Canadian Landmark Case, *Smith v. Jones*, Supreme Court of Canada: Confidentiality and Privilege Suffer Another Blow

Roy J. O'Shaughnessy, MD, FRCP, Graham D. Glancy, MB, FRCP, and John M. Bradford, MB, FRCP

The recent decision of the Supreme Court of Canada titled *Smith v. Jones* has made major changes to the way forensic psychiatry may be practiced in Canada and may have implications for other jurisdictions as well.[1] This decision has made major inroads into the limitations of privileged communication and confidentiality between a criminal defendant and the forensic psychiatrist retained by defense counsel to assess the defendant. In this case, the Court was willing to utilize pseudonyms to protect the confidentiality of the defendant until the case was decided. Smith is the pseudonym of a forensic psychiatrist practicing in Vancouver and Jones is the pseudonym of the defendant.

Dr. O'Shaughnessy is affiliated with the Youth Forensic Services, Burnaby, Province of British Columbia, Canada; Dr. Glancy with The Psilex Group, Etobicoke, Ontario; and Dr. Bradford with the Royal Ottawa Hospital, Ottawa, Ontario. Address correspondence to: R. J. O'Shaughnessy, MD, Youth Forensic Services, Province of British Columbia, 3405 Willingdon Ave., Burnaby, B.C. V5G 3H4, Canada.

The Facts

Mr. Jones was charged with aggravated sexual assault upon a prostitute from the "skid row area" of Vancouver. He was alleged to have paid for a sexual act, at which point he physically assaulted the woman and attempted to tie her up. During the struggle she suffered injuries to her eye and a fractured tooth but was able to attract the attention of passers-by, who came to her rescue. Mr. Jones fled the scene, but his license plate was identified. After he was arrested and spent a period of time in custody awaiting trial, he was released, with orders not to frequent the area where the assault occurred being a condition of his bail. He was subsequently referred to Dr. Smith for a psychiatric assessment to assist counsel in preparing a defense or preparing a presentence examination report. Prior to seeing Dr. Smith, Mr. Jones was assured by his lawyer that his communications with

Dr. Smith were privileged under lawyer-client communication and would not be used against him if the psychiatrist's report was unfavorable.

Mr. Jones met with Dr. Smith in July of 1997, at which time Mr. Jones was uncommonly candid. He described the onset of a severe paraphilic disorder beginning in his early teens that gradually elaborated and expanded throughout his teens and early twenties. He acknowledged predominant interests in bondage and domination as well as rape fantasies and the gradual development of sexually sadistic fantasies and behaviors. By his early twenties, his fantasies were primarily sexually sadistic. During his twenties, he began to hire prostitutes in the skid row area of Vancouver and engage in sadistic behaviors with them. He specifically chose women who were drug-addicted and in difficult social circumstances because he assumed they would be willing to put up with the pain and injury in exchange for money.

By his early thirties, Mr. Jones acknowledged that he started having elaborate fantasies of torturing, raping, and eventually murdering women. These fantasies continued for some years in duration, but he denied ever acting on the fantasies until the assault in question. He indicated to Dr. Smith that he had sometime earlier made the decision to kidnap and subsequently torture a prostitute for a number of days before killing her and burying her body in an isolated mountainous region not far from the city of Vancouver. He indicated to Dr. Smith that he had informed his employer and friends that he would be away during the period in question so that they would not visit him and by chance discover the victim. He further affixed dead-bolt locks to the rooms in the basement of his apartment so that he could torture the victim for a number of days without interruption. He had also arranged a cover story in which he informed his employer and friends that he would be taking a tent trailer for a camping trip and had intended to convey the body in the trailer to the burial site. He planned on shooting the body in the face to impede identification.

During the evaluation, Mr. Jones stated that he had some ambivalence in committing the murder and had decided to manage it by kidnapping the woman without making any effort to hide his identity, such that he would then be forced to kill her to protect himself. He stated that he deliberately chose a frail and slightly built victim whom he felt he could overpower. He brought duct tape and rope with him as well as a small blue ball, which he then tried to force into the victim's mouth to ensure she would not scream. It was during this episode that the victim struggled more than he had anticipated and was able to attract the attention of passers-by.

During the consultation, Dr. Smith and Mr. Jones openly discussed potential treatment and risk issues. Dr. Smith recommended anti-androgen medications to help Mr. Jones control his deviant urges, and Mr. Jones indicated he would contemplate the recommendation and discuss it with his lawyer.

After seeing Mr. Jones, Dr. Smith spoke with the referring lawyer; they had a frank discussion regarding the risks posed by Mr. Jones. Various options were

discussed regarding protecting Mr. Jones' rights while at the same time ensuring that he obtain the necessary treatment and that the authorities were alerted regarding his potential risk. Mr. Jones' counsel indicated that he would discuss the matter with Mr. Jones and subsequently speak with Dr. Smith with instructions as to how to proceed. After a lengthy period of time without hearing from Mr. Jones' lawyer, Dr. Smith called the lawyer, who informed him that he had made an arrangement to plead to a charge of aggravated assault and that Mr. Jones specifically stated that Dr. Smith was not to reveal the information or provide a report to anyone. Dr. Smith subsequently retained counsel, and, after consultation decided to commence a legal action for declaration that he was allowed to disclose the information provided by Mr. Jones in the interests of public safety. Dr. Smith filed an affidavit outlining the details of the consultation and the information Mr. Jones had told him. The case was heard in December 1997. The trial judge noted the importance of the solicitor-client privilege to the proper functioning of the law and noted that the courts had always given the highest weight to this form of privilege. The judge relied heavily on the codes of professional conduct of both the Canadian Bar Association and the American Bar Association, in which lawyers may reveal the intentions of clients to commit crimes in the future. The trial judge noted that Dr. Smith had opined it was more likely than not that Mr. Jones would go on to act on his fantasy and kill a woman and therefore concluded that Dr. Smith was allowed to breach solicitor-client privilege and reveal the information. The trial judge also raised an issue as to whether this disclosure was mandatory or discretionary, and he concluded that if a psychiatrist decides a patient presents a danger to the life or safety of another person, disclosure becomes mandatory.

The decision was immediately appealed by Mr. Jones. In the interim, a stay of sentencing was applied and the appeal court heard the case *in camera*, a very uncommon procedure, to protect the confidentiality of Jones' pending outcome of the appeal.

British Columbia Court of Appeal

The Court of Appeal affirmed the trial court's decision to allow Dr. Smith to disclose the information in the interests of public safety but reversed the trial judge on the issue as to whether disclosure was mandatory.[2] Here they opined that the court did not have the authority to make a declaratory judgment mandating reporting by the psychiatrist.

Mr. Jones appealed the decision to the Supreme Court of Canada. The appeal was heard on October 8, 1998. Judgment was rendered on March 25, 1999.

Supreme Court of Canada

The Supreme Court of Canada affirmed the fundamental importance of the solicitor-client privilege to the administration of justice and acknowledged that it was the highest privilege recognized by the Courts.[3] They noted, however, that this privilege was not absolute and that there were significant exceptions to that

privilege, including public safety. The Court outlined those factors that should be considered in determining whether public safety would outweigh the solicitor-client privilege. These can be summarized as clarity of the risk, severity of the risk, and imminence. The Court looked to other decisions in the United States, including the Tarasoff decision,[4] as well as in Great Britain, for guidance in defining these terms and chose to define them somewhat broadly.

In defining clarity of risk, the Court indicated that there should be a clearly identified group of persons or an individual person but also looked to other indicators of intent including evidence of long-range planning, method of effecting the attack, and whether or not there was a prior history of violent behaviors. They defined a group broadly and gave examples of identified groups such as children under a certain age or women living alone in a certain area. They opined that even if the threatened group may be large, if it is clearly identifiable it would be an essential factor to be considered.

The Court described severity of the risk as primarily being severe bodily injury or death. By the same token, they observed that serious psychological harm may also constitute a serious bodily harm, and they quoted a previous case, R. v. McGraw, 3 S.C.R. 72 (1991), in which the Court opined, "So long as the psychological harm substantially interferes with the health or well being of the complainant, it properly comes within the scope of the phrase 'serious bodily harm'."

The third factor was imminence of risk. The Court had difficulties in this case insofar as Mr. Jones had been out on bail and had not to anyone's knowledge attacked any other prostitutes during that time. The Court opined, however, that imminence is not to be defined as one would normally define it but noted, rather, "Depending on the seriousness and clarity of the threat, it will not always be necessary to impose a particular time limit on the risk."[3] They in fact substituted a "sense of urgency" created by the threat and gave as an example of such urgency a person who threatens to kill another after release from prison in three years.

In applying the facts from the affidavit provided by Dr. Smith, the Court felt that the situation met all three of the criteria and affirmed Dr. Smith's ability to disclose the information provided by Mr. Jones under solicitor-client privilege. They noted in the discussion, however, that not all of the three areas must be necessarily affirmed to release information, as each case must be judged on its own merits, and at times one or two of the factors may be of such magnitude that they would outweigh other considerations.

The Court was unanimous in their findings regarding the discretion to release information. On a second question as to the scope of the information to be released, however, the Court divided six to three. The majority held that all requisite material should be released, whereas the minority were of the opinion that only the conclusion that Mr. Jones posed a danger to prostitutes in a certain area of the city of Vancouver should be released.

Conclusion

Smith v. Jones is the first case in Canada to clearly articulate the grounds to breach confidentiality to protect public safety. Although the case was concerned primarily with lawyer-client privilege, because the Court affirmed that this privilege was the highest in the land, it therefore follows that this case will apply to all types of privilege and confidentiality. The scope of the decision definitively changes the nature of confidentiality and privilege in forensic psychiatric practice and profoundly expands the duty to disclose and to warn.[5] The Court was not asked to address the "duty to protect."

Smith v. Jones expands the duty of care applicable to psychiatrists, and by implication all physicians and mental health professionals, as well as affecting the duties of lawyers representing potentially dangerous clients. The Court has broadened the definitions of "intended victim" now to include large groups as opposed to a single person. This definition could be extrapolated to include, potentially, almost any group if identifiable as a group at risk of being harmed by a particular individual. In addition, the Court has expanded the definition of "severity of risk" by including the concept of serious psychological harm as incorporated under the general framework of serious bodily harm. Further, they expanded the concept of time limitation to define "imminence" as causing a sense of urgency as opposed to being specifically time-linked. The expansion of these terms will likely cause considerable increase in the duty to report potentially dangerous individuals. One could foresee, for example, that a psychiatrist examining a pedophilic individual may feel obliged to report the person as a potential risk if the psychiatrist is made aware of the individual's access to victims coupled with a clinical impression that the person's capacity to restrain himself is impaired or absent. Numerous similar clinical scenarios can be imagined to fit within the parameters of danger to the public outlined by this decision and could have a chilling effect on the practice of psychiatry in general and in particular in the practice of forensic psychiatry.

In reviewing the decision, we find it probable that there will be significant impact on at least four main areas that will affect forensic psychiatric practice. The first is the impact on the relationship between lawyers and clients in terms of their communications. The effect will not be restricted to criminal clients, however, as one can easily see non-criminal clients in other disputes being regarded as a potential risk to identified groups or individuals, for example in matrimonial cases. The Court recognized the need for clients to speak openly with their lawyers to provide an adequate defense and thus to obtain the protection of our system of justice. The Court wrestled with this difficult issue and eventually concluded that the dangers to the public would outweigh the negative consequences of breaching solicitor-client privilege. The cost, however, is that lawyers will no longer be able to guarantee that their clients' communications will be privileged, and this may deter individuals from revealing the full scope of their actions for fear that

their lawyers may be obliged to disclose based on implications for future risk.

The second major area of impact will be on the practice of forensic psychiatry itself. Perhaps the most important implication is in the circumstances where defense lawyers refer clients to forensic psychiatrists. Counsel will no longer be able to assure their clients that these communications are privileged, and as a result, many clients may not feel they are able to be as open and honest as would be necessary to formulate a thorough psychiatric opinion. Lawyers may also be reluctant to refer their clients to psychiatrists for fear that the psychiatrist may obtain information that causes the psychiatrist to believe their client is a significant risk, which in turn would obligate the psychiatrist to disclose the information. It is probable that there will be a diminished number of referrals by lawyers or that the referral questions will be so limited as to make full assessment impractical.

The third area of impact will be on general psychiatric practice, especially when dealing with individuals who may be potentially violent. Although the issue of physician-patient confidentiality was never addressed by the Court, it is clear from the decision that there is now a "duty to disclose" by psychiatrists or other physicians that is a great deal broader than previous duties outlined in other jurisdictions. The Court noted the importance of fostering a climate in which individuals would be more likely to disclose their disorders and seek treatment and as a result reduce their risk to the public. They noted that when confidentiality is undermined, individuals may not disclose as willingly, and as a result their disorders will not be properly identified, diagnosed, and treated, thus resulting in a risk to the public. Because the criteria are so broad, it may become extremely difficult for psychiatrists to adequately treat those potentially dangerous persons without disclosing their risk potential to someone in authority. Further, there is an implication that failure to do so may incur a civil liability if the patient does harm to a member of an identifiable group. Although no civil cases in Canada have previously mandated a duty to warn or to protect, *Smith v. Jones* effectively opens the door for increased civil liability in this area.

The fourth area of impact will be procedural. Although the Court discussed general plans of reporting to police or prosecutors, they did not articulate the precise steps to be taken; this will have to be examined on a case-by-case basis. Psychiatrists may have to rely on warnings delivered by telephone to potential victims, which obviously will be impossible in circumstances where there is a broad target group. Presumably, warnings to the police may satisfy the duty to warn, but this has not been clearly noted.

Although the duty to warn and protect has been the generally accepted, if not clearly stated, standard of care in Canada,[6] Provincial licensing bodies have only just begun to consider the issue.[7] Although it is generally accepted that physicians may be held liable for civil sanctions for failure to report a person at risk from a particular patient, under certain provincial rulings, the breaching of confidentiality may result in civil or medical

licensure sanctions as well as criminal liability.[8] Provincial health care legislation will now have to be altered to be consistent with the recommendations recently stated by the Supreme Court of Canada in *Smith v. Jones*.

Because of the special circumstances in the case, it was heard without any of the usual organizations being given the chance to seek intervener status. In particular, the Canadian Psychiatric Association and the Criminal Lawyers Association of Canada were not privy to the case and not able to argue the issue before the Courts. The lack of third-party intervention could be seen as an omission that may need to be rectified in subsequent case law refining the operational criteria defined by the Supreme Court.

In summary, the Supreme Court of Canada, in its ruling on the case of *Smith v. Jones*, has clearly articulated a duty to disclose and warn. The case involved a psychiatrist who was retained by counsel in preparing a defense and the Court concluded that the information elicited would be generally covered by the umbrella of solicitor-client privilege. While noting that the solicitor-client privilege is the highest privilege recognized and is a fundamental principle to the administration of justice, the Court held that it is not absolute and is limited when public safety is at risk. The Court clearly delineated three factors which must be taken into consideration in weighing public safety although they failed to clarify how these factors were to be weighed in practice. In review of the decision, the Court has expanded the duty to disclose by expanding the concepts of identifiable groups, severity of risk, and imminence of danger. The decision will likely have multiple effects for those who come into personal contact with criminal defendants or mentally ill individuals.

References

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