

The Constitutionality of Mandatory Reporting of Gunshot Wounds Legislation

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In its final report of October 2004, the Select Special Health Information Act Review Committee (the “Review Committee”) decided that “the current provisions [of the *Health Information Act*] do not allow the police adequate access to health information to allow them to carry out their duty to enforce the law.”¹ The Review Committee therefore offered a number of recommendations, including Recommendation 33: “The Government of Alberta should consider introducing separate stand-alone legislation requiring mandatory reporting by custodians to police services of gunshot wounds, stabbings and severe beatings” (the “Recommendation”).² It is worth emphasizing that no province, other than Ontario, has taken formal steps to introduce this type of legislation.³ Whatever may be the position in the United States, the mandatory reporting of gunshot wounds is not Canadian law. The Review Committee did not provide any details about the contemplated legislation (e.g. when, exactly, reporting would be required; what, exactly, would be permissible uses of the information; how, exactly, police services would protect the information from improper use or disclosure; whether custodians would be granted immunity from civil or criminal proceedings for good-faith reporting). Nonetheless, despite its high level of generality, some observations may be made about the Recommendation’s constitutional viability and political advisability. Mandatory reporting legislation, I suggest, is not necessary; current legislation permits reporting when it is warranted. The legislation, moreover, would face two types of constitutional difficulties: the legislation may fall outside provincial legislative authority and it may not be sustainable under the *Charter*. And even if the legislation could be supported under the *Charter*, there are good reasons for not enacting it.

In the following, I will focus only on the gunshot wound reporting aspect of the Recommendation.

A patient’s identity and the nature of his or her injuries are “health information” under the *Health Information Act*.⁴ The basic rule is that health information may be used for health purposes only and may not be disclosed to third parties – such as the police – for non-health purposes – such as criminal prosecution. This basic rule, though, is subject to several statutory exceptions. A patient’s health information may be disclosed to comply with (e.g.) a warrant or other court order.⁵ A custodian may disclose health information to a police service “for the purpose of investigating an offence involving a life-threatening personal injury to the individual, if the disclosure is not contrary to the express request of the individual.”⁶ Finally – and this exception tracks the general public interest exception applicable to other confidentiality obligations – a custodian may disclose health information to “any person” (including a police service) “if the custodian believes, on reasonable grounds, that the disclosure will avert or minimize an imminent danger to the health or safety of any person.”⁷ In these circumstances, the public interest in disclosure outweighs the private interest in confidentiality.

This last exception is especially relevant in the gunshot context. There may be reasonable grounds for an apprehension that the shooter will arrive to finish the job. If the shooter does arrive, not only the patient but anyone in the vicinity will be at risk of injury. There may be reasonable grounds to believe that a third party has been shot or is at risk of being shot, and that the disclosure of health information concern-



ing the patient will address the dangers to the third party's health.

This last exception has a few critical features. Disclosure is discretionary, not mandatory. Disclosure depends on a professional assessment of not only the injury, but its context. The objective of disclosure is defined broadly, but it is clear. The exception has a reasonably well-developed foundation in professional responsibility rules.⁸ Furthermore, disclosure is expressly to promote health or personal safety. None of this betrays constitutional weakness. The same cannot be said of the mandatory gunshot reporting legislation proposed by the Review Committee.

Mandatory gunshot reporting legislation could claim some constitutional support. A province is entitled to regulate the use and disclosure of health information within the province. Under s. 92(14) of the *Constitution Act, 1867*, a province is also entitled to legislate in relation to the administration of justice in the province. Provinces do have significant legislative roles in even the criminal law area. Police services (other than the Royal Canadian Mounted Police) are regulated by provincial law. Prosecution services reporting to provincial Ministers of Justice or Attorneys General prosecute many criminal offences. The legislation, then, could be argued to be legislation in relation to health information; or, more specifically, in relation to the transmission of health information for purposes of the administration of criminal justice in the province.

This argument runs into two objections. First, the mandatory transmission of health information to the police does not serve (or, at least does not directly serve) individuals' health interests or the interests of the health system. It serves prosecution, a criminal law purpose. The legislation, then, falls outside the provincial entitlement to regulate health information. Second, by providing information to the police, the legislation creates a "prelude to prosecution;"⁹ it establishes a warrantless information seizure mechanism that supplements police powers under the *Criminal Code*; it furthers investigations relating to criminal offences, concerning specific individuals.¹⁰ These features of the legislation support its characterization not as legislation in relation to the administration of justice, but as legislation in relation to "criminal procedure," which is a legislative subject reserved to Parliament.

We have no decisive case law on whether mandatory gunshot reporting legislation falls within provincial or Parliamentary legislative authority – the issue has not yet been

litigated, since Canada has not had any instances of mandatory gunshot reporting legislation. I suggest, though, that the better view is that the legislation does not fall within provincial legislative competence. If this view prevails, the Recommendation is a non-starter as provincial legislation, whatever its merits and regardless of whether it might pass *Charter* scrutiny. Suppose, however, that I am wrong; or suppose that the legislation were taken up by Parliament rather than a province. The legislation would still be forced to contend with the *Charter*.

Privacy interests are protected by ss. 7 and 8 of the *Charter*. I will focus on s. 8 (the most apt constitutional provision in this context),¹¹ which provides that "[e]veryone has the right to be secure against unreasonable search or seizure."¹² The s. 8 protection has three elements: it protects against State "searches" or "seizures;" it requires that a s. 8 claimant have a "reasonable expectation of privacy" in relation to the matter searched for or seized; and it only protects against "unreasonable" searches or seizures. Even if mandatory gunshot reporting legislation did permit the unreasonable seizure of health information, the legislation might be justified under s. 1 of the *Charter*, although, outside of extreme circumstances such as war or national emergencies, it is unlikely that "unreasonable" limitations could be "reasonable limits" that are demonstrably justifiable in a free and democratic society.¹³ I shall therefore abstain from a s. 1 analysis of the contemplated legislation.

Mandatory gunshot reporting would entail a "seizure" – through statutory compulsion, the State would come into possession of personal (health) information, without the subject-individual's consent.¹⁴ It is as if State agents were entitled to enter medical facilities and seize health records without warrant.

A more difficult issue is whether an individual has a reasonable expectation of privacy concerning information relating to gunshot wounds provided to health professionals in a medical setting. Ordinarily, an individual does have a reasonable expectation that health information conveyed in such circumstances will not be used or disclosed, except for the purposes of providing medical services to the individual. This expectation is supported by obligations imposed on health services providers by ethical rules, the common law, and statute;¹⁵ the *Charter* jurisprudence reinforces this expectation.¹⁶ The wound itself would not entail a diminished expectation of privacy. A gunshot wound does not disclose a condition that poses a risk to the community, as might manifesting symptoms of a virulent highly contagious



disease. One might argue, however, that the implicit context of the wound discloses public risk: the wound, probably, was caused in the context of some criminal activity. Because of the severe restrictions on the lawful uses of firearms (as opposed, say, to hammers or power tools), the wound likely occurred because the individual was the victim of an offence or because the individual had been engaged in an offence. The shooter or the individual or both are ongoing public risks. The mere fact, however, that an individual has been or is involved in criminal activity, or even that he or she poses a risk of further criminal activity, does not entail that he or she has a diminished expectation of privacy. Thus, for example, individuals engaged in illegal gambling in a hotel room have a reasonable expectation of privacy, and the State is required to obtain a warrant to electronically monitor their activities.¹⁷

The most difficult issue is whether mandatory reporting amounts to a reasonable or unreasonable seizure. Because the seizure effected through the legislation is warrantless, it is presumptively unreasonable.¹⁸ This presumption is overcome only if there are compelling reasons supporting warrantless seizure as opposed to the usual seizure under warrant.

I will assume that legislation providing for mandatory gunshot reporting would limit disclosure only to essential information (and would not involve excessive disclosure of health information); and that the legislation would impose appropriate controls on the use and disclosure of the information: these sorts of measures would ensure that the legislation would not lose constitutionality (if it could otherwise be supported) by straying beyond “reasonable” disclosure.

One might argue that the objectives promoted by mandatory reporting would be significant. The State does have a special interest in regulating firearms use, as evidenced by our relatively restrictive gun control regime.¹⁹ Gunshot wounds do entail firearms misuse.²⁰ As indicated, a gunshot wound does suggest some criminal conduct. Most other injuries do not have a strong correlation with criminality. At least some gunshot wounds are not self-inflicted, which entails that the shooter remains at large. Having shot at least one victim, the shooter has demonstrated that he or she is a risk to others. If

the wound was caused by a third party, that third party may be guilty of a serious intentional offence (e.g. attempted murder) or a negligence offence.²¹ The wounded individual may or may not have been involved in an offence that led to the wounding (i.e., the individual may have engaged in a shootout with criminals or with the police). Even a self-inflicted wound is cause for concern, since it would be caused by careless handling (or perhaps maintenance) or intentional misuse of a weapon. A suicidal individual with access to firearms may well decide to kill others once released from hospital.²² A gunshot wound, then, is distinct from other injuries in that it is linked to criminal conduct and is evidence of ongoing serious risk. One might even argue that a gunshot wound gives rise to reasonable grounds to believe that an offence has occurred – while the wound does not, by itself, disclose what offence caused it, the wound was likely caused by an offence. The wound is a form of proxy for the usual reasonable grounds. The State would be justifiably concerned with this type of injury.

In response, one might point to the facts. Most firearms-related deaths are suicidal; only about 15% are homicidal.²³ Within the “homicidal” category, most deaths are impulsive acts caused by individuals who know their victims.²⁴ The “State interest” argument is based on a narrative (gangland-style shootouts) that does not correspond to most actual instances of gunshot wounds. The accidentally-injured and the suicidal do not pose public risks.

I do concede that, without mandatory reporting, at least some valuable evidence could be lost. If attendance for treatment of a gunshot wound were not reported, no information about the wounding might come to the attention of the police.²⁵ Even if the police did learn that an individual had received medical attention for a gunshot injury, the police might be unable to locate the individual. The police might also lose access to physical evidence, or the chain of custody for any recovered evidence might be compromised. It is true that unlike some other types of evidence, recorded health information is not fleeting. The medical institution would preserve information. If a warrant were obtained, the information could be accessed.

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I also concede that medical services providers are likely the sole institutional contacts with individuals suffering gunshot wounds. The only other persons likely to have knowledge of the wounding are parties to the wounding and the family or associates of the wounded individual.

The sum of the State interest argument and my concessions is this: a medical service provider in possession of information about a gunshot wound is in possession of important information, connected with important evidence; that information and evidence is likely to be lost if not brought to the attention of the State; and the provider alone is likely to be in a position to provide the information to the State.

In these sorts of circumstances, mandatory reporting obligations have been imposed respecting child abuse and elder abuse.²⁶ However, assuming that these reporting obligations are constitutional, the factual basis for the obligations is distinguishable. In abuse cases, the victims are powerless, unable to speak for themselves – in large part because of the abuse they have experienced. In these cases, mandatory reporting gives voices to those condemned to silence. In gunshot wound cases, the victims, presumably, can report to the police if they so wish. The problem is that they may not wish to report to the police. Another feature of mandatory reporting of abuse regimes is that the information disclosed relates to the wrongdoing of others, not the subjects of the information; in the gunshot wound context, the wrongdoing may well be that of the subjects of information.

A better analogy, again based on similar circumstances, might be the mandatory reporting of certain financial transactions by financial institutions (imposed by federal, not provincial legislation).²⁷ Like health information, money matters are sensitive, and usually confidential. Like gunshot victims, clients of financial institutions are presumably capable of talking to the authorities should they so desire. Like gunshot victims, the clients may themselves be involved in criminal activity.

This last point deserves some consideration. Mandatory reporting, of both the financial or medical variety, effectively limits the principle against self-incrimination or the individual's right to decide whether or not to communicate with the authorities about an offence. True, the reporting obligations do not attach directly to the affected individual; the obligations do not directly "conscript" the individual into the ranks of the State to act as a witness against himself or herself. The individual has a choice as to whether to com-

municate with others, who may be bound by a reporting obligation. The reporting obligations, however, do attach to recipients of communications that the individual would reasonably have expected to have kept the information confidential. The recipients, not the individual directly, are conscripted by the State.²⁸ The information is provided to the State as adversary of the subject individual, in circumstances in which the information is at least potentially incriminatory.²⁹ While disclosure may or may not feed into a pre-existing investigation, it may provide informational nourishment for an investigation – that is the point of mandating disclosure.

But given my concessions and the existence of analogous reporting obligations, on what basis may the mandatory reporting of gunshot wounds be resisted? Three sorts of arguments may be advanced to show that imposing this obligation would not be reasonable; or, if the obligation were reasonable within the meaning of s. 8, the obligation is not one that Canada should be inclined to impose.

First, our legal tradition has, for the most part, set its face against compelling individuals to report others' misdeeds. Generally, if the State wants information for criminal law purposes, it must get the information on its own, relying on its own resources. Individuals cannot lie to the authorities about others – this would expose to liability for the obstruction of justice offence. Individuals, however, are not obliged to go forward with information about others, no matter how bad others' misdeeds, no matter that no one else may have the information. Furthermore, professionals may be under definite obligations not to disclose information, subject to defined exceptions. Individuals can be compelled to provide information by the courts – e.g., if their records are seized under warrant, or if a court directs them to provide information. These compulsory processes, though, are initiated by the State, are mediated through judicial officers, and are reviewable by the courts. Mandatory reporting obligations are very much the exceptions that prove the rule. We should be leery of multiplying such exceptions. Multiplication risks undermining the relationship between State and citizen in criminal matters.

Second, mandatory reporting of gunshot wounds may have adverse medical or public health effects. If, as appears to be the case, most firearms injuries are accidental or self-inflicted, police involvement would be inappropriate. Enhanced safety training, instead, would address accidental injuries; psychiatric care would be needed for the suicidal.³⁰ Mandatory reporting could deter individuals with fire-



arms-related injuries from obtaining medical assistance.³¹ The deterrent effects could be even more widespread:

If physicians are obliged to report gunshot wounds, the real danger is not that a few people may be deterred from seeking care, but that many others, who see that physicians have become an extension of the police force, will choose not to reveal their drug use, will refuse to say how they received an injury or will not disclose their sexual practices for fear that this information will be used against them. This will make it harder for physicians to treat some of our most vulnerable patients³²

Third, mandatory reporting undermines important differences between the health system and the legal system. Medical services focus on the health of the patient. Whether the patient is good or bad, innocent or guilty, a witness or a perpetrator, is largely beside the point. The challenge is to preserve the individual's health and to respect each individual's dignity and autonomy: hence, for example, the medical emphasis on obtaining patients' informed consent to procedures. Advancing the interests of the punitive apparatus of the criminal justice system is not part of the mission of the health system.³³ One might say that the health system is "not in the business of justice."³⁴ We should avoid the notion that all of our public processes – e.g., the criminal justice system, the health care system, the economy – should be integrated, or follow the same set of principles or procedures. Overall social benefits may be achieved through different systems achieving their different results in their different ways.³⁵ We see the good sense in the following passage from the 1980 Krever Report on the Confidentiality of Health Care Information, quoted by La Forest J. in the *Dyment* case:

the primary concern of physicians, hospitals, their employees and other health care providers must be the care of their patients A free exchange of information between physicians and hospitals and the police should not be encouraged or permitted. Certainly physicians, hospital employees and other health-care workers should not be made part of the law enforcement machinery of the State.³⁶

Mandatory reporting substitutes legal obligation for professional discretion. It substitutes an absolute rule for case-by-case assessment. It substitutes health system obligation for law enforcement initiative. It tasks health system

workers with criminal justice responsibilities. I have argued that legislation establishing the mandatory reporting of gunshot wounds lies outside provincial competence and that the legislation would not effect "reasonable" seizure under s. 8 of the *Charter*. If I am wrong, I hope to have shown that mandatory reporting of gunshot wounds would be inconsistent with Canada's traditions. Even if constitutional, the legislation would not be advisable.

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1. Alberta, Legislative Assembly, Select Special Health Information Act Review Committee "Final Report" (October 2004) at 30, online: Review of the Health Information Act <<http://www.hiareview.assembly.ab.ca>> [*Final Report*].
2. *Ibid.* at 31.
3. Ontario has passed the *Mandatory Gunshot Wounds Reporting Act, 2005*, S.O. 2005, c. 9. This act was assented to on June 13, 2005, but as of July 12, 2005 (this paper's last revision), has not been proclaimed in force.
4. R.S.A. 2000, c. H-5, s. 1(1)(k) [*HIA*].
5. *Ibid.*, s. 35(1)(i).
6. *Ibid.*, s. 35(1)(j).
7. *Ibid.*, s. 35(1)(m).
8. See, for an analysis in the solicitor-client privilege context, *Smith v. Jones*, [1999] 1 S.C.R. 455.
9. *A.G. Quebec v. A.G. Canada*, [1979] 1 S.C.R. 218, Estey J.
10. *Di Iorio v. Montreal (City) Common Jail*, [1978] 1 S.C.R. 152, Dickson J.; *Starr v. Houlden*, [1990] 1 S.C.R. 1366, Lamer J.
11. *R. v. S.A.B.*, [2003] 2 S.C.R. 678 at para. 35, Arbour J.
12. Section 7 of the *Charter* protects informational privacy in criminal and civil proceedings. Section 7 provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." "Security of the person" extends to psychological security and protects the right to be secure against psychological trauma, which could be the result of non-consensual disclosures of information: *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 55, Dickson C.J.C. and at 171, Wilson J.; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 111-112, L'Heureux-Dubé J.; *R. v. Mills*, [1986] 1 S.C.R. 863 at 920, Lamer J.



13. *R. v. Heywood*, [1994] 3 S.C.R. 761 at 802-03, Cory J.
14. *R. v. Dersch*, [1993] 3 S.C.R. 768 at 778 [Dersch], Major J.; *R. v. Dymont*, [1988] 2 S.C.R. 417 at 431 [Dymont], La Forest J.; *R. v. Colarusso*, [1994] 1 S.C.R. 20 at 54, La Forest J.
15. For example, *Canadian Medical Association Code of Ethics*, online:
16. See, in particular, the cases cited at note 14.
17. *R. v. Wong*, [1990] 3 S.C.R. 36.
18. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 161, Dickson J.; *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.) at 14, Lamer J.; *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 33, Binnie J.; *Dersch*, *supra* note 14 at 777.
19. See Part III of the *Criminal Code*, R.S.C. 1985, c. C-46; the *Firearms Act*, S.C. 1995, c. 39, and *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783.
20. See OMA Section on Emergency Medicine position statement: The Case for Mandatory Reporting of Gunshot Wounds in the Emergency Department (November 2003), online: <<http://www.oma.org/pcomm/omr/nov/03gunshot.htm>>.
21. Alternatively, the negligence may lie in a third party's design or maintenance of the premises in which the injury occurred.
22. Howard Ovens, "Why mandatory reporting of gunshot wounds is necessary: A response from the OMA's Executive of the Section on Emergency Medicine" (2004) 170(8) CMAJ 1256.
23. Merrill A. Pauls & Jocelyn Downie, "Shooting ourselves in the foot: why mandatory reporting of gunshot wounds is a bad idea" (2004) 170(8) CMAJ 1255 [Pauls & Downie]. Nonetheless, even if homicides make up a small percentage of the gunshot injury cases, there is the fact that "[i]n the United States, firearms are used to commit homicide more frequently than all other methods combined." A. L. Kellerman et al., "Community-Level Firearm Injury Surveillance: Local Data for Local Action" (2001) 38:4 *Annals of Emergency Medicine* 423 [Kellerman].
24. *Pauls & Downie*, *ibid.*
25. The differences in information about incidents (hospitals have information the police lack, and vice versa) may not be that great; the police generally do have information about shooting injuries: see *Kellerman*, *supra* note 23 at 428 (13% of emergency department reports could not be matched with a corresponding police report).
26. See e.g. *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 4 and *Protection for Persons in Care Act*, R.S.A. 2000, c. P-29, s. 2.
27. See the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, ss. 7 and 9.
28. We should bear in mind that if the State wishes to electronically intercept a conversation, the consent of the recipient of information (one of the parties to the conversation) is not sufficient. No mandatory reporting obligation is imposed on parties to conversations. If the State wishes to intercept, it must obtain a warrant: *R. v. Duarte*, [1990] 1 S.C.R. 30.
29. *R. v. White*, [1999] 2 S.C.R. 417 at para. 53, Iacobucci J.
30. *Pauls & Downie*, *supra* note 23.
31. Could deter - but, it appears, in the United States, many wounded criminals do seek medical attention in hospitals, despite mandatory reporting: John P. May, David Henenway & A. Hall, "Do criminals go to the hospital when they are shot?" (2002) 8 *Injury Prevention* 236.
32. *Pauls & Downie*, *supra* note 23.
33. This is not to deny the possibility of cooperation between the health system and the criminal justice system (as in the cases of drug courts, mental health courts, or domestic violence courts); this sort of cooperation involves each partner using its proper tools and techniques. Insofar as this sort of cooperation involves institutional modification, the modification is by the criminal justice system.
34. Michael Ignatieff, *The Warrior's Honour: Ethnic War and the Modern Conscience* (Toronto: Penguin Books, 1999) at 139.
35. Hargarten and Waeckerle put this point well: "Whereas the interaction between a patient and physician is nurturing, curative, and confidential, the interaction between a police officer and a victim or perpetrator is inquisitive, correctional, and inherently public. Both wish to protect the individual and our society, but we pursue that end in distinctly different fashions." Stephen W. Hargarten & Joseph F. Waeckerle, "Docs and Cops: A Collaborating or Colliding Partnership?" (2001) 38:4 *Annals of Emergency Medicine* 438.
36. *Dymont*, *supra* note 14 at 433.

