

Confidentiality & disclosure of crime-related information

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A recent decision of the Court of Appeal (Victoria) has implications for psychotherapists working with clients who have disclosed that they have committed serious criminal offences.

In *R v Lowe (1997)* the court considered psychotherapists' obligations of confidence to their clients, the issue of privilege in relation to court proceedings and the disclosure of confidential information to potential victims.

A key issue, at both the trial and the appeal hearings, was whether courts should be reluctant to admit evidence of a confessional nature which is obtained in trust and confidence by a psychotherapist from a client. Before considering some of the issues raised before the courts, a brief description of the facts of the case is appropriate.

The Crime and the Investigation: On 29 June 1991 Sheree Beasley, a six-year-old girl living in Frankston, a Melbourne bayside suburb, was abducted. Her decomposed body was discovered on 24 September in a stormwater drain on the Mornington-Flinders road in nearby Red Hill.

Eyewitness reports indicated that a young girl, matching the description of Sheree Beasley, had been seen on the day of the abduction in a distressed state in a blue hatchback car driven by a middle-aged male.

In the ensuing investigation Robert Lowe, a 57-year-old with 14 prior convictions for indecent exposure, was interviewed by police on several occasions. Lowe had a holiday home near where the child was abducted. Lowe was charged with, and subsequently convicted of, the kidnapping and murder of this six-year-old girl. It was alleged that he had abducted her for sexual purposes and that, after she died by suffocation, he concealed her partly clad body in a stormwater drain.

At his trial, evidence was given by a prison informer with whom Lowe had initiated conversations about the crime and to whom Lowe had voluntarily confessed. Evidence was also given by a psychotherapist to whom Lowe had made admissions in confidence after the abduction and during the period that he was being investigated by the police.

At the instigation of the police (and originally without the knowledge of the psychotherapist), a number of psychotherapy sessions and telephone conversations between Lowe and the therapist were taped. After five months of secret taping, the police consulted the psychotherapist and she subsequently co-operated with them; further tapes of conversations between herself and Lowe were made with her knowledge and consent.

The information disclosed by the psychotherapist at the trial therefore came from two sources: the therapist herself and tapes produced by a listening device lawfully installed at her professional premises by the police.

The psychotherapeutic relationship: The psychotherapist who was treating Lowe had known him professionally for several years. Three months after Sheree Beasley's disappearance, Lowe sought counselling, ostensibly regarding difficulties he was experiencing in his relationship with his wife. The psychotherapist at all times indicated to Lowe that their conversations were confidential.

Soon Lowe began talking about Beasley's disappearance, stating that he was aware that the police were watching him but that he could not recall being in the area on the day of her abduction.

He subsequently recalled being in the Frankston area at the time that the child went missing and discussed with the therapist the consequences of causing accidental death.

During the counselling sessions, Lowe talked repeatedly about 'constructing' an alibi to explain his movements on the day of the abduction and discussed arranging a meeting with his wife and children so that they could 'build on the alibi'. There were also discussions

about Lowe pleading guilty to manslaughter, on the basis that his wife would be more likely to forgive him if he faced up to the facts.

At one point Lowe asked the therapist to show him where the body was found. When a road directory was produced, he informed her of the page number and marked the spot on the relevant map. Although he continued to deny involvement with the crime, on 21 November Lowe asked the therapist if he could be charged with manslaughter. Four days later, police secretly installed a listening device at the psychotherapist's office; more than 30 subsequent conversations between Lowe and the therapist were taped and admitted at his trial. A recurring theme in the conversations was that Lowe intended to make a spurious confession to manslaughter in the hope that his family would take him back.

Several months later, in March 1992, Lowe suggested to the psychotherapist that they travel together to Red Hill stating that 'if I got down there and things began to ring a bell ... I don't know what I would do ... but I might confide in you'.

On 6 April, 1992, Lowe gave the therapist a typed statement which acknowledged that he had taken Beasley 'for a ride' and claimed that she had become hysterical while in his car and had choked to death. He then admitted placing her body in a stormwater drain. One week later the therapist visited Lowe at his home and drove him to various locations associated with the crime.

Confidentiality, privilege and the duty to protect endangered third parties: The Significance of R v Lowe

At Robert Lowe's trial his lawyers unsuccessfully argued that the evidence from the psychotherapy sessions should be excluded on the basis that it was in the public interest that confidential communications in 'psycho-sexual therapy' be upheld as confidential and not be the subject of evidence in court. Additionally, they argued that the circumstances in which the evidence came into existence in this case rendered it unfair to admit the evidence in these proceedings.

The court was not persuaded by these considerations and, in a judgement that should be of interest to all psychologists, emphasised that the psychotherapeutic relationship is neither privileged nor absolutely confidential.

Confidentiality: Although the psychotherapist had indicated to Lowe that their discussions were confidential, she changed after becoming disturbed by the story recounted by him and eventually willingly collaborated with the police in the taping of her conversations with Lowe.

When considering confidentiality in the psychotherapeutic relationship, the court noted:

In Victoria it is clear that both common law and statute law subordinate private confidence to the wider public interest; at least when it comes to disclosing information in the interests of prosecuting serious crime and/or protecting public safety.

It has not been, and cannot be, suggested that health service providers are under a duty (in the interests of the patient) not to disclose confidential information if such disclosure will aid the protection of the public from a specific identifiable threat.

Hence, the appeal court clearly stated that confidentiality in the psychotherapeutic relationship is not absolute and is overridden by the public interest when matters involve protecting the safety of the public and/or the prosecution of serious crime.

Privilege: Considerable confusion exists among psychologists about the legal concept of privilege and whether it extends to information disclosed by a client to a psychologist.

Essentially, privilege is the right to withhold certain communications or information from disclosure in evidence. In all professional relationships where privilege is at issue, it is important to note that it is the client - not the professional - who holds the privilege.

Privilege may have a common law or statutory basis. For example, in Victoria - but not all states in Australia - the relationship between a penitent and a minister of religion is privileged. Thus, a person who confesses to committing a crime to a Catholic priest may subsequently demand that his or her admissions to the priest not be admitted in any criminal trial that might occur: this person is claiming privilege for that information.

Limited privilege may also apply to *some* professional relationships; for example, in Victoria the patient-medical practitioner relationship generally is privileged in relation to civil (but not criminal) proceedings. Another example of privilege that is conferred by statute for limited purposes involves psychologists (and others) who work for the Family Court of Australia.

The Appeal Court in Lowe's case reiterated the view that the relationship between a client and psychotherapist generally is *not* privileged. The court held that, although Lowe participated in the discussions on the basis of confidentiality, 'no common law or statutory privilege applied to the discussions'.

Hence, unless a psychologist is working in one of the few, specified areas in which privilege is conferred by statute, the psychologist-client relationship is not privileged.

Duty to protect endangered third parties?

Echoing many of the discussions of professional responsibilities, legal duties and ethical liabilities that occurred in the United States following the Tarasoff case, consideration in Australia has often been directed to the issue of a psychologist's responsibilities to an 'endangered third party': that is, a person who may be at risk of harm from a client of the psychologist (see, for example, McMahon, 1992). Although this matter was not directly before the court in Lowe's case (and hence the remarks of the court are *obiter dicta*), the Appeal Court noted - without endorsing - that 'there is an emerging view that a duty of disclosure exists'. Thus, the issue of a psychotherapist's potential liability to an endangered third party was again noted by an Australian court.

Limitations: The significance of *R v Lowe* may be subject to some limitations.

In this case the trial judge formed the view that Lowe 'appeared intelligent', 'was acting voluntarily', and participated in the discussions 'for his own ends'. The Appeal Court noted that the psychotherapist was 'an unqualified and self-styled psychotherapist'.

While the observation about Lowe's mental state and motivation may be most relevant to the admissibility of his confessions to the psychotherapist, the lack of professional status of the psychotherapist involved in that case may mean that different issues are raised in any future cases where qualified professionals are involved.

The information disclosed by Lowe pertained to identified, past criminal actions: whether similar legal duties and responsibilities would arise if a client disclosed future, anticipated criminal activity is not certain. Finally, the decision of the court, although influential, is not binding in other jurisdictions in Australia.

In summary, in *R v Lowe (1997)* the Victorian Court of Appeal clearly indicated that psychotherapist-client confidentiality is subordinate to public interest and that there is no legal duty requiring a psychotherapist to maintain the confidentiality of information disclosed by a client which relates to the investigation of a serious crime and/or the protection of public safety.

Additionally, the court stated that there is no general common law or statutory privilege which applies to communications between a client and their psychotherapist.

Finally, although not essential to the case before the court, the judges noted that there was 'an emerging view' that a duty exists to disclose information to protect an endangered third party, thereby providing further acknowledgment of the possible existence of a *Tarasoff*-type duty in Australia.

Further reading

McMahon, M. (1992) Dangerousness, confidentiality and the duty to protect. *Australian Psychologist*, 27, (1), 12-16.