do so."²³ The interpretation of such phrases and their application in the context of a particular case obviously would vary considerably according to the predilections of individual judges.

It must be stressed that the absence of a testimonial privilege beyond solicitor-client communications applies equally to civil and criminal cases. Before proceeding further, it is necessary to consider briefly several other

¹⁶ *Id.* at 755-56.

¹⁷ *Id.* at 757.

¹⁸ See Annot., *A State Statute to Provide a Psychotherapist-Patient Privilege* (1966-67), 4 Harv. J. Legis. 307 at 315 for a listing of the relevant state laws. But *cf.* Slovenko, *Psychotherapist-Patient Testimonial Privilege*, *supra* note 2, for a critical opinion of the effectiveness of such statutes.

¹⁹ *Mole v. Mole*, [1950] 2 All E.R. 328 (C.A.); *Henley v. Henley*, [1955] 1 All E.R. 590, [1955] P. 202.

²⁰ The proposed Evidence Code, *supra* note 3, codifies "without prejudice" statements and negotiations for purposes of proof of liability, although such evidence is admissible for other purposes: s. 24.

²¹ *Broad v. Pitt* (1828), 3 Car. & P. 518, 172 E.R. 528 (C.P.).

²² *Dembie v. Dembie* (1976), 21 R.F.L. 46 (Ont. H.C.).

²³ Kennedy, *supra* note 2, at 42. (Emphasis added.) This conclusion was based on a line of English cases: *Noor Mohammed v. The King*, [1949] A.C. 182, [1949] 1 All E.R. 365 (P.C.); *Harris v. DPP*, [1952] A.C. 694, [1952] 1 All E.R. 1044, 36 Cr. App. R. 39 (H.L.), *rev'g* [1952] 1 K.B. 309; *Kuruma, Son of Kaniu v. The Queen*, [1955] A.C. 197 (P.C.); and *R. v. Payne*, [1963] 1 W.L.R. 637 (C.C.A.).

common law principles operating within the criminal sphere. In marked contrast to the protection against self-incrimination afforded by the Fifth Amendment to the American Constitution, Canadian case law bestows no comparable general right on accused individuals.²⁴ However, several rules do grant some protection. For example, the accused is a competent witness for the defence, but not a compellable witness for the Crown.²⁵ For pre-trial confessions to persons in authority to be admissible as evidence, they must be shown by the Crown to be voluntary.²⁶ Whether or not a statement was "voluntary" depends upon the circumstances, but must include the notion that the confession was free from the fear of prejudice or hope of advantage.²⁷ The requirement that the confession be made to a "person in authority" has generated considerable case law. At the very least, a uniformed policeman or Crown counsel falls within the category.²⁸ Some courts, though, have utilized an objective test, i.e., the person who induces the confessions must actually have the power to influence the prosecution,²⁹ while others have focused on the subjective view, i.e., whether the accused believed the individual to have such power.³⁰

The question, then, is this: are medical practitioners or other mental health professionals "persons in authority" for the purpose of the confessional rule? If the answer is "yes," such admissions are not privileged, but must be shown to be voluntary by the Crown. If "no," the statements are neither privileged nor must the Crown satisfy the burden of proving voluntariness. The confessions are admissible, although the individual circumstances may raise questions of credibility. The issue is of real concern in that the accused may be forced to undergo physical examination by a doctor, or a psychiatric examination, or both.³¹

The courts have not resolved the matter clearly. A doctor in a public

²⁴ Ratushny, *Is There a Right Against Self-Incrimination in Canada?* (1973), 19 McGill L.J. 1.

²⁵ This principle is now codified in the *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 4(1). Section 4(5) provides that the failure of the accused to testify shall not be made the subject of comment by the judge or by counsel for the prosecution. Cf. Evidence Code, *supra* note 3, s. 56, which continues the non-compellability of the accused but would permit comment on the failure to take the stand.

²⁶ *Ibrahim v. The King*, [1914] A.C. 599; *Piché v. The Queen*, [1971] S.C.R. 23, 11 D.L.R. (3d) 700, [1970] 4 C.C.C. 27, *rev'g* 69 W.W.R. 336 (Man. C.A.); *Boudreau v. The King*, [1949] S.C.R. 262, 3 D.L.R. 81, 94 C.C.C. 1, *aff'g* 93 C.C.C. 55 (Qué. K.B.).

²⁷ *R. v. Fitton*, [1956] S.C.R. 958, 6 D.L.R. (2d) 529, 116 C.C.C. 1.

²⁸ Kenny, *Outlines of Criminal Law*, ed. Turner (18th ed. Cambridge: University Press, 1962) at 517; Wigmore, *supra* note 1, at 258-59.

²⁹ *R. v. Roadhouse*, [1934] 1 W.W.R. 349, 61 C.C.C. 191 (B.C.C.A.); *R. v. Wilson*, *R. v. Marshall-Graham*, [1967] 2 Q.B. 406, [1967] 1 All E.R. 797, 51 Cr. App. R. 194.

³⁰ *R. v. Myles*, [1923] 2 D.L.R. 880, 40 C.C.C. 84 (N.S.S.C.); *Loiselle v. The Queen* (1955), 11 C.C.C. 265 (P.Q.Q.B., App. Side); *R. v. Pettipiece*, [1972] 5 W.W.R. 129, 18 C.R.N.S. 236 (B.C.C.A.).

³¹ The accused may be remanded for a psychiatric examination under the *Criminal Code*, R.S.C. 1970, c. C-34, ss. 465, 547, or under provincial legislation, for example, *The Mental Health Act*, R.S.O. 1970, c. 269 as am. by S.O. 1978, ss. 4 and 5. Further, the Crown may order such an examination: *Vaillancourt v. The Queen* (No. 2), [1976] 1 S.C.R. 13, 31 C.R.N.S. 81, *aff'g* (1974), 16 C.C.C. (2d) 137 (Ont. C.A.).

hospital rendering emergency treatment has been held not to be a "person in authority."³² Where a convicted individual was examined prior to a dangerous sexual offender hearing, one court has held that the psychiatrist was a person in authority,³³ while three reached the opposite conclusion.³⁴ Outside the context of a dangerous sexual offender hearing, the Supreme Court of Canada held that where the testimony of the psychiatrist was limited to the mental capacity of the accused and the statements themselves were not tendered as evidence, the issue of whether the psychiatrist was a person in authority was irrelevant.³⁵ Although the Crown conceded that the psychiatrist was a person in authority, the court, in *obiter*, indicated otherwise.³⁶ Some commentators have concluded that a psychiatrist *may* be considered a person in authority depending upon the facts in the individual case.³⁷

In summary, then, the common law recognizes only a solicitor-client privilege. Communications of patients or clients of other professionals, however confidential, must be disclosed to the court subject to the exception for "without prejudice" statements and the exercise of judicial discretion to refuse to compel testimony in a particular case where the "interests of justice" or "fairness" so indicate. In the criminal sphere, admissions to a professional may be held to be made to a "person in authority" so as to invoke the confession rule requiring that the Crown demonstrate that the statements were given freely and voluntarily. If, however, the professional is testifying merely in his capacity as an expert witness and the statements themselves are not introduced as evidence in chief, the question is irrelevant even though the defence may not safely cross-examine the witness without the statements being admitted. Finally, it must be remembered that the not inconsiderable judicial sanction of contempt proceedings is available to enforce the compliance of a reluctant witness.

III. SHOULD PRIVILEGE BE EXTENDED?

According to Wigmore, there are four essential conditions for the establishment of a privilege at common law:

- 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;

³² *R. v. Roadhouse*, *supra* note 29.

³³ *R. v. Leggo* (1962), 39 W.W.R. 385, 133 C.C.C. 149 (B.C.C.A.).

³⁴ *R. v. Johnston* (1965), 51 W.W.R. 280, [1965] 3 C.C.C. 42 (Man. C.A.); *R. v. McKenzie* (1965), 51 W.W.R. 641, [1965] 3 C.C.C. 6 (Alta. C.A.); *Wilband v. The Queen*, [1967] S.C.R. 14, 60 W.W.R. 292, [1967] 2 C.C.C. 6.

³⁵ *Perras v. The Queen*, [1974] S.C.R. 659, [1973] 5 W.W.R. 275, 11 C.C.C. (2d) 449.

³⁶ Spence J. (with whom Laskin J. concurred), dissenting, considered that in the circumstances and applying the subjective test, the psychiatrist was a person in authority (*id.* at 673 (S.C.R.), 285 (W.W.R.), 459 (C.C.C.)). Ritchie J., also dissenting, argued that in the circumstances (the accused was under arrest at the time of the interview conducted at police headquarters) a *voir dire* should have been held to prove that the statements were voluntary.

³⁷ Manning and Mewett, *Psychiatric Evidence* (1975-76), 18 Crim. L.Q. 325 at 349. But *cf.* Schiffer, *supra* note 2, at 39-40.

- 3) the *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
- 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.³⁸

A testimonial privilege, in Wigmore's view, could not be justified for doctor-patient communications, since only the third criterion is met.³⁹ However, Wigmore did not apply his analysis specifically to the psychiatrist-patient relationship. Consequently, several writers⁴⁰ have accepted Wigmore's criteria as the correct standard, but have argued that the psychiatrist-patient relationship *does* expressly fulfil each of the conditions and that, therefore, the common law ought to recognize the privileged nature of these communications on the same basis as solicitor-client confidences.

In brief, the arguments are as follows. The information needed by a physician to treat a patient largely concerns medical facts (blood pressure, symptoms, etc.) that are independently measurable. With few exceptions, no stigma attaches to contracting an illness or to treatment by a physician. In contrast, the essence of psychiatry requires extensive revelations of "hidden" emotions, fantasies, frustrations and such like. It is difficult to conceive of individuals entering into a psychiatric relationship except on the implicit understanding that such confidences would be respected. The first condition is thus satisfied. Is confidentiality essential to the relationship? The answer here also must be affirmative. The psychiatrist is virtually dependent on the active cooperation of the patient; testing is certainly valuable in diagnosis, but the patient interview remains the heart of the process. In Freud's oft-quoted words: "The whole undertaking is lost labour if a single concession is made to secrecy."⁴¹ The third condition is obviously satisfied for psychiatrists as it is for physicians generally—the community has a real interest in encouraging individuals to seek professional help in resolving mental health problems. In the criminal sphere, psychiatric assistance may well be essential to the proper presentation of the accused's case. The fourth condition is somewhat more difficult to fulfil. Indeed, some have maintained that the primary consideration must remain the correct disposal of the litigation; privilege would operate to thwart the just and fair administration of justice.⁴² Psychiatric testimony, however, is essentially opinion evidence; the psychiatrist seldom has independent knowledge of the facts.⁴³ To protect such con-

³⁸ *Supra* note 1, at 527.

³⁹ *Id.* at 528. Also see Freedman, *supra* note 2.

⁴⁰ Diamond and Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations* (1964-65), 63 Mich. L. Rev. 1335; Slovenko, *Psychiatry and a Second Look at Medical Privilege*, *supra* note 2; Slovenko and Usdin, *supra* note 2; Guttmacher and Weihofen, *supra* note 2; Fisher, *supra* note 2.

⁴¹ Freud, 2 *Collected Papers* (London: Hogarth Press, 1956) at 346, n. 1.

⁴² See, for example, the *McRuer Report*, *supra* note 10; and Baldwin, *supra* note 2.

⁴³ Some have argued that this disqualifies psychiatrists entirely from testifying—what the court needs is facts, not conjecture based on unscientific theorization. See Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction* (1958), 23 *Law & Contemp. Prob.* 650.

fidences would sustain the relationship and not frustrate the objects of the judicial system, but simply would require the parties to tender independent evidence of the relevant facts.

While commentators may contend that the psychiatrist-patient relationship meets Wigmore's four criteria, thereby justifying a testimonial privilege, it is highly unlikely that the common law would be modified in this way. Although in theory the common law is amenable to change, the pace of such adaptations is painfully slow. Moreover, the basis of the common law is adherence to precedent; once the judicial policy in an area is established, the principle of *stare decisis* retards any fresh re-examination of the whole issue. Any changes are more likely to be small-scale; for example, a particular case may be distinguished from its predecessors to permit some variation in the "rule of precedent."

Additional support for this position is derived from an examination of the response of the American courts to state statutes granting some form of privilege to physician-patient (which would include psychiatrists) or psychologist-patient communications. It is fair to say that the courts have adopted a restrictive approach to exclusionary statutes—to the point where one writer argues that the practical protection offered by most privilege statutes is illusory.⁴⁴

First, the courts have held that the communication must be confidential. The presence of third parties, excluding nurses who are considered agents of the physician, negates the privilege.⁴⁵ This restrictive approach has serious implications for the practice of group therapy. The other participants in the session are not agents of the physician-psychiatrist and, hence, destroy any professional privilege. Presumably, those patients are compellable witnesses as well. The amendment of privilege statutes to provide a testimonial privilege where therapy occurs in a group setting has been recommended.⁴⁶ Hospital records that include information beyond that communicated by the patient to the physician himself have been held to fall outside the privilege statute.⁴⁷

The patient is the holder of the privilege. Even though the psychiatrist may argue that his assessment should not be disclosed fully even to the patient, the psychiatrist has no right to assert a privilege in his own name.⁴⁸ Courts have also developed the concept of implied or constructive waiver to reduce further the scope of testimonial privilege. In civil suits, the "patient-litigation

⁴⁴ Slovenko, *Psychotherapist-Patient Testimonial Privilege*, *supra* note 2.

⁴⁵ Orland, *supra* note 2, at 27.

⁴⁶ Braman, *Group Therapy and Privileged Communication* (1967-68), 43 Ind. L.J. 93; Cross, *Privileged Communications Between Participants in Group Psychotherapy*, [1970] Law & Social Order 191.

⁴⁷ Orland, *supra* note 2, at 29. Also see Springer, *Professional Standards Review Organizations—Some Problems of Confidentiality*, [1975] Utah L. Rev. 361.

⁴⁸ Davis, *A Psychiatrist Has no Constitutional Right to Assert an Absolute Privilege against Disclosure of Psychotherapeutic Communications* (1970-71), 49 Texas L. Rev. 929; *In re Lifschutz*, 2 Cal. 3d 415, 467 P. 2d 557 (S. Ct. 1970).

exception" implies a waiver of privilege where the mental or physical condition of the patient is at issue.⁴⁹ To be sure, the position has some merit in that a patient should not be able to claim for "mental suffering," for example, and then hide behind privilege to frustrate the defence. Privilege, like equity, should be a shield and not a sword. Nonetheless, it should be remembered that the patient must prove his case on the balance of probabilities and, consequently, must introduce evidence supporting his claim. Expert medical or psychiatric testimony is then subject to cross-examination.

In criminal cases, most courts have relied on several doctrines to exclude privilege entirely where the accused has been compelled to submit to a psychiatric examination.⁵⁰ Such examinations are held not to violate the Fifth Amendment because the accused "cooperated" with the psychiatrist (implied waiver), or because the accused raised an insanity defence⁵¹ (constructive waiver), or because of the "physical exhibit analogy" (psychiatric evidence is deemed "real" evidence in the same category as blood tests). A Georgia court has held that the statutory privilege only attaches where treatment is given or contemplated.⁵² The compelled or state-conducted psychiatric examination has no such purpose. Testimonial privilege, then, does not include this category of psychiatrist-patient relationship.

Incriminating statements or outright confessions of guilt communicated to a psychiatrist during a compulsory examination, therefore, are admissible in evidence against the accused. As few restrictions are placed on the conduct of psychiatric examinations, the accused may be tricked, induced or drugged

⁴⁹ This "patient-litigation exception" has been included in the *Model Code of Evidence* (Philadelphia: American Law Institute, 1942) Rule 223. Also see Orland, *supra* note 2, at 28; and Slawson, *Patient-Litigation Exception: A Hazard to Psychotherapy* (1969), 21 Arch. Gen. Psych. 347.

⁵⁰ The policy and constitutional issues involved in compulsory psychiatric examinations in the United States are dealt with extensively in the following three articles: Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?* (1973-74), 26 Stan. L. Rev. 55; Berry, *Self-Incrimination and the Compulsory Mental Examination* (1973), 15 Ariz. L. Rev. 919; and Meister, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants* (1974-75), 11 Colum. J.L. & Soc. Prob. 403.

⁵¹ In the United States, state law may place the onus on the prosecution to prove sanity if the "insanity defence" is raised. The courts argue that to permit the defendant to raise the "insanity" issue and then to prevent the prosecution from securing psychiatric testimony to the contrary would thwart the judicial process. The counter-arguments run thus: the prosecution could prove sanity through other factual evidence, the testimony of lay witnesses or the cross-examination of defence witnesses. In Canada, however, the question is irrelevant since one is presumed sane until proven otherwise: *Criminal Code*, R.S.C. 1970, c. C-34, s. 16(4).

⁵² *Massey v. State*, 226 Ga. 703, 177 S.E. 2d 79 (1970), *cert. denied* 401 U.S. 964 (1971). The judicial reasoning has been criticized as prejudicial to poor defendants who must seek expert testimony from state-appointed psychiatrists; wealthy defendants could afford their own psychiatrists for "treatment" and thus communications would be privileged. See Loftis, *Patient-Psychiatrist Privilege Does Not Apply to Mental Examination by a Court-Appointed Psychiatrist* (1972), 21 J. Pub. L. 251.

into making implicating statements.⁵³ In several jurisdictions, however, state law restricts the evidentiary use of such statements; confessions are not admissible upon the issue of guilt, but may properly be used as the foundation for expert opinion.⁵⁴ One state, Colorado, has legislated bifurcated insanity procedures wherein the issues of guilt and insanity are tried separately, with evidence of insanity being inadmissible at the trial of guilt.⁵⁵

The response of the American courts to privilege statutes is presented to do more than suggest that the common law and common law courts are resistant to changes in the doctrine of testimonial privilege. It is argued that Canadian privilege statutes, if adopted, would face a similar reception in our courts. The American experience, then, would prove invaluable in drafting a privilege statute by revealing points of vulnerability; while it is felt that legislation is the only avenue to introduce testimonial privileges beyond the traditional categories, the effectiveness of the statute will depend on the precise model adopted.

Most American privilege statutes are category-specific, i.e., they grant a testimonial privilege to physicians, including psychiatrists or psychologists. This approach has serious drawbacks, affording both too much and too little protection. For example, a physician-patient privilege protects many factual communications and diagnoses that do not merit insulation from judicial scrutiny. Yet, a psychologist in the same state who is privy to his patient's sensitive confidences may be compelled to testify. Conversely, a psychiatrist in a "psychologist privilege" state is afforded no protection against testifying. Moreover, the statutes fail to include other professionals such as social workers who frequently have access to intimate communications. It is argued that the category approach, i.e., substituting "physician" or "psychiatrist" or "psychologist" for "solicitor," is an inappropriate model for broadening the common law privilege. Far preferable is a functional approach that focuses on the nature of the confidence and the relationship between the professional and the patient/client.⁵⁶

Exclusionary statutes, particularly those based on the category model, have tended to be textually brief:

There are certain admissions and communications excluded from consideration of public policy. Among these are: . . . 5. psychiatrist and patient . . .⁵⁷

This model frequently has been criticized as too simplistic to deal adequately with the complexities of the privilege issue.⁵⁸ Recent statutes have tended to

⁵³ Several writers have protested against the use of narco-interrogation in psychiatric examinations because of the unreliability and inherent unfairness of the procedures. See Macdonald, *Truth Serum* (1955-56), 46 J. Crim. L., Criminology & Pol. Sci. 259; and Gall, *The Case Against Narcointerrogation* (1962), 7 J. Forensic Sci. 29. But cf. Dession *et al.*, *Drug-Induced Revelations and Criminal Investigation* (1952-53), 62 Yale L.J. 315.

⁵⁴ See Berry, *supra* note 50, at 926-28 for a listing of the states so restricting the uses of such evidence. Only in Montana is there an absolute prohibition against the use of confessions at trial for any purpose.

⁵⁵ *Id.* at 927.

⁵⁶ See, for example, Fisher, *supra* note 2, who also proposes functional criteria as the basis of extending privilege.

⁵⁷ Ga. Code Ann. § 38-418.

⁵⁸ Fisher, *supra* note 2, at 641-43.

be considerably more lengthy and intricate in an effort to tailor privilege to the nature of the proceedings (e.g., competency hearings, insanity defences), and the relationship of the patient and professional (physician, psychiatrist, etc.).⁵⁰ The following proposed model statute is set out in full to illustrate the difficulties in drafting privilege legislation so as to deal adequately with possible ramifications of extending the common law privilege:

Psychotherapists' Privilege: Confidential Communications

(1) As used in this act, (i) "problem" means mental conflicts in a patient produced by psychological or environmental pressures, or a combination of both; (ii) "psychotherapist" means a person skilled in the diagnosis and treatment of problems as the result of professional training in the behavioral sciences for that purpose. "Psychotherapist" shall also be interpreted to include a person reasonably believed by a patient to be so qualified; (iii) "patient" means a person who seeks out or consents to the services of a psychotherapist in the hope of remedying a problem. Where the psychotherapeutic relationship is such as to require the participation of more than one of such persons, "patient" shall be interpreted as meaning more than one of such persons; (iv) "psychotherapeutic relationship" means a relationship which exists between two (or more) persons where one (or more) is a patient seeking help from a psychotherapist in the solution of his (their) problem(s); (v) "confidential communication between patient and psychotherapist" means such information transmitted by action or declaration between patient and psychotherapist which is transmitted in confidence and by means which, so far as the patient is aware, disclose the information to no persons outside of the psychotherapeutic relationship other than those persons reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(2) In civil and criminal proceedings, in juvenile proceedings, in legislative and administrative proceedings, and in proceedings preliminary and ancillary thereto, a patient, or his psychotherapist, or his guardian, or his personal representative, whether or not the patient is a party, has a privilege to refuse to disclose and to prevent the disclosure of (i) facts tending to show that the patient and a psychotherapist have entered into a psychotherapeutic relationship, or (ii) confidential communications between patient and psychotherapist, or (iii) communications made in confidence between members of the patient's family and the psychotherapist, or between any of the foregoing in subsections (ii) and (iii) and such persons who participate, under the supervision of or in co-operation with the psychotherapist, in the accomplishment of the objectives of the psychotherapeutic relationship. The above privilege shall be subject to the exceptions as provided for by sections (3), (4), (5), and (6) of this act.

(3) There is no privilege for any communications otherwise privileged under this act when evidence of a deceased patient's mental condition is introduced as an issue by any party claiming by testate or intestate succession or inter vivos transaction through or from the patient, provided that the judge finds that the social harm done by requiring the disclosure of confidences in the particular situation is overbalanced by the desirability of disclosure.

(4) There is no privilege for any communications otherwise privileged under this act in a civil proceeding in which the patient introduces evidence bearing on his mental condition as an element of his claim or defense, provided that the judge finds that it is more important to the interests of justice that the communications be disclosed than that the particular psychotherapeutic relationship be protected or that the social harm done by requiring the disclosure of confidences in the particular situation is overbalanced by the desirability of disclosure. Juvenile proceedings in which delinquency is being determined shall not be included in this exception to the privilege.

⁵⁰ See, for example, the Connecticut privilege statute: Conn. Gen. Stat. Ann. 52-146a (Supp. 1963). Also see Goldstein and Katz *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute* (1962), 36 Conn. B.J. 175.

(5) There is no privilege for any communications otherwise privileged under this act (i) when a psychotherapist, in the course of, or subsequent to, the diagnosis or treatment of the problem of the patient determines that the interests of society and the patient will best be served by commitment of the patient to an institution for the treatment of mental disorders, or (ii) if the judge presiding in any proceeding finds that the patient, after having been informed that the communications would not be privileged, has made such communications to a psychotherapist in the course of an examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental condition.

(6) A person, other than the psychotherapist, who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing any matter otherwise privileged under this act will have waived that privilege if the judge finds that he has (i) contracted with anyone not to claim the privilege, or (ii) without coercion, with knowledge of his privilege, and with mental capacity to appreciate the circumstances under which he reveals these confidences, made disclosure of any part of the confidential matter or has consented to such disclosure made by anyone. Where more than one patient has participated in the psychotherapeutic relationship, no behavior which would otherwise constitute a waiver of the privilege within this section shall be held to do so unless all the participating patients join in this behavior.

(7) No comment upon the exercise of the privilege shall be made, nor shall any adverse inferences be drawn from such exercise.⁶⁰

While the present Georgia statute errs in the direction of simplicity, this proposal is manifestly unwieldy and would likely provide more hours of textual argument than instances of privilege granted.

The question must be asked seriously: if a statute extending privilege is so difficult to draft, is the case for extending the right to refuse to answer in court really compelling, based on notions having broad appeal, or is it merely a matter of status for particular professionals? Proponents of an extended privilege argue that mental health professionals should be granted a privilege based on compliance with Wigmore's criteria. That analysis represents the policy arguments favouring a statutory grant of privilege if the common law does not prove amenable to such changes. It must be reiterated, however, that testimonial privilege confers the right to refuse to place relevant evidence before the courts. Testimony in numerous instances may be highly embarrassing for the parties involved, for example, in divorce cases. Words spoken to a trusted friend may be revealed. Mere embarrassment and breach of a confidence given to a professional are not sufficiently compelling reasons for excluding relevant testimony.

What of professional ethics forbidding disclosure of confidential material? No doubt, many professionals would find forced disclosure of confidences repugnant and unconscionable in terms of their personal integrity and professional standards. The bottom line of this argument requires the professional to refuse to disclose what he feels are sensitive communications, regardless of the possibility of contempt charges. Indeed, a number of professional journalists have taken precisely this stand rather than disclose their sources. Lest this line of argument appear to place the professional in the unhappy dilemma of defying the court or violating professional standards, at least three *caveats* must be added. First, it must be stressed that the concept of privilege is not to protect

⁶⁰ Fisher, *supra* note 2, at 643-45; for his analysis of the statute, see 645-54.

professional sensibilities but the client/patient. Second, in practice, the courts almost invariably respect the professional's request for permission to refuse to answer a particular question because a confidence would be violated. Finally, privilege statutes are not absolute. Exceptions to the grant of privilege may be statutory, as in mental competency hearings, or common law (the patient-litigation rule), but the import is clear. Competing policy arguments often call for a revocation of privilege in particular instances. For example, in custody cases and juvenile proceedings, the welfare of the child is of paramount concern. It would be difficult to support the view that privilege should protect the parent from disclosure of information that is directly relevant to the well-being of the child. And, given that the privilege is not absolute, the professional may well be placed in the position outlined above: defy the court and face the consequences, or violate ethical standards.

The Law Reform Commission of Canada has recommended a modified form of privilege in its proposed Code of Evidence:

41. A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or who has been rendered such services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice.⁶¹

Essentially, the proposal codifies the judicial discretion at common law to refuse to admit testimony in the interests of justice or because of unfairness to the party. The codification, however, is preferable in that statutory guidance is provided as to the criteria for exercising the discretion. The statute recognizes both the privacy of professional relationships and that the public has an interest in maintaining that privacy. Against this policy position stands the competing issue of the public interest in the administration of justice. The judge is specifically directed to weigh these conflicting values in the particular context.

The recommendation represents a viable compromise on the privilege issue. The statute would grant a privilege where none existed at common law provided certain conditions are fulfilled. Admittedly, the decision as to whether the criteria are satisfied remains discretionary, although in view of the general practice in the courts, it seems unlikely that the "discretionary power" would be exercised so as to emasculate the intention of the statute. The use of discretionary authority also avoids the drafting of labyrinthian exceptions to the privilege where other competing interests (such as the welfare of the child) would outweigh the arguments against disclosure, exceptions that might engulf the exclusionary rule itself.⁶² Finally, the statute grants a general professional privilege, thereby including social workers, accountants, clergymen and psychologists as well as physicians and psychiatrists. By adopting a functional

⁶¹ Evidence Code, *supra* note 3, s. 41. Also see s. 36, which provides that a "claim of privilege . . . is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom." Also see s. 37, which contemplates a right of appeal alleging error in a ruling disallowing a claim of privilege but restricts the appeal to the holder of the privilege. Thus, although the matter is discretionary, the right to appeal from the ruling is specifically provided.

⁶² *Id.* at 80.

approach, the statute has avoided a basically arbitrary decision to extend privilege to select categories. It should be noted that this broad grant of privilege is possible because of the use of judicial discretion as the balancing mechanism to weigh the competing interests involved.

It is suggested that in civil cases⁶³ such a proposal would resolve the question of professional privilege satisfactorily. In the criminal sphere, though, it is contended that additional safeguards are necessary to protect the rights of the accused adequately.

Two additional strengths of the Law Reform Commission proposal should be dealt with first. The common law solicitor-client privilege is codified, albeit with the restriction that privilege applies only to communications made in contemplation of litigation.⁶⁴ Beyond this, the general rule regarding professional privilege would govern. The privilege is then extended to include preparatory work:

42(2) A person has a privilege against disclosure of information obtained or work produced in contemplation of litigation by him or his lawyer or a person employed to assist the lawyer, unless, in the case of information, it is not reasonably available from another source and its probative value substantially outweighs the disadvantages that would be caused by its disclosure.⁶⁵

How would the section apply to an examination of the accused by a mental health professional arranged by defence counsel? At first blush, the information would appear to be privileged, as the examination would have been arranged in contemplation of litigation. Presumably, an "expert witness" engaged by the defence could be called only by the defence, although he would be subject to cross-examination if called. On the other hand, the discretionary authority to admit such evidence is granted; the material is to be disclosed if "it is not reasonably available from another source" and "its probative value substantially outweighs the disadvantages that would be caused by its disclosure." In criminal cases, it could be argued that, as the Crown can compel an accused to submit to a psychiatric examination,⁶⁶ the information is reasonably available elsewhere and, consequently, the criteria are not fulfilled. Should this argument fail, it could be asserted that under the second condition, admissions or confessions should be excluded. While the probative value of such material undoubtedly would be significant, so would the disadvantages of disclosure to the defence—the former could never "substantially outweigh" the latter.

The general professional privilege would apply to the compulsory mental examination in that the accused would have been "rendered such services by a

⁶³ The Law Reform Commission proposal, if enacted, would govern civil cases brought in the federal courts; the provision would have to be enacted provincially before the bulk of civil cases would be affected.

⁶⁴ Evidence Code, *supra* note 3, s. 42(1).

⁶⁵ *Id.*, s. 42(2). Also see Gardner, *Agency Problems in the Law of Attorney-Client Privilege: The Expert Witness* (1964-65), 41 U. of Detroit L.J. 473 at 499, where the author argues that the work product of experts on behalf of a defendant in criminal cases should be privileged.

⁶⁶ See *supra* note 31.

professional person."⁶⁷ Mental examinations of the accused on judicial remand in Metropolitan Toronto are conducted by METFORS⁶⁸ primarily in the Brief Assessment Unit (BAU). The Unit utilizes a team of mental health professionals (including a psychiatrist, psychologist, social worker, psychiatric nurse and corrections officer) to conduct the examinations, although the final report is written by the psychiatrist. Because the statutory provision is directed toward function and not category, all members of the examining team could assert a professional privilege against disclosure of certain communications. The statute, then, would apply to compulsory mental examinations and would include all team members. While this is necessary and laudable, it is felt that the most damaging communications—confessions and incriminating statements—would not be excluded under the privilege rule.

The test for admissibility under the provision requires a balancing of the public interest in the privacy of the relationship against the public interest in the administration of justice. In view of the brief duration of the relationship (usually for three days) and the purpose of the relationship (to "examine" and not to "treat"), it is felt that the value in the "privacy of the relationship" would be considerably less than in the case of a patient with a voluntary therapeutic relationship of long standing. The common law position would confine judicial discretion to circumstances in which the evidence was of "trifling" probative value and of great prejudicial effect.⁶⁹ Undoubtedly, the prejudicial effect is considerable; however, the probative value could never be considered "trifling" in regard to a confession. Under the statute as well, it certainly could be argued that the public interest in the administration of justice would favour the admission of a confession.

It is argued, then, that the privilege rule would not exclude confessions. Would such statements be excluded because of other provisions in the proposed Evidence Code?

16(1) A statement made by the accused to a person in authority is inadmissible if tendered by the prosecution in a criminal proceeding, unless the judge is satisfied beyond a reasonable doubt that the statement was not made under circumstances (including the presence of threats or promises) that were likely to render the statement unreliable, or unless the accused personally or through his counsel agrees to its admission.⁷⁰

The first hurdle is the requirement that the statement be to a "person in authority." As indicated earlier, the case law appears to support the position that mental health professionals would not be so classified⁷¹ although there is some support for the argument that in the circumstances of a compulsory mental examination such professionals could be so considered.⁷² Even assuming that the BAU team were deemed "persons in authority," the statements

⁶⁷ Evidence Code, *supra* note 3, s. 41.

⁶⁸ See *supra* note 4.

⁶⁹ *R. v. Wray*, [1971] S.C.R. 272, 11 C.R.N.S. 235, *rev'g*, [1970] 2 O.R. 3 (C.A.).

⁷⁰ Evidence Code, *supra* note 3, s. 16(1).

⁷¹ See *supra* note 5 and accompanying text.

⁷² *Id.*

would be admissible unless the circumstances rendered the information "unreliable." While this condition might well exclude a confession induced by narco-interrogation,⁷³ incriminating statements made during the standard BAU interview probably would not be considered "unreliable."

Absent the statutory proposal, if the professionals were held to be persons in authority, the Crown would be required to demonstrate that the statements were made voluntarily. It is suggested that there would be little difficulty in showing this. If the professionals were not persons in authority, the statements would be admissible *simpliciter*.

Again, assuming (and it is suggested that the assumption is unwarranted) that the statements were inadmissible directly on the issue of guilt, the confession could be introduced as forming the foundation for the expert opinion, either at common law⁷⁴ or under the statutory proposal.⁷⁵ To be sure, "the judge shall restrict the use of the evidence to its proper scope and instruct the jury accordingly."⁷⁶ However, as a number of writers⁷⁷ and judges⁷⁸ have stated, "limiting instructions" are a legal fiction and fail to overcome the prejudicial effect of the statements. It is submitted that this statement is correct—particularly in the case of confessions or other incriminating admissions. The likelihood of a jury respecting the niceties of evidentiary rules and relying on the material only as a foundation for expert opinion and not tending to prove guilt is virtually non-existent.

The necessity for excluding confessions made during a compulsory mental examination, at least in part, is related to the frequency with which such statements are uttered. It is standard procedure in the BAU interview for the psychiatrist to administer a caution to the accused. A typical formulation of the caution is this:

I must tell you that this examination is not like visiting your own doctor—it is not a private matter between the people in this room. I must write a report to the judge about our interview and may be asked in court to reveal what we discuss here. If there are any questions which you do not wish to answer, you do not have to answer them.

On its face, the caution indicates to the accused that the interview is not privileged—that anything said may be repeated in court. Perhaps from a legal viewpoint there is nothing objectionable in using information obtained during the interview against the accused. It is asserted, though, that there are compelling policy arguments for excluding such material.

First, while the accused was cautioned, in every case observed, the indi-

⁷³ See *supra* note 53.

⁷⁴ *McRuer Report*, *supra* note 11, at 823.

⁷⁵ Evidence Code, *supra* note 3, s. 8.

⁷⁶ *Id.*

⁷⁷ Meister, *supra* note 50, at 459-62.

⁷⁸ *Krulewich v. United States*, 336 U.S. 440, 69 S. Ct. 716 (1949) *per* Jackson J.; *Delli Paoli v. United States*, 352 U.S. 232, 77 S. Ct. 294 (1957) *per* Frankfurter J. See, generally, Meister, *id.* for other cases in which the courts indicated that limited instructions could not cure the prejudicial effects of admitting a confession.

vidual proceeded to describe the events that formed the subject matter of the charge. The interviews confirmed that this response is typical. Thus, in actual practice, the BAU team hears confessions or incriminating statements in virtually every case remanded to them for examination, although the accused's version of the events may conflict to a greater or lesser degree with the information on the charge sheet.

Why are the accused apparently so willing to disregard the caution and incriminate themselves? A number of factors are involved. For those truly mentally disordered, it may be argued that the caution is at best imperfectly understood; there is no informed consent in such cases. Moreover, the setting likely conveys the impression of a hospital rather than a police station or jail. After all, METFORS is physically located at Queen Street Mental Health Centre, and the examining team consists of psychiatrists, psychologists, social workers and psychiatric nurses—all individuals associated with the helping professions rather than the courts. It may be quite difficult for the accused to resist the notion that these individuals are there to help him⁷⁹—an adversary relationship⁸⁰ is not likely contemplated. Beyond these subjective reasons, though, are the exigencies of the BAU interview. The team must interview the individual, administer and evaluate psychological tests, contact significant others (e.g., spouse, parents) for additional information, discuss the data collected and write the report within one day. Furthermore, as many as four such cases may be dealt with during that single day. Given these time pressures, the interview assumes considerable importance as a source of facts and impressions of the accused. Despite the team's best intentions to avoid discussing the "crime," it is virtually impossible to perform the examination and ignore the events surrounding the alleged offence. After all, that event is the reason the accused is being examined. It is undoubtedly the most fruitful source of the information that the team must use in considering matters of fitness, dangerousness and insanity.

Thus, it may be inferred that incriminating statements and even outright confessions are made by the accused during the BAU interview. It is asserted further that such material is not suppressed by the caution because of subjective factors (the accused's perception of the mental examination) and objective reasons (the exigencies of the BAU process).

The problem of confessions is complicated further by the results of the mental examinations. Between June 1977 and March 1978, METFORS completed 372 Brief Assessments.⁸¹ The diagnostic classification system describes the individuals examined as follows:

⁷⁹ Indeed, the general attitude of the accused is cooperative. According to METFORS data (*supra* note 4), Table 15, indicating the general attitude and behaviour of persons while attending the BAU as recorded on the correctional officer's summary sheet (for March 1978), reveals that cooperative behaviour was most common, followed by fidgeting and anxiety. In very few instances were the individuals overtly hostile; in only one case was cooperation refused so as to thwart the examination (Table 13B).

⁸⁰ See, generally, Szasz, *Psychiatric Justice* (New York: Macmillan, 1965).

⁸¹ METFORS Statistical Supplement, *supra* note 4, Table 2.

1. Psychoses	40.94%
2. Neuroses, Personality Disorders	50.00
3. Mental Retardation	3.15
4. Other conditions	.79
5. No mental illness	3.15
6. Not given	1.97
	<u>100.00%</u> ⁸²

While the population involved could not be described as "mentally healthy," only in about ten percent of the cases were the individuals certified under *The Mental Health Act*.⁸³ When the mental health of the individuals examined by the BAU team is related to legal questions, though, the following picture emerges:

1. Fit to be granted bail	5.5%
2. Not fit to be granted bail	2.0
3. Fit to stand trial	57.5
4. Not fit to stand trial	21.5
5. Fitness questionable	7.5
6. Fit to receive sentence	5.0
7. Cooperation refused	.5
	<u>99.5%</u> ⁸⁴

In approximately 75.5 percent of the cases, the accused was considered by the BAU team as fit to receive bail, stand trial or be sentenced.⁸⁵ The results of the inpatient unit are even more dramatic: 88.25 percent were considered fit and only 11.75 percent not fit to stand trial.⁸⁶ While it is true that "insanity defence" cases may not be included under the unfitness or the certification categories (i.e., the accused is fit and not certifiable but was insane at the time

⁸² *Id.*, Table 6. Only the summary is reproduced; the actual data are further detailed, giving incidence of types of psychoses, etc. The data only cover the period between October 1977 and March 1978. The statistics for the inpatient population (i.e., those on 30 or 60 day remands) are similar:

Table 12

1. Psychoses	45.65%
2. Neuroses, Personality Disorders	45.65
3. Mental Retardation	5.43
4. Other	3.26
	<u>100.00%</u>

⁸³ *Id.*, Table 13A. The data in question cover the period from July, 1977 to September, 1977 but the percentage appears to hold overall. As the legislation involved, however, was the 1970 Act (*supra* note 31), the figure could well decrease, given the stricter standards for certification under the 1978 Amendments.

⁸⁴ *Id.* The data were summarized from the more detailed analysis in Table 13B; hence the total of 99.5 percent rather than 100 percent.

⁸⁵ Item 5, "fitness questionable" is used by the BAU team to refer to persons "marginally fit" and, therefore, was included in the "fit" total.

⁸⁶ METFORS Statistical Supplement, *supra* note 4, Table 8, METFORS Psychiatric Recommendations Regarding Persons Discharged from the Inpatient Unit from November 1977 to March 1978. Also see Table 13A for the period from June to September wherein psychiatrists indicated fitness to stand trial in 70.5 percent of the cases.

of the alleged offence), the absolute number of such pleas is so low as not to undermine the statistical results.⁸⁷

Thus, it may be concluded that the majority of individuals remanded to METFORS are returned to the legal process having made damaging admissions during the compulsory mental examination and before being convicted of any offence.⁸⁸ The danger of this situation, stated baldly, is that a mental examination of the accused may be compelled in order to elicit damaging admissions that are then tendered in evidence through the testimony of the psychiatrist or other team member to prove the *actus reus* of the crime or as foundation for the expert testimony (which would accomplish the same result in fact). It is not suggested that such is the case at present. In fact, there is a tacit understanding between the prosecution and METFORS that the Crown will not proceed with the charge unless the *actus reus* may be established independently, without the testimony of the psychiatrist. In the interviews, one psychiatrist indicated that, to his knowledge, in only two instances out of about 600-700 cases was the psychiatrist directly asked for an opinion on criminal responsibility of the accused (which would include *mens rea* as well). In only one instance was the psychiatrist asked in court to recount the inculpatory statements of the accused made during a mental examination.⁸⁹ While the spectre of the psychiatrist as investigator for the prosecution is not likely at present, it must be noted that tacit agreements are dependent upon the personalities involved and are not a sound legal foundation upon which to administer a judicial system. Moreover, there would be no doctrinal or statutory obstacles (except, perhaps, proof of voluntariness if the psychiatrist was considered a "person in authority"⁹⁰) to tendering such damaging material in evidence.

Should incriminating statements made by the accused during a compulsory mental examination be inadmissible? It is argued that the answer must be in the affirmative. The Canadian judicial system is based on the adversarial, not the inquisitorial, model. Fairness to the accused requires that the Crown produce independent evidence of the *actus reus*. The psychiatric assessment must not become an adjunct to the investigatory arm of the prosecution. Although there is no general right against self-incrimination in Canada,⁹¹ it is suggested that the compulsory mental examination raises special considerations. The foundation of the judicial system rests on several assumptions including the notion that the defendant be fit to stand trial and not be legally insane at the time of the offence.⁹² It is considered improper to try a man who cannot parti-

⁸⁷ It is estimated that the defence of insanity is raised in approximately 50 cases during a one-year period throughout the whole of Canada.

⁸⁸ Where the remand is for a pre-sentence report, the danger of incriminating statements is non-existent; the accused has already been convicted of the offence. Most of the cases, though, do not fall into this category.

⁸⁹ In that case, when the Crown indicated that it would question the psychiatrist regarding admissions by the accused, the defence interposed that it would ask the questions in examination-in-chief. As the defence rested on an insanity plea, counsel was not contesting the commission of the *actus reus*.

⁹⁰ See text accompanying note 31, *supra*.

⁹¹ See *supra* note 23.

⁹² *Criminal Code*, R.S.C. 1970, c. C-34, s. 16.

cipate in the judicial process, instruct his counsel or plead to the charge.⁹³ Both provincial⁹⁴ and federal⁹⁵ legislation provide for a remand for a mental examination; the matter of fitness or insanity may be raised by the Crown, the judge or the defence.⁹⁶

The compulsory mental examination, then, comprises an integral part of the proper administration of justice.⁹⁷ It is contended that this valid and necessary function—to assess an individual's fitness to stand trial or his mental condition—must not be subverted. The examination cannot be justified on the basis that the state has a right to induce incriminating admissions of the accused through the use of a procedure ostensibly directed to other issues. Such admissions, therefore, should be excluded from the evidence at trial so as to restrict the examination to its proper purpose. Interviews with mental health professionals supported this proposal. With inculpatory statements inadmissible in evidence, the professionals felt that the examination process would be strengthened. The attempted (and admittedly ineffective) caution could be disregarded and the team members could concentrate on their proper function—the mental assessment of the individual—without fear that they might induce a confession and then be required to repeat that information in court. The exclusion of confessions and incriminating statements made during the compulsory mental examination, then, would not thwart the administration of justice, but would support that system by restricting the role of the examination to the mental condition of the accused with regard to fitness, insanity and dangerousness, and by improving the examination process itself.

One American state that excludes such incriminating evidence is Arizona. The relevant statutory provisions include:

Rule 11.3 Appointment of Experts
e. Experts' Reports

- (1) Any expert appointed by the court shall submit to the clerk of the court his opinion of the defendant's competency to stand trial . . .
- (3) In addition, at the request of the court or of any party, with the consent of the defendant, the expert shall report on:
 - (i) the mental status of the defendant at the time of the offense;
 - (ii) if the expert determines that the defendant suffered at that time from a mental disease or defect, the relation of such disease or defect to the alleged offense.

Rule 11.4 Disclosure of Mental Health Evidence
a. Reports of Appointed Experts

The reports of experts appointed pursuant to Rule 11.3 shall be made

⁹³ The reader is referred to an excellent article on fitness: Schiffer, *Fitness to Stand Trial* (1977), 35 *Fac. L. Rev. U. of T. 1*. Also see Law Reform Commission of Canada, *The Criminal Process and Mental Disorder, Working Paper 14* (Ottawa: Information Canada, 1975).

⁹⁴ *Supra* note 31.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Some have suggested that the fairest solution would be to eliminate the compulsory pre-trial psychiatric investigation altogether; any mental examination should be predicated upon the accused's voluntary informed consent. See, for example, Schiffer, *supra* note 2, at 49-50. What of the seriously mentally disordered individual who cannot grant an informed consent?

available to all parties, except that any statement or summary of the defendant's statements concerning the offense charged shall be made available to the defendant.

Rule 11.7 Privilege

a. General Restriction

No evidence of any kind obtained under these provisions shall be admissible at any proceeding to determine guilt or innocence unless the defendant presents evidence intended to rebut the presumption of sanity.

b. Privileged Statements of Defendant

- (1) No statement of the defendant obtained under these provisions, or evidence resulting therefrom, concerning the events which form the basis of the charges against him shall be admissible at the trial of guilt or innocence, or at any subsequent proceeding to determine guilt or innocence, without his consent.
- (2) No statement of the defendant or evidence resulting therefrom obtained under these provisions, concerning any other events or transactions, shall be admissible at any proceeding to determine his guilt or innocence of criminal charges based on such events or transactions.⁹⁸

The effect of the Arizona rules have been summarized by one writer thus:

(The expert) may testify fully and completely at any competency hearing, making use of any data in his possession to substantiate his conclusions. At a trial of innocence or guilt, he may only testify if the issue of the defendant's mental condition is properly raised. If he does testify, he may buttress his evaluation of the defendant's mental condition by the recital of any statements or other evidence procured at the examination except admissions about the crime itself. In this way, the defendant is freed from all testimonial incriminating effects of the examination.⁹⁹

It also should be noted that the rules prohibit the introduction of incriminating statements at the trial of the charge for which the defendant was examined by the expert and at a trial based on other "events or transactions." Further, not only the statements but evidence resulting from those statements are made inadmissible.

It is suggested that this model forms the basis for an additional section in the proposed Evidence Code that would exclude admissions made by the accused during a compulsory mental examination from being tendered in evidence at the trial for any purpose. The accused, however, could consent to the introduction of such statements, provided that such consent was granted expressly at trial.¹⁰⁰ Thus, not only would this damaging material be inadmissible on the issue of guilt, but also as the foundation of expert opinion. This latter exclusion is necessary since, in practice, limiting instructions as to the proper use of such evidence do not overcome the considerable prejudicial effect of the admissions. It is felt that such an exclusion would not unduly hamper the expert in testifying as to the basis of his opinion since such confessions themselves form only a small part of the grounds for his assessment.

One other procedural change recommended by the Law Reform Commission should be mentioned briefly. The issue of fitness may be tried at the

⁹⁸ Ariz. R. Crim. P. 11.3, 11.4, 11.7.

⁹⁹ Berry, *supra* note 50, at 948.

¹⁰⁰ This would permit the introduction of such statements where defence counsel felt that the material would support the accused's case, for example, where the *actus reus* is not contested and the plea is insanity.

time that the question is raised or postponed until the close of the case for the Crown.¹⁰¹ In practice, the issue is not deferred until the prosecution has completed its case. If a defendant is found unfit to stand trial, the judge must order the accused to be kept in custody under a lieutenant-governor's warrant.¹⁰² Where the grounds for unfitness are permanent (as in severe mental retardation, for example), the accused may well be incarcerated permanently under a lieutenant-governor's warrant without having been convicted of any offence. Postponement of the issue of fitness to the close of the Crown's case would at least lead to acquittal where the charge is not proven beyond a reasonable doubt. The Commission, however, has recommended that the issue be postponed until the close of the trial.¹⁰³ This would permit the accused's counsel to introduce a good defence to the charge at law (e.g., self-defence, alibi).

This proposal would defer psychiatric testimony as to fitness until the close of the trial. The Crown would not be able to introduce expert opinion as to the mental condition of an accused remanded for an examination for fitness as part of its case. The postponement of the fitness issue, then, would buttress the proposed rule excluding admissions. Where the Crown sought to introduce expert testimony on the question of *mens rea*, however, the exclusionary rule would be essential to safeguard the rights of the accused.

Therefore, it is submitted that policy arguments amply justify the exclusion of incriminating admissions by the accused during a compulsory mental examination (whether or not the defence has concurred in the remand for assessment). Indeed, it is argued that such an exclusionary rule is essential to safeguard the rights of the accused and to facilitate the proper administration of justice.

IV. PRIVILEGE: THE PROPOSALS

In light of the preceding analysis, the proposals for resolving the privilege issue may be summarized as follows:

- (1) In civil cases, it is felt that the Law Reform Commission of Canada proposal¹⁰⁴ recognizing a general professional privilege subject to the exercise of judicial discretion in weighing the competing public interests probably represents the best way to resolve the privilege issue. The section is function-oriented, it provides clear statutory guidelines as to the interests involved and, in contrast to some American models, it avoids both the pitfalls of extreme simplicity and complexity.
- (2) In criminal cases, the extension of the solicitor-client privilege to include preparatory work produced for the defence, as recommended by the Law Reform Commission,¹⁰⁵ also provides needed protection for the accused who seeks supporting expert testimony.

¹⁰¹ *Criminal Code*, R.S.C. 1970, c. C-34, s. 543. Also see Schiffer, *supra* note 93, at 7-11.

¹⁰² *Criminal Code*, R.S.C. 1970, c. C-34, s. 543(6).

¹⁰³ Law Reform Commission, *supra* note 93, at 38-40.

¹⁰⁴ See text accompanying note 61, *supra*.

¹⁰⁵ See text accompanying note 65, *supra*.

- (3) In the criminal sphere, however, it is urged that admissions, confessions and other inculpatory statements made by the accused during a compulsory mental examination (whether or not the defence consents to such examination) be made inadmissible in evidence at trial for any purpose, including the issue of guilt and foundation for the opinion evidence of experts. Such material should likewise be inadmissible at the trial of other offences. This position is supported by policy arguments regarding the proper administration of justice and the realities of the compulsory mental examination.
- (4) The Law Reform Commission recommendation¹⁰⁶ to defer trial of the fitness issue until the close of the defence case would buttress the proposed exclusionary rule. This procedural change, however, would not obviate the need for the exclusionary rule itself. Where the Crown sought to introduce expert testimony on the question of *mens rea*, the proposed rule would be essential to safeguard the rights of the accused.

In conclusion, it is submitted that the above proposals would resolve the question of privilege in such a manner as to provide valid protection where needed and yet not facilitate the obstruction of justice.

¹⁰⁶ *Supra* note 103.