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Abstract
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To illustrate this quandary, the paper will look specifically at the nature and practice of genetic registers as appropriate repositories of human genetic information. The paper will look at the legislative enactments and case law decisions that complicate this area and will conclude with a statement of policy that, in the writer's view, will provide an effective balance.

Keywords
genetic information, genetic registers, subpoena duces tecum, confidentiality, privacy

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The author would like to thank Professor Loane Skene, Melbourne Law School for her assistance in the preparation of this paper.

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HUMAN GENETIC INFORMATION, GENETIC REGISTERS AND THE SUBPOENA DUCES TECUM: BALANCING PRIVACY, CONFIDENTIALITY AND THE ADMINISTRATION OF JUSTICE

*By William Keough**

> *We expect the jury will be out for the next few years as we explore more fully the possible connection between judicial temperament, genetic testing and civil and criminal case management.*[1]

Introduction

This paper will look at the vexing issue of balancing the two following fundamental public interest considerations in the context of 'the new genetics' - the maintenance of the confidentiality and privacy of human genetic information versus the disclosure of such information to the courts in the course of litigation and in the interests of the proper administration of justice.

To illustrate this quandary, the paper will look specifically at the nature and practice of genetic registers as appropriate repositories of human genetic information. The paper will look at the legislative enactments and case law decisions that complicate this area and will conclude with a statement of policy that, in the writer's view, will provide an effective balance.

Human Genetic Information

The first significant characteristic of human genetic information is that such information is knowledge - knowledge about one's self and one's family. It is also a,

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1 F Zweig and D Cowdrey, 'Educating Judges for Adjudication of New Life Technologies' (1999) Vol 83, No 3, *Judicature*, online at <www.ornl.gov/sci/techresource/Human_Genome/publicat/judicature/article11.html> accessed 14 December 2003, copy on file with author.

'general label [used] to describe information about an individual's genetic make-up, encompassing the results of genetic tests as well as the sort of information that has always been available [to medical practitioners] through family history.'[2] Indeed, in many ways, human genetic information is not something that is particularly new. Otlowski makes the valid point that:

> … For many years, attention has been given to 'family history' of genetic disease for the purposes of individual diagnosis and predicting a person's future health status. What has changed is … the *extent* of information that is now available as a result of the advancements in relation to genetic testing.[3]

It is to be accepted that knowledge about one's self carries with it profound moral and ethical overtones. It represents the power to determine appropriate outcomes that are consistent with one's own personal beliefs in a rational and positive way. For a liberal society such as ours, this is a positive outcome that enhances our autonomy and - from both an absolutist and consequentialist perspective - allows realistic choices to be made, provided that they do not interfere with the rights of others.

In addition to this sense of personal empowerment, human genetic information carries with it very sensitive overtones in the sense that it *may* reveal significant insights into the future health and life prospects of an individual who *may* at present, be wholly asymptomatic. A good example of this can be seen in the area of late onset disorders and information obtained regarding susceptibility to the same through presymptomatic testing. On the other hand, the individual may not want others to know about his/her condition. Indeed, the individual may not want to know themselves if there is a chance that they will succumb to a particular condition in circumstances where there is no effective treatment or prevention. On the other hand, the emphasis is on the word *may*. As the Australian Law Reform Commission reports:

> Genetic information tends to be about possibilities rather than certainties, because only a proportion of those people with a particular disease-related mutation will go on to develop the disorder.[4]

This underscores the second significant characteristic of human genetic information - its predictive dimension.

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2 M Otlowski, 'Protecting Genetic Privacy: An Overview', unpublished paper presented at Regulating the New Frontiers: A Symposium, Centre for Law and Genetics, December 2001, at p 69.

3 Ibid, emphasis in original.

4 Australian Law Reform Commission Report 96, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Canberra, 2003, Vol 1, at p 134, online <www.alrc.gov.au> accessed 30 December 2003, copy on file with author.

Whilst human genetic information has the potential to empower individuals to make significant life choices for the benefit of themselves and/or their families, there are growing concerns that the imprecise nature of predictive information could be misunderstood and misapplied, resulting in less than favourable consequences for the person 'affected'.

The third significant characteristic of human genetic information is its familial dimension. Human genetic information possesses a distinct familial quality due to its inherited and shared nature. Accordingly, as Lemmens points out, '[g]enetic information traverses the bounds of personal autonomy insofar as genetic tests necessarily reveal information about the family of those who undergo testing',[5] which may have implications for their health and which they may or may not want to know.

Given the personal, predictive and familial qualities of human genetic information, the question is begged: is such information different to other health or medical information? Otlowski argues that whilst human genetic information falls within the general meaning of health and medical information, given the cumulative effect of such qualities on an individual, such information creates particular vulnerability in a person.[6] As such, this makes human genetic information, 'sufficiently qualitatively different from other health information to justify the need for special care to be taken for its protection.'[7] Indeed, Haan argues that given the highly sensitive nature of human genetic information, there is a need for:

- confidentiality;
- formal consent procedures in several settings;
- careful counselling to ensure that patients understand the consequences of any proposed genetic testing;
- consideration of possible stigma and discrimination in families and the community as a result of genetic testing;

5 T Lemmens, 'Selective Justice, Genetic Discrimination and Insurance: Should We Single Out Our Genes' (2000) 45 *McGill Law Journal/Revue de droit de McGill* 347 at para 51. See also B Knoppers, 'Human Genetics: Parental, Professional and Political Responsibility' (1993) 1 *Health Law Journal* 13 and S Suter, 'Whose Genes Are These Anyway? Familial Conflicts over Access to Genetic Information' (1993) 91 *Michigan Law Review* 1854.

6 Op cit at pp 71-2.

7 Ibid. See also J Hustead and J Goldman, 'Genetics and Privacy' (2002) Vol 28 *American Journal of Law and Medicine* 285, L Gostin, 'Genetic Privacy' (1995) 23 *Journal of Law, Medicine and Ethics* 320, and Privacy Commissioner of Canada, *Genetic Testing and Privacy* (1992) Ottawa at p 30, where it is argued that the need to prevent others from gaining access to a person's genetic information save with that person's consent, as well as the individual's right 'not to know' about his/her genetic make-up, are integral to the existence of a reasonable expectation of genetic privacy under Canadian law.

- application of guidelines for predictive or carrier testing of children; and
- appropriate procedures for approaching family members identified as at risk of a genetic disorder.[8]

Save for the issues of confidentiality and genetic counselling (which will be discussed later), discussion of these important issues is beyond the scope of this paper.

Genetic Registers

In 1972, the World Health Organisation passed a recommendation that medical genetic centres establish appropriately staffed and resourced registers for the purpose of preventing specific genetically determined disorders.[9] The recommendation was born out of a recognition that such registers would facilitate the most effective way of identifying members of families who are at significantly increased risk of developing an inherited disorder or of having children who are either affected, or at risk of being affected, with such disorder. Genetic registers were subsequently established in many countries around the world throughout the 1970s, including Australia.

In 1999, the National Health and Medical Research Council published a comprehensive set of guidelines for the establishment and functioning of genetic registers.[10] These guidelines highlighted the significance of genetic registers by providing that:

> Genetic registers will have the greatest impact on the prevalence and burden of disorders that are serious and relatively common, for which the risk to relatives is high, for which prevention and/or improved outcome are possible as a result of surveillance, and for which there are reproductive choices which will enable couples to avoid the occurrence of severe genetic disorders in their children.[11]

In essence, the primary purpose of a genetic register is to achieve complete ascertainment of particular diseases and, by proactive contact, to have a role in their prevention. To facilitate this aim a genetic register undertakes the systematic collection of accurate and up to date information over a lengthy period of time. Family pedigrees are prepared and are annexed to specific medial

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8 E Haan, 'The Clinical Geneticist and the "New Genetics"' (2003) Vol 178 *Medical Journal of Australia* 458, at p 458.

9 World Health Organisation (1972), *Genetic Disorders: Prevention, Treatment and Rehabilitation*, Technical Report Series, No 497, Geneva, World Health Organisation, Preamble.

10 *Guidelines for Genetic Registers and Associated Genetic Material*, National Health and Medical Research Council, Canberra, 2000.

11 Ibid at p 7.

information, such as test results and tissue samples. Indeed, the Australian Law Reform Commission has commented that this amalgamation of pedigree and medical information relating to individuals, nuclear families and branches of a family into a single large pedigree is what constitutes a genetic register.[12] Genetic registers are also actively involved in a specific research issue/interest.

Primarily genetic registers have focused on what is known as monogenic disorders[13] or Mendellian disorders.[14] These disorders include such conditions as:

- Huntington's Disease which is a late onset degenerative disease of the brain, transmitted by dominant inheritance and characterised by progressive chorea and dementia;[15]
- Fragile X Syndrome which is the most common known inherited cause of intellectual disability with a wide variety of clinical presentations. Intellectual problems can vary from mild learning difficulties, to emotional and behavioural problems through to severe intellectual disability;[16] and
- Duchenne and Becker muscular dystrophies which are characterised by progressive muscle wasting and weakness that begins with minute changes in the muscle as demonstrated diagrammatically as follows:

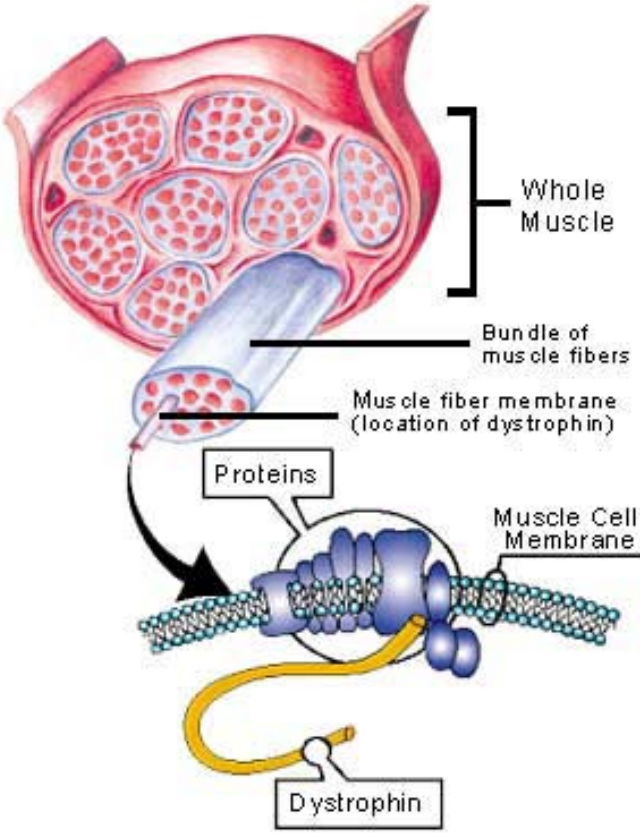
12 Op cit at paras 22.3 et seq.

13 An inherited disease controlled by a single pair of genes, online <www.hyperdictionary.com/ dictionary/monogenic+disease> accessed 27 December 2003, copy on file with author.

14 For example, sickle cell anaemia, Huntington's Disease, myotonic dystrophy, haemophilia and cystic fibrosis which arise from a single gene which may be either dominant or recessive and is usually highly penetrant, ie: having the disease genotype virtually ensures having the phenotype or physical expression of the condition. See J Pritchard, 'Medical Applications of Population Genetics', Oxford University, online at <www.stats.ox.ac.uk/~mcvean/slides8.pdf> accessed 27 December 2003, copy on file with author and see also R Pagon, "Genetic Testing for Disease Susceptibility: Consequences for Genetic Counselling" (2002) Vol 8, No 6, *Trends in Molecular Medicine*, 306, online at <www.mult-sclerosis.org/news/May2002/ GeneticTestingForDiseaseSusceptibilities.html> accessed 27 December 2003, copy on file with author.

15 M Critchley, ed, *Butterworths Medical Dictionary*, London, 2nd ed, 1984, at p 828. Huntington's Disease is discussed later in the paper.

16 See generally W O'Donnell and S Warren, 'A Decade of Molecular Studies of Fragile X Syndrome' (2002) Vol 25 *Annual Review of Neuroscience* 315, see also online notes at <www.murdoch.rch.unimelb.edu.au/ GHSV_new/pages/downloads/GeneticsFiles/The_Genetics_File_PartH.pdf> accessed 27 December 2003, copy on file with author.



Muscles are made up of bundles of fibers. A group of independent proteins along the membrane surrounding each fiber helps to keep muscle cells working properly.

When one of these proteins, dystrophin, is absent, the result is Duchenne muscular dystrophy; poor or inadequate dystrophin results in Becker muscular dystrophy.[17]

In Duchenne muscular dystrophy, boys begin to show signs of muscle weakness as early as age 3. The condition gradually weakens the skeletal muscles. By the early teens the heart and respiratory muscles may also be affected. Becker muscular dystrophy is a milder version. Its onset is usually in the teens or early adulthood and the course of the condition is slower and less predictable than in Duchenne muscular dystrophy. In rare cases both Duchenne and Becker muscular dystrophy can affect girls although the condition is almost exclusively related to boys; and

- BRCA 1 and BRCA 2 gene mutation for breast cancer.[18]

17 Figure online at <www.mdausa.org/publications/fa-dmdbmd-what.html> accessed 27 December 2003, copy on file with author.

18 The significance of the BRCA 1 and BRCA 2 mutation will be discussed later in the paper.

The National Health and Medical Research Council Guidelines report that the focus of genetic registers has recently widened to include conditions with a polygenic inheritance, ie: a condition resulting from a mutation in more than one gene, as well as conditions which have a multifactorial basis.[19] A significant aspect of multifactorial disorders is that such conditions involve both genetic and environmental factors. These disorders include conditions such as:

- Spina bifida which is a form of neural tube defect that results from improper closure of the spine. It is frequently associated with complete or partial paralysis of the lower extremities and difficult bowel and bladder control.[20] One environmental factor that has been identified in the prevalence of spina bifida is that of a lack of folic acid together with a corresponding reduction in the onset of spina bifida in women who ingest folic acid prior to conception;[21] and
- Breast cancer where the majority of cases are caused by mutations of the BRCA 1 and BRCA 2 genes. Whilst essentially a monogenic disorder, obesity, a diet high in saturated fats and smoking are *environmental factors* known to increase the risk of breast cancer.

The most significant aspect of multifactorial inheritance is that the genotype and the environment interact to produce the final phenotype. It is submitted that this interaction between genotype and environment can give rise to the kind of sensitive personal genetic information that a genetic register may have to produce to a court under a subpoena. This will be discussed later in the paper.

By providing information about disorder expression within a family and improving risk assessment, a genetic register is accordingly fundamental in the provision of health care to families.[22] However, the National Health and Medical Research Council Guidelines provide that the staff of a genetic register:

> cannot provide *total care* of a person with the disorder addressed by the register. If registers are to be effective, register staff will need to develop good working relationships with others, including those relevant clinicians and organisations who will deliver the health care services coordinated and facilitated by staff of the register.[23]

An integral part of the operation of a genetic register is genetic counselling. Kelly defines genetic counselling in the following terms:

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19 Op cit at p 7.

20 See Critchley op cit at p 1581,

21 See online at <www.georgetown.edu/research/gucdc/hugem/fs13.htm> accessed 12 January 2004, copy on file with author.

22 Australian Law Reform Commission 96 Report, op cit at paras 22.5 and 22.6 and National Health and Medical Research Council Guidelines, op cit at pp 7-8.

23 Ibid at p 10, emphasis added.

> [It is] an educative process that seeks to assist affected and/or at-risk individuals to understand the nature of the genetic disorder, its transmission and the options open to them in management and family planning.[24]

Indeed Weil argues that:

> … [g]enetic counsellors facilitate knowledgeable decision-making that supports patient autonomy … [by promoting] meaningful informed consent based on an adequate understanding of the technical information and its implications for the individual and his or her family.[25]

Genetic counsellors deal with information that is of a highly emotive nature. An example of this can be seen in Huntington's Disease, and with what Folstein refers to as the 'triade of clinical features'[26] of the condition, which is:

- The motor disorder which comprises two components: involuntary movement and abnormalities of voluntary movement. The involuntary movements are most commonly of a choreic nature, but can also include motor restlessness. Voluntary movement is impaired usually by clumsiness, slowing of response time and a progressive inability to sustain a voluntary movement;[27]
- The cognitive disorder which includes trouble with memory, calculation, verbal fluency, judgement and speed of performance;[28] and
- The emotional disorder which includes depression, anxiety and irritability,[29] which Folstein identifies as causing considerable problems to both the patient and the patient's family.[30]

A further example of the type of emotive issues dealt with by genetic counsellors can be seen from two recent studies[31] which evaluated the motives of women for

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24 T Kelly, *Clinical Genetics and Genetic Counselling*, Year Book, Chicago, 1986, cited in I Kerridge et al, *Ethics and Law for Health Professionals*, Social Science Press, Sydney, 1998, at p 380.

25 J Weil, 'Genetic Counselling in the Era of Genomic Medicine' (2003) Vol 3, No 7, *European Molecular Biology Organisation Reports* 590, at p 591.

26 S Folstein, *Huntington's Disease: A Disorder of Families*, Johns Hopkins University Press, Baltimore, 1989, at pp 13-64.

27 Ibid at p 13 - the clinical presentation of motor disorder problems is not dissimilar to Parkinson's Disease.

28 Ibid at p 32.

29 Ibid at p 64.

30 Ibid.

31 C Van Asperen et al, 'What do Women Really Want to Know? Motives for Attending Familiar Breast Cancer Clinics' (2002) Vol 39, No 6, *Journal of Medical Genetics* 410 and S Clark. 'Patient Motivation, Satisfaction and Coping in Genetic Counseling and Testing for BRCA 1 and BRCA 2' (2002) Vol 9, No 3, *Journal of Genetic Counseling* 219.

attending familial breast cancer clinics for BRCA 1 and BRCA 2 testing. Clark reports that the women in her study group were concerned less about the potential negative effects that could result from the testing for the BRCA 1 and BRCA 2 mutation than the potential benefits.[32] Van Asperen et al report that most women in that study group wanted to be informed about the genetic nature of breast cancer as well as their own risk. The study revealed four characteristics that emerged as important to an understanding of the reasons for additional information. These reasons can be summarised as follows:

- Having a history of breast cancer;
- Having a BRCA mutation in the family;
- Having children; and
- The age of the counsellee.[33]

In relation to the having of children as a reason for seeking additional information, Van Asperen et al write that, '…[i]t is understandable that parenthood would give women a strong sense of responsibility. They want to survive to bring up their children, even if a mutilating and irreversible intervention is needed for their future health.'[34]

Given the highly personal nature of the genetic counselling process, as well as the sensitive nature of the information obtained by genetic counsellors (as illustrated above), Weil argues that, 'genetic counsellors promote a relationship of trust that encourages continued utilisation of their services …'.[35] It is submitted that inherent in this relationship of trust is the notion of confidentiality.

Ascribing Confidentiality to Genetic Registers

It is the writer's view that the relationship between the genetic counsellor and counsellee is analogous, in many respects, to the doctor-patient relationship. For example, in the law of torts, the adequacy of disclosure of information is defined by what a reasonable person needs to know in deciding whether to undergo certain medical treatment, ie: the disclosure of any material risks associated with the treatment, and the like. It is submitted that the adequacy of disclosure of information in genetic counselling is similarly defined by what a counsellee needs to know in order to make certain life decisions, ie: to execute a will and put one's financial affairs into order prior to the onset of Huntington's Disease or to decide not to have a child - or to terminate a pregnancy - in circumstances where there is

32 Clark at p 235.
33 Van Asperen et al at p 413.
34 Ibid.
35 Op cit at p 591.

a high probability of any progeny being born with a serious condition as Duchenne muscular dystrophy.[36]

Support for this proposition can be drawn from the following comment by the Australian Law Reform Commission:

> While genetic registers may be used to facilitate research, they can be distinguished from human genetic databases … because genetic registers are used primarily in the provision of health care.[37]

Similarly, the National Health and Medical Research Council Guidelines distinguish genetic registers from health data collection agencies, such as cancer registers, on the basis that the primary function of the latter is primarily to measure the incidence or prevalence of cancers within a specific population, as opposed to the provision of health services.[38]

Indeed, Kobrin argues that a 'counselee enters the genetic counseling relationship with many of the same expectations … that exist in any doctor-patient relationship'.[39] It is submitted that one of those expectations is that of unfettered confidentiality. The requirement to keep the highly sensitive and emotionally charged information obtained in the course of genetic counselling confidential lends itself, in the writer's view, to the same legal analysis relevant to the traditional medical relationship. Accordingly, issues of privacy, confidentiality and privilege can arise for consideration in circumstances where the records of a genetic register are sought to be produced to a court in the course of litigation under a subpoena and subsequently released to third parties.

In what circumstances might a genetic register's records be required in the process of litigation? As stated earlier, the records of a genetic register may contain information that relates to conditions with multi-factorial characteristics. It is not difficult to envisage how such information could be highly sought after in the context of litigation. For example, in a personal injuries case, an insurance company may wish to explore whether or not a Plaintiff's alleged work-related cancer is, in fact, wholly work related or that it may be primarily the expression of that person's genotype.

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36 For example B Fine, *Strategies in Genetic Counseling: Reproductive Genetics and New Technologies*, March of Dimes Birth Defects Foundation, Original Articles Series, Vol 26, No 3 (1990), New York and see also A Matthews, 'Known Fetal Malformations During Pregnancy: A Human Experience of Loss', in Fine at p 168.

37 Australian Law Reform Commission Report 96, op cit at para 22.6.

38 National Health and Medical Research Council Guidelines, op cit at p 8.

39 J Kobrin, 'Confidentiality of Genetic Information' (1983) *UCLA Law Review* 1283, at pp 1307-1308.

The paper will now examine the manner in which a third party can seek to compel the production of the details in a genetic register to a court as well as the various statutory provisions governing this issue.

Subpoena Duces Tecum

There are a number of procedures by which persons who are not parties to legal proceedings can be required by court order to produce documents for inspection, whether by the court or by the parties. A most important means of obtaining documents from non-parties during the currency of litigation is the witness summons, also known as the subpoena. The legal word 'subpoena' derives from the Latin phrase *sub poena* which means, 'under penalty'.[40] There are at law two forms of witness summons. First, there is the summons to attend court to provide oral evidence on behalf of the party issuing the summons. This type of summons was formerly known as the subpoena *ad testificandum*, which derives from the Latin phrase meaning to 'give evidence'.[41] Secondly, there is the summons to attend court to produce certain documents or things specified in the subpoena which are in the person's possession. This type of summons was formerly known as the subpoena *duces tecum*, which derives from the Latin phrase meaning 'bring with you'.[42] The modern practice form of the summons to witness is referred to as either a 'subpoena to give evidence' or a 'subpoena for production'[43] - it is the latter that is of immense significance to the practice of genetic registers. For ease of reference, the phrase *subpoena duces tecum*, shall be used throughout the remainder of this paper.

Matthews et al write that a subpoena duces tecum differs from inter partes discovery and disclosure of documents - by way of a formal affidavit of documents upon receipt of a Notice/Request for Discovery - in the following manner:

> (a) It requires the *production* of documents; it does not require the recipient to disclose the existence of documents, or to list them;
> (b) It requires production of documents *identified* by the summons itself;
> (c) It requires production *at the trial* or other hearing in the action, not at the disclosure stage;

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40 G Carter, *Subpoena Law and Practice in Australia*, Blackstone Press, Sydney, 1996, at p 3. See also D Bailey and E Evans, *Discovery and Interrogatories Australia*, Butterworths, Sydney, 1997, at paras 45,040ff.

41 Ibid.

42 Ibid at p 4.

43 Forms of subpoena are prescribed under the rules of the various jurisdictions, see Family Court: O 27 r 2 and Forms 41, 42 and 43 and O 69 r 4 and Forms 66-72 (inclusive; HC: O 37 r 24, Form 35; ACT: o 39 rr 25 and 31 and Forms 45, 46, 47 and 48; NSW: Pt 37 r 2. Forms 46, 46A, 46B, 47 and 48; NT: r 42.02(2), Forms 42A, 42B, 42C and 42D; Qld: Forms 41, 42 and 43; SA: r 81.01, Form 23; Tas: rr 494-500, Forms 37-40 inclusive; Vic: r 42.02(2), Forms 42A, 42B, 42C and 42D; WA: O 36 r 12(1).

> (d) It requires production *to the court*, not to either or both parties; if the non-party does not wish to co-operate (… such as where professional confidence is involved …) the parties will often not know what the specific documents contain until the documents are produced [or formally released] at trial.[44]

The primary purpose of the subpoena duces tecum is to secure the production of a document to be used in evidence. It cannot act as a substitute for discovery,[45] nor can it be used as a device to obtain *discovery* from a non-party.[46] This is especially relevant in jurisdictions which specifically provide for non-party discovery. Whether or not it can be used to fulfil its primary purpose from a non-party is a matter within the sole discretion of the judge to determine matters such as whether or not a claim of privilege is capable of being established.

In order to be valid a subpoena duces tecum must be addressed to a party or to a stranger to the litigation and, in either case, it must specify with reasonable particularity the documents required to be produced.[47] It is submitted that even if the documents are so specified, a subpoena duces tecum may still be objectionable if a great quantity of documents is required and their relevance is not sufficiently demonstrated by the person who issued the subpoena.[48] In this context a document will only be deemed by a court to be *sufficiently relevant* if its production is as Waddell J said in *Spencer Motors Pty Ltd v LNC Industries Ltd*, 'reasonably likely to add, in the end, in some way or other to the relevant evidence in the case'.[49] The issue of the 'probative value' of evidence sought to be produced by way of a subpoena duces tecum will be discussed later in the paper.[50]

Before the subpoena duces tecum must be obeyed, the person issuing it must tender to the witness proper conduct money. A person served with a subpoena is not bound to attend the trial unless s/he is paid an amount sufficient to meet the expenses of a witness in going to, remaining at, and returning from the place of the trial.[51] The witness should also be served with the subpoena in sufficient time to allow him/her to collect the necessary documents for delivery to the court.

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44 P Matthews, H Malek and K Bradford, *Disclosure*, Sweet and Maxwell Litigation Library, London, 2000, at p 176.

45 See *McAuliffe v McAuliffe* (1973) 4 ACTR 9, esp at p 12.

46 See *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564, esp at p 573 and *Macmillan Inc v Bishopsgate Investment Trust Plc* (1993) 4 All ER 998.

47 *Commissioner for Railways v Small*, ibid, per Jordan CJ.

48 See *Spencer Motors Pty Ltd v LNC Industries Ltd* (1982) 2 NSWLR 921, per Waddell J.

49 At p 927.

50 This issue is of significant relevance in relation to the issue of confidentiality and the test for determining whether or not human genetic information ought to be released pursuant to a subpoena duces tecum.

51 This is a long-standing rule of civil procedure, see for example *Fuller v Prentice* (1788) 126 ER 31.

Finally, in responding to the subpoena, the documents are produced to the court, not to the parties and the subpoenaed witness may take objection to any order of the court releasing the documents to the parties.[52]

Challenging The Subpoena Duces Tecum

It is open to a genetic register to object to the production of documents sought by way of a subpoena duces tecum on a number of grounds. It is the writer's view that the grounds for such challenge fall into two distinct categories:

- Those that relate per se to the integrity of the judicial process; and
- Those that relate more generally to the public interest.

The challenges that relate to the integrity of the court's process are identified as follows:

Vexatious, oppressive or an abuse of process

A subpoena duces tecum may constitute an abuse of process where it has not been served with the bona fide purpose of obtaining relevant evidence or where it is being used as a substitute for discovery against the party or as an attempt to obtain discovery from a stranger to the litigation.

Where a subpoena duces tecum is being used for the purpose of discovery, the traditional view is that the process of the court is being abused because the person who issued the subpoena is seeking to get through the use of the subpoena something that s/he could not otherwise get from a non-party or that which the person should have got pursuant to the Rules of Court from a party to whom the subpoena was addressed. In any event, there will be an abuse of process in such circumstances whether or not the documents are specifically or clearly described.[53] The concern for the court in cases where the witness named in the subpoena duces tecum is a third party (such as a genetic register), the person obtaining the issue of the subpoena is seeking to circumvent the usual rules prohibiting discovery from non-parties.[54] The High Court has referred to such practice as simply oppressive.[55] Bailey and Evans argue that, '… the modern approach seems to be to treat oppressive or vexatious subpoenas as merely sub-sets of the all-inclusive term "abuse of process"'.[56]

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52 *Commissioner for Railways v Small* at p 574.
53 See *Greyhound Australia Pty Ltd v Deluxe Coachlines Pty Ltd* (1986) 67 ALR 93, where the description of the documents was deemed to be sufficiently precise.
54 See *Botany Bay Instrumentation and Control Pty Ltd v Stewart* (1984) 3 NSWLR 98.
55 *Greyhound Australia Pty Ltd v Deluxe Coachlines Pty Ltd*, ibid at p 97.
56 D Bailey and E Evans, *Discovery and Interrogatories Australia*, op cit at para 45,085.

It is to be noted that an application to set aside a subpoena duces tecum which is an abuse of process may be made not only by the person to whom the subpoena is directed (eg: a genetic register) but also a party to the litigation and any other person who may be shown to have a legitimate interest in having the subpoena set aside.[57]

Too widely drawn

The objection that a subpoena is too widely or oppressively drawn occurs when the party who issues the subpoena is unsure of the description of the document, uncertain as to who is in possession of it, or perhaps unaware of the contents of the document. In *Epstein v Epstein*,[58] the wife in proceedings before the Family Court of Australia issued 20 subpoenas duces tecum against the husband, his parents and the office-holders, past and present of various companies for the production of a vast array of documents in property proceedings. In setting them aside, Treyvaud J said:

> The subpoenae issued by the wife do not discern particularity, do not grapple with the burden of seeking only documents relevant to the issues to be determined; the language used in the subpoenae is broad beyond belief, to comply with them would be a nightmare ...[59]

Where a subpoena duces tecum is oppressively drawn, the witness may apply to have it set aside, although in *Epstein's* case it was the husband who applied to have the subpoenas set aside in his capacity as a party to the proceedings. The court's power to set aside an oppressive subpoena is axiomatic. Even in the absence of any Rules of Court to this effect, the court has an inherent jurisdiction to so act, for a wide and oppressively subpoena duces tecum has been held to constitute an abuse of process.[60]

Purpose ulterior to the litigation

A subpoena duces tecum may be regarded by a court as objectionable if it is used for some purpose ulterior to the litigation at hand, such as:

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57 See *Greyhound Australia Pty Ltd v Deluxe Coachlines Pty Ltd*, op cit, see also *Scott v Scott* (2003) FamCA 526. For a general discussion as to abuse of process in the issuing of subpoenas duces tecum see *Rippon v Chillcox Pty Ltd & Ors* (2001) 52 NSWLR 198, per Handley J, *State Bank of NSW v Stenhouse* (1997) Australian Torts Reports 81-423 at p 64,077 per Gyles J.

58 (1993) FLC 92-834.

59 At p 79,971. For a further example of the abuse of the subpoena process in the Family Court, see *Sharpe and Dalton; Twigg (Intervenor)* (1990) FLC 92-167 and *Morgan v Morgan* (1977) Fam 122.

60 *In the Marriage of Blann* 1983) FLC 91-322.

> … to inspect the documents in connection with other proceedings, or for some private purpose, or in collusive proceedings to give them publicity. A witness might argue the documents must be sought for some undefined, spurious reason, as they have no conceivable relation to the proceedings ...[61]

In *Maddison v Goldrick*,[62] during committal proceedings for murder, a police witness admitted that he had prepared the police 'brief' for use by the police prosecutor and that the 'brief' was in the possession of the prosecutor in court. The defence maintained that the accused was being 'framed' by the police, and stated its belief that certain witnesses' statements taken by the police would support this contention. Counsel for the accused made application to the committing magistrate for an order under section 12 of the *Evidence Act 1989* (NSW) (as it then was) that the 'brief' be produced to the court. The magistrate made the order and, after hearing submissions, permitted defence counsel to have access to the documents contained in the 'brief'. On application for review by the Crown, Taylor CJ made orders restraining the magistrate and the accused from proceeding on the magistrate's orders under the section,[63] and the defendants appealed to the Court of Appeal.

Samuels JA, with whom Street CJ and Moffitt P agreed, noted that committal proceedings were 'legal proceedings' for the purposes of section 12, and decided that the call for the documents under the section sufficiently described them and was properly made. Consequently, the magistrate was entitled to act as he did in ordering, 'that the documents be produced to the court to enable him to inspect them and to judge whether they should be made available to the defence'.[64]

His Honour went on to say that once such documents are released to a magistrate and, '… before exercising his discretion to make them available to the defence, [the magistrate] must be satisfied that they are required for some *legitimate forensic purpose'*.[65]

Similarly, the New South Wales Court of Appeal in *Barton v Csidei*[66] said that a preliminary decision as to what evidence is admissible, or as to what may become admissible, on questions of relevance, or further oral evidence, does not determine the validity of a subpoena duces tecum. It is enough if the purpose for the issuing of the subpoena is evidentiary in nature.[67]

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61 *Waind v Hill and National Employer's Mutual General Association Ltd* (1978) 1 NSWLR 372 at p 381 per Moffitt P.
62 (1976) 1 NSWLR 651.
63 (1975) 1 NSWLR 557.
64 Ibid at p 662.
65 Ibid at p 666.
66 (1979) 1 NSWLR 54.
67 Ibid at p 62.

It is the writer's view that the test of forensic/evidentiary purpose as a determining factor in allowing the production of documents is a significant one in light of the second basis for the challenge of a subpoena duces tecum, being the public interest ground.

Public interest immunity

The production of documents may be refused if such production would be contrary to the public interest. The statutory formulation of the principle is found in both Federal and State legislation.[68] This ground for non-disclosure has its genesis in the older doctrine of Crown Privilege,[69] where the rationale for such doctrine was entrenched in the notion that production would be injurious to *high matters of state* such as national security or the proper functioning of government.[70] However, it has been recognised that the power to object to production on this ground is not restricted to the Crown.[71] Similarly, it has been recognised that the categories of public interests, which may call for protection under the doctrine of public interest, are not closed and may change with social attitudes.[72]

As discussed earlier, the relationship between genetic counsellor and counsellee is analogous to the doctor-patient relationship. It is submitted that inherent in such relationship is the notion of confidentiality. Biesecker argues:

> [A]lthough genetic counselling has been described as value neutral, this does not mean that the relationship is value free. Rather, the mere presence of a human relationship makes it value laden. For instance, counselors value and respect the personal nature of decision-making; the importance of personal freedom, self-determination and reproductive choice and the need for confidentiality. [Accordingly] … the individualistic model of genetic counseling respects the privacy of clients and strives to maintain confidentiality.[73]

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68 *Evidence Act 1995* (Cth), section 130 which provides for exclusion of evidence in 'matters of state'. See also S Odgers, *Uniform Evidence Law*, 4th edn, Law Book Company, Sydney, 2000, at pp 338ff and *Evidence Act 1995* (NSW).

69 See T Cooper, *Crown Privilege*, Canada Law Book, Toronto, 1990, esp at pp 1-16.

70 For a detailed discussion of these issues see S McNicol, *The Law of Privilege*, Law Book Company, Sydney, 1992, at pp 412 et seq.

71 See for example *D v National Society for the Prevention of Cruelty to Children* (1977) 1 All ER 589, *Buckley v Law Society (No 2)* (1984) 3 All ER 313, and *Law Institute of Victoria v Irving* (1990) VR 429.

72 *D v National Society for the Prevention of Cruelty to Children* at p 230, per Lord Hailsham, who took a very liberal approach towards public interest immunity.

73 B Biesecker, 'Future Direction in Genetic Counseling: Practical and Ethical Considerations' (1998) Vol 8 No 2 *Kennedy Institute of Ethics Journal* 145 at pp 148-9, online <www.muse.uq.edu.au/journals/Kennedy_Institute _of_Ethics_Journal/v008/8.2biersecker.html> accessed 30 December 2003, copy on file with author.

But what is confidentiality? Rothstein defines the concept and the problem in this area as follows:

> [W]ith confidentiality I am referring to the right of an individual to prevent re-disclosure of certain sensitive information that was disclosed originally in the confines of a confidential relationship … With regards to genetics, the central question is: how can the confidentiality of genetic information be protected? In other words, is it possible to keep certain information a patient has given to a physician or a physician has developed from getting to a third party?[74]

The conventional measure of the duty of confidentiality is that the recipient of the confidential information is subject to a duty - arising equally in contract as well as in equity[75] - not to use that information for a purpose other than that for which the information was given. Thomson argues:

> In a medical situation, this is customarily accepted as justifying, without specific consent, disclosure for additional diagnostic evaluation or specialist examination or opinion, that is, the purpose of the disclosure is within the purpose of the original grant of the information. Disclosure beyond these purposes is thus unauthorised by the original grant and constitutes a breach of the recipient's duty.[76]

It is submitted that confidentiality is then a vehicle for respecting and ensuring privacy. Rothstein defines privacy in terms of it constituting a 'limited access to a person, the right of an individual to be left alone, and to keep certain information from disclosure to other individuals'.[77] Similarly, Westin defines privacy as, '… the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others'.[78]

The Westin definition contains very strong elements of self-determination. In short, it is appropriate to think of confidentiality as 'the logical counterpart'[79] of the concept of privacy, creating on the part of the recipient of information, 'an

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74 M Rothstein, 'Genetic Privacy and Confidentiality: Why are they so Hard to Protect' (1998) 26 *Journal of Law, Medicine and Ethics* 198 at p 198.

75 See *Parry Jones v Law Society* (1969) 1 Ch 1 and *Attorney-General v Guardian Newspapers (No 2)* (1988) 3 WLR 776. Indeed, the equitable notion of confidentiality is entrenched in the concept of the fiduciary relationship. See for example P Finn, *Fiduciary Obligations*, Law Book Company, Sydney, 1977, at pp 152-156.

76 C Thomson, 'Records, Research and Access: What Interests should Outweigh Privacy and Confidentiality? Some Australian Answers' (1993) Vol 1 *Journal of Law and Medicine* 95, at p 96.

77 Ibid.

78 A Westin, *Privacy and Freedom*, 1967, Athaneum Press, New York, at p 7.

79 Otlowski, op cit, at p 68.

obligation not to use that information for any purpose other than that for which the information was given.'[80]

Accordingly, it is submitted that it is open to a genetic register to raise a public interest-based argument/objection against compelled production of its records by asserting that the principles of confidentiality - arising out of the nature of the relationship between the genetic counsellor/register and the counsellee - offers protection for the privacy of an individual's genetic information.

Whilst no common law right of privilege exists between a doctor and patient in relation to information given in confidence, it is arguable that the various rationales favouring the creation of such privilege apply equally to a genetic register. McNicol summarises the rationales as follows:

> First, there is the civil libertarian argument which relies on a citizen's fundamental right to seek medical treatment and to consult doctors without interference from the law. This argument proceeds on the basis that people should be encouraged to seek medical treatment, that candour and trust are essential for the doctor-patient relationship, and that some people might be deterred from consulting a doctor if they knew their confidences might be revealed at some later date in court … Secondly, there is a strong ethical duty imposed on doctors not to divulge information obtained and communications made in professional confidences … Thirdly, it is claimed that doctors, when faced with such a choice will invariably disobey a law compelling confidential communications and choose to undergo the legal sanction attached … A privilege is therefore required to avoid such undesirable consequences for members of the medical profession.[81]

Support for the first rationale can be found in *X v Y*,[82] a case concerning doctors who were believed to be continuing to practise despite having contracted AIDS, where Rose J said:

> In the long run, preservation of confidentiality is the only way of securing public health; otherwise doctors will be discredited as a source of education, for future individual patients will not come forward if doctors are going to squeal on them. Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled and self-treatment does not provide the best care.[83]

It is submitted that the need to maintain confidentiality could be argued as constituting a significant and weighty consideration in determining a claim of privilege on the ground of public interest.

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80 Ibid at pp 68-69.
81 McNicol, op cit at p 341.
82 [1988] 2 All ER 648.
83 At p 653.

In any event, it is of no real consequence whether the terms 'privilege', 'confidentiality' or 'privacy' are used as the basis for challenging the compelled production of documents. As Dawson argues:

> [w]hat is important is the possibility that the material [eg: from the genetic register] which was subject to compelled production might still be excluded from presentation in evidence. It could be excluded when its admission would involve an *interference* with *privacy* not justified by the need to protect some other overriding value.[84]

such as the public interest in the proper administration of justice.

The Ubiquitous Balancing Test[85]

Where objection to production of subpoenaed documents is taken, it is solely for the judge to decide whether the claim is made out. In *Attorney-General for New South Wales v Stuart*,[86] the New South Wales Court of Appeal made it clear that any objection to production of documents is to be determined before their formal production in court and if the claim of public immunity is upheld, the person to whom the subpoena duces tecum is directed is excused from the obligation formally to produce the documents to the court.

In order to determine a claim the judge must balance the following:

- The public interest in maintaining professional confidences; and
- The public interest in the proper administration of justice.

In attempting to resolve this issue Cooper argues:

> The court's task may be partially described as the ascertainment of the weight of two public interests which, in the circumstances, conflict. This ascertainment is very contextual and complex, but somewhat similar to the usual judicial function of referring to public policy when applying law to a factual situation … [the] balancing of two public interests must yield a dominant public interest; in effect the only public interest relevant to the resolution is 'created' by the court.[87]

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84 Dawson, 'Compelled Production of Medical Reports' (1998) 43 *McGill Law Journal/Revue de droit de McGill* 25, online <www.ql.quicklaw.com/qltemp/C2KoKJMTYwgqeOhs/00004mcgl-00000289.htm> at p 39 of online article, emphasis added, accessed 22 November 2003, copy on file with author.

85 Ibid at p 5 of online article.

86 (1994) 34 NSWLR 667.

87 Cooper, *Crown Privilege*, op cit at p 179. See also *W v Egdell* (1990) 1 All ER 385, where it was held to be wrong to think of the balancing test as comprising a balancing of a private interest and the public interest.

In reverting back to the earlier proposition that notions of confidentiality form the basis for an objection to compelled production, it is necessary to examine the factors that a court must take into account when examining confidentiality. In *D v National Society for the Prevention of Cruelty to Children*, Lord Kilbrandon identified these factors as follows:

> (I) In civil proceedings a judge has no discretion, simply because what is contemplated in the disclosure of information which has passed between persons in a confidential relationship (other than that of lawyer and client), to direct a party to that relationship that he need not disclose that information even though its disclosure is (a) relevant to and (b) necessary for the attainment of justice in the particular case. If (a) and (b) are established, the doctor or the priest must be directed to answer if, despite the strong dissuasion of the judge, the advocate persists in seeking disclosure. This is also true of all other confidential relationships in the absence of a special statutory provision, …
>
> (II) But where (i) confidential relationship exists (other than that of lawyer and client) and (ii) disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a refusal to disclose relevant evidence provided it considers that, on balance, the public interest would be better served by excluding such evidence.
>
> (III) In conducting the necessary balancing operation between competing aspects of public interest, the presence (or absence) of involvement of the central government in the patter of disclosure is not conclusive either way, though in practice it may affect the cogency of the argument against disclosure …
>
> (IV) The sole touchstone is the public interest. …
>
> (V) The mere fact that relevant information was communicated in confidence does not necessarily mean that it need not be disclosed. But where the subject matter is clearly of public interest, the additional fact (if such it be) that to break the seal of confidentiality would endanger that interest will in most (if not all) cases probably lead to the conclusion that disclosure should be withheld. And it is difficult to conceive of any judicial discretion to exclude relevant and necessary evidence save in respect of confidential information communicated in a confidential relationship.
>
> (VI) The disclosure of all evidence relevant to the trial of an issue being at all times a matter of considerable public interest, the question to be determined is where it is clearly demonstrated that in the particular case the public interest would nevertheless be better served by excluding evidence despite its relevance. If, on the balance, the matter is left in doubt, disclosure should be ordered.[88]

88 (1978) AC 171 at pp 245-6.

It is incumbent upon a judge to look beyond the mere promises of confidentiality and examine the interests that they were intended to protect. Indeed, as the High Court said in *Kanthal Australia Pty Ltd v Minister for Industry, Technology and Commerce*,[89] '[i]f it is possible to protect that interest whilst simultaneously according to the applicant an opportunity properly to present its case to the court, this is the appropriate course to follow'.[90] Given the particularly sensitive nature of human genetic information, the *interests* to be protected by the notion of confidentiality is potentially huge and far-reaching.

The existing case law in this area is confusing. As Cooper notes, '… the court has no statutory benchmark to assist in balancing public interests. Nor is precedent capable of wielding its usual authority'.[91] An examination of the case law shows a marked disparity in results in cases involving similar arguments in support of disclosure. The following are examples:

- *In Re HIV Haemophiliac Litigation*,[92] the plaintiffs, who were haemophiliacs, or the wives and children of haemophiliacs, claimed damages for personal injuries which were alleged to have been caused by the breach of statutory duty and negligence of the defendants (Department of Health) in that many of the haemophiliac plaintiffs were treated with Factor VIII Blood Products imported from the USA which were infected with HIV and, therefrom, those plaintiffs, and in some cases, their wives and children, had contracted AIDS.

  The trial judge hearing an application relating to discovery ordered the Department to produce certain documents for which public interest immunity was claimed, but ordered that certain other documents should not be released.

  Both sides appealed. The plaintiffs asked the Court of Appeal to vary the judge's order so as to include all documents. The Department cross-appealed contending that there should be no order requiring production of any documents.

  The Court of Appeal held that the task of the Court is properly to balance the public interest in preserving immunity on the one hand, and the public interest in the fair trial of the proceedings on the other. Bingham LJ held that on balance, the public interest favoured the position of a, 'large body of grievously injured plaintiffs'[93] and ordered that the judge's order for inspection be varied so that the defendants

89 (1978) 71 ALR 109.
90 At pp 114-5.
91 Op cit.
92 (1996) PIQR 220 and (1998) 41 BMLR 171.
93 (1996) PIQR 220 at p 250.

disclose the documents for inspection by the judge, who would decide whether or not the plaintiffs would be deprived of the means of proper presentation of their case without disclosure of the documents. This case is contrasted with the single judge decision in *X v Y*.

- In *Maranda v Richer*,[94] suspecting that C was involved in money laundering and drug trafficking, the Royal Canadian Mounted Police obtained authorisation to search the appellant's law office for any documents relating to fees and disbursements billed to C or relating to the ownership of a motor vehicle that C had allegedly transferred to his lawyer in payment for professional services. No notice was given to the appellant but a representative of the Barreau du Québec went with the police when they conducted the search, which lasted thirteen and a half hours. The appellant brought an application for *certiorari* in the Superior Court to have the warrant quashed and the search declared to be unlawful and unreasonable. Although the Crown conceded that the search was void, the trial judge decided to continue hearing the case given the importance of the issues. He allowed the application for *certiorari* and quashed the search warrant and the procedures that had been carried out under it, declaring them to have been unlawful and unreasonable. The Court of Appeal reversed that decision.

  On appeal to the Supreme Court of Canada, it was held that the appeal should be allowed. LeBel J writing for the majority said:

  > An application for information concerning defence counsel's fees in connection with a criminal prosecution involves the fundamental values of criminal law and procedure, such as the accused's right to silence and the protection against self-incrimination. The preservation of those values leads to the conclusion that no distinction should be drawn between a fact and a communication in determining whether the solicitor-client privilege applies to lawyers' billings for fees and disbursements. The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship and must be regarded as a general rule, as one of its elements. The fact consisting of the amount of the fees must therefore be regarded, in itself, as information that is generally protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will

94 (2003) SCC 67, unreported at the time of writing, judgment dated 14 November 2003 – online <www.lexumontreal.ca/csc-scc/en/rec/html/2003scc067.wpd.htmenglish> accessed 28 November 2003, copy on file with author.

> provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of the solicitor-client privilege are achieved and helps keep impairments of solicitor-client privilege to a minimum. In this case, the Crown neither alleged nor proved that disclosure of the amount of the appellant's billings would not violate the privilege that protected his professional relationship with his client and that information therefore had to remain confidential.[95]

In her dissenting judgment, Madam Justice Deschamps held that in the administration of justice there ought to be a greater transparency in respect of the amount of fees that lawyers charge to their clients.[96]

- In *Law Institute of Victoria v Irving*,[97] the Supreme Court of Victoria recognised a category of public interest requiring protection from disclosure for material gathered by the Law Institute during an inquiry into the affairs of a solicitor and an audit of his trust account. Hence it was open to the Law Institute to take objection to the production of documents on the ground of public interest immunity. However, the Supreme Court went on to decide that this public interest was outweighed on the balancing test by the public interest in disclosure, because production of the documents in question would not be injurious to the public interest provided that the identity of informants was not disclosed. The Supreme Court decided that the Law Institute is a corporate entity charged with the performance of statutory duties all of which can properly be said to be exercisable in the public interest.[98] However, although the Law Institute could take objection to the production of the documents on the ground of public interest immunity, the Supreme Court decided that the objection would fail because not only was information relevant to the litigation, some of it had a bearing upon the very issues which the court was required to determine in that litigation.[99] Hence the public interest in disclosure prevailed.

95 Summary taken from headnote at p 2 of online report.
96 At pp 13-16 of online report.
97 [1990] VR 429.
98 Ibid at p 437.
99 Ibid.

- In *R v SAB*,[100] a case which involved DNA evidence, the complainant, a 14-year-old girl, discovered that she was pregnant and informed her mother that the accused had sexually assaulted her. The complainant had an abortion and the police seized the fetal tissue for DNA testing. Pursuant to an *ex parte* warrant, the police seized a blood sample from the accused and conducted forensic analysis comparing his DNA with the fetal tissue. The accused was arrested and charged with sexual assault and sexual exploitation. At trial, evidence was presented that five of seven DNA samples taken from the blood sample established the probability that he was not the father to be 1 in 10 million. The sixth sample was damaged and inconclusive. The seventh did not produce a DNA match and was described by the Crown's DNA expert as a mutation. The expert testified that 'mutations are well documented in paternity testing, and the international guidelines state that at least two exclusions have to be noted before parental exclusion can be determined'. No evidence was given as to the nature of the international guidelines. The accused argued that the expert's opinion lacked a factual foundation. He also sought a declaration that the DNA warrant provisions in sections 487.04 to 487.09 of the *Criminal Code* violated section 8 of the *Canadian Charter of Rights and Freedoms*. The trial judge held that the impugned provisions were constitutional as they did not infringe any *Charter* provisions. Accordingly, the DNA evidence was admissible at trial. The accused was convicted of sexual assault but acquitted of sexual exploitation. The majority of the Court of Appeal upheld the conviction.

  On appeal to the Supreme Court of Canada, it was held that the appeal should be dismissed. Madam Justice Arbour writing for the majority said:

  > The reasonable expectation of privacy protected by section 8 requires assessing whether the public's interest in being left alone must give way to the government's interest in advancing its goals, notably law enforcement. Balancing these interests requires a system of prior authorization of a warrant by a decision maker capable of balancing the interests at stake and acting judicially. The DNA warrant scheme fulfills this requirement. The *Criminal Code* also restricts DNA warrants to designated offences and requires that the judge be satisfied that it is in the best interests of the administration of justice to issue the warrant.

100 (2003) SCC 60 - unreported as at time of writing, judgment dated 31 October 2003, online <www.lexumontreal.ca/csc-scc/en/rec/html/2003scc060.wpd.html> accessed 1 November 2003, copy on file with author.

> Generally. The DNA provisions appropriately balance the public interest in law enforcement and the rights of individuals to dignity, physical integrity, and to control the release of personal information about themselves. The state's interest in the scheme is significant. DNA evidence has enormous power as an investigative tool and may exonerate an accused. Effective law enforcement benefits society and law enforcement is interested in arriving at the truth in order to bring offenders to justice and to avoid wrongful convictions. With regard to privacy, although the taking of bodily samples under a DNA warrant clearly interferes with bodily integrity, under a properly issued warrant, the degree of offence to the physical integrity of the person is relatively modest. The requirement that a warrant shall include any terms and conditions advisable to ensure that the seizure is reasonable alleviates any concern that the collection of bodily substances constitutes an intolerable affront to the physical integrity of the person. The informational aspect of privacy is also clearly engaged by the taking of bodily samples under a DNA warrant, however the DNA samples are collected for a clearly articulated, limited purpose. Only non-coding DNA is used and DNA analysis is conducted solely to compare identifying information to an existing sample. The DNA warrant scheme also explicitly prohibits misuse of DNA information.[101]

The cases provide no consistent body of jurisprudence in relation to the balancing test. It is submitted that one way in which a court can seek to establish an appropriate balance is through a determination as to whether or not the material that is sought to be produced is sufficiently probative. This issue was considered by the Supreme Court of Canada in the criminal case of *R v O'Connor*,[102] where the test was stated as follows:

> Production should only be ordered in respect of records, or parts of [such] records, that have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice or by the harm to the privacy rights of the witness or to the privileged relation. The following factors should be considered in this determination: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or bias; (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record; (6) the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and (7) the effect on the integrity of the

101 Summary taken from headnote at pp 1-2 of online report.

102 (1995) 4 SCR 411, online at <www.canlii.org/ca/cas/scc/1995/1995scc103.htm> accessed on 3 January 2004, copy on file with author.

> trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome. Where a court concludes that production is warranted, it should only be made in the manner and to the extent necessary to achieve that objective.[103]

Whilst *R v O'Connor* relates to a criminal matter, it is submitted that the probative value test is equally as applicable in civil cases. As a standard for consideration in civil litigation, it is the writer's view that point (1) of the test should read: *the extent to which the record, document or thing ought to be produced is necessary to allow a party(ies) to the proceedings to proceed with a complaint or maintain a defence to such complaint*.

The purported challenge to a subpoena duces tecum on the grounds outlined in this paper has never been tested in Australia. Accordingly, the common law can offer no guidance. The requirement for an evidentiary nexus between documents sought to be produced and the litigation, as enunciated in *Maddison v Goldrick* and the test of probative value as enunciated by the Supreme Court of Canada in *R v O'Connor* - whilst constituting, in the writer's view, a logical approach to the ubiquitous balancing test - constitutes persuasive authority only for the whole of Australia.[104]

Statutory Regulation

The uncertainty in this area is compounded by the fact that the current state of the legislative regulation of privacy in Australia is confusing. For some years now there has been comprehensive privacy legislation enacted at the Federal level. Central to the *Privacy Act 1988* (Cth) are a set of eleven 'Information Privacy Principles' (IPPs)[105] which regulate inter-alia the collection, storage and dissemination of 'personal information'. The term 'personal information' is defined in section 6(1) as information or an opinion (including information or an opinion forming part of a database) about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. This, to some extent, may cover human genetic information. The principal *Privacy Act* is, however, restricted in its ambit, applying only to government agencies.

The *Privacy Amendment (Private Sector) Act 2000* (Cth) expanded the operation of the principal privacy legislation by expanding its scope of operation into the private sector. The amending legislation contains a set of ten 'National Privacy Principles' (NPPs) that will apply to 'organisations'. This means that commercial entities will be required to comply with the new principles, as well as individuals operating in the private sector who have access to the personal information of

103 Per LaForest, L'Heureux-Dubé and Gonthier JJ at p 6 of online report.
104 *Maddison v Goldrick* was a decision of the new South Wales Court of Appeal and is, therefore, not binding authority on the remaining States and Territories.
105 Contained in section 14.

others. The NPPs apply to all private sector organisations that are health service providers. Section 6(1) of the private sector amending legislation defines 'health service' as inter-alia an activity performed in relation to an individual that is intended by the individual or the person performing it to assess, record, maintain or improve the individual's health. The practical effect of the private sector amending legislation is the enactment of a comprehensive scheme covering the collection, use and disclosure of personal information by both public and private sector organisations. The gist of the principles relating to the use and disclosure of human genetic information is that dissemination of such information is prohibited without the express consent of the subject. The definition of 'health information' in the Federal legislation[106] is wide enough so as to encompass genetic information.

Similarly, state-based privacy legislation can compound the problems as to which legislation is applicable to which organisation in relation to the dissemination of personal information, For example, in Victoria the *Health Records Act 2001* (Vic) specifically regulates the collection, use and disclosure of 'health information', which expressly includes genetic data.[107] This Act contains a set of eleven Health Privacy Principles (HPPs) which regulate the use of health information. Principle 2 specifically governs the use and disclosure of such information. Principle 2.2 provides that an organisation must not use or disclose health information unless the, 'use or disclosure is required, authorised or permitted … by or under law'[108] or, 'the use or disclosure is necessary for the establishment, exercise or defence of a legal or equitable claim'.[109]

It is submitted that there is the possibility for conflict between the different methods of statutory regulation applicable to the private sector at both State and Federal level. This could impact significantly on a genetic register's compliance with privacy laws, especially if the registry is faced with a request for compelled production of its records via a subpoena duces tecum.[110]

Discussion

This paper begs the question: does the relationship of genetic counsellor and counsellee and the sensitive and far-reaching nature of human genetic information give rise to interests of a sufficiently significant kind so as to justify

106 Section 6(1) of the *Privacy Act 1988* (Cth) as amended by the private sector amending legislation.
107 Section 3(d).
108 Subparagraph (c).
109 Subparagraph (k).
110 For an interesting study on the problems encountered by a voluntary database in complying with privacy laws, see C Clarke and R Magnusson, 'Data Registers in Respiratory Medicine: A Pilot Project Evaluating Compliance with Privacy Laws and the National Statement on Ethical Conduct in Research involving Humans' (2002) Vol 10 No 1 *Journal of Law and Medicine* at p 69.

the impediment to justice that may result from the suppression of such information in a court case? No line of jurisprudence nor clearly defined statutory scheme can provide an answer to that question. It is submitted that the answer lies first, in an act of judicial intrepidity that attaches public interest immunity to the records of a genetic register. Such finding would need to be predicated on an acceptance of the relationship between counsellor/counsellee as a 'special relationship' in need of protection. Secondly, the creation of a statutory immunity would be an easy solution to the problem. However, any attempt to usurp the jurisdiction of a court to balance competing public interests on a case-by-case basis would, in the writer's view, be contrary to the public interest in maintaining the proper administration of justice.

The author favours the need to establish an evidentiary nexus, as enunciated in *Maddison v Goldrick* as well as the probative value test as enunciated by the Supreme Court of Canada as the test that ought to be adopted by a court in ascertaining whether or not the records sought to be produced have any relevance to the litigation at hand. Once it has been determined that the records have relevance then it is up to the court to balance the competing public interests of maintaining confidence and the proper administration of justice. It is certainly the author's view, however, that there ought to be a presumption in favour of the proper administration of justice but that a court, if called upon to balance notions of confidence and administration of justice, should view this exercise of weighing the 'raw materials'[111] as a primary and not a derivative one.

111 See Cooper, op cit at p 179.