 



September 2019

Diagnostic Imaging Peer Learning Toolkit

5.2a Common Law Privilege (Wigmore Criteria) Quick Facts

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### **How to Use This Tool**

1. Review this section with your organization’s privacy and/or legal representative(s).
2. Determine if you would use this legal protection to manage your peer learning program data.

*Note: If Common Law Privilege is the legal protection chosen for your peer learning program, the criteria listed in the table below would have to be applied to every instance where data is generated in the peer learning program for it to be covered by the Wigmore Criteria.*

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| Quick Facts |
| **Requirements for the Establishment of Privilege** |
| In Slavutych v. Baker, [1976] 1 SCR 254,[[1]](#endnote-1) the Supreme Court of Canada expressed the Wigmore Criteria in the following manner:1. The communications must originate in confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties.
3. The relation must be one in which the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

Establishing privilege and protection of quality assurance information is made on a case-by-case basis using the above criteria to balance the privacy of information against fairness in legal proceedings. Under the fourth Wigmore criterion, the courts must balance the interest in maintaining privilege against the interest of pursuing the truth based on the circumstances presented in any proceeding. Under this protection, documents that meet all of the following criteria would be classified as privileged and protected. |
| **Example Application to a Diagnostic Imaging Peer Learning Program** |
| In November 2002, the Ontario Superior Court of Justice released a judgement that supported arguments around quality assurance reports prepared by a quality assurance subcommittee as being privileged and confidential. In the case of Steep (Litigation Guardian of) v. Scott (2003), 62 O.R. (3d) 173, the plaintiffs requested production of two quality assurance reports from Kingston General Hospital that was dismissed by the court. Furthermore, the court sought to establish privilege by applying the four Wigmore Criteria as follows[[2]](#endnote-2):1. The communications must originate in confidence that they will not be disclosed.
* *The court was able to conclude that the hospital in question conducted peer quality reviews in confidence. It is therefore recommended that all peer reviews and communication resulting from the peer learning program be conducted in confidence and marked as “privileged and confidential” where applicable.*
1. This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties.
* *The court was able to ensure that medical staff and the quality assurance committee would not be able to have open and candid conversations if confidentiality were not guaranteed.*
1. The relation must be one which in the opinion of the community ought to be sedulously fostered.
* *The court was able to further establish that the open exchange of information—given the assurance of confidentiality—was a key success factor in conducting peer reviews, which then resulted in improving the quality of care.*
1. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.
* *The court was able to determine that the information sought by the plaintiffs was available to them by other means and did not require the defendant to disclose its quality assurance reports. Therefore, the benefit of maintaining confidentiality of the quality assurance reviews did not have an impact on disclosure in this case as the information requested by the plaintiffs would be accessible through other means.*

**Risk Management Implications** (based on the above case):1. Communication generated within the peer learning program will be protected only if all four Wigmore’s criteria are met in each case.
2. Individuals in the peer learning program that are providing information as part of the process should be advised that the information will be kept confidential.
3. A written policy that has been approved by the peer learning quality of care committee and the organization-level oversight entity can be used as evidence in a legal proceeding.
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**References**

1. Slavutych v. Baker, [1976] 1 S.C.R. 254, [1976] S.C.J. No. 29. Available from: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2679/index.do> [↑](#endnote-ref-1)
2. Cassels Brock Lawyers. Hospital Does Not Have To Disclose Quality Assurance Reports In Medical Malpractice Case [Internet]. Toronto (ON): Cassels Brock Lawyers; 2003 May 26 [cited 2019 Feb 28]. Available from: <https://www.casselsbrock.com/Doc/Hospital_Does_Not_Have_To_Disclose_Quality_Assurance_Reports_In_Medical_Malpractice_Case_517>

ISBN 978-1-4868-3789-2 (PDF)

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