
CANADA / JUDGMENT

Taylor v. Cooper

2013 BCSC 2073

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Supreme Court of British Columbia

DECIDED

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2013 BCSC 2073 Taylor v. Cooper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taylor v. Cooper,

2013 BCSC 2073

Date: 20131029

Docket: S128836

Registry: Vancouver

Between:

Kathleen Isabel Taylor

Plaintiff

And

Lawrence Cooper a.k.a. Father Damian Lawrence Cooper

and the Roman Catholic Archbishop of the Archdiocese of Vancouver,

a Corporation Sole

Defendants

Before: The Honourable Madam Justice Warren

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

M.R. Ellis, Q.C.

Counsel for Defendant Lawrence Cooper:

D.A. Shugarman

Counsel for Defendant Roman Catholic Archbishop of the Archdiocese of Vancouver, a Corporation Sole

I.D. Mackie

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 22, 2013

Place and Date of Judgment:

Vancouver, B.C.

October 29, 2013

Introduction

- [1] THE COURT: The defendant the Roman Catholic Archbishop of the Archdiocese of Vancouver (the "Archdiocese") applies for production of the following documents listed in Part 4 of the plaintiff's list of documents: item 4.2, personal journals of the plaintiff dated between August 12, 1987 and October 1997 (the "Journals"); and item 4.3, communications between the plaintiff and her brother, Tim Fagan, (the "Fagan Correspondence"). The defendant Lawrence Cooper supports the application.
- [2] The plaintiff asserts privilege over the Journals on the basis of the Court of Appeal decision in *K.L.V. v. D.G.R.*, [1994] B.C.J. No. 1978 [K.L.V.] and the Supreme Court of Canada decision in *A.M. v. Ryan*, [1997] S.C.J. No. 13 [A.M. v. Ryan]. The plaintiff asserts privilege over the Fagan Correspondence on the basis of solicitor-client privilege or litigation privilege.

Background

- [3] The plaintiff claims the defendant Lawrence Cooper sexually exploited her when she was between the ages of 17 and 22. She alleges Mr. Cooper's conduct has caused her injuries, and she has sued Mr. Cooper for damages.
- [4] Mr. Cooper was a Catholic priest during the material time. He admits the sexual conduct occurred, although he contends it did not commence until the plaintiff was 18 years old. He asserts that the plaintiff consented to the sexual conduct and in any event that the conduct was not the cause of the injuries for which the plaintiff sues.

- [5] It is common ground that the plaintiff and Mr. Cooper first met at a Catholic summer camp in 1985 and became reacquainted the following summer at the same camp. It is common ground that Mr. Cooper began providing the plaintiff with counselling in the fall or winter of 1986. The plaintiff alleges the sexual conduct commenced early in 1987, when she was 17 years old. The defendant claims it commenced in February 1988, when she was 18 years old. It is common ground that the sexual conduct ceased in September 1989, resumed a year later when the plaintiff was 20 years old, and ended in December 1992.
- [6] The plaintiff claims that the Archdiocese was negligent in its dealings with Mr. Cooper after having received an allegation of inappropriate contact between the plaintiff and Mr. Cooper and/or that the Archdiocese is vicariously liable for Mr. Cooper's alleged wrongful acts.

Issues

- [7] The following issues arise:
1. Should the Journals be shielded from production on the ground of common law privilege?
 2. Should the Fagan Correspondence be shielded from production on the grounds of solicitor-client privilege or litigation privilege?

Analysis

- [8] The plaintiff bears the onus of establishing that the documents are privileged, and she must do so on a document-by-document basis: *Keefer Laundry Ltd. v. Pellerin Milner Corp.*, [2006] B.C.J. No. 1761 (S.C.) at paras. 58, 60 [*Keefer Laundry*].

The Journals

- [9] Before addressing the question of privilege, it is helpful to consider the relevance of the Journals.
- [10] The plaintiff listed the Journals on her list of documents, thereby conceding relevance, but her counsel submitted they are not relevant to liability and are only marginally relevant to damages. It is the plaintiff's position that notwithstanding the marginal relevance of the Journals to the question of the nature and extent of the injuries suffered by her, the damage that would be caused to the plaintiff's healing process as a result of being compelled to produce the Journals outweighs any benefit to be gained from their disclosure.
- [11] The defendants submit the Journals are of significant relevance to both liability and damages. Regarding liability, the defendants' position is the Journals are directly relevant to the defence of consent. As already noted, the age of the plaintiff at the time the alleged sexual conduct commenced is contested. As a result of the Criminal Code in effect at the material time, as a matter of law the plaintiff may not have been able to consent to sexual acts at the age of 17: *A.B. v. C.D.*, [2011] B.C.J. No. 1087 (S.C.) at paras. 102 to 104. Accordingly, the defendants submit the plaintiff's age at the time the sexual conduct commenced may have a bearing on Mr. Cooper's liability.

- [12] In addition, while counsel for the defendants acknowledge that a priest/penitent relationship has been held to be fiduciary in nature, they rely on the obiter dicta of Master Brandreth-Gibbs in *P.J.S. v. Pornbacher*, [1996] B.C.J. No. 2812 [Pornbacher] as support for the submission that there are situations where a priest could engage in sexual activity where his personhood as a priest is not part of the transaction such that no fiduciary duty is breached. They point out that Mr. Cooper denies that his relationship with the plaintiff was one of priest and penitent once the relationship became sexual. Further, Mr. Cooper alleges the plaintiff initiated, pursued, terminated and then actively renewed the relationship. As a result, counsel for the defendants say any evidence that will assist in establishing the nature of the relationship is probative of whether the plaintiff consented and therefore of Mr. Cooper's liability.
- [13] As already stated, the plaintiff submits the Journals are not relevant to liability. Counsel for the plaintiff referred to some hearsay evidence that indicates Mr. Cooper acknowledged several years ago that the sexual conduct commenced when the plaintiff was 17. In any event, counsel for the plaintiff submits it makes no difference whether the sexual conduct commenced when the plaintiff was 17 or 18. The plaintiff's position is that irrespective of her age, her consent was vitiated because it was obtained as a result of the power imbalance inherent in a relationship with a priest. Counsel for the plaintiff suggested that so long as the priest's identity as a priest was known, that would be enough, implying that it would always be a breach of fiduciary duty for a priest to engage in a sexual relationship with someone who knew he was a priest. She points out that this is consistent with what Master Brandreth-Gibbs said in *Pornbacher*.
- [14] It has been said that the priest/penitent relationship is one of the traditional categories that gives rise to a presumption of fiduciary duty: see, for example, *D.P. v. Allen*, [2004] O.J. No. 3042 (S.C.) at para. 289 [D.P. v. Allen]. However, notwithstanding the narrow example referred to in *Pornbacher*, it appears that not every relationship involving a priest who is known to be a priest gives rise to such a presumption. For example, in *D.P. v. Allen*, the Ontario Supreme Court found that an adult relationship between the plaintiff and the defendant priest did not fall within an established fiduciary relationship category.
- [15] The defence submission also referred to the "priest/penitent" relationship, perhaps implying that in order for a presumption of fiduciary duty to arise, the relationship must include the priest hearing the complainant's confession. Indeed, it appears there is a factual dispute between the parties as to whether Mr. Cooper ceased hearing the plaintiff's confession once the sexual conduct commenced, which suggests that the parties consider that fact to be of significance to liability.
- [16] Does the existence of the presumption depend on the complainant's status as a penitent? Would the presumption arise if the complainant was regularly attending mass said by the priest but not going to him for confession or not going to confession at all? Would it make a difference if the complainant went to the priest for confession even though there were other priests available? In my view, these questions demonstrate the difficulty associated with

characterizing a relationship involving a priest as one of the traditional relationships which gives rise to a presumption of fiduciary duty.

- [17] It may be in this case, given the plaintiff's age at the time the sexual conduct commenced, even if she was 18, and the fact that Mr. Cooper was at some point in time hearing her confession and providing her with counselling, that a presumption of fiduciary duty will be found to exist. On the other hand, it may be that no presumption arises. In my view, in either case it is going to be necessary to assess and evaluate the entire factual context in which the sexual conduct occurred. If the presumption applies, this will be necessary in order for the defendants to attempt to rebut it, and if there is no presumption, this will be necessary in order to determine whether the relationship was in fact characterized by a power imbalance.
- [18] In my view, the Journals which record the plaintiff's impressions and thoughts during the very time the sexual conduct was occurring and in the years immediately thereafter are directly relevant to establishing this context. Of course, they may furnish evidence of specific facts in issue, such as when the sexual conduct began and when Mr. Cooper stopped hearing the plaintiff's confession, but in my view their relevance is much broader than that, as they will contribute to an understanding of the entire nature of the relationship. For these reasons, it is my view the Journals are of significant relevance to liability.
- [19] As already noted, the plaintiff appears to concede the Journals are relevant to damages, but asserts they are only marginally so.
- [20] The plaintiff is seeking damages for a very broad set of problems and injuries. Many of the plaintiff's complaints are subjective and therefore difficult to verify. Further, although the plaintiff attributes her problems to Mr. Cooper, clinical records that have already been produced indicate that the plaintiff has had ongoing issues with her mother since before she began seeing Mr. Cooper for counselling. It is my view that any direct evidence of the plaintiff's mental and emotional state during the period she kept the Journals is relevant to verifying her subjective claims.
- [21] The plaintiff also alleges that Mr. Cooper convinced her to pursue studies in theology rather than law and that but for this she would have become a lawyer. She has asserted a claim for past and future earnings quantified at in excess of \$2 million. Mr. Cooper denies having counselled or steered the plaintiff towards divinity school and away from law school, and the Journals are likely to shed light on what influenced her career choice. For these reasons, it is my view that the Journals are also of significant relevance to damages.
- [22] The next question is whether the plaintiff has established that the Journals are privileged. A privacy claim over a communication is properly analyzed under the rubric of common law privilege: *A.M. v. Ryan*. As explained by Madam Justice McLachlin at para. 20, this involves the application of the four-part Wigmore test:
1. The communication must originate in a confidence.

2. The confidence must be essential to the relationship in which the communication arises.
3. The relationship must be one which should be "sedulously fostered" in the public good.
4. If all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

[23] In *K.L.V.*, the Court of Appeal considered whether the Wigmore test could apply to journals, which by definition are not communications between people. In that case the plaintiff sued her former stepfather for sexual assaults that occurred when she was between the ages of 7 and 15. The stepfather had been criminally convicted, and so liability was not an issue. The stepfather applied for production of the plaintiff's journals. The chambers judge reviewed the journals and found that they may be relevant to the issue of damages and ordered them to be produced to counsel for the defendant. The Court of Appeal overturned that decision and in so doing applied the following reframed Wigmore test:

1. The writings must originate in a confidence that they would not be disclosed.
2. The activity of the secret writing is important if not essential to the healing process.
3. The healing process is such that in the opinion of the specialists (and therefore society) it ought to be strongly encouraged.
4. The possible injury to the ongoing healing process is far greater than the benefit gained by disclosure.

[24] In my view, it is readily apparent that a significant connection between the confidential writing and the healing process is a necessary element of this test.

[25] In *K.L.V.*, the Court of Appeal concluded that the evidence of the plaintiff and her psychiatrist was sufficient to satisfy the first three criteria of the reframed Wigmore test. In that case the plaintiff's affidavit established that her purpose in keeping the journals was at least in part a therapeutic one: see para. 5 of the decision. The affidavit of the plaintiff's psychiatrist expressed the opinion that disclosure would be harmful to the healing process: see para. 6 of the decision.

[26] In this case the plaintiff's evidence regarding the journals consists of one paragraph in her own affidavit plus an affidavit of Dr. Sandra Wieland, the plaintiff's psychologist. The plaintiff deposes as follows:

I do not wish to have my personal journals disclosed to the defendant Father Cooper, the Archbishop or their representatives. Those journals were kept by me as a young girl as a repository of my private thoughts and feelings and giving the defendants access to them would cause me great distress. I also kept a calendar with coded notations of events and interactions with Father Cooper, which calendar has been disclosed.

[27] The defendants object to the admission into evidence of Dr. Wieland's affidavit on a variety of grounds. I agree that much of Dr. Wieland's affidavit is either not admissible or not of assistance on this application. In assessing that affidavit, in my view it is important to keep in mind what the plaintiff must establish:

1. the Journals originated in confidence;
2. the plaintiff's journaling was important, if not essential, to her healing process;
3. the healing process should be strongly encouraged; and
4. harm that could result to the healing process from the disclosure of the Journals far outweighs the probative value of them.

[28] Paragraph 2 of Dr. Wieland's affidavit simply summarizes her qualifications.

[29] Paragraphs 3 and 4 appear to express her opinion regarding the typical impact on an individual of sexual abuse and of the failure of a trusted institution to protect an individual from sexual abuse. They do not mention journaling. While I accept that Dr. Wieland is qualified to give such opinions, in my view these paragraphs do not assist in resolving the issues that must be addressed on this application, which focus on the connection between confidential journaling and the healing process.

[30] Paragraph 5 of Dr. Wieland's affidavit states that she has been treating the plaintiff since 2010, and she understands her clinical notes have been produced in this proceeding. This paragraph is in my view admissible as background facts upon which the opinions expressed in paragraph 8, which I will address in a moment, are based.

[31] Paragraph 6 for the most part consists of a very brief statement of Dr. Wieland's assessment of the plaintiff's efforts to deal with her psychological injuries. It makes no mention of her Journals or even journaling in general and as such, in my view, does not assist in resolving the issues raised on this application.

[32] The first and last sentences in paragraph 7 of Dr. Wieland's affidavit are difficult to characterize. They appear intended to express Dr. Wieland's view as to the plaintiff's purpose in writing her Journals. Given Dr. Wieland did not start treating the plaintiff until some 13 years after the Journals were written, in my view they are either opinion or hearsay. If they are opinion, it is my view they are inadmissible, as they go to an issue upon which opinion is not required. The plaintiff herself is able to attest to her purpose in writing the Journals. If they are properly characterized not as opinion but as fact, they are unattributed hearsay. In the circumstances here where the plaintiff can and did give direct evidence as to her purpose in writing the Journals, and where Dr. Wieland did not recommend the plaintiff keep the Journals, I give no weight to Dr. Wieland's views as to the plaintiff's purpose in writing the Journals.

- [33] The middle three sentences in paragraph 7 are in my view either argument or Dr. Wieland's opinion as to why people in general, particularly young women, write in journals. In my view, this is not something that requires expert opinion. This part of the affidavit does not say anything about why the plaintiff in particular kept the Journals, nor does it express any opinion as to whether the plaintiff's writing in these Journals was important or essential to the plaintiff's healing process. This part of the affidavit is not directed at the role journaling can play in the healing process of someone who has been sexually exploited.
- [34] This leaves paragraph 8, which, given Dr. Wieland has been the plaintiff's treating therapist since 2010, I accept as admissible opinion. She states:

Being forced to disclose these journals to Father Cooper, the Archdiocese and their legal representatives is highly likely to retrigger the emotional distress of the plaintiff's late adolescence and early adulthood. I believe that were that to be ordered it would be highly likely to impede her treatment and her recovery.

- [35] As noted above, the plaintiff bears the burden of establishing the Journals are privileged. In my view her evidence falls short. The real problem for the plaintiff is the second K.L.V. criterion, namely, that the activity of the secret writing was important, if not essential, to the plaintiff's healing process.
- [36] There are several potential reasons for keeping a journal. These include a desire to maintain a contemporaneous record of events, feelings and thoughts for no particular purpose, or a desire to do so as an aide-memoire for future reference. A journal may also be kept as an outlet for creative writing. I also accept that journals may be kept for therapeutic purposes, to explore feelings and attempt to gain perspective on life experiences. Here, however, the only evidence of why this plaintiff kept these Journals is her statement that they were kept as a repository of her private thoughts and feelings. In my view, this does not establish that the Journals were kept for therapeutic purposes. The plaintiff in effect concedes as much in her application response, which states in part as follows:

It is not suggested that all the diaries were written for a therapeutic purpose, but this application raises the issue of the special privacy accorded to personal diaries and journals, as well as the impact of the production of those diaries on the therapy of the plaintiff.

- [37] In my view, to read the K.L.V. test as if it were not necessary to establish that the Journals were written for a therapeutic purpose would deprive the second criterion of meaning. There is no evidence from which I could conclude that any of the Journals were important, if not essential, to the plaintiff's healing process. As such, it is not necessary to consider the other elements of the K.L.V. test.
- [38] For the foregoing reasons, I conclude that the Journals are relevant and not privileged and, as such, they ought to be produced. However, in my view, there still remains a question of whether, given the privacy interests at stake, conditions should be imposed on the production.

- [39] Rule 7-1(17) provides that the court may order production of documents in the manner it considers appropriate. This rule was considered by Williams J. in *Nikolic v. Olson*, 2011 BCSC 125. At paras. 23 through 25 he confirmed the court has a broad discretion under Rule 7-1(17) to order the production of documents in a manner that seeks to do justice between the parties, balancing their interests fairly and having regard for the object of the Rules.
- [40] For the reasons already expressed, it is my view that the Journals are of significant relevance to both liability and damages and that the defendants would be prejudiced in their ability to meet the case against them if the Journals were not produced. However, I also recognize the very significant privacy interests at stake, and I accept Dr. Wieland's opinion that the disclosure of the journals is likely to impede the plaintiff's treatment and recovery.
- [41] In these circumstances, it is my view that the best way to do justice between the parties is to order the Journals to be produced, but at least initially only to counsel for the defendants and their experts. If, upon reviewing the Journals, counsel are of the view that it is necessary to disclose them or portions of them to their clients in order to mount a proper defence, then they may apply to vary this order as required to do so.

The Fagan Correspondence

- [42] As noted above, the plaintiff asserts privilege over the Fagan Correspondence on the basis of solicitor-client privilege and/or litigation privilege. As stated by Madam Justice Grey in *Keefer Laundry* at para. 60, solicitor-client privilege can only be claimed document by document, and each document must meet the following criteria: (i) a communication between lawyer and client; (ii) that entails the seeking or giving of legal advice; and (iii) that is intended to be confidential.
- [43] Although no formal retainer is required before solicitor-client privilege will attach, the lawyer must be acting in a professional capacity at the time of the communication. To determine whether the lawyer is acting in a professional capacity at the relevant time, the court will consider evidence of the nature of the relationship, the subject matter of the advice, and the circumstances in which it was sought or rendered: *Keefer Laundry*, at paras. 63 and 64.
- [44] Litigation privilege can apply to correspondence between a party and another person who is not a lawyer. However, it only attaches to documents created for the dominant purpose of litigation. Two factual determinations must be made to conclude that litigation privilege attaches to a document: first, litigation had to have been a reasonable prospect at the time the document was produced; and second, the litigation must have been the dominant purpose for its production: *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, [2005] B.C.J. No. 5 (C.A.) at para. 43.

[45] The plaintiff's list of documents does not identify the Fagan Correspondence on an individual document basis, nor does it disclose the timing of the correspondence; it simply indicates that there are some documents characterized as "communication between Kate and Tim Fagan regarding claim" and that they are of "various" dates.

[46] The plaintiff herself gave no evidence with respect to the purpose of the Fagan Correspondence or the circumstances in which it originated. The plaintiff relies on the affidavit of Christine Woolfries, a paralegal who works with the plaintiff's counsel, and the affidavit of Mr. Fagan.

[47] Ms. Woolfries deposed as follows:

The plaintiff advised me, and I verily believe, that her brother, Timothy Fagan, is a lawyer in Boston, Massachusetts. He was called to the bar in 1996. He attended with her to meet with representatives of the Catholic Church for the purposes of reporting Father Cooper's conduct and obtaining financial compensation, which was initially for counselling. He acted as her agent from time to time in communications with representatives of the church. She sought and received advice from him with respect to the issues arising from the disclosure of the sexual misconduct and believed that those communications were confidential.

[48] Mr. Fagan's affidavit establishes that he is the plaintiff's brother and in 1994 was a law student at the University of Victoria. He deposed as follows:

In or about June 1994, the plaintiff first advised me that she had been sexually abused by the Defendant Father Cooper. She asked me to assist her in dealing with the Archdiocese in connection with redress and I did that. From time to time she asked me to act as her agent in communications with the Archdiocese's representatives.

I have reviewed the documents which I am advised by her counsel are listed as 4.3 on the Plaintiff's List of Documents. These documents are communications between the plaintiff and me regarding dealing with the Archdiocese on questions of redress, including but not limited to payment for counselling and other expenses. Litigation was an option the plaintiff and I discussed from the outset.

[49] As already noted, the plaintiff bears the burden of establishing the privilege she has claimed. In my view, she has failed to do so.

[50] I will address the claim of solicitor-client privilege first. From the evidence, it appears the documents were created in 1994 when the plaintiff first disclosed the sexual conduct to the Archdiocese. In 1994, Mr. Fagan was not a lawyer; he was a law student. It appears that solicitor-client privilege may only apply to communications with a lawyer who is, at the time of the communication, authorized to practise law in the jurisdiction in issue: *Canada v. Newport Pacific Financial Group*, [2011] 3 W.W.R. 117 (Alta Q.B.) at paras. 43 to 44. In any event, the plaintiff's evidence does not establish that the communications were for the purpose of seeking or giving legal advice. In my view, that purpose cannot be inferred from the fact Tim Fagan was a law student at the time, particularly given it would have been easy

for the plaintiff herself to give evidence that her purpose in communicating with her brother was to obtain legal advice.

- [51] Ms. Woolfries deposes on information and belief from the plaintiff that the plaintiff "sought advice" from Mr. Fagan. She does not say that it was legal advice that was sought.
- [52] Mr. Fagan says that he was asked to assist the plaintiff but he does not say that he was asked to provide her with legal advice or that he did provide her with legal advice.
- [53] In the circumstances, it is my view that the plaintiff has not established that the Fagan Correspondence entailed the seeking or giving of legal advice and as such she has not established that it is subject to solicitor-client privilege.
- [54] I will now address the claim of litigation privilege. I accept that Mr. Fagan acted as the plaintiff's agent in dealings with the Archdiocese and that communications between the plaintiff and Mr. Fagan as her agent could be subject to litigation privilege. However, it is clear on the authorities that the privilege will only apply where litigation was a reasonable prospect at the time the document was produced and litigation was the dominant purpose of its production.
- [55] In *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254, Mr. Justice Wood for the Court of Appeal said the following with respect to the meaning of litigation being in reasonable prospect:

Common sense suggests that it must mean something more than a mere possibility, for such possibility must necessarily exist in every claim for loss due to injury whether that claim be advanced in tort or in contract. On the other hand, a reasonable prospect clearly does not mean a certainty, which could hardly ever be established unless a writ had actually issued. In my view litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it.

- [56] In my view, the plaintiff's evidence fails to establish that at the time of the plaintiff's dealings with the Archdiocese in 1994 it was unlikely that the plaintiff's claim would be resolved without litigation. Ms. Woolfries' affidavit says nothing about the prospects of litigation, and Mr. Fagan's affidavit says only that it was an option, which, in my view, amounts to a mere possibility.
- [57] It is also my view that the plaintiff's evidence fails to establish the second aspect of the test, namely, that the dominant purpose of the production of the documents was contemplated litigation. As stated by Madam Justice Gray in *Keefer Laundry* at para. 98:

To establish "dominant purpose", the party asserting the privilege will have to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of it.

- [58] The plaintiff's evidence falls short of that standard. Ms. Woolfries says only that Mr. Fagan attended with the plaintiff to meet representatives of the church for the purpose of reporting Mr. Cooper's conduct and obtaining financial compensation but she says nothing about the purpose of the particular communications in issue.
- [59] Mr. Fagan's evidence is that the documents are communications in relation to dealings with the Archdiocese on questions of redress and that litigation was an option. In my view, this evidence supports the conclusion that contemplated litigation was not the dominant purpose, and as such the plaintiff has not established that the Fagan Correspondence is subject to litigation privilege.
- [60] In conclusion, I grant the following orders:
1. Within 14 days of the date of this order, the plaintiff shall produce the Journals to counsel for the defendants but, subject to further order of this court, that disclosure shall be limited to counsel for the defendants and their expert witnesses, and any person who sees them shall not disclose the contents to anyone not entitled to inspect them.
 2. Within 14 days of the date of this order, the plaintiff shall produce the Fagan Correspondence to counsel for the defendants.
- [61] Are there any questions?
- [62] MS. ELLIS: My Lady, can you please restate part 1 of the order? I didn't get the last half of it.
- [63] THE COURT: Yes. I will restate it entirely:
1. Within 14 days of the date of this order, the plaintiff shall produce the Journals to counsel for the defendants but, subject to further order of this court, that disclosure shall be limited to counsel for the defendants and their expert witnesses, and any person who sees them shall not disclose the contents to anyone not entitled to inspect them.
 2. Within 14 days of the date of this order, the plaintiff shall produce the Fagan Correspondence to counsel for the defendants.
- [64] THE COURT: Anything further?
- [65] MR. MACKIE: My Lady, the Archdiocese would like to seek special costs in respect to this application. I have some brief submissions in that regard.
- [66] THE COURT: Well, I will hear your submissions.
- [Submissions re: special costs]
- [67] THE COURT: The Archdiocese seeks special costs of this application. In my view, costs should be in the cause. The Archdiocese relies primarily on two points: first, as evidenced by correspondence between counsel, before bringing on the application the Archdiocese provided plaintiff's counsel with a detailed explanation of its position that the Journals and the Fagan Correspondence had to be produced and plaintiff's counsel's response was

perfunctory; and second, counsel for the plaintiff did not review the Journals in advance of taking the position that they were privileged.

- [68] In my view, the correspondence between counsel simply shows a disagreement between them as to whether the documents had to be produced, which is understandable given the nature of this case and the particular privacy concerns that attach to documents as sensitive as personal journals written by the plaintiff when she was a teenager and very young woman. The position taken by counsel for the plaintiff does not, in my view, come close to reprehensible conduct that would justify an order for special costs.
- [69] Similarly, counsel's failure to review the Journals in advance of taking the position they were privileged cannot, in my view, be characterized as reprehensible. The Journals were listed on the plaintiff's list of documents and as such their relevance was conceded. The issue was whether they were privileged. As evident from the reasons I have already given, the focus of the K.L.V. test is on the connection between the confidential journaling and the healing process. The content of the Journals is not relevant to the question of whether they were privileged. Again, given the privacy interests at stake, counsel's decision not to review the Journals was, in my view, appropriate.
- [70] Costs will be in the cause.
- [71] MR. MACKIE: I just want to clarify that, My Lady. We don't get costs of this application in any event of the cause?
- [72] THE COURT: No, you do not, Mr. Mackie.
- [73] MR. MACKIE: Thank you, My Lady.
- [74] THE COURT: Anything further?
- [75] MS. ELLIS: No, My Lady.
- "Warren J."

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