

# REASONABLE DOUBT

THE USE OF HEALTH RECORDS IN CRIMINAL AND CIVIL CASES OF VIOLENCE AGAINST WOMEN IN RELATIONSHIPS

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**DO THE HEALTH RECORDS OF ABUSED WOMEN** that are used in criminal and civil court cases produce fair, equitable, and just legal outcomes? A new study suggests that the answer is 'No'. *Reasonable Doubt* documents how information created for the purposes of health care cannot be assumed to be a reliable and objective account of woman abuse. It also found that health records are most often used to undermine women and their legal claims.

*Reasonable Doubt* is the first study in Canada to examine the use of health records in cases involving violence against women in relationships. Professionals from the fields of health care, law, and anti-violence advocacy made up the research team, supported by funding from the Law Foundation of British Columbia.

**“Most of the records that go to court won’t have been kept for the purposes of documenting violence against women by a partner. We probably make lots of assumptions that are wrong because we don’t have the full picture. Then our notes can be misinterpreted.”**

(Physician)

This pamphlet is to inform health professionals, legal professionals, women’s advocates, and women about the use of these records. The authors also hope to stimulate discussion between professions about how to avoid causing further harm to abused women through the legal process.

This pamphlet conveys the study’s major findings. We encourage readers to access the full report for more in-depth information.

**RESEARCH QUESTION: DO HEALTH RECORDS USED IN LITIGATION LEAD TO POSITIVE LEGAL OUTCOMES FOR ABUSED WOMEN OR ARE THEY ARE USED TO DISCREDIT WOMEN AND THEIR CLAIMS?**

# Research Methods and Key Findings

## A. ANALYSIS OF LEGAL CONCEPTS AND SURVEY OF CASE LAW

- Legal concepts relating to disclosure and production of health records pre-trial and their introduction at trial were analyzed: relevance, hearsay, self-serving and opinion evidence, privilege, and prejudice.
- A survey of Canadian case law resulted in the emergence of 20 cases that dealt specifically with health records in the context of violence against women in relationships.

**In 16 of the 20 cases, health records were ultimately used against the woman and her claims.**

### Key Findings

- In 16 of the 20 cases, health records were ultimately used against the woman and her claims. In 14 cases, records were sought to discredit the woman's case. In two cases, records sought to support the woman were used against her.
- In the only two cases where the record was found to support the woman's claims, expert evidence on violence against women in relationships was given. Documentation that a woman received treatment for injuries and that she attempted to mask their cause was considered by the court to be consistent with this type of victimization.
- In the second case, a medical expert's assessment supported a woman's claim for damages for emotional suffering caused by harassment and intimidation by her abuser. The medical expert referred to the records of the woman's doctor, which indicated that prior to the incidents the woman had a high level of functioning.

- In two cases in which health records were sought to support the woman's case, the fact that the abuse was not recorded in medical records was found admissible as evidence consistent with fabrication of the allegation.

### How Records Were Used to Discredit Women's Cases

Records were sought to show:

- there is no indication of abuse in health records, in order to argue that the woman's claim is false;
- she may be unfit to care for her child(ren);
- she has a psychiatric disorder and is therefore not a credible witness;
- alcohol and drug abuse affected her memory;
- inconsistencies between her evidence regarding injuries and what is said in health records;
- she has an animus against the accused; and
- to defend the accused abuser's character and reputation.


**“The courts must take care not to create a class of vulnerable victims who have to choose between accusing their attackers and maintaining the confidentiality of their records.”**

Justice L'Heureux-Dubé

(R v. O'Connor, [1995] 4 S.C.R. 411, at para 121)

# The Filtering of Facts

How Health Records can be Created and Used Against Women in Abusive Relationships



**Abused Woman**

I need help. Who can I trust?

My partner said he'd beat me up again if I tried to leave. He threatened to take our baby away. I'm afraid to tell anyone. What if they take my baby away?


I'm not sleeping at all. Maybe my doctor can help.

**INTERPRETATION OF FACTS**

**Patient's Concerns**

"Doctor, I'm stressed out and not sleeping right now. There's quite a bit of tension in our marriage since the baby was born. Sometimes I just don't feel like I can get out of bed. I can't seem to stop crying."

The potential for creating unreliable records exists



**Health Care Provider**

What's my treatment plan?

"I need to document what she's saying. I need to document her symptoms. I need to make a diagnosis."

I'd like to spend more time with this patient but I have a waiting room full of people.

**INTERPRETATION OF FACTS**

**Health Record**


**S** - pt. reports marital stress and insomnia as a result of new baby SUBJECTIVE

**O** - labile, appears anxious and distracted  
- pt. reports not coping well with new role OBJECTIVE

**A** - post-partum depression, marital discord ASSESSMENT

**P** - prescribed anti-depressants, suggested couples counselling and a new mothers support group PLAN

The potential for creating unreliable records exists



**Lawyer**

I'm worried about how his lawyer will interpret the records.

There is no evidence in the health records that he abused her. Instead the records make her look like she's the one with problems.

I requested her health records because she said she saw her doctor during the abusive relationship.

I'm the victim. Why do I feel like I'm on trial?

**INTERPRETATION OF FACTS**

**Legal Decision**

The records show that the mother has mental health issues, which raises questions about her ability to parent. She's made unsubstantiated allegations of abuse. Father shows willingness to share custody. Joint custody in best interests of the child.

**Many health care providers said that records do not provide objective evidence for legal proceedings, yet most lawyers expressed confidence in the objectivity of records.**

## **B. THE QUALITATIVE STUDY**

Many health care providers said that records do not provide objective evidence for legal proceedings,.

In standardized interviews, 90 B.C. health care professionals, legal professionals, women's advocates, and women who had been abused by intimate partners, shared their knowledge and experience about the use of health records.

### **Key Findings**

- The primary purpose of creating health records is to document health-care treatment, to communicate among a health-care team, for continuity of care, and for professional liability.
- Distortions occur in the transfer of information from the woman to the health-care provider and then from the provider's records to the legal system. "I've already interpreted the problems and then they will be re-interpreted," a psychiatrist said. "That's a lot of interpretation and not a lot of safeguards."
- Health care professionals caution legal professionals about using health records as objective and reliable records of abuse.
- Lawyers stated that they regard health records as a source of objective, reliable, and relevant facts and as a form of evidence to be used in legal proceedings. "The benefit is that these records can assist in the truth, can determine the truth." (Lawyer)
- Respondents indicated that, in most of the legal cases they were familiar with,

women's health records had been used as evidence against the women.

- Some respondents noted that the effects of abuse, such as fear of telling and traumatized demeanour, are commonly misunderstood and used against the woman.
- A "silent record", in which there is no record of abuse, is often interpreted by the court as evidence that the woman has fabricated allegations of abuse rather than as evidence that a woman has not disclosed to protect her privacy or safety.

**"I've already interpreted the problems and then they will be re-interpreted," a psychiatrist said. "That's a lot of interpretation and not a lot of safeguards."**

## **C. MAKING SENSE OF THE RESEARCH**

The review of case law revealed that health records are most often used against women and their legal claims.

In the interviews, key stakeholders found reasonable doubt that health records should be used as reliable legal evidence. Many health care providers, for example, said that records do not provide objective evidence for legal proceedings, yet most lawyers expressed confidence in the objectivity of records.

How do we make sense of these findings?

Information about the woman's situation passes through various filters. Starting at the creation of the record, up to and including its use in legal proceedings, these filters create the potential for creating discriminatory records.

**"The benefit is that these records can assist in the truth, can determine the truth."**

(Lawyer)

# Reasonable Doubt: The Filtering of Facts



The Abused Woman

“A woman tells her physician about abuse but says ‘I provoked it’, then in court tells the truth and this is used as evidence against her.” (Women’s Advocate)

## The First Filter - The Abused Woman

*The potential for creating unreliable records exists* because women make choices about what to tell and not tell a health care provider. Women may filter their experience of abuse through social and cultural values that blame women for abuse. They may not disclose abuse because of lack of trust, a sense of powerlessness and isolation, threats of child apprehension, fear of retaliation by the abuser, fear of a prejudiced reaction, or a desire to protect the abuser. Women who do disclose may view the health care encounters as private and request that records are not kept about the abuse. Other women disclose their abuse, trusting that it will be accurately and completely recorded and may later support their case if they decide to engage in legal proceedings against their abuser.

“The assumption is that no matter who a woman was examined by, the same facts would be written.... In fact, this is true for many medical conditions, but not when it comes to assessments that involve psycho-social dimensions of a person, then it’s really a convergence of our own values, experience, and a little training in some cases.” (Physician)



Health Care Provider

## The Second Filter - The Health Care System and Record Keepers

*The potential for creating unreliable records exists* because the content of records is dictated by health care system needs not to serve legal processes. Health professionals do not and cannot always accurately or

completely record what they are told. Most physicians do not have adequate training to assess and document psychological harm caused by trauma, nor are they trained to recognize signs of abuse. They may document the physical or psychological impacts of the abuse without linking them to abuse, or inaccurately draw inferences from the traumatized demeanor of the patient. Gender bias and myths about woman abuse are other filters within the health system that may distort record keeping. These records—however lacking, partial, or inaccurate—may be deemed ‘reliable’ and ‘objective’ by the legal system.



Lawyer

“There is often a tendency to exaggerate or not tell the truth. The benefits are that these records can assist in the truth, can determine the truth.” (Lawyer)

## The Third Filter - The Legal System and Lawyers

*The potential for creating unreliable records exists* because when information has already passed through the two previous filters, discrepancies can arise between the record and the statements a woman makes during the legal proceeding. When a woman has not disclosed the abuse to her health care provider, the alleged abuser’s lawyer may argue that she is lying about the abuse in court. It is seldom recognized that the woman did not disclose to her physician out of fear, shame, or lack of trust. If the record produced shows that the woman has seen a psychiatrist or taken anti-depressant medication, for example, this may also be used to cast doubt on the woman’s credibility. Health records are given much more weight in legal proceedings than women’s evidence or testimony. Gender bias and myths about woman abuse are other filters within the legal system that may limit women’s chances of equal treatment before the law.



# What Can I Do

## PREVENTING THE DISCRIMINATORY USE OF HEALTH RECORDS

### WOMEN

Talk about relationship abuse only with those you trust.

If you want, have an advocate go with you to the hospital or doctor's office.

Ask to see your records and make sure what they say is accurate.

You can ask your doctor not to write down what you are saying, or to take something out of the record.

There are limits to the confidentiality of your health records. They may be used in court whether or not you want them to be.

With consent forms, make sure you understand what you are being asked to sign.

### HEALTH PROFESSIONALS

Recognize how a woman's record could be used in court.

Obtain a woman's consent for creating a record of her abuse and get her input into what is recorded.

Document physical injuries clearly and concisely.

Avoid speculation in records about the woman's behaviour or demeanour.

Discuss with patients the limits of confidentiality.

Carefully review the contents of an order for production. Release only those records specified.

You can argue in court that a record is not relevant, may negatively impact a woman's mental or physical health, or for conditions or limits to be placed on the release.

Work with women, advocates, and lawyers to support equality in a woman's case.

Learn about the dynamics of violence against woman.

Ensure the woman's safety is a top priority.

### WOMEN'S ADVOCATES

Support women in understanding what they can do about the information that is recorded in their charts, the limits of confidentiality, and the consent forms they are signing.

Support women in finding health and legal professionals who are committed to ensuring women's equality and safety.

### LEGAL PROFESSIONALS

Understand how and why health records are created. Question their objectivity and reliability.

Be selective about the records you request.

Review the records with the woman.

Help health professionals identify which parts of health records may be withheld on the grounds of privilege or irrelevance.

Learn about the dynamics of violence against woman.

Use your discretion to exclude evidence if its prejudicial effect outweighs its probative value.

Get expert evidence to interpret the lack of disclosure or documentation of abuse in the record.

Ensure that hidden assumptions about the credibility of women or health records are made visible to the court.