DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Sean Robert Brown* [2020] QDCPR 70
PARTIES:	**THE QUEEN** (respondent) v **SEAN ROBERT BROWN** (applicant)
FILE NO/S:	1213 of 2019
DIVISION:	Criminal
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland at Brisbane
DELIVERED ON:	25 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2020
JUDGE:	Loury QC DCJ
ORDER:	**1. A copy of the medical records be provided to an expert witness commissioned by the applicant or the respondent, by the legal representatives for the complainant.** **2. The nature and details of any trauma that the complainant has suffered, other than that arising from the incident the subject of the charges, is not to be published in any expert report without the leave of the Court.** **3. The nature and details of any trauma the complainant has suffered, other than that arising from the incident the subject of the charges, is not to be disclosed by an expert to the applicant or his legal representatives.** **4. Submissions of the counselled person and statement of harm are to be sealed in an envelope and are not to be opened without an order of a Judge of the District or Supreme Court.**
CATCHWORDS:	CRIMINAL LAW – SEXUAL ASSAULT – SUBPOENAED MATERIAL – APPLICATION FOR ACCESS TO MATERIAL – PRIVILEGED COUNSELLING COMMUNICATION – where the applicant was granted leave to subpoena the complainant's psychiatric and psychological records – where the applicant makes an

application to inspect, copy and use these records to engage an independent psychiatric report – where the applicant also applies for full access to the records to fully brief the psychiatrist generating the report – where counsel for the complainant concedes the material is substantially relevant but argues there is no reason for counsel for the applicant, nor her instructing solicitors, to access the records – whether provision of the records to the applicant's legal representatives is in the public interest

Criminal Procedure Act 1986 (NSW) s 299D
Evidence Act 1977 ss 14F, 14G, 14H, 14N

Farrell v The Queen (1998) 194 CLR 286
R v JML [2019] QDCPR 23
KS v Veitch (No 2) (2012) NSWLR 172

COUNSEL: JE Shaw for the respondent
AJ Cousen for the applicant
TR Morgans for the counselled person

SOLICITORS: Office of the Director of Public Prosecutions (Qld) for the respondent
Harper Finch for the applicant
Women's Legal Service Queensland for the counselled person

Facts

[1] The complainant (the counselled person) worked as a dominatrix. She did not know the applicant. On 13 September 2017 the applicant sought and paid for her services. He attended at her unit where he paid $250 for a half-hour of service. The applicant showered and lay naked on the floor. The complainant commenced a service called *"trampling"* where she walked over the applicant's body in high heels from his chest to his abdomen. He asked her to stop and she did so. The applicant said he wanted to move onto something else and requested that she slap and punch him in the face. The complainant walked to the nearby kitchen and retrieved a glass of milk. As she returned to the applicant he leaned towards her and attempted to kiss her. She slapped him in the face three times. She said *"you're not allowed to kiss me. You're not allowed to touch my vagina or asshole".* The applicant acknowledged her instruction.

[2] The applicant again tried to kiss the complainant and she slapped him again three times and said to him *"this is for not asking permission to kiss me".* He apologised and asked permission to kiss her. She allowed him to kiss her on the cheek. He moved behind her to do so. He then grabbed her around the waist. They wrestled. She managed to break free and punch him in the face. The applicant then said *"can you fuck me now?".* The complainant led the applicant to a shelf where she kept a selection of sex toys. The applicant chose a large *"strap-on"* [dildo]. The complainant used the dildo to hit the applicant over his head whilst saying *"cock slap"*.

[3] The applicant then grabbed the complainant from behind and pushed her against a nearby massage table. She was unable to free herself from his clutch. She said *"ok, you win this round"*. The applicant then started to thrust his erect penis between her buttocks. He pushed his fingers towards her vagina and touched her labia. She pushed his hand away and repeatedly said *"get off me"*. The applicant dislodged the complainant's bra and used his hand to push his penis closer to her vagina. It touched her between her anus and vagina. The complainant broke free from his hold and walked towards a knife in her kitchen. The applicant grabbed her again and they wrestled. She managed to break free and went to the bedroom where she picked up a hammer. She returned to the applicant and told him to get out of her apartment. The applicant dressed himself and demanded his money back. She told him that he tried to rape her. The applicant said *"I wasn't trying to rape you, I was trying to stop you from hitting me with the dildo because it would have knocked me out."* The applicant left the complainant's apartment.

[4] The complainant called police. She realised that her lace underpants were torn.

[5] The applicant was interviewed by police on 4 October 2017. The applicant admitted to paying the complainant for sexual services. He said that he was interested in *"BDSM stuff"* and knew that she was a dominatrix from her online advertisement. He said that he wanted *"whipping and beating…strangling…a bit of pain and stuff"*.

[6] The applicant described the complainant as a petite woman. Upon attending her apartment he paid her first and had a shower. He said that they discussed *"trampling"* and her punching, kicking and slapping him, after which she commenced providing those services. He described her walking on him, slapping him and punching him in the face. The applicant said that he started to get a bit panicky. The complainant walked towards a knife in the kitchen. He freaked out and grabbed her around the waist. She was giggling. She then went and got a hammer. He demanded the return of his money. She threatened to hit him so he got changed and left her apartment. The applicant said that the complainant said to him *"you tried to hurt me, you tried to assault me, blah blah blah"*. He said *"no I didn't"* and left.

[7] The applicant admitted to being aroused by the services the complainant provided and having an erect penis. He admitted that the complainant told him at the start of the session that he was not allowed to touch her sexually. He denied saying *"can you fuck me now?"* He could not recall being struck with the dildo. He denied thrusting his penis between her buttocks or touching her genitalia at all.

Triable issue

[8] The applicant is charged with attempted rape and alternatively sexual assault.

[9] The issue at trial will be quite a narrow one. The complainant's evidence is supported in essential features by the admissions of the applicant and by the torn underpants.

[10] Counsel for the applicant argues that the issue at trial will relate to the complainant's credibility and reliability and that her evidence is uncorroborated. Whilst her credibility and the reliability of her evidence will be of concern to the

tribunal of fact, there is significant support for the evidence of the complainant. It is incorrect to characterise it as uncorroborated.

Psychiatric material

[11] The complainant in her statement to police has revealed that she has been diagnosed with dissociative identity disorder; that she is under the treatment of a psychiatrist and psychologist and is prescribed medication. Her disorder, she says, can affect the way she remembers certain things. She states that her memories can appear similar to dreams. She says that she had a change in personality during the course of the transaction with the applicant because she was in a dangerous situation.

The application

[12] Leave was granted to the applicant's lawyers to subpoena the complainant's psychiatric and psychological records. The applicant makes an application pursuant to section 14G of the *Evidence Act 1977* to inspect, copy and use these records in order to engage an independent psychiatric report addressing how an acute episode of dissociation may affect the complainant's actions and perceptions at the time of the event and how it might affect her later recall of the event. It is argued that the complainant's psychiatric condition is a relevant topic for cross-examination of her.

[13] In addition to the provision of the records to an independent psychiatrist, the applicant applies for full access to the records in order to *"fully brief the psychiatrist"*. The concern raised by the applicant's counsel is that the psychiatrist might not think relevant, aspects of the records that a lawyer would consider so. Further, instructions from the applicant would not be able to be taken on particular aspects of the records.

The complainant's position

[14] Counsel for the complainant concedes that all of the privileged material is of substantial relevance to the provision of an independent psychiatric opinion. However, he argues that there is no current reason why the applicant's counsel, solicitors or the applicant himself need access to the records. He proposes that if, after provision of an independent psychiatric report, issues of substantial relevance arise, a further application can be made identifying the reasons why further access to the records is sought.

[15] Counsel concedes that there is a quantity of material contained within the records which does not meet the definition of a *"protected counselling communication"*. That material largely contains the results of routine medical tests. Counsel objects to the provision of that material to the applicant on the basis that it does not serve any legitimate forensic purpose. Counsel for the applicant has not sought access to these particular records and I have not heard submissions from the applicant about the records which are not subject to counselling privilege. There is some substance to this argument however in the absence of having heard from the applicant's counsel I do not intend to make any ruling with respect to that material at this time.

Consideration of privileged material

[16] The sexual assault counselling privilege scheme is contained in Division 2A of the *Evidence Act 1977*. The policy behind its introduction includes that such counselling services play an integral role in assisting people to recover from the potential long term impacts of sexual assault. The statutory protections against disclosure of the material recognises the public interest in encouraging those who have been sexually assaulted to seek therapy to assist in their recovery.

[17] Section 14F of the *Evidence Act 1977* prevents a person (other than with leave of the court) from compelling a person to produce a protected counselling communication; producing to the court, adducing evidence of or otherwise using a protected counselling communication; and disclosing, inspecting or copying a protected counselling communication.

[18] Section 14H of the *Evidence Act 1977* sets out the test to be applied in determining leave. It reads:

> **"14H Deciding whether to grant leave**
>
> (1) The court can not grant an application for leave under this subdivision unless the court is satisfied that—
>
> (a) the protected counselling communication the subject of the application will, by itself or having regard to other documents or evidence produced or adduced by the applicant, have substantial probative value; and
>
> (b) other documents or evidence concerning the matters to which the communication relates are not available; and
>
> (c) the public interest in admitting the communication into evidence substantially outweighs the public interest in—
>
> (i) preserving the confidentiality of the communication; and
>
> (ii) protecting the counselled person from harm.
>
> (2) In deciding the matter mentioned in subsection (1)(c), the court must have regard to the following matters—
>
> (a) the need to encourage victims of sexual assault offences to seek counselling;
>
> (b) that the effectiveness of counselling is likely to be dependent on maintaining the confidentiality of the counselling relationship;
>
> (c) the public interest in ensuring victims of sexual assault offences receive effective counselling;
>
> (d) that disclosure of the protected counselling communication is likely to damage the relationship between the counsellor and the counselled person;
>
> (e) whether disclosure of the communication is sought on the basis of a discriminatory belief or bias;
>
> (f) that the disclosure of the communication is likely to infringe a reasonable expectation of privacy;
>
> (g) the extent to which the communication is necessary to

enable the accused person to make a full defence;

(h) any other matter the court considers relevant.

(3) For deciding the application, the court may consider a written or oral statement made to the court by the counselled person outlining the harm the person is likely to suffer if the application is granted.

(4) If an oral statement is made by the counselled person under subsection (3), while the statement is being made the court must exclude from the room in which the court is sitting—

(a) anyone who is not an essential person; and

(b) an essential person, if—

(i) the counselled person asks that the essential person be excluded; and

(ii) the court considers excluding the essential person would serve a proper interest of the counselled person.

(5) The court must not disclose, or make available to a party to the proceeding, a statement made to the court under subsection (3).

(6) The court must state its reasons for granting or refusing to grant the application.

(7) If the proceeding is a trial by jury, the court must hear and decide the application in the absence of the jury.

(8) In this section—

harm includes physical, emotional or psychological harm, financial loss, stress or shock, and damage to reputation."

[19] Section 14H is in similar terms to section 299D of the *Criminal Procedure Act 1986* (NSW). In considering the operation of that section, Baston JA in *KS v Veitch (No 2)*[1] said that it is the use which might be made of the documents by the party seeking access which must be the focus of the Court's determination. Baston JA said:

> *"Under the general requirements in relation to a subpoena or a notice to produce, it is not necessary that the moving party demonstrate that the material sought will be admissible in evidence; the accepted test of a "legitimate forensic purpose" is undoubtedly broader than that. An accused may well seek access to documents in order to formulate lines of cross-examination, either by suggesting that the applicant has made inconsistent statements to a counsellor in relation to the circumstances of the offence, or by using material in the medical records to suggest that the evidence of the applicant may be unreliable. It may be possible to formulate a line of cross-examination without seeking to admit into evidence the document or the information contained in the document.*

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1 (2012) NSWLR 172 at [29].

> *It follows that the first limb, requiring the court be satisfied that the document or evidence "have substantial probative value", before allowing the accused access to it, will constitute a significant reduction in the material which might be made available to the accused under the general law with respect to access to material on subpoena or through a notice to produce…"*

[20] Later in his reasons, Baston JA said that the concept of "*substantive probative value"* must be concerned with admissible material.

[21] Of the second limb (that other documents are not available) Baston JA said it is intended to prevent access to counselling communications where relevant material is available from another source.

[22] The third requirement (the public interest consideration) imposes an additional and significant constraint. He said[2]:

> *"….Significantly, the former public interest has two limbs: the first addresses the public interest in maintaining protected confidences generally, while the second relates to possible harm to the particular confider. The purpose of protecting such confidences generally is to encourage victims of sexual assault to seek professional assistance to deal with the resultant trauma. That public purpose will be undermined if confidentiality is too readily held to be overridden by other public interests, in circumstances where the court may be satisfied that the particular confider will not suffer significant harm. On the other hand, an assessment that the information has substantial probative value, in the usual case no doubt by casting doubt on the veracity or reliability of the complainant, will militate in favour of disclosure where it could give rise to a doubt as to the guilt of the accused."*

"Substantial probative value"

[23] In *R v JML*[3] Her Honour Judge Fantin said that the use of the word *"will"* rather than *"may"* in subsection 14H(1)(a) *"connotes future certainty, or at the very least, likelihood, rather than mere possibility."* The test must therefore be considered in light of the evidence available to be led at trial. As indicated above the evidence of the complainant is significantly corroborated and the issue at trial is a narrow one relating only to whether the applicant in fact touched his penis to her genitalia.

[24] The assessment of the credibility of the complainant is a matter for the tribunal of fact. Evidence which serves only to usurp the function of the jury is not admissible. An expert opinion therefore, as to the accuracy, consistency and believability of the complainant's evidence is not admissible. However where the complainant suffers from a condition which has been the subject of scientific study by expert psychiatrists and/or psychologists, evidence as to the nature of that condition, its physical manifestations and whether and how it might lead to certain behaviour relevant to credibility is admissible and should be available to the tribunal of fact.[4]

[25] The effect of the complainant's disorder on her capacity to observe, to remember and to give a coherent narration of events is a proper subject therefore for expert testimony.

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2 Supra at [34].
3 [2019] QDCPR 23 (581/2018) Fantin DCJ 13 June 2019.
4 *Farrell v The Queen* (1998) 194 CLR 286.

The applicant cannot, of course, compel the complainant to undergo an independent psychiatric assessment for that purpose. It is a necessity in those circumstances for an expert opinion to be based upon the medical records of the complainant.

[26] I consider that that there is a substantial probative value in the disclosure of the records for the purpose of commissioning a psychiatric/psychological report on the effect of the complainant's recognised psychiatric disorder. Disassociation can describe a wide array of experiences from mild detachment to something more severe. It does, nonetheless, involve a detachment from reality. It can also result in amnesia. Whether the complainant is prone to amnesia as a result of her disassociating and the extent of that amnesia is something that will be of substantial probative value when considered against the real issue in the trial.

[27] That finding by me means that a psychiatrist or psychologist who is providing an expert opinion will need access to the records. That can be accommodated by the complainant's legal representatives providing the records directly to such an expert.

[28] It is also argued by counsel for the applicant that both counsel and her instructing solicitor will need access to the records. It is said that the complainant's condition is a relevant matter to explore with her in cross-examination. Whilst that might be so, the complainant cannot provide expert evidence as to her condition and its effect on her capacity to observe, to remember and to give a coherent account of events actually lived.

[29] The applicant's counsel argues that if there are matters contained in the records that relate to how the complainant's personality changes, that would be a proper matter for cross-examination and would make the records of substantial probative value. Again, this a matter that can be properly addressed in the expert report. The applicant in his quite fulsome account to the police did not made any comments that suggest he noticed a change or a fracture in her personality. It is therefore difficult to understand how access to the complainant's psychiatric records even if they did record how her personality changes is substantially probative of anything. Simply because a line of cross-examination could be formulated does not elevate that cross-examination to being of substantial probative value.

[30] The applicant's counsel also argues that unless both she and her instructing solicitor are able to peruse the records, they will not be able to fully brief an expert as to matters that might be relevant to cross-examination. I do not accept such an argument. There is no reason to suspect that an expert witness chosen by the applicant on the advice of his representatives, would need the input of counsel and the instructing solicitor into how to read and interpret the medical records and how to identify matters that might affect the complainant's ability to observe, to remember and to recount a lived event.

[31] There is further no reason why instructions would need to be taken from the applicant as to the content of the complainant's psychiatric and psychological records. It is for counsel to settle the letter of instruction to the chosen expert.

[32] The applicant's counsel also argues that any documents which contain additional or conflicting versions of the complainant's allegations would be substantially probative. Counsel for the complainant has taken me to the entries in the records in which the complainant recounts this event in any detail at all. There is nothing in those entries which gives rise to any such inconsistencies or discrepancies in her evidence.

Is the material available from another source?

[33] The complainant's statement expresses that she has been diagnosed with dissociative identity disorder however as she is not an expert in the field of psychiatry she is unable to give expert evidence as to the matters referred to above.

[34] The medical records will provide the very foundation for an expert's report. An expert providing such a report ought to be provided with all records relating to the treatment of the complainant's condition over time for the opinions of the expert to be of value to the tribunal of fact.

Weighing the public interest

[35] I have received a statement of harm from the complainant pursuant to section 14H(3). Suffice to say there is a high risk of significant harm to the complainant in the event of disclosure of her medical records particularly to the applicant and to his legal representatives.

[36] According to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) dissociative disorders are frequently found in the aftermath of trauma. Like post-traumatic stress disorder such symptoms as amnesia, flashbacks, numbing depersonalisation/derealisation may occur. Stress often produces an exacerbation of dissociative symptoms.

[37] It is the disclosure of the trauma which causes the complainant great distress for reasons that ought not be published.

[38] Maintaining the confidentiality of the complainant's medical records is of particular importance in ensuring her ongoing treatment. Dissociative identity disorder can cause clinically significant distress or impairment in social, occupational and other areas of functioning. The DSM-5 reports that it is frequent in over 70 percent of outpatients with this disorder to attempt suicide and other injurious behaviour.

[39] The balancing exercise is weighted against disclosure, however the nature of the complainant's diagnosis is such that it is necessary and desirable for the tribunal of fact to understand her condition and how it manifests in her, particularly as to her capacity to observe, to remember and to recall a lived event. The public interest favours the provision of the complainant's medical records to an independent expert psychiatrist or psychologist for the purpose of providing an expert opinion.

[40] Section 14N of the *Evidence Act 1977* provides a Court may make any order it considers appropriate to limit the extent of the harm likely to be caused to the counselled person by the production of a document or the adducing of evidence that is a protected counselling communication.

[41] Pursuant to section 14N I order that the details of any trauma that the complainant might have suffered other than the details relating to the incident the subject of the charges, not be published in any way to any person, including the applicant and his legal representatives. I intend to convey by that order that any expert witness who is given access to the complainant's psychiatric and/or psychological records is not to publish the details of any trauma that the complainant has suffered in any report, other than that arising from the incident the subject of the charges.

[42] Should an expert consider it necessary to reveal any such details, a further application can be made to the court for disclosure. Such an application should be brought to the

notice of the legal representatives of the complainant so that they can make arrangements for evidence to be adduced from the expert witness as to the nature of and necessity for the disclosure.