

CANADA / JUDGMENT

HMTQ v. Dorsay

2003 BCSC 15

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Supreme Court of British Columbia

DECIDED

3 January 2003

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Source record

2003 BCSC 15 HMTQ v. Dorsay

Citation:	HMTQ v. Dorsay
Date:	20030103 2003 BCSC 15
Docket:	CC990255 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA HER MAJESTY THE QUEEN AGAINST WILLIAM MORLEY DORSAY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SCARTH

RE: Ruling on Voir Dire Regarding the

Child Abuse Exception to the Jaffee Privilege

and Whether the Exception has Extraterritorial

or Retrospective Application

BAN ON PUBLICATION ss. 539(1) and 648

CRIMINAL CODE OF CANADA

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- [1] This Court, on August 12, 2002, found as a fact on the evidence before it on the voir dire that the psychotherapist-patient privilege recognized by the Supreme Court of the United States in *Jaffee v. Redmond* (1996), 518 U.S. 1 is subject to a child abuse exception which would apply to the circumstances of this case, albeit no court having binding authority in the State of Washington has so found: vide rulings delivered August 12 and August 26, 2002. The questions presently requiring determination are whether this exception applies to the accused's confessions, in the State of Washington in January, 1995 to certain psychotherapists during the course of his treatment, of the murder of a child alleged to have been committed 35 years ago in British Columbia (the "extraterritorial" issue), and whether the exception applies retrospectively to proceedings held in the State of Washington regarding the accused before the exception was recognized by this Court (the "retrospectivity" issue). Leave was given on September 19, 2002 to the defence to lead evidence with respect to those issues.
- [2] Leave was not given in the September 19th ruling to the defence to re-open the issue of the existence of the child abuse exception to the privilege found by this Court. The defence on October 15, 17 and 18, 2002 called, as an expert on the psychotherapist-patient privilege in the United States, Professor Melissa Nelken, professor of law at the Hastings College of Law, University of California in San Francisco. Professor Nelken testified with respect to the issues of extraterritoriality and retrospectivity for which leave had been given and, over the objection of the Crown, gave opinion evidence regarding the existence of the child abuse exception found by this Court in respect of which leave had not been given. The Court heard this testimony on the basis of the defence assurance there is a nexus between the three issues.
- [3] To place the issues in context a brief chronology of the principal events will suffice. The accused Mr. Dorsay is charged on indictment in this Court with the non-capital murder of his infant son at Vancouver, British Columbia on September 23, 1967. In January, 1995 he was receiving treatment for depression at the Highline Hospital in Burien, State of Washington, and whilst there is alleged to have confessed the murder to certain psychotherapists at the hospital. These caregivers noted Mr. Dorsay's statements to them regarding his son's death in Mr. Dorsay's clinical records.

- [4] During the night of January 10, 1995 Mr. Dorsay came upon a patrol officer, Michael J. Klokow, at a car service station near Burien. He is said to have told the officer he wished to make a statement about the murder of his infant son. At the police station in Burien Mr. Dorsay declined to give a statement to the detective summoned to the station for that purpose, James Corey.
- [5] Thereafter there was communication between the King County police and Vancouver police. Pursuant to an informal request made by Detective Alan Cattley of the Vancouver Police Detective Corey, on October 15, 1996, obtained a warrant to search for and seize Mr. Dorsay's medical records at the Highline Hospital from the Superior Court for King County and, on October 16th, executed the search warrant. He mailed copies of the seized records to the police in Vancouver on October 17th.
- [6] Four months prior to the application by Detective Corey to the Superior Court for the search warrant the Supreme Court of the United States, on June 14, 1996, handed down its decision in *Jaffee v. Redmond*, *supra*. The Court held in that case that statements made by a patient to her therapist during counselling sessions are protected from compelled disclosure in a civil action in a federal court of the United States under the Federal Rules of Evidence.
- [7] I have analyzed the Jaffee decision in several rulings including those of August 26 and December 2, 2002. It is convenient here to refer to the analysis of Jaffee set out in paragraphs 11 to 13 of the judgment of Circuit Judge Portfilio, writing for the United States Court of Appeals Tenth Circuit in *United States v. Glass* (1998), 133 F.3d 1356, as follows:
11. In *Jaffee*, Petitioner, the administrator of the estate of a man who was shot by a police officer, sought access to a therapist's notes taken during counseling sessions with the officer after the shooting. Because of the conflicting versions of the event, Petitioner sought to discover the clinical social worker's notes for use in cross-examining the officer in a suit alleging violation of the deceased's constitutional rights under 42 U.S.C. Section(s) 1983 and Illinois' wrongful death statute. The officer responded the notes were protected by the psychotherapist-patient privilege and despite the court's rejecting the argument, the officer and therapist refused to comply with the court's disclosure order, prompting the court to instruct the jury it "could presume the contents of the notes would have been unfavorable to respondents." 116 S.Ct. at 1926. The jury then awarded the estate damages on the federal and state claims. The Seventh Circuit reversed and remanded for a new trial, concluding "reason and experience," the touchstones for acceptance of a privilege under Rule 501 of the Federal Rules of Evidence, compelled recognition of the psychotherapist-patient privilege." *Id.* (quoting 51 F.3d 1346, 1355 (7th Cir.1995)). Because of the split in the circuits in recognizing a psychotherapist privilege under Rule 501 of the Federal Rules of Evidence, the Court granted certiorari.
12. Against the broad mandate of the Federal Rules of Evidence authorizing federal courts "to define new privileges by interpreting 'common law principles ... in the light of reason and experience,'" *id.* At 1927 (citation omitted), yet recognizing "the general duty to give what

testimony one is capable of giving," *id.*, the Court acknowledged that testimonial privileges may, however, be justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Id.* (internal quotes omitted) (citations omitted). "Reason and experience" persuaded the Court the psychotherapist-patient privilege advances both a public good and important private interests. "The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 1929. At the same time, fostering and protecting "an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears" further "important private interests." *Id.* The Court reasoned sacrificing these important public and private interests for only modest evidentiary benefit, given the communications would unlikely come into being were they not protected, "would therefore serve no greater truth seeking function than if it had been spoken and privileged." *Id.* Thus mirrored against "the uniform judgment of the States," *id.* At 1930, that fifty States and the District of Columbia had enacted some form of psychotherapist-patient privilege, the Court concluded the confidential communications between a psychotherapist and her patient are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.

13. Made clear by *Jaffee* is that the privilege is not rooted in any constitutional right of privacy but in a public good which overrides the quest for relevant evidence; the privilege is not subject to a "balancing component ... [m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance or the patient's interest in privacy and the evidentiary need for disclosure," *id.* At 1932; and it covers confidential communications to licensed psychiatrists, psychologists, and clinical social workers whose "clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist but whose counseling sessions serve the same public goals." *Id.* At 1931. Left expressly unresolved, however, were its exact contours and specific exceptions

[8] I return to the chronology of events. In January, 2000 the Crown, pursuant to the provisions of the Treaty for Mutual Legal Assistance in Criminal Matters between the Governments of Canada and the United States of America (M.L.A.T.) obtained an order from the United States District Court for the Western District of Washington at Seattle appointing Mr. Justice Josephson of this Court as a commissioner of the United States District Court to take the psychotherapists' testimony on commission at Kent, Washington. The evidence of the psychotherapists was taken at Kent on January 24 and 25, 2000. (Vide rulings delivered February 11, March 14 and August 12, 2002.)

[9] As I stated at the beginning of those reasons this Court, on August 12, 2002, found as a fact on the evidence before it that the psychotherapist-patient privilege recognized by the Supreme Court of the United States in *Jaffee* is subject to a child abuse exception which

would apply to the circumstances of this case although no court having binding authority in the State of Washington has so found. The reasons for that finding are set out in the ruling delivered on August 26, 2002. It will suffice here to set out paragraph 25 of those reasons as follows:

Thus, I am persuaded by the opinion of Professor Aronson when considered in the light of the reasoning of the Supreme Court of the United States in *Jaffee v. Redmond* that although no court having binding authority in the State or Washington has ruled that the principle enunciated in *Jaffee* is subject to a child abuse exception which would apply to the circumstances of this case, I find the privilege is subject to that exception. Shortly stated, the Court in *Jaffee*, in 1996, recognized a common law psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence in part because the 50 states and District of Columbia recognized such a privilege. The Court declined to express an opinion with respect to exceptions to the privilege because that aspect of the matter was not necessary for its decision. Nonetheless, the Court did not doubt that in certain situations the privilege must give way to disclosure by the therapist. According to Professor Aronson, a child abuse exception to the privilege is commonly accepted in the overwhelming number of states. Accordingly, applying the reasoning of the Court in *Jaffee*, I conclude that if the matter came before a federal court having binding authority in the State or Washington that court would recognize a child abuse exception to the patient-psychotherapist privilege based upon common law principles interpreted in the light of reason and experience.

[10] In order to focus the debate with respect to the issues presently before the Court I set out Professor Nelken's written opinions as follows:

1. I am not aware of any published opinion by a United States federal court that recognizes a child abuse exception to the psychotherapist-patient privilege established in *Jaffee v. Redmond*, 518 U.S. 1 (1996). Under current law, no such exception exists.
2. The privilege created in *Jaffee*, like the attorney-client privilege, is an unconditional one, that is, it is not subject to a balancing test in each case to determine whether the need for the evidence in question outweighs the patient's interest in confidentiality.
3. The Supreme Court in *Jaffee* did not recognize any exceptions to the privilege it created. In dicta, the Court referred to "future developments ... situations in which the privilege must give way, for example, if a serious threat of harm to the patient or others can be averted only by means of a disclosure by the therapist," 518 U.S. at 18, n.19.
4. The Tenth and Sixth Circuits have disagreed as to whether the language in footnote 19 (above) was intended to suggest that there might be a "dangerous patient" exception to the *Jaffee* privilege. The Sixth Circuit rejected the idea of an exception that would permit a therapist to testify against his patient in a criminal proceeding, *U.S. v. Hays*, 227 F. 3d 578, 584-586 (6th Cir. 2000). The Tenth Circuit, although it recognized such an exception, limited it to situations in which "disclosure was the only means of averting harm ... when the disclosure was made," *U.S. v. Glass*, 133 F3d 1356, 1360 (10th Cir. 1998). That is, the exception recognized in *Glass* applies only where disclosure by the therapist can prevent future harm

from occurring, not when a patient confides a past act.

5. The private interest in confidentiality and the public interest in citizens' mental health that supported adoption of the psychotherapist-patient privilege in Jaffee are so important that any exception to the privilege must be narrowly drawn to protect the confidential relationship. In light of footnote 19 in Jaffee, and the Glass and Hays cases, it is my opinion that a federal court asked to recognize a child abuse exception to the Jaffee privilege would limit any such exception to cases where disclosure of the patient's confidence could actually avert a future harm. This view is further supported by analogy to the crime-fraud exception to the attorney-client privilege, which permits an attorney to divulge client confidences in order to prevent future wrongdoing, but not to reveal past acts.
 6. The fact that a psychotherapist may have an ethical or statutory duty to report instances of suspected child abuse to appropriate state authorities does not preclude assertion of the psychotherapist-patient privilege in a subsequent criminal proceeding against his patient.
 7. There is no federal physician-patient privilege, so a federal privilege would apply to hospital records only insofar as those records reveal communications between a licensed psychotherapist and a patient, made for the purpose of diagnosis or treatment.
 8. A new rule announced by a federal court is generally applicable to all cases not yet finally decided, but not to closed cases.
- [11] In her oral testimony before the Court Professor Nelken confirmed her opinions as above set out.
- [12] In sum, Professor Nelken is not aware of any case decided by a United States federal court that recognizes a child abuse exception to the psychotherapist-patient privilege established by the Supreme Court of the United States in Jaffee. In her opinion no such exception exists under current law. A federal court asked to recognize a child abuse exception to the Jaffee privilege would, in her opinion, limit any such exception to cases where disclosure of the patient's confidence could actually avert a future harm. The recognition of an exception to the privilege by a federal court would apply to all cases not finally decided.
- [13] In her testimony in chief on October 15, 2002 Professor Nelken testified with respect to the existence of a child abuse exception to the Jaffee privilege as follows: (Transcript p. 6)

I am aware of no case that has considered and either recognized or rejected the child abuse exception to that privilege.

Q Thank you.

A And that's what I mean by saying that, under current law, no such exception exists.

- [14] With respect to the issue of retrospectivity Professor Nelken testified in chief as follows: (Transcript p. 10)

Q And item 8 is dealing with this question of retroactivity. Perhaps you can just read that into the record, as well?

A

A new rule announced by Federal Court is generally applicable to all cases, not yet finally decided, but not the closed cases.

Meaning that you would not re-open a case, but, for example, once *Jaffee v. Redmond* was decided, that any case where there was a similar issue that was still open, either at the trial level or pending on appeal, the issue could be -- could then be raised and would apply there.

In support of her proposition Professor Nelken stated that she was referring to *Griffith v. Kentucky*, 479 U.S. 314, and *Harper v. Virginia Department of Taxation*, 509 U.S. 86.

[15] Regarding the issue of extraterritoriality, Professor Nelken testified in chief on October 15 as follows: (Transcript pp. 11-12)

Q Now, moving to the issue of extraterritoriality, you've not expressly set out an opinion with respect to that. Can you say why?

A Well, in the context of the extraterritorial application of the -- the child abuse exception to *Jaffee*, I -- I couldn't really, since I don't think that there is such an exception, I couldn't really give an opinion about whether such an exception, if it did exist, would apply extraterritorially. There certainly is no case discussing that particular issue, since there is no case discussing the child abuse exception in and of itself.

Q And perhaps we can just define the issue of extraterritoriality. Are you saying then that there's no case that would say that, for example, there's a duty to report under the supposed child abuse exception, in that it doesn't exist on the basis of your evidence, that there's no duty to report a wholly foreign incident of historic dimensions? There's just --

A Well, I -- the word "reporting" is difficult, because reporting statutes are one thing, and privileged statutes are something else. So I'm not familiar with the requirements of the Washington reporting statutes. But there is no case, that I am aware of, that discusses the question of whether a confidence made in one State regarding -- regarding something that might be termed "child abuse" would have to be or could be subject to an exception to the *Jaffee* privilege in some other proceedings.

Q All right.

A It's difficult to address because the premise is, I think, an incorrect one, so that it's hard for me to say what a court would do on top of that --

Q Yes.

A -- with respect to the -- to an exception that I don't believe is supported by case law.

[16] In her cross-examination on October 15 Professor Nelken testified as follows: (Transcript pp. 12-13)

Q Professor Nelken, you feel you can give an opinion as to whether or not a child abuse exception would be generally applicable to all cases not yet finally decided, and yet you cannot give an opinion as to whether a child abuse exception can have application to a case originating in a foreign country?

A Well, the statement that I made with respect to retroactivity was a general one that a new rule announced by Federal Court is generally applicable to all cases that are not yet finally decided.

Q Well, why are you unable to give any opinion as to whether a new rule can be applied extraterritorially?

A That is not an area -- that is not an area of my expertise. I would not -- I could not give an opinion about it being applied extraterritorially, and certainly not about an -- if I had -- if there were a case that discussed the question with respect to the child abuse exception, that would be one thing, but I don't -- I don't know of any such case.

Q Well, isn't that the difficulty, really, this whole question of extraterritorial application is outside of your expertise?

A In general, yes, it is.

Q And --

A In general, that is, if you are asking me that, as a general matter what about extraterritorial applications. That is not an area of my expertise, but I would certainly be aware of any situation in which that matter had been addressed with respect to the psychotherapist/patient privilege.

Q Well, for example, you're not in any position to render an opinion as to whether or not the general rule in Jaffee could be applied extraterritorially to a case in Canada?

A No, I'm not.

[17] The possibility of exceptions to the absolute privilege enunciated by the Court in Jaffee is indicated in Endnote 19 to the majority decision in that case, which reads as follows:

Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

[18] Professor Nelken acknowledges that the Court in Jaffee does not exclude the possibility of a child abuse exception to the privilege (Transcript, October 17, p. 9), but opines to the view that in order to conform with the tenor of the Endnote "the threat that was presented was both serious and that disclosure was the only means of averting the harm". Her position is neatly summed up in cross-examination as follows: (Transcript, October 17, p. 15)

Q And you, in giving your evidence about a child abuse exception is you're first saying that a child abuse exception should not be applied in this case because, in your view, there is no child abuse exception, correct?

A Yes.

Q And secondarily, if there is a child abuse exception, it is your view that it would only operate to avert present risk of harm to a child, correct?

A Only operate to avert -- I'm sorry, I didn't hear.

Q To avert a present risk of harm to a child?

A That's correct.

Q You are not saying that a child abuse exception shouldn't be applied because this case is closed?

A No.

Q You're not saying that the application of a child abuse exception would be impermissibly retroactive in this case?

A I'm -- I don't believe that I can really give an opinion about that matter of criminal law.

[19] With the greatest of respect to Professor Nelken I have not found her evidence helpful in determining the issues of retrospectivity and extraterritoriality. Her evidence is only tangentially related to those issues. Her fundamental thesis in giving her evidence is that there is no case in a United States federal court that recognizes a child abuse exception to the psychotherapist-patient privilege and therefore under current law no such exception exists.

[20] The Crown has made a very forceful argument to the effect that the defence ought not to be permitted to re-open the issue of the existence of the child abuse exception. The defence, on the other hand, seeks to have Professor Nelken's evidence admitted for all purposes on the voir dire and thus have the Court reconsider its ruling with respect to the existence of the exception.

[21] In grappling with the questions of retrospectivity and extraterritoriality I have necessarily had to consider the whole of Professor Nelken's testimony. At the end of the day I am persuaded that I ought to consider her testimony in connection with the issue of the existence of a child abuse exception to the Jaffee privilege.

[22] It is common ground that no court having binding authority in the State of Washington has ruled that the privilege enunciated in Jaffee is subject to a child abuse exception. Professor Nelken takes us no further than that in giving her opinion "no such exception exists". Certainly one is unable to glean from her evidence a refutation of Professor Aronson's opinion or the reasoning set out in paragraph 25 of the ruling delivered on August 26, 2002 set out *infra* at paragraph 9. Thus, I continue to be persuaded, for the reasons set out in the ruling of August 26, 2002, that the privilege is subject to a child abuse exception which would apply to the circumstances of this case.

[23] With respect to Professor Nelken's opinion regarding a child abuse exception to the Jaffee privilege I issued the following memorandum to counsel through the trial coordinator on December 13, 2002:

During the course of my deliberations with respect to the issues of the extraterritorial application and retrospective operation of the child abuse exception to the Jaffee privilege I have considered the testimony of Professor Melissa Nelken which was heard by the Court on October 15, 17 and 18, 2002. During the course of her testimony Professor Nelken expressed opinions to the effect that: (1) there is no child abuse exception to the Jaffee privilege, and (2) if there is the exception would only operate to avert a present risk of harm to a child.

The latter of these opinions was not addressed by counsel on October 21 or 22 following the completion of Professor Nelken's evidence. Notwithstanding I have under reserve the question of whether Professor Nelken's evidence should be admitted for all purposes on the *voir dire* and thus considered in connection with the ruling of August 26, 2002, I would be obliged to have the submissions of counsel with respect to Professor Nelken's opinion that any child abuse exception to the privilege would be confined to cases "where disclosure of the patient's confidence could actually avert a future harm" given the apparent relevance of this opinion to at least one of the issues for which leave was given.

[24] I have now had the benefit of the submissions of Mr. Millar and Mr. Ruttan with respect to the matter raised in the memorandum on December 16 and 17 respectively.

[25] Mr. Millar again emphasizes that with respect to American law the role of this Court is restricted to finding as a fact what the United States law is. This Court, it is said, must not engage in speculation as to what the law of the United States may be at some future time. The Court should not be engaged in defining a future child abuse exception to the Jaffee privilege. There is, it is argued, no child abuse exception to the Jaffee privilege.

[26] Moreover, Mr. Millar submits, this Court has no jurisdiction to "create" American law. It has no jurisdiction to do what the Crown asks it to do: rule that there is a child abuse exception to the Jaffee privilege albeit none is recognized by a court in the United States.

- [27] Further, it is argued, the debate as to what form the exception would take is not properly before this Court. According to Professor Nelken, it is said, any exception to the Jaffee privilege would be based on policy considerations and would not be case specific. Here, the ruling with respect to the exception is case specific, that is, limited to this case, and cannot operate to change United States law.
- [28] Mr. Millar submits that it is not within this Court's role as fact finder to sit as if it was a court in the United States hearing the issue of a child abuse exception to the Jaffee privilege for the first time given that the Crown did not place the issue before the Federal Court in the United States when it had the opportunity to do so, namely, either at the time it submitted the letter of request to hold the Commission Hearing to the authorities in the United States or at the time the Commission Hearing was held. The Crown, it is argued, cannot wait until the privilege issue is before the Court here and then raise the issue of an exception. If the Crown wanted to argue a child abuse exception to the Jaffee privilege it should have done so in the United States. It should not be raised here before a court having no jurisdiction to make retrospective findings of United States law or make new exceptions to an unconditional United States privilege. In essence, it is said, the question of Mr. Dorsay's privilege in the United States should never have been before this Court at all.
- [29] I pause to note that the question of Mr. Dorsay's privilege in the United States is necessarily before this Court. Mr. Dorsay is being tried in this Court for murder. The evidence over which Mr. Dorsay asserts an American privilege is in this Court's custody and control. Only this Court, and no other, has the jurisdiction to make rulings with respect to the admissibility of evidence on Mr. Dorsay's trial whether that evidence engages a United States privilege issue or not.
- [30] The matters of this Court's jurisdiction, its role as fact finder with respect to American law, and the reasons for finding there is a common law child abuse exception to the common law psychotherapist-patient privilege recognized by the United States Supreme Court in Jaffee have been dealt with by this Court in previous rulings. Little would be achieved by repeating what has been said in those rulings.
- [31] What is germane here is whether any child abuse exception to the Jaffee privilege would be confined to averting a present risk of harm to a child as asserted by Professor Nelken.
- [32] There is in this case no suggestion in the evidence presently before the Court of a need to avert a present risk of harm by Mr. Dorsay to a child. What is alleged is the murder of a child which occurred in British Columbia some 35 years ago.
- [33] In paragraph 17 *infra* I set out Endnote 19 to the decision of the majority of the United States Supreme Court in Jaffee which gives, by way of an example, a situation in which the privilege recognized by the Court "must give way", namely, "if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist". This Endnote is essentially related to what is known as the "dangerous patient exception".

- [34] Mr. Millar argues that Professor Nelken's opinion with respect to confining any child abuse exception to cases where disclosure of the patient's confidence could actually avert future harm to a child is as fraught with speculation as Professor Aronson's opinion with respect to the existence of a child abuse exception.
- [35] In my respectful opinion Professor Nelken fails to recognize the fundamental distinction between the dangerous patient exception, which plainly imports the notion of averting a future risk of harm: *United States v. Glass*, supra, and a child abuse exception which involves an event of child abuse in the past. As Mr. Ruttan put it, a child abuse exception arises out of cases where the patient has admitted to child abuse. There may be concern to avert future harm. But the cases involving a child abuse exception do not require a threat of future harm; they look to an event which has occurred: *Washington v. Fagalde* (1975), 539 P. 2d 86 (Washington Supreme Court); *Washington v. Anderson* (1980), 616 P. 2d 612 (Washington Supreme Court); *United States v. Bahe* (1997), 128 F. 3d 1440 (United States Court of Appeals Tenth Circuit).
- [36] In short, I am not persuaded by Professor Nelken's evidence that the finding of this Court with respect to the existence of a child abuse exception to the Jaffee privilege (vide rulings delivered on August 12 and 26, 2002) should be altered.
- [37] I return to the issues of extraterritoriality and retrospectivity referred to in the first paragraph of these reasons.
- [38] Does the child abuse exception found by this Court apply to the accused's confessions made in the State of Washington in January, 1995 to certain psychotherapists during the course of his treatment for depression of the murder of a child alleged to have been committed 35 years ago in British Columbia. This is referred to as the extraterritorial issue.
- [39] Mr. Millar is, in my opinion, correct in his submission that this Court cannot create American law. The Court does not, with respect, purport to do so. Its role is confined to making findings of fact with respect to United States law. Moreover, the Court cannot bind any court in the United States by its findings of fact with respect to United States law. That is not an exercise the Court is engaged in. Its role is to determine the admissibility of the evidence taken at the Commission Hearing on Mr. Dorsay's trial for murder in this Court in this province. An aspect of that determination is the application of the Jaffee privilege to the proceedings at the Commission Hearing. In short, if the Jaffee privilege applies to the evidence relating to a charge of murder said to have occurred in Vancouver then so too does any exception to that privilege.
- [40] The retrospectivity issue is whether the child abuse exception applies retrospectively to the Commission Hearing proceedings held in the State of Washington in January, 2000 before the exception was recognized by this Court in August, 2002.
- [41] The Crown led no evidence of when the exception would apply, Mr. Millar submits.

- [42] In Jaffee the Supreme Court of the United States was engaged in recognizing a common law privilege. The decision of the Court was delivered on June 14, 1996 but related to an event which occurred on June 27, 1991 (the shooting) and to 50 counselling sessions which took place prior to the trial of a civil action for damages against the officer responsible for the shooting. The reasoning of the Court in Jaffee leads me to conclude that what the United States Supreme Court was doing there is similar to what courts here do in recognizing the principles of the common law: see *Jobidon v. The Queen*, [1991] 2 S.C.R. 714, at pp. 727 et seq.
- [43] What must however be recognized is that Mr. Dorsay's privilege under United States law is a rule of evidence which operates at his trial to exclude the admissibility of evidence covered by the privilege. The privilege may have retrospective effect in the sense of looking back to circumstances which occurred in the past, but the operation of the rule, if it operates, is at the trial. So too with respect to any exception to the privilege.

"W.B. Scarth, J."

The Honourable Mr. Justice W.B. Scarth

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