

Legal Professional Privilege:

The influence of Jeremy Bentham and John Henry Wigmore on the judicial pronouncement of Lord Taylor of Gosforth in *R v Derby Magistrates' Court; ex parte B*.

Olivia Grosser-Ljubanovic

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The University of Adelaide

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ABSTRACT

R v Derby Magistrates' Court, ex parte B represents a pivotal point of 20th-century cases on legal professional privilege. This thesis argues that in that case, Lord Taylor misapplied the principles with respect to the absoluteness of the privilege. This decision, made at the highest level of the English judicial system, contradicted Benthamic and Wigmorean teachings by placing the nature of legal professional privilege beyond doubt. Through an exploration of the works of Jeremy Bentham and John Henry Wigmore, this thesis analyses the extent to which legal professional privilege evolved as a result of their perspectives and argues that *Derby's* sweeping pronouncement ultimately diverged from their philosophies.

In attempting to limit the breadth of the privilege, or, in the alternative, abolish it altogether, Bentham and Wigmore sought to promote justice over concealment and instituted a dialogue about the parameters in which the privilege does, or should, operate. Both scholars shared similar sentiments about the privilege and assigned the highest priority to reaching the correct decision in court proceedings. This common thread winds its way through the commentaries of Bentham and Wigmore. The continuing significance of these scholars lies in the fact that they, unlike their predecessors, adopted a broad view of the subject of evidence. Their incisive arguments, in which each advanced rationalist utilitarian theories, culminated in agreement that 'the man [was] more important than the rule'.

Espousing a polished wisdom in their individual intellectual enterprises, Bentham's *Rationale of Judicial Evidence: Specially Applied to English Practice* and Wigmore's *A Treatise on the Systems of Evidence in Trials at Common Law*, came to be linked, with the pair belonging to the mainstream rationalist tradition of evidentiary scholarship. Bentham's successor, Wigmore, went so far as to label his predecessor the greatest opponent of all the privileges. While sympathetic to Bentham's premise that the main objective in adjudication was rectitude of decision, with the Benthamic philosophy seemingly irresistible,

Wigmore defended legal professional privilege against the Benthamic attack by pointing out that if it were abolished, the incidence of criminal defendants having recourse to legal advice would not reduce. He stated that no one aside from Bentham had ‘taken such an uncompromising stance against all types of rigid formality and regulation in adjudications’. Wigmore recognised the validity of Bentham’s argument and conceded that legal professional privilege was misused and abused, leading to intolerable obstruction of truth finding.

In challenging the immutability of legal professional privilege, this thesis argues that the measures applied by Lord Taylor in *Derby* have unnecessarily enlarged the application of the doctrine. In critiquing the factors that influenced his reasoning, this thesis examines relevant earlier judgments over which Lord Taylor presided. These rulings are contrasted against his *dicta* in *Derby* to reveal that Lord Taylor swung from advocating a narrow scope for the rule to enlarging its application beyond what was necessary to facilitate the administration of justice. According to traditional doctrine, the rationale for this standard is that it promotes the representation of clients by legal advisers and ensures that all relevant material is available to courts when deciding cases. Through utilising Bentham and Wigmore as a vehicle to critique Lord Taylor’s decision in *Derby*, this thesis concludes that the *Derby* ruling amounts to a legal fiction.

DECLARATION

I, Olivia Grosser-Ljubanovic, hereby certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution.

To the best of my knowledge and belief, it contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

I give consent for this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying, subject to the provisions of the *Copyright Act 1968* (Cth). I also give permission for the digital version of my thesis to be made available on the Internet, via the University's digital research repository, the Library catalogue and also through Internet search engines, unless permission has been granted by the University to restrict access for a period of time.

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LIST OF PUBLICATIONS

PUBLICATIONS BY THE CANDIDATE RELEVANT TO THE THESIS

- Olivia Ljubanovic, 'Attorney-Client Privilege: Incarnation and Interpretation' (2018) 35 *The Journal Jurisprudence*
- Olivia Ljubanovic, 'Legal Professional Privilege: Tilting the Scales in Favour of Disclosure' (2018) 7 *Arkansas Journal of Social Change and Public Service* 1
- Olivia Ljubanovic, 'Legal Professional Privilege: A Judicial Uncertainty' (2018) 2 *University of Lagos Law Review* 1
- Olivia Ljubanovic, 'Absolute Privilege: A Legal Fiction' (2018) 45 *Ohio Northern University Law Review* 1

CHAPTER I: INTRODUCTION

This thesis critically analyses the historical and recent authoritative statements surrounding the absolute nature of legal professional privilege as articulated in *R v Derby Magistrates' Court; Ex parte B*.¹ *Derby* forms the focal point of this thesis because this proceeding sought to prevent the continuing evolutionary development of legal professional privilege according to common law principles. This thesis assesses whether the rule has remained faithful to the jurisprudential teachings of Jeremy Bentham and John Henry Wigmore. In mapping the progression of legal professional privilege together with Lord Taylor of Gosforth's judicial rulings on the subject, a close textual analysis has been applied to an extensive range of English common law. While emphasising its Roman origins, the thesis focuses on 16th century Elizabethan England through to the 19th and 20th centuries. A chronological examination is presented in order to demonstrate the fragmented trajectory of the privilege at pivotal points in its history.

Legal professional privilege is defined as a single privilege consisting of two limbs with corresponding qualities; namely, legal advice privilege² and litigation privilege. It originated as a mechanism for the protection of individuals who were unfamiliar with, and vulnerable in the face of overwhelming legal complexities.³ The notion of 'privilege' essentially bound lawyer and client in a special contractual relationship.⁴ 'Characterised as a sacred trust that touch[ed] the very soul of lawyering',⁵ legal professional privilege allowed lawyers to defend their status by appealing to the public's need for their services and unique area of

¹ [1996] AC 487.

² Lord Taylor noted that the foundation for the 'legal advice test' was laid in *Smith-Bird v Blower* [1939] 2 All ER 406 and *Conlon v Conlons Ltd* [1952] 2 All ER 462.

³ 'Developments in the Law: Privileged Communications' (1985) 98 *Harvard Law Review* 1450, 1502.

⁴ John Gergacz, *Attorney-Corporate Client Privilege*, (Thomson Reuters, 3rd ed, 2000) § 1.04, 1-5; John Wigmore, *Evidence in Trials at Common Law* (John T. McNaughton, 1961) § 2290, 543.

⁵ Adam Dodek, 'Reconceiving Solicitor-Client Privilege' (2010) 35 *Queen's Law Journal* 493, 517.

expertise. This enabled them to morph into important exemplars of order in society.⁶ The value attached to Elizabethan lawyers culminated in the expansion of legal business such that they exerted a far greater influence in the conduct of proceedings. During this time, the rule regarding legal professional privilege was the subject of judicial uncertainty, leading judges to concede that doubt and inconsistency obscured its application.

The effectiveness of interrogating the doctrine through the lenses of Bentham and Wigmore is twofold. These scholars have been selected primarily because each was prominent in his views about the dangers associated with the application of the privilege. In particular, each foresaw the harm that could arise from invoking the rule and stifling justice. Bentham recognised that precedents were not a frozen monolithic body of precedent, nor of absolute authority. Judicial pronouncements made in one era were disregarded in another.⁷ Neither he, nor Wigmore advocated *Derby's* 'absoluteness' rationale.

Legal professional privilege bore the undeniable stamp of Bentham and Wigmore's influences. Their thinking was instrumental to the way in which the rule developed in England.⁸ Throughout this thesis, the Bentham/Wigmore dichotomy is used to illustrate and contrast the core philosophical underpinnings

⁶ The author notes, per Richard Helmholz, *The Ius Commune in England: Four Studies* (Oxford University Press, 2001) 191, that while ecclesiastical privilege has been thoroughly documented in the Middle Ages, little to no attention has been devoted to the civil aspect of 'privilege', with Blackstone and Maitland concentrating on the clergy's privileged jurisdictional status.

⁷ Ibid 48.

⁸ English law discerns two limbs of legal professional privilege. Firstly, the dissemination of legal advice in a professional capacity is classed as 'legal advice privilege'. This includes all communications passing for giving or receiving legal advice between solicitor and client. Secondly, the term 'litigation privilege' applies to communications made in anticipation of adversarial proceedings. It encompasses communications made only when litigation is anticipated or pending. Legal professional privilege, therefore, is a single privilege, whose sub-headings are legal advice privilege and litigation privilege; the latter of which has been historically limited to the curial setting, with any extension beyond the field of litigation carefully restricted. See *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, 88 (Lord Carswell).

of the rule. The Bentham/Wigmore dichotomy arises because Bentham despised the rule for its ability to conceal injustice. Where he advocated for its abrogation, Wigmore noted the value of legal professional privilege in promoting client-counsel communications. He did however accept that it could be manipulated and abused. For this reason, Wigmore predicated its existence on a four-tiered paradigm and resolved that the privilege could be invoked only if it met these criteria.⁹ As a precursor to the review of *Derby*, this thesis explores the congruence of Bentham and Wigmore's philosophies and resolves that, ultimately, little separates the pair.

The influence of Bentham and Wigmore on judicial opinion is also canvassed, with an emphasis on common law culminating in an assessment of how the present English position as enunciated in *R v Derby Magistrates' Court; Ex parte B*¹⁰ relates back to the origins and justifications identified by Bentham and Wigmore. This analysis produces the conclusion that *Derby* represented a dramatic and unwarranted departure from their jurisprudential teachings. This thesis ultimately concludes that the privilege is flawed, with much contemporary thinking misapprehending the rationales espoused by Bentham and Wigmore.

⁹ The Wigmorean Paradigm morphed into the contemporary cornerstone of the twentieth century incarnation of legal professional privilege; firmly embedded in jurisprudence. Its existence was predicated on the following conditions: (1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. See John Wigmore, *Evidence*, above n 4, § 2285.

¹⁰ [1996] AC 487.

I SIGNIFICANCE AND LIMITS OF THIS STUDY

This thesis presents an in-depth analytical study utilising the Benthamic and Wigmorean approaches to critique the pronouncement of Lord Taylor CJ in *R v Derby Magistrates' Court; Ex parte B*¹¹ in order to establish whether the privilege was settled once and for all in the 16th century, has been consistently applied across the board, and is unqualified and absolute in every circumstance and setting. Although legal professional privilege has drawn a high level of scholarly attention, its primary focus has been on justifying an expansion of the perimeter of the rule so as to encompass within its ambit a wider range of communications.¹² Where the privilege could once be claimed only if it pertained to legal advice or litigation, its revised scope enabled any legitimate communication to achieve protected status, save for the recognised waiver and crime-fraud exceptions.

The scholarly literature focuses on reinforcing the existence of legal professional privilege because of its ability to free clients from any apprehension that their innermost confidences will be revealed.¹³ It is commonly contended that this

¹¹ Ibid.

¹² This proposition is dealt with in the body of the thesis.

¹³ Scholars including John Henry Wigmore, Christopher de Courcy Ryder, Richard Helmholz, JA Coutts, Lord Taylor and Donaldson and Parker LJJ were among those to justify the existence of legal professional privilege by its ability to promote full and frank disclosure. By contrast, Edward Imwinkelried and Charles Hollander advocated a more measured approach, in which the rule must adapt. According to Imwinkelried, the privilege must cede in exceptional circumstances ... [with a] discretionary jurisdiction offer[ing] a better solution'. Hollander similarly stated that 'absolutism may be subject to challenge under relevant human rights guarantees because the right to a fair trial is an obvious right which is hampered when information that can prove innocence or aid in a defence of an accused is omitted from evidence'. See Edward Imwinkelried, 'Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges' (2004) 65 *University of Pittsburgh Law Review* 145, 175. See Charles Hollander, *Documentary Evidence* (Sweet & Maxwell, 7th ed, 2000) [9]–[15]; Charles Hollander, 'The Legal

facilitates the administration of justice because clients gain optimal legal representation. Bentham, however, challenged this theory on the basis that it could lead to injustice by keeping critical information out of the courtroom. Legal professional privilege prevents confidential client-counsel communications being revealed in court. This is an absolute, inviolable right. What remains untested at an academic level is whether the privilege, by safeguarding communications, disadvantages third parties or plays an active role in miscarriages of justice. These should not be viewed as isolated or novel occurrences and it is important to address such points in order to determine whether an absoluteness rationale can be sustained when innocence is on the line, or whether a further discretionary or mandatory exception is warranted. This thesis will utilise a combination of judicial comment and case law to demonstrate that legal professional privilege has the capacity to produce injustice.

This dilemma was central to *Derby*, wherein the Court declined to balance the interests of the criminal defendant against a third party, despite the defendant's interest in not being wrongfully convicted being of paramount importance. This thesis culminates in an examination of the privilege in the *Derby* era, where the House of Lords unconvincingly pronounced that the rule was absolute. By freezing it at this particular point in history, *Derby* attempted to proscribe courts from continuing the evolutionary development of legal professional privilege according to common law principles or in light of reason and experience.

This thesis concludes that *Derby* does not justify an unqualified privilege and the rule should be applied only where necessary to achieve the purpose for which it was designed.

Spotlight: A Question of Privilege' in Legal Week Intelligence, *Funding in Focus Content Series: Report 1* (2015) 10, 26.

II METHODOLOGY

This thesis evaluates the ‘absolutist’ rationale applied in the judgment of Lord Taylor of Gosforth CJ in *R v Derby Magistrates’ Court; ex parte B*¹⁴ against the Benthamic and Wigmorean philosophies. The thesis argues that the absolutism of legal professional privilege is a legal fiction. Given that the applicability of the rule bears daily importance and significance in the lives of lawyers and clients, this thesis challenges Lord Taylor’s premise that ‘... If a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client’s individual merits’.¹⁵

This thesis employs a normative and historical analysis to determine how Lord Taylor reached this premise. Bentham and Wigmore influenced the reasoning of Lord Taylor and the development of legal professional privilege. Bentham and Wigmore both sought to reconcile the application of the rule with the truth-finding process. This ‘clash in values’ forms a central theme throughout the thesis, whereby Wigmore’s attempts to resolve the privilege are contrasted with Bentham’s ideology of rectitude of decision. Lord Taylor, it is argued, encountered a similar struggle in discerning the appropriate scope of the rule, frequently referring to one or both of these scholars in his *dicta*. In instances where it is not evident that he directly referenced them, Lord Taylor’s stance is analysed to determine whether he favoured a Benthamic or Wigmorean approach.

This thesis notes that there has been a movement away from older scholarship in which a Benthamic approach has ceded to the Wigmorean vision; one embraced by contemporary scholarship. This enables the current implications of legal professional privilege in England to be drawn out. The research builds upon each of Lord Taylor’s judgments by undertaking a review of his decisions on legal professional privilege to expose flaws in the rule. It postulates that legal professional privilege does, in a practical sense, impact civil and criminal

¹⁴ [1996] AC 487.

¹⁵ *Ibid* 508E (Lord Taylor).

litigants, including the criminal defendant in *Derby*. Accordingly, this thesis proposes exceptions to the rule in exceptional circumstances, particularly when exculpatory information could prove the innocence of a defendant or prevent wrongful conviction.

III STRUCTURE

Chapter II frames the history of legal professional privilege through an examination of Lord Taylor's pronouncement that the rule was settled once and for all in the 16th century. The works of Bentham and Wigmore inform the argument that an ancient Roman construct informed its existence rather than a status-based exception rooted in 16th century England. Chapter II concludes that Wigmore's erroneous view of the history came to be absorbed into judicial thinking and reproduced by Lord Taylor in *Derby*.

Chapter III considers whether the privilege has 'applied across the board in every case'¹⁶ by examining the scope and breadth of the rule as expressed by Lord Taylor in some of the earlier judgments over which he presided. In particular, his ruling in *Balabel v Air India*¹⁷ is contrasted against his *dicta* in *Derby* to reveal that where Lord Taylor advocated a narrow scope of the rule in *Balabel*, he reversed his position in *Derby*. The rationales of Bentham and Wigmore are also considered in assessing whether Lord Taylor aligned himself with a particular vision. Bentham adopted an abolitionist view that legal professional privilege functioned as a shield behind which guilty parties could hide. Wigmore also noted the potential for concealment of pertinent client–counsel communications and devised a four-tiered paradigm in which legal professional privilege was narrowly construed. In *Balabel*, Lord Taylor accorded a narrow 19th century scope to the rule and recognised that this rationale elevated the client-counsel relationship above other professional relations. This leads into a discussion of whether Lord Taylor concurred with Bentham and Wigmore in limiting the classes of people

¹⁶ [1996] AC 487, 508E (Lord Taylor).

¹⁷ [1988] Ch 317.

who could assert a claim of privilege. His ruling in *R v Umoh Mfongbong*¹⁸ is relevant in this regard because it reveals Lord Taylor's thinking that legal professional privilege should be strictly confined to communications passing between clients and their lawyers.

Chapter IV assesses whether Lord Taylor applied legal professional privilege 'irrespective of the client's individual merits'.¹⁹ Particular attention is paid to his enunciated exclusions and limitations to the rule in *Goldman v Hesper*²⁰ and *Tanap v Tozer*.²¹ This leads into a discussion of relevant case law, allowing an assessment of whether the privileged nature of communications can be reasserted once surrendered. Bentham and Wigmore posited that if confidential communications were partially or fully disclosed this sufficed to waive privilege over the entire communication. Lord Taylor diverged from Bentham and Wigmore on this point. As illustrated in *Goldman*, he restored the privilege over a waived communication. This conflicted with his subsequent judgment in *Tanap*.

In *Tanap*, Lord Taylor promulgated the notion that fairness underpinned the reason for waiver because it would be unfair to allow a party to use a selection of information which was most advantageous and not permit an adversary or judge to view the remainder of material which may be to his detriment. It is argued that these rulings contradict; demonstrating that Lord Taylor applied legal professional privilege on a case-by-case basis.

In *Derby*, the criminal defendant sought access to privileged communications in order to support his claim of innocence. Chapter V examines whether legal professional privilege applies differently in civil and criminal litigation and considers whether the justification for its existence directly translates from one legal context to the other. A secondary focus of this chapter is whether Bentham's rhetoric has been explicitly employed by some members of the judiciary in an

¹⁸ (1987) 84 Cr App R 138.

¹⁹ [1996] AC 487, 508E (Lord Taylor).

²⁰ [1988] 1 WLR 1238.

²¹ [1991] WL 839041.

attempt to promote an independently existing opposition to the privilege. The most prominent argument advanced in this regard is that the rule cannot be maintained when innocence is on the line. This proposition is attractive because it assigns a priority to one fundamental right over another: the right that no one should be wrongfully convicted, with its ancillary right of access to evidence to establish innocence, prevailing over the right to invoke a claim of privilege.

Bentham and Wigmore were hesitant to adopt a one-size-fits-all policy with respect to the rule. Lord Taylor disagreed with the notion that legal professional privilege should have distinct applications in civil and criminal settings. Although he previously held in *R v Keane*²² that ‘if the disputed material may prove the defendant’s innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosure’,²³ his ruling in *Derby* proved the opposite point which was that ‘once any exception to the general rule is allowed, the client’s confidence is necessarily lost’.²⁴

Chapter VI challenges the immutability of legal professional privilege and argues that the measures applied by Lord Taylor in *Derby* have enlarged the application of the doctrine beyond what is necessary to facilitate the administration of justice. In critiquing the factors that influenced the reasoning of Lord Taylor, this chapter posits that how his ruling in *Derby* was distinct from the previous judgments over which he presided. Where he once advocated a narrow scope to the rule, *Derby* confirmed it was absolute.

This thesis concludes that Lord Taylor’s rigid and unyielding application fell out of step with the historical interpretation of the privilege and ceased to avail any degree of flexibility or judicial discretion. This broadening of the rule has weakened its force by usurping the central truth-finding function of the courts

²² *R v Keane* [1994] 1 WLR 746.

²³ *Ibid* 751. See also *R v Turner* [1995] 1 WLR 264, 268.

²⁴ [1996] AC 487, 508B (Lord Taylor); *Greenough v Gaskell* (1883) 1 M & K 98, 103 (Lord Brougham LC). There is a dearth of empirical evidence to support the claim that the client’s confidence would necessarily be lost.

and stifled the ends of justice. Presenting a constant challenge for trial and appeal judges, the ‘absoluteness’ rationale created a tension between truth, on the one hand, and efficacy on the other. This thesis exposes as a legal fiction the ‘absoluteness’ of legal professional privilege and contends that a contemporary interpretation adopted by Lord Taylor has misapprehended the Wigmorean theory.

In spite of Lord Taylor’s misapprehension, subtle traces of Wigmore’s philosophy are contained in his judgment. Wigmore, for instance, noted that, if a privilege met his criteria, it must be classed as absolute in order to achieve the desired behavioural effect of promoting full and frank disclosure. Regrettably, as only minimal analysis has been accorded to the exploration of this theme, the connection has not been made between Lord Taylor’s judgment in *Derby* and Wigmore.²⁵

²⁵ This proposition is addressed throughout the course of the thesis.

CHAPTER II: DERBY: THE ULTIMATE ARBITER OF LEGAL PROFESSIONAL PRIVILEGE

I INTRODUCTION

The fallacy of the absolutist nature of legal professional privilege owes much of its legacy to *R v Derby Magistrates' Court, Ex parte B*.¹ In this 1995 English case, the House of Lords, constituted by Lord Taylor of Gosforth CJ, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Keith of Kinkel and Lord Mustill, anchored the doctrine to a 16th-century paradigm which held that, once legal professional privilege attached to a certain communication, the privilege was absolute and could not be breached by any court for any reason. This result left no opportunity to balance the needs of other competing interests against the interest in preserving the confidentiality of privileged communications.² Lord Taylor of Gosforth CJ announced:

If a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits.³

This chapter assesses the factors leading to Lord Taylor's pronouncement that the privilege was settled once and for all in the 16th century. The purpose is to frame the period in which legal professional privilege was conceptualised so as to highlight that the rule was not a 16th century English construct. English law and procedure absorbed ancient Roman legal principles. Albert Alschuler stated that 'the history of the privilege ... is almost entirely a story of when and for what

¹ *R v Derby Magistrates' Court; Ex parte B* [1996] AC 487.

² Adrian Zuckerman, 'Legal Professional Privilege – The Cost of Absolutism' (1996) 112 *Law Quarterly Review* 535, 535–6.

³ [1996] AC 487, 508E (Lord Taylor).

purpose people would be required to speak under oath'.⁴ This chapter traces the history of legal professional privilege and provides an analysis of the origins of the rule from ancient Rome through to the 19th century.

Section II contrasts the perspectives of Bentham and Wigmore; comparing the latter's Elizabethan rationale with the former's assertion that a Roman construct predicated on servitude informed the principle's existence. In utilising Bentham and Wigmore's philosophies, this chapter develops the historical justification for the existence of legal professional privilege, which is a recurrent theme throughout the thesis, and introduces some ideas about the way this has shaped contemporary judicial thinking.

The chapter begins with a series of Wigmorean interpretations, which initially claimed that the privilege was rooted in a medieval status-based exception dating to the reign of Elizabeth I, where the tenets of oath and honour proscribed lawyers testifying on behalf of clients. Wigmore's argument seems incomplete, given the Benthamic philosophy that this principle was of such high antiquity, with English law having been, in its first incarnation, imported from ancient Rome.⁵ Section III canvasses competing academic views in order to discern whether the majority of cited authorities echo Benthamic or Wigmorean sentiments regarding the absorption of Roman legal principles into later English law. Contrary to its understood origins, this chapter affirms that traces of Roman law can be found in the procedures of English courts.

II LEGAL PROFESSIONAL PRIVILEGE: HISTORICAL UNDERPINNINGS

A *Wigmore on the Evolutionary Path of Legal Professional Privilege*

The position taken by Lord Taylor CJ that legal professional privilege was settled in the 16th century may logically be attributed to the influence of Wigmore.

⁴ Albert Alschuler, 'A Peculiar Privilege in Historical Perspective: The Right to Remain Silent' (1995–96) 94 *Michigan Law Review* 2625, 2641–2.

⁵ *Ibid.*

Contending that the privilege was initially conceived to safeguard the oath and the honour of the lawyer in a society predicated on inequality of rank,⁶ Wigmore's rationale supported the traditional justification for the existence of the rule.⁷ Wigmore's pronouncement that legal professional privilege was connected to the evolution of the legal profession throughout the later Middle Ages, reinforces the fact that the legal profession had established the necessary level of specialisation such that client–counsel communications were entitled to fall under an obligation of secrecy.⁸

Wigmore interpreted the theoretical justifications underpinning legal professional privilege as a status-based exception courtesy of the esteemed nature of lawyering. He argued that under the tenets of oath and honour, the lawyer could waive the privilege⁹ because it was for the lawyer alone to determine what honour demanded.¹⁰

An inference may be drawn that the reactionary and parallel evolutionary paths shared by the legal profession and legal professional privilege would eventually converge and be mutually reinforced.¹¹ The basis for this proposition lies in the assumption that, as the status of the legal profession grew in prominence; corresponding rules of professional conduct would also emerge to govern client–counsel relations.

⁶ Michel Rosenfeld, 'The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism: The Adversary System and the Corporate Client's SEC Disclosive Obligations' (1982) 33 *Hastings Law Journal* 495, 496.

⁷ 'Developments in the Law: Privileged Communications' (1985) 98 *Harvard Law Review* 1450, 1472.

⁸ Anton-Hermann Chroust, 'Legal Profession During the Middle Ages: The Emergence of the English Lawyer Prior to 1400' (1956) 31 *Notre Dame Law Review* 4, 566-8.

⁹ John Wigmore and Colin McNaughton, *Evidence in Trials at Common Law* (Little, Brown & Co, 1905) § 2291.

¹⁰ Justin Gleeson, James Watson and Elisabeth Peden, *Historical Foundations of Australian Law: Volume II – Commercial Common Law* (Federation Press, 2013) 136.

¹¹ Anton-Hermann Chroust, above n 8, 573.

Through strictly limiting the operation of legal professional privilege to communications arising between clients and themselves, lawyers were afforded a competitive advantage over other professional groups. This ensured they were indispensable to the proper functioning of the legal system¹² and the administration of justice, which could not be advanced if clients were unable to confide in those skilled in law.¹³ In limiting the privilege in this manner, relations between lawyer and client were emphasised as conveying special significance and constituted part of the functioning of the law itself. Ensconced in their privileges, lawyers could afford to be tolerant; so long as they guarded those privileges well, both barristers and solicitors were indispensable.¹⁴

Lawyers defended their privileges by appealing to the public's need for their services and unique area of expertise, thereby morphing into important beacons of order in society. Evinced the growing sense that lawyers were becoming increasingly important components within the English judicial system,¹⁵ a strong sentiment of maintaining client confidences would evolve into a necessary function of the lawyer.

This normative proposition fortified the privilege. Privacy was a legitimate end in and of itself. The fact that communications were disclosed in confidence conferred the benefit of the privilege and provided conclusive protection in the future. Even Lord Eldon LC in *Parkhurst v Lowten* remarked: 'Once confidence ceases, privilege ceases', for without an assurance of confidentiality, there could be no trust or dependence on any person.

In the eighth volume of *A Treatise on the Systems of Evidence in Trials at Common Law*,¹⁶ Wigmore announced that the testimonial disqualification

¹² *Baker v Campbell* (1983) 153 CLR 52, 94 (Wilson J).

¹³ Justin Gleeson et al, above n 10, 143.

¹⁴ Michael Birks, *Gentlemen of the Law* (Stevens & Sons, 1960) 1.

¹⁵ William Dunham, *Radulphi de Hengham Summae* (Cambridge University Press, 1932) 4–7.

¹⁶ John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States, Vol IV* (Little, Brown & Co, 1905). Bentham distinguished *treatises* and *abridgements* as follows: '*treatises* contain, with

enjoyed by lawyers sprang from medieval jurisprudence, with the venerated history of legal professional privilege dating back to the reign of Elizabeth I. He specifically claimed that the rule had its origins in section 12 of the 1562 *Act for Punishment of Such as Shall Procure or Commit Any Wilful Perjury*¹⁷ and anyone who failed to testify upon service of process, or bore false witness, was liable to penalty.¹⁸ ‘The history of the privilege goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications’.¹⁹

Erroneously claiming that it arose contemporaneously in response to the then-novel right of testimonial compulsion which officially gained recognition in the 1570s,²⁰ Wigmore stated that legal professional privilege already appeared as unquestioned at this time and concluded that it was one of the oldest of the privileges for confidential communications.²¹ He later recanted this statement and insisted that legal professional privilege emerged from the Court of Chancery in the 14th century, most likely around the year 1375.²² In a separate statement, he added:

or without rules, argumentation about rules, while abridgements contain alleged rules with or without (though commonly without) the argumentation out of which the rules were spun, and in which they were drowned’. See Jeremy Bentham, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf and Others* (John Polbemus, 1882) 10.

¹⁷ *Act for Punishment of Such as Shall Procure or Commit Any Wilful Perjury 1562*, 5 Eliz 1 c 9.

¹⁸ Jonathan Auburn, *Legal Professional Privilege: Law & Theory* (Hart Publishing, 2000) 2–3.

¹⁹ See Wigmore and McNaughton, above n 16, §2290–1. Legal professional privilege applies to confidential communications, whether written or oral, between a client and lawyer, where the latter is acting in a professional capacity. The privilege constitutes a guarantee of security in which discussions can take place absent a fear of disclosure. Communications must be made for the purpose of enabling the lawyer to conduct the cause, with the test being whether communications are necessary for the purpose of carrying on the proceeding in which the lawyer is engaged.

²⁰ Auburn, above n 18, 2–3.

²¹ Wigmore and McNaughton, above n 16, § 2290–1.

²² Wigmore and McNaughton, above n 16; Auburn, above n 18, 3.

The policy of the privilege has been plainly granted since the latter part of the 1700s on subjective considerations. In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the lawyers must be removed, hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory.²³

Wigmore failed three times accurately to discern the history of legal professional privilege and imparted a lasting, albeit erroneous, impression that the privilege first took root in the 16th century as a by-product of Elizabethan transformation.²⁴ For Lord Taylor CJ to accept Wigmore's various statements is to overlook his terminology in which the scholar expressly articulated that the privilege already appeared as unquestioned by the 1570s and was one of the oldest of the privileges for confidential communications, having originated in section 12 of the 1562 *Perjury Act*. If the privilege was already unquestioned by the 16th century and was regarded as one of the oldest privileges pertaining to confidential communications, it must have been in use prior to this era.

Assuming that legal professional privilege was in fact framed in section 12 of the 1562 *Perjury Act*, it would *not* have been a preserve of the common law as is universally agreed, but would have conformed to a statutory provision. Legal professional privilege cannot be distinctly traced back to any statutory enactment. Rather, this thesis argues that it derived its authority and recognition from the common law; through systematic reporting and publication of precedent-driven cases in the early 1500s.²⁵

Consider *Lee v Markham*,²⁶ in which the defendant's counsel was excused from testifying so as 'not [to] be compelled to answer to any interrogation, to [have]

²³ Wigmore and McNaughton, above n 16, § 2290–1.

²⁴ Ronald Desiatnik, *Legal Professional Privilege in Australia* (Prospect Media, 1999) 9.

²⁵ See Geoffrey Hazard, 'An Historical Perspective on the Attorney-Client Privilege' (1978) 66 *California Law Review* 1061, 1070. These 16th century cases involved judicial consideration, without guidance of statute.

²⁶ (1569) *Monro* 375, *Tohill* 48.

ministered unto him which shall touch or concern the discussing of the title'.²⁷ Similarly, in *Breame v Breame*²⁸ and *Windsor v Umberville*,²⁹ the Court proscribed counsel acting in a cause from being examined in that same matter.³⁰ In *Berd v Lovelace*,³¹ the Court of Chancery ordered that Thomas Hawtry, lawyer, not be examined in relation to communications that had passed between himself and his client. Declaring that Hawtry would 'not be compelled to be deposed, touching the same, and that he was not in danger of any contempt, touching the not executing of the said process',³² the Court's ruling signified that, while lawyers *were* competent to testify, it would not compel their testimony.³³

The position enunciated in *Berd v Lovelace*³⁴ established the rule that a lawyer previously retained to act could not be subpoenaed to testify against a client,³⁵ either past or present, as this was repugnant to the policy of the law. In addition to ignoring any injury to clients, the early justification ignored protection of any

²⁷ Ibid.

²⁸ (1571) Tothill 48. See also Ronald Bridgman, *A Digest of the Reported Cases on Points of Practice and Pleading in the Courts of Equity in England and Ireland and of the Rules and Orders of the Same Courts; from the Earliest Period to the Present Time* (Edward B Gould, 1829) 178.

²⁹ (1574) Monro 411.

³⁰ Bridgman, above n 28, 178.

³¹ [1577] Cary 62.

³² Ibid.

³³ Auburn, above n 18, 1. With the passing of the *Common Law Procedure Act 1854* and the *Supreme Court of Judicature Act 1873* (UK), the High Court of Justice assimilated the legal procedures of the Court of Chancery and the Court of Common Law (as well as other courts). Where there was any variance between the old practice of the two courts, the more convenient one would prevail. See William Hastings, *A Digest of the Law of Practice Under the Judicature Acts and Rules: And the Cases Decided in the Chancery and Common Law Divisions from November 1875 to August 1880* (Stevens & Haynes, 1880) 1, 3. See also Colin Tapper, 'Privilege, Policy and Principle' (2005) 121 *Law Quarterly Review* 181, 182.

³⁴ [1577] Cary 62.

³⁵ Ibid.

particular professional relationship or the preservation of client–counsel communications. These were not valued as an end in and of themselves.³⁶

The rationale that the privilege belonged to the lawyer was carried through in several cases which essentially limited the scope of legal professional privilege to the exchange of communications between lawyer and client for the purpose of obtaining legal advice.³⁷ The next of these, in chronological order, is *Austen v Vesey*,³⁸ in which a solicitor for one of the litigants was discharged and ‘not admitted to be examined’. *Hartford v Lee*³⁹ similarly determined that counsel could not be compelled to testify ‘touching a matter in variance, wherein he hath been of counsel; it is ordered he shall not be compelled to testify’. In *Kelway v Kelway*,⁴⁰ Roger Taylor enjoyed the same privilege when he was excused from answering any interrogatories touching the secrecy of the title ‘or any other matter which he knoweth as solicitor only’. In the 1579 matter of *Dennis v Codrington*,⁴¹ it was ordered that a lawyer in that suit should not be compelled, by virtue of subpoena or otherwise, ‘to be examined upon any matter wherein he had been counsel, either by the indifferent choice of both parties or with either of them, by reason of annuity or fee’.

In the subsequent cases of *Strelly v Albany*⁴² and *Cutts v Arminger*,⁴³ the Court confined the operation of legal professional privilege to matters arising from the respective lawyers’ involvement in the case at hand.⁴⁴ In *Strelly*, the Court

³⁶ Edward Imwinkelreid, ‘The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges’ (2003) 83 *Boston University Law Review* 315, 319–20.

³⁷ Paul Rice, John Corr and David Drysdale, *Attorney-Client Privilege in the United States*. (Lawyers Cooperative Publishing, 2nd ed, 2009) 6.

³⁸ (1577) Cary 63.

³⁹ *Ibid.*

⁴⁰ (1579) Cary 89.

⁴¹ (1579) Cary 100.

⁴² (1583) *Monro* 519–520.

⁴³ (1585) *Monro* 544.

⁴⁴ *Breame v Breame* (1571) *Tothill* 48.

ordered that the lawyer should not be examined in this cause⁴⁵ and in *Cutts*: ‘He hath not dealt therein but as a counsellor for the plaintiff; it is therefore ordered, that the said Fuller shall not be enforced to be examined in the cause’.⁴⁶

By the time *Ward v Waldron*⁴⁷ came to be prosecuted, the Court permitted counsel to invoke a claim of privilege only to avoid being ‘bound to make answer for things which may disclose the [innermost] secrets of his client’s cause and thereupon he was [unable] to be examined’. The shallow scope of legal professional privilege was again evident in *Havers v Randall*,⁴⁸ where counsel could not be questioned over ‘anything concerning his clynts title’. *Creed v Trap*⁴⁹ meanwhile limited the operation of legal professional privilege to the professional knowledge acquired by the lawyer in relation to his representation of the client; ‘but for any other matter, it shall be lawful for the plaintiff to examine him’.

Containing principles which were recognised and applied as sound law on the subject of client–counsel communications, these Court of Chancery cases – which together comprised the basis for Wigmore’s ‘honour theory’ of legal professional privilege – contained principles which were recognised and applied as sound law on the subject of client–counsel communications. As a general precept in early modern English law, these cases demonstrate that legal professional privilege evolved through the common law as opposed to legislative enactments per Wigmore’s assertion.

These authorities failed to describe the right of a lawyer to ‘avoid compulsory disclosure as a privilege and certainly not as a legal professional privilege’.⁵⁰ This is to say that 16th–century English law did not recognise the rule as a means of

⁴⁵ *Strelley v Albany* (1583) Monro 519–520.

⁴⁶ *Cutts v Armingier* (1585) Monro 544.

⁴⁷ (1654) 82 ER 853.

⁴⁸ (1581) Choyce Cas 149.

⁴⁹ (1578) Choyce Cases 121.

⁵⁰ Justin Gleeson et al, above n 10, 132.

excusing lawyers from testifying. *Bulstrod v Lechmere*⁵¹ firmly enunciated this view. In *Bulstrod*, the defendant allegedly had in his possession an ancient deed belonging to his client, Dingley, which the plaintiff sought to discover by exhibiting a demurrer to a bill.⁵² The defendant pleaded that he was a counsellor and it had been agreed between the parties that no information should be disclosed or made use of by the other side.⁵³ The court ruled that the defendant ‘shall have the privilege of the bar and is *not* obliged to answer’.⁵⁴ Furthermore, any information that came to the knowledge of his lawyer *prior* to being retained as counsellor in the conduct of the cause, or upon any other account, should afford him the privilege of the bar and he should not be put to answer.⁵⁵

Unfortunately, the word ‘privilege’ misstated the application of the doctrine, with the English Law Report commenting that the word *not* should have been inserted between *shall* and *have*, so as to actually read: ‘The barrister for the defendant shall *not* have the privilege of the bar and is obliged to answer’.⁵⁶ While historical records do not elaborate on precisely how this mistake occurred, it has been suggested that the negative was transposed probably through typographical error.⁵⁷ This erroneous version, which gave the privilege an evolutionary advantage, would become the emerging practice as documented in cases for the next two hundred years.⁵⁸

⁵¹ (1676) 2 Freeman 5.

⁵² Bridgman, above n 28, 179.

⁵³ *Ibid.*

⁵⁴ *Bulstrod v Lechmere* (1676) 2 Freeman 5.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ See English Law Reports: (1557–1865) 22 ER Equity Cases Abridged, Volume 2 in which it is stated: ‘The negative has obviously been here transposed; probably through a mere typographical error. With respect to facts known by a barrister, or attorney, unprofessionally, the claim of privilege can not be maintained’. See also John Beames and William Halstead, *The Elements of Pleas in Equity: With Precedents of Such Pleas* (O Halstead, 1824) 279.

⁵⁸ While no direct correlation exists between the *Bulstrod* and *Derby* judgments, Lord Taylor CJ pronounced in *Derby* that when claimed, legal professional privilege ‘could not be overridden’. This parallels the fallible *Bulstrod* ruling that the lawyer ‘shall have the privilege of the bar and is *not* obliged to answer’.

It was not until 1816 that *Parkhurst v Lowten*⁵⁹ corrected the erroneous *Bulstrode v Lechmere* judgment, wherein that court held that, with regard to facts known to a lawyer unprofessionally, the claim of privilege could *not* be maintained and ‘refusal to answer was in itself a breach of trust’. This is significant because, prior to *Parkhurst*, any knowledge or information, whether or not independently acquired by the lawyer, mistakenly fell within the scope of the privilege, when in actual fact no privilege should have attached. While the vision for legal professional privilege reached reasonable clarity only in the 16th century, with the value attached to Elizabethan lawyers culminating in an expansion of legal business, legal professional privilege found its origins in the accumulated historical events which preceded it.

B *Bentham, Rome and the Origins of Legal Professional Privilege*

English utilitarian philosopher Jeremy Bentham dominated English legal thought in the 18th and 19th centuries with his ‘truth theory’ of adjudication. Bentham insisted that the overriding objective of the judicial system was the ascertainment of truth.⁶⁰ Attaching priority to rectitude of decision, he opposed exclusionary rules that defeated access to probative evidence.⁶¹ He argued: ‘Evidence is the basis of justice: exclude evidence, you exclude justice’.⁶² In contrast to Wigmore, who claimed the privilege was formed in the 16th century, Bentham paid homage to the Roman origins of English jurisprudence when he

⁵⁹ (1816) 36 ER 589.

⁶⁰ Edward Imwinkelried, ‘Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges’ (2004) 65 *University of Pittsburgh Law Review* 145, 150.

⁶¹ Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice, Vol V* (Hunt and Clarke, 1827) 227. See also William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford University Press, 1985) 70.

⁶² *Ibid* 227.

stated that legal professional privilege was grounded in the Roman legal maxim that no one was bound to accuse himself.⁶³

Noting that these ‘principles and rules were of such high antiquity that the time cannot be assigned when they did not have an existence and use’,⁶⁴ Bentham cautioned against the propensity to forget that ‘both Roman and English systems of law were in use in England’;⁶⁵ with English law having been, in its first concoction, imported from ancient Rome.⁶⁶ While Bentham noted an evolutionary connection, he differentiated between the severity of exclusion created by the privilege and observed differences between the effects of the Roman law and those cemented in later English practice.

Where the Roman objective was to keep secret as much client–counsel evidence as possible, the English rule was confined to complex causes.⁶⁷ According to Bentham, the degree of refinement accorded the rule constituted no small improvement, with England’s interpretation of the ancient Roman privilege excluding not only client–counsel relations, but extraneous witness testimony.⁶⁸ As a result, the mischief produced by the English rule was not nearly as damaging as that produced under Roman law, in which the systematic concealment was so unnatural to justice and so unpalatable to the general complexion of the English judicature that it required justification in the sight of English lawyers when it was planted in English soil.⁶⁹

⁶³ Jeremy Bentham and John Bowring, *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring, Vol VII* (Simpkin, Marshall & Co, 1843) <http://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-7-rationale-of-judicial-evidence-part-2?q=Elizabeth#Bentham_0872-07_853>.

⁶⁴ Jeremy Bentham, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf and Others* (John Polbemus, 1882) 29.

⁶⁵ Bentham and Bowring, above n 63.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ This was not limited to client–counsel communications, but also excluded testimony based on the characteristics of impropriety, inconsistency and mischievousness. Bentham and Bowring, above n 63.

⁶⁹ *Ibid.*

According to Bentham, the roots of contemporary legal professional privilege were clearly traceable to the era of Roman jurisprudence ‘which provided the organisational and legal framework’ for the rule to seep into later legal practice. He excoriated the judiciary for failing to consider that ‘English precedents have been grounded on original Roman law’⁷⁰ and limiting their reflections to English precedents for legal professional privilege. Notwithstanding the fact that the ancient Romans ‘failed to develop distinctive standards of professional conduct, professional organisations or disciplinary standards’,⁷¹ Roman law faintly foreshadowed the beginnings of a distinctive and prestigious legal profession,⁷² with Roman orators and lawyers forming the earliest legal profession in any sense of the term.⁷³

An ancient variation of legal professional privilege can be traced back to the prosecutions of Herennius and Hortensius in 116 BC and 70 BC respectively.⁷⁴ In the first case, Gaius Marius⁷⁵ was charged with *ambitus*; the offence of electoral corruption⁷⁶ for which he would later be acquitted.⁷⁷ The prosecutor, of which history records no name, sought to compel Gaius Herennius to testify against Marius; who had been a client of the House of Herennii.⁷⁸ Under Acilian law, consul Manius Acilius Glabrio decreed that no one could be ordered to give evidence if they are their ancestors are past or present clients of the defendant or

⁷⁰ Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice*, Vol VII (Simpkin, Marshall & Co, 1843) 848.

⁷¹ Anton-Hermann Chroust, ‘Emergence of Professional Standards and the Rise of the Legal Profession: The Graeco-Roman Period’ (1956) 36 *Boston University Law Review* 587, 58.

⁷² James Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians and Courts* (Chicago University Press, 2008) 11.

⁷³ *Ibid* 58.

⁷⁴ Max Radin, ‘The Privilege of Confidential Communication between Lawyer and Client’ (1928) 16 *California Law Review* 487, 488.

⁷⁵ Abel Greenidge, *The Legal Procedure in Cicero’s Time* (Forgotten Books, 2013) 484.

⁷⁶ *Ibid*; Plutarch, *Lives: Demetrius and Antony. Pyrrhus and Gaius Marius*, Vol IX, Bernadotte Perrin trans, Harvard University Press, 1920) 5.

⁷⁷ Plutarch, above n 76, 475.

⁷⁸ *Ibid*; Greenidge, above n 75, 484.

of his ancestors, or if they or their ancestors are, whether now or in the past, *patrons* of the defendant or of his ancestors,⁷⁹ including anyone pleading the case of the defendant.⁸⁰ This highlights that Herennius' objection to testifying was partially based on an assumed duty of loyalty and servitude towards his client.

By contrast, the 70 BC proceedings against former Sicilian governor Gaius Verres on a charge of extortion,⁸¹ invited early discussion of 'honour' in connection with men who engaged in the practice of law. This concept was adopted throughout the Ciceronian period, in which Cicero lamented his inability to summon Verres' defence counsel, Quintus Hortensius Hortalus, to testify against his client.⁸² Declaring that counsel was feigning ignorance as to 'what our experience at the Bar has repeatedly shown to us',⁸³ Cicero noted that he could not ignore the duty to prosecute 'so flagrant a plunderer as Verres was commonly believed to be',⁸⁴ particularly in an era when it was becoming increasingly difficult for Roman citizens to obtain justice:

For indeed, in these days, no surer means of securing our country's welfare can be devised than the assurance of the Roman people that – given the careful challenging of judges by the prosecutor – our allies, our laws, our country can be safely guarded by a court composed of senators; nor can a greater disaster come upon us all than a

⁷⁹ The significance of 'ancestry' rested on the virtuous displays of excellence achieved by past generations of men for the benefit of ancient Rome. Providing structure by operating within a shared behavioural code, an integral feature of the *mos maiorum* was the duty to increase the level of glory for one's family which lasted in perpetuity. See Sarolta Takacs, *The Construction of Authority in Ancient Rome and Byzantium: The Rhetoric of Empire* (Rutgers, 2009).

⁸⁰ Avalon Project, *Acilian Law on the Right to Recovery of Property Officially Extorted, 122 BC* Yale Law School <http://avalon.law.yale.edu/ancient/acilian_law.asp>.

⁸¹ Max Radin, above n 74, 487.

⁸² *Ibid.*

⁸³ Marcus Cicero, *Verrine Orations 2 – Second Pleading Speech on Gaius Verres* (C. D. Yonge trans, George Bell & Sons. 1903) 149 [27].

⁸⁴ Frank Cowles, *Gaius Verres: An Historical Study* (PhD thesis, Cornell University, 1917) <https://archive.org/stream/gaiusverresanhi00cowlgoog/gaiusverresanhi00cowlgoog_djvu.txt>.

conviction, on the part of the Roman people, that the Senatorial Order has cast aside all respect for truth and integrity, for honesty and duty.⁸⁵

Cicero commented that only a lawyer in his representation of an accused was exempt from bearing witness against him⁸⁶ on the grounds that he cannot give testimony in the case he was conducting: ‘Only [the] patronus is exempted from giving evidence’.⁸⁷ Cicero’s rationale corresponded with the Herennian decision of 116 B.C. This is significant insofar as it demonstrates that it was merely customary, rather than mandatory, that a lawyer not bear witness against his client.

Legal professional privilege was not the subject of honour concomitant with the practice of law as Wigmore alleged. It was grounded in the notion of slavery, with the privilege belonging to the client. This view gains currency when one accepts that the concept of not speaking against one’s client was rooted in an equally old and powerful feeling that a servant must keep his master’s secrets.⁸⁸ Within the framework of traditional Roman views, there was an expectation that a promise between lawyer and client created a natural obligation where members of the legal fraternity, who were conceived of as servants and helpers,⁸⁹ would obey the unifying principles of fidelity and piety.⁹⁰

The next section considers the scholarly literature echoing Benthamic and Wigmorean sentiments regarding the absorption of Roman legal principles into

⁸⁵ Marcus Cicero, above n 83, 125 [4–5].

⁸⁶ Ibid. See also Abel Greenidge, above n 75, 484.

⁸⁷ The original Latin phrase is: ‘Nonne te mihi testem in hoc crimine ei-ipuit non istius innocentia sed legis exception ... quive ... causam deicet dum taxat unum’.

⁸⁸ Max Radin, above n 74, 487.

⁸⁹ Ibid.

⁹⁰ Abel Greenidge, above n 75, 484. In Latin: ‘Hi homines inviti in reum testimonium ne dicunt; qui sobrinus est reo propiorve cognatione coniunctus quive socer, gener, victricus privignusve eius erit’. 2, 3]

later English law. This informs which view ultimately prevailed and eventually influenced *R v Derby Magistrates' Court; ex parte B*.⁹¹

III GENESIS OF THE PRIVILEGE: THE SCHOLARLY LITERATURE SURROUNDING BENTHAM AND WIGMORE

The previous section developed the history of legal professional privilege by examining its evolution according to the perspectives of Bentham and Wigmore. This section has elicited novel historical and normative perspectives on a longstanding doctrine which is widely accepted across the common law world, but the theoretical basis for which has rarely been questioned. This established that Lord Taylor's reasoning followed the Wigmorean presumption that the rule was established in the 16th century, whereas Bentham traced its antecedents to ancient Rome. This analysis has support. Albert Alschuler succinctly stated that 'the history of the privilege ... is almost entirely a story of when and for what purpose people would be required to speak under oath',⁹² while William Twining wrote that legal professional privilege had 'a rich and complex history that stretched back at least as far as classical rhetoric'.⁹³ Geoffrey Hazard noted that 'the historical record is not authority for a broadly stated rule of privilege' and commented that it was 'rather, an invitation for reconsideration'.⁹⁴ Eben Moglen noted that the history of legal professional privilege revealed how procedure made substance and how legal evolution, like natural selection itself, adapted old structures to new functions, bringing us closer to the real mechanisms of legal development.⁹⁵ Wigmore made a striking, albeit similar, concession when he stated:

⁹¹ [1996] AC 487.

⁹² Albert Alschuler, 'A Peculiar Privilege in Historical Perspective: The Right to Remain Silent' (1995–96) 94 *Michigan Law Review* 2625, 2641–2.

⁹³ William Twining, above n 61, viii.

⁹⁴ Geoffrey Hazard, above n 25, 1070.

⁹⁵ Eben Moglen, 'Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination' (1994) 92 *Michigan Law Review* 1086, 1090.

If one instance better than another serves to exemplify the manner in which history may cover up the origin of a legal principle, destroy all traces of its real significance, change and recast its purpose and its use, while preserving an identity of form and leaving it with its vigour of life unabated and its legal orthodoxy untainted, it is this rule.⁹⁶

Frederick Pollock and Frederic Maitland who, as historians of English law, distinguished themselves through their ‘insights and superb historical sense’,⁹⁷ stated that Roman law failed to exhibit a face of authority in the English courts.⁹⁸ They perceived the 16th-century form of legal professional privilege as distinct from the privilege practised in the preceding Roman and medieval eras, and offered grounds to support their contention. Firstly, Roman legal principles were not received into later English law, with every shred of evidence belonging to Roman law crushed, thrashed and forced to give up its meaning.⁹⁹ Secondly, labelling Roman law a product of time and circumstance, an historical artefact rather than a body of universally valid legal wisdom,¹⁰⁰ they claimed that the duty to uphold client confidences was the result of primitive custom, rather than a natural extension of a formally constituted legal profession governed by a code of conduct.

⁹⁶ John Wigmore, ‘Nemo Tenetur Seipsum Prodere’ (1891) 5 *Harvard Law Review* 1, 71.

⁹⁷ Pollock revered Maitland as ‘a man with a genius for history, who turned its light upon law because law, being his profession, came naturally into the field’. Indeed, Maitland used medieval law as a tool to ‘open ... the mind of medieval man and to reveal the nature and growth of his institutions’. Pollock, on the other hand, exhibited ‘commanding qualities of mind and character’, and overwhelmed with the sweep of his learning and knowledge of facts. Robert Schuyler, ‘The Historical Spirit Incarnate: Frederic William Maitland’ (1952) 57(2) *American Historical Review* 303, 303.

⁹⁸ See also Richard Hurd, *Moral and Political Dialogues: Being the Substance of Several Conversations between Diverse Eminent Persons of the Past and Present Age, Digested by the Parties Themselves* (London, 1759) 232.

⁹⁹ Frederick Maitland, ‘Why the History of English Law is Not Written’, *An Inaugural Lecture Delivered in the Arts School at Cambridge on 13th October 1888* (Cambridge University Press, 1888) 5.

¹⁰⁰ William Bouwsma, ‘Lawyers and Early Modern Culture’ (1973) 78(2) *American Historical Review* 303, 326.

This assertion stands in contrast to arguments advanced by William Holdsworth, Charles McCormick and Lord Brougham, each of whom affirmed the Benthamic pronouncement that the loyalty owed by a lawyer to his client was deeply rooted in Roman law.¹⁰¹ Pollock and Maitland concluded that the absence of a fully formed legal profession in Roman times precluded the need to accord special protection to the client–counsel relationship and fixed 3 September 1189 as the date at which English law began to speak clearly, articulately and continuously.¹⁰² Brougham noted that the English common law underwent many additions and alterations in the process of time, with parts collected from a variety of ancient Roman codes.¹⁰³ Plainly acknowledging the correlation between Roman and Elizabethan principles of confidentiality, Max Radin¹⁰⁴ and James Gardner¹⁰⁵ claimed that traces of Roman law survived in the procedures of English courts. In reality, whether or not we care to admit it, Roman and medieval attitudes are very much “in our bones”.¹⁰⁶

The effects of Roman law did not disappear entirely, with medieval lawyers deriving much of their law from Roman sources,¹⁰⁷ while courts and jurists adopted the Roman tradition of preventing lawyers from testifying in proceedings in which they were professionally engaged.¹⁰⁸ Bentham stated that this was born

¹⁰¹ Charles McCormick, *McCormick on Evidence* (West Publishing Co, 2nd ed, 1972) 175. See also William Holdsworth, *A History of English Law, Vol IX* (Methuen & Co, 3rd ed, 1944) 98; University of Northern Iowa, ‘Review: Life and Character of Henry Brougham’ (1831) 33(72) *North American Review* 227, 247.

¹⁰² Frederick Maitland, above n 99, 4.

¹⁰³ University of Northern Iowa, ‘Review: Life and Character of Henry Brougham’ (1831) 33(72) *North American Review* 227, 247.

¹⁰⁴ Max Radin, above n 74, 487–8.

¹⁰⁵ James Gardner, ‘A Re-evaluation of the Attorney-Client Privilege (Part I)’ (1963) 8 *Villanova Law Review* 279, 289.

¹⁰⁶ Max Radin, above n 74, 493.

¹⁰⁷ James Brundage, ‘Vultures, Whores and Hypocrites: Images of Lawyers in Medieval Literature’ (2002) 1 *Roman Legal Tradition* 56, 57.

¹⁰⁸ Guillaume Durand, *Speculum iudiciale* (Sandra Hindman ed, Les Enluminures, 2013) 1.4 De teste s1.74 [1:298–9]. ‘A governor must see that those who represent clients in law suits do not give evidence in cases in which they appear’. Titus Livius cited in *The Digest of Justinian*

of ancient Roman influence. Wigmore discounted its Roman origins and made several conflicting statements in which he variously contended that the privilege came into existence in 1375, was born of the 1562 *Perjury Act*, stated that it did not gain recognition until the 1570s and asserted that the policy of the privilege was granted in the latter part of 1700. Wigmore's pronouncement lacks the evidential foundation to support it, but his contention proved sufficiently persuasive to convert mainstream thinking into adopting the 16th century as the birthplace of the doctrine.

Legal professional privilege did not arrive in English law on a certain footing. Its way was paved by successive historical steps, including a series of 'largely isolated responses to particular problems at different times'.¹⁰⁹ A more appropriate phrasing of its evolution might be that legal professional privilege, rather than serving as a quaint remnant of an ancient legal system, enjoyed a reassertion of its status, whereby it finally achieved formal recognition in the common law.

Legal professional privilege was boldly articulated in the 16th century, but it was not a phenomenon of Elizabethan England. Despite the doctrine coming to prominence in this era when the Court of Chancery issued precedent-making pronouncements on this subject matter, England did *not* give birth to the concept of legal professional privilege. This is significant because the House of Lords in *Derby* recognised English law as the relevant starting point. Consequently, it overlooked other historical edicts in which narrowly construed the privilege; with suppression of confidential communications requiring justification rather than being automatically granted.¹¹⁰

IV CONCLUSION

(Theodor Mommsen and Paul Kreuger ed, Alan Watson trans, University of Pennsylvania Press, 1985) IV, 22.5.1.25. See also James Brundage, above n 107, 325.

¹⁰⁹ William Twining, above n 61, 1.

¹¹⁰ *Ibid.*

The first defining attribute of the privilege was a moral underpinning informed by the concepts of servitude and loyalty rather than profession and honour. The foundations of not speaking against someone with whom one had a particular relationship were embedded in the ancient rationale whereby lawyers were proscribed from testifying against clients.

This chapter has analysed the rationales underpinning the historical justification for legal professional privilege according to the perspectives of Bentham and Wigmore. Wigmore denied the struggles and achievements of his legal predecessors and obscured the ancient common law application of the privilege. Wigmore constituted significant influence in judicial opinion and his philosophy was absorbed into legal thinking and reproduced by Lord Taylor CJ in *R v Derby Magistrates' Court; Ex parte B*.¹¹¹ The judicial interpretation of the rule's history has informed its operation and enlarged its scope beyond what history intended. This chapter has demonstrated that, through adopting a Wigmorean view of the history of legal professional privilege, Lord Taylor's articulation in *Derby* fails to withstand scrutiny and obfuscates the true heritage of the doctrine and its ancient application under the common law.

Chapter III introduces the practical setting in which Lord Taylor framed the scope of legal professional privilege and considers whether a Benthamic or Wigmorean vision guided the scope of the rule. This chapter assesses whether Lord Taylor aligned himself with one or both of their pronouncements in the earlier privilege cases over which he presided. Particular attention is paid to his ruling in *Balabel v Air India*¹¹² which stands in direct contrast to the pronouncement formulated in *Derby*.

¹¹¹ [1996] AC 487.

¹¹² [1988] Ch 317.

CHAPTER III: LEGAL PROFESSIONAL PRIVILEGE: A JUDICIAL UNCERTAINTY

I INTRODUCTION

Chapter II concentrated on the origins of legal professional privilege and explained the history of the rule for the purposes of this thesis. The objective of Chapter III is to establish the scope and certainty of the rule. Section II examines Lord Taylor's second articulation in *Derby*, namely that the privilege is applicable 'across the board in every case'. *Balabel v Air India*¹ tests this presumption. Rather than the privilege being as broad as *Derby* implied, *Balabel* adopted a narrow scope of the rule, with Lord Taylor CJ establishing a presumption in favour of disclosure. This indicates that judicial uncertainty has muddied an absolute and consistent application of the rule. It raises questions about the clarity of the rule prior to *Balabel* and reveals a series of shifts in judicial thinking about the application of the privilege.

Balabel was significant for discerning whether the rule extended to communications seeking or giving legal advice, or to all information passing between lawyer and client.² Linking the constriction of the privilege to truth-seeking values, Lord Taylor, in *Balabel*, was conscious of the need to discern the bounds of the privilege. He aimed to ascertain the proper point of balance between two imposing imperatives; specifically, the need to make available to the court the maximum amount of information while avoiding unfairness to clients through having confidential client-counsel communications divulged. Lord Taylor CJ overturned his *Balabel* stance in *Derby* when he pronounced an 'absoluteness' rationale.

¹ [1988] Ch 317.

² *Ibid.*

The balance of Section II analyses Bentham's theory of adjudication in which he articulated what needed to be done in order to remedy defects in the law and facilitate justice through admitting all relevant evidence.

Section III considers whether either rationale, or portions thereof, filtered through to Lord Taylor's reasoning in *Balabel*. Required to define the parameters in which the privilege did or ought to operate, Lord Taylor, in Benthamic fashion, linked the constriction of the privilege to truth-seeking values and aligned himself with historical judicial decisions that espoused a traditional justification for the rule. Conscious of the need to discern the bounds of the privilege, he sought to ascertain the proper point of balance between the need to make available to the court the maximum amount of information and the need to avoid unfairness to clients through having confidential communications revealed.

Section IV utilises a passage in *Derby* to discover whether Lord Taylor, like Bentham and Wigmore, disavowed 'privileges' which accorded protection to values or professional relationships outside the legal profession. In *R v Umoh Mfongbong*,³ Lord Taylor remarked that 'it was at first thought that the reason for the privilege was that a lawyer ought not, in honour, to be required to disclose what he had been told in confidence'.⁴ Culminating in the client's right to control or stem the flow of information about him,⁵ legal professional privilege anchored the legal profession as a whole. This informs whether the privilege offers real or fancied protection to lawyers and whether the protection enhances the services they are uniquely qualified to offer.

While acknowledging that legal professional privilege is today a preserve of the client; in its earlier incarnation, the principle was invoked to justify the existence of a beleaguered legal profession. This view is supported by the *dicta* of Lord Taylor in *Derby*, wherein he distinguished the continued significance of lawyers:

³ (1987) 84 Cr App R 138.

⁴ [1996] AC 487, 504E (Lord Taylor).

⁵ Geoffrey Stone, 'The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers' (1976) *American Bar Foundation Research Journal* 1193, 1207.

‘A man must be able to consult his lawyer in confidence ... The client must be sure that what he tells his lawyer in confidence will never be revealed’.⁶ Having regard, therefore, to the above, it is undeniable that in the 20th and 21st centuries, the legal profession continues to derive benefit, whether directly or indirectly, from the existence and application of legal professional privilege.

II NARROW OR BROAD: THE SCOPE OF PRIVILEGED COMMUNICATIONS IN
BALABEL V AIR INDIA

The obiter observations of Lord Taylor CJ in *Derby* are in direct conflict with his own assessment of the privilege in an earlier case over which he pronounced judgment in 1988.⁷ Where Lord Taylor proclaimed in *Derby* that the privilege had been settled once and for all in the 16th century and thereafter applied across the board in every case to which it bore relevance, *Balabel v Air India*⁸ reflected the degree of judicial uncertainty, arbitrariness and inconsistency with respect to the balancing of the rule. The reason for this difference of approach by Taylor is addressed in Section III.

As the operation of privilege created a tension between access to information, on one hand, and efficacy on the other, the proportionality exercise of which Lord

⁶ [1996] AC 487, 507D. On Pp 71-72 of my thesis, I further discuss the unique advantage that legal professional privilege offers to the legal profession.

⁷ Although it may appear that *Balabel* and *Derby* address distinct points with respect to the privilege, a close textual analysis confirms that each concerns the scope and breadth of the rule. *Balabel* was referenced in *Derby* and it would be remiss of me not to incorporate this noteworthy case in my scholarship. The ability to produce a thorough examination of other LPP cases over which Lord Taylor has presided provides unique insight into how his position altered throughout the course of his judicial appointments and culminated in his ‘absolutist’ approach in *Derby*. In particular, his ruling in *Balabel* is contrasted against his *dicta* in *Derby* to reveal a series of shifts in judicial thinking. Lord Taylor recognised that LPP was not immutable. Criticising cases which extended the doctrine without limit to all communications, the *Balabel* Court remarked that the privilege was not as clear as it might have been prior to Lord Taylor’s ruling. Where Lord Taylor advocated a narrow scope in *Balabel*, he reversed his position in *Derby* when he pronounced an ‘absoluteness’ rationale. This is further explained on Pp 48-49 and 72 of my thesis.

⁸ [1988] Ch 317.

Taylor spoke pertained to the need to weigh competing interests of privacy against disclosure; and truth finding and accuracy against the desire to maintain client confidences. The public interest in permitting clients to confide in lawyers was pitted against the public interest in ensuring that all relevant material was before the court.

In *Balabel*, the Court considered whether the privilege extended merely to some or all communications seeking or giving legal advice, or to all information passing between lawyer and client.⁹ This point cast light on the erroneous pronouncement in *Derby*. Adapting the language used by Lord Brougham in *Greenough v Gaskell*,¹⁰ Lord Taylor affirmed:

In *Balabel v Air India*, the basic principle justifying legal professional privilege was again said to be that a client should be able to obtain legal advice in confidence. The principle which runs through all these cases ... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent ... Once any exception to the general rule is allowed, the client's confidence is necessarily lost.¹¹

This did not paint an accurate picture of the outcome in *Balabel*. Rather than the privilege being as broad as *Derby* implied, *Balabel* adopted a narrow scope of the rule, with Lord Taylor CJ establishing a presumption in favour of disclosure. This was not the first instance in which he advocated truth finding and accuracy in the trial process. When Peter Taylor QC, as he then was, appeared as junior prosecutor in *R v Ward*,¹² which led to the conviction of Judith Ward in 1974 for

⁹ *Ibid.*

¹⁰ (1883) 1 M & K 98.

¹¹ *R v Derby Magistrates' Court; Ex parte B* [1996] AC 487, 508B (Lord Taylor); *Greenough v Gaskell* (1883) 1 M & K 98, 103 (Lord Brougham LC). There is a dearth of empirical evidence to support the claim that the client's confidence would necessarily be lost.

¹² *R v Ward (Judith Theresa)* [1993] 96 Cr App R 1. *Ward* was considered by the House of Lords in *Derby*.

the murder of British soldiers, he offered to testify during her 1992 appeal. Lord Taylor was appointed Lord Chief Justice of England in this same year. When his offer was declined and he was advised that his evidence was not required, Lord Taylor was vexed to the extent that he later spoke publicly of it.¹³

An inference may be drawn that Lord Taylor aligned himself with Bentham's presumption that the privilege may operate as an indefensible obstruction which attaches 'to every man; one safe, unquestionable and ever ready accomplice for every crime imaginable'.¹⁴ The Court in *Ward* underscored the importance of 'ensuring that there is a proper understanding of the nature and scope ... of the duty'.¹⁵ This led Lord Taylor CJ to champion reform in the area of full disclosure of evidence. By all accounts, it would appear that, prior to adopting an 'absoluteness' rationale in *Derby*, Lord Taylor displayed Benthamic leanings whereby he sought to foster a traditional judicial preference for truth finding and obviate conduct that prejudiced the proper administration of justice.

A *The Benthamic Principle*

Bentham considered that legal professional privilege was incongruous with the search for truth because of its power to conceal rather than illuminate all of the facts. His central argument against the privilege was grounded in contempt for the unethical conduct of the legal profession. Bentham levelled the following attack against the premise that reverence should be accorded to communications entered into between lawyer and client:

Why should any higher regard be paid to the engagements with legal practitioners, into which, after the fact, these very criminals may have entered to aid their safety? ... It is in the interests of society that

¹³ 'Lord Taylor of Gosforth', *The Times*, 30 April 1997, 22

<<http://hillsborough.independent.gov.uk/repository/docs/CPS000002800001.pdf>>.

¹⁴ Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice, Vol II* (Hunt and Clarke, 1827) 338.

¹⁵ *R v Ward (Judith Theresa)* [1993] 96 Cr App R 1.

honest engagements should be observed and dishonest engagements violated.¹⁶

The soundness of the privilege rarely raised any question;¹⁷ however, Bentham's incisive arguments set him apart as one of the only eminent names enrolled in radical opposition to the rule.¹⁸ Claiming that 'my optics were to such a degree distorted that, to my eyes, the imperfections of the phantom rule ... seemed only errors calling for an easy remedy',¹⁹ Bentham derided the argument that confidential communications should be shielded from discovery on the basis that they may possibly produce unpleasant consequences. He asserted that this concept was 'one of the most pernicious and most irrational notions that ever found its way into the human mind'.²⁰

This sentiment was recapitulated by Lord Bolinbroke who observed that 'the profession of the law ... is in its abuse and abasement, the most sordid and pernicious'.²¹ Twenty-two years prior to the 1827 publication of Bentham's *Rationale*, American law reformer Jesse Higgins contended that true justice did not require the presence of laws or lawyers; for equality, character and honesty would suffice.²² The common law, he claimed, produced 'intolerable expense,

¹⁶ Jeremy Bentham, *Treatise on Judicial Evidence* (Filiquarian Legacy Publishing, 2012) 247.

¹⁷ John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States, Vol IV* (Little, Brown & Co, 1905) § 2291, 3199.

¹⁸ William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford University Press, 1985) 2. Although Bentham chiefly wrote about evidence from 1803 to 1812, his principal works, in which he documented a confronting body of judge-made law that was relatively new or perceived as having the force of law, were not published until the 1820s.

¹⁹ *Ibid* 22.

²⁰ Jeremy Bentham, above n 16, 193–4.

²¹ Lord Bolinbroke, cited in George Sharswood, *An Essay on Professional Ethics* (T & J W Johnson & Co, 2nd ed, 1860) 171.

²² Jesse Higgins, *Sampson Against the Philistines, or The Reformation of Lawsuits and Justice Made Cheap, Speedy and Brought Home to Every Man's Door: Agreeably to the Principles of the Ancient Trial by Jury, Before the Same was Innovated by Judges and Lawyers* (B Graves, 1805) iv, 6, 37.

delay and uncertainty of lawsuits'.²³ He believed the truth could only be arrived at by 'question[ing] the parties and letting them altercation and question each other'.²⁴ Higgins opposed the rules of non-disclosure in a law reform pamphlet entitled *Sampson Against the Philistines*.²⁵ Deriding legal professional privilege for exposing the prodigious evil of our jurisprudence and the absurdity of common law,²⁶ Higgins claimed that the operation of the privilege prevented parties 'getting at the truth in court'.²⁷

Bentham was intellectually consistent insofar as he continually, and without contradiction, insisted on the abolition of legal professional privilege. He stated that if a person has engaged in an act of supposed mischievousness which the law thinks fit to prohibit, he or she shall not be imbued with the power to flatter himself or herself with the hope of safety by having recourse to legal professional privilege.²⁸ Bentham identified two redeeming features – arbitration and cross-examination – which had filtered through the English procedural system as better serving the ends of justice. Bentham proposed a system modelled on the principles of arbitration, in which fact-finding would be unimpeded by the rules of non-disclosure.

Holding that testimony should be open to scrutiny via cross-examination and extra-judicial publicity,²⁹ Bentham opined that these attributes would aid in ascertaining whether a witness was liable to engage in falsehood.³⁰ Any innovation to the contrary, including evidence which the parties had failed to bring forward, would be sufficient to strike horror into a professional and learned

²³ Ibid 38.

²⁴ Ibid 31.

²⁵ Ibid.

²⁶ Ibid iv.

²⁷ Ibid 37.

²⁸ John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown), 3rd ed, 1940 & Supp, 1993) § 3200.

²⁹ Jeremy Bentham, above n 16, 327–8. See also William Twining, above n 18, 31.

³⁰ Ibid 328.

mind.³¹ A proponent of the utilitarian principle, Bentham stated that its aim was to promote happiness by approving or disapproving of conduct according to the tendency that increased the happiness of the greatest number of individuals.³²

According to Gerald Postema, Bentham's perspective, while in one sense stringent, added up to a radical doctrine of judicial freedom.³³ Impressed by the intellectual achievement it represented, Postema applauded the extraordinary power of Bentham's insight into the adaptability of 'the greatest happiness principle'³⁴ in legal and political theory:

Bentham's work is significant not only from a historical point of view but also from a philosophical and practical one. This is so for two reasons; First, Bentham's theory of adjudication represents the only sustained attempt in the English language at a philosophical account of the law of procedure. To the extent that he raises and formulates problems in this area, his work is of considerable philosophical interest, even if his theory must ultimately be rejected. Second, passing notice of certain of Bentham's remarks on procedure have frequently been taken by commentators as evidence for a plausible 'indirect utilitarian' ... interpretation of Bentham's general moral and political theory.³⁵

³¹ Ibid 327.

³² As well as addressing Bentham's central hypothesis in the present chapter, it is dealt with again in Chapter 4, Section II and Chapter 5, Section II. It is canvassed in these sections because it is relevant to the argument in those sections about the clash of values inherent in the privilege as it applies in the context of civil and criminal law. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford University Press, 1780) 2.

³³ Gerald Postema, 'The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication' (1977) 11 *Georgia Law Review* 1393, 1424.

³⁴ Ibid.

³⁵ Ibid 1393-4.

Labelling Bentham ‘a hero of our profession’,³⁶ whose ‘great influence on our law took time’,³⁷ Alschuler equally recognised Bentham’s devotion to addressing procedural problems; particularly legal professional privilege. In Twining’s words, ‘His passionate commitment to law reform was balanced by a combination of intellectual honesty, courage and patient attention to detail’.³⁸ Bentham operated on the premise that social utility alone justified the application of the law. This provides further clues to Bentham’s own values. These emerge in ‘his attitude to the presumption of innocence and his antipathy [towards] the legal profession’,³⁹ wherein he characterised the natural system of justice by the ‘absence of artificial rules and technical devices of the Technical System of Procedure’.⁴⁰

Bentham attributed the creation of the ‘technical system’ to ‘the sinister interests of the legal profession (Judge & Co)’,⁴¹ in which English judges had ‘taken care to exempt members of the legal profession from the obligation, unpleasant as it was, of rendering service to justice’.⁴² Bentham argued that the privilege and rules of evidence were created and defended by the legal establishment out of concern for its own pretensions of infallibility.⁴³ Bentham sought to remedy these defects in the law by having the decisions of judges subjected to public scrutiny via publicity.⁴⁴

In the second volume of *Rationale of Judicial Evidence: Specially Applied to English Practice*, Bentham asked: ‘When a statute was found troublesome, in

³⁶ Albert Alschuler, ‘The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel’ (1982–83) 54 *University of Colorado Law Review* 67, 81.

³⁷ *Ibid.*

³⁸ William Twining, above n 18, 100.

³⁹ *Ibid.* 103.

⁴⁰ *Ibid.* 28.

⁴¹ *Ibid.*

⁴² Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice, Vol VII* (Simpkin, Marshall & Co, 1843) 758.

⁴³ William Twining, above n 18, 2.

⁴⁴ *Ibid.*

what instance was it ever an ineffectual bar to the wishes of an English judge?’⁴⁵ As a ‘prerequisite for any hope of real gain to be derived from legal professional privilege’, Wigmore similarly foresaw ‘the need for the judiciary to improve in spirit; for better rules would avail little if the spirit of using them did not also improve’.⁴⁶

Bentham denounced judge-made law and ridiculed the laws of England as a ‘fathomless and boundless chaos made up of fictions ... and exquisitely contrived chicanery which maximised delay and justice’⁴⁷ designed to conceal the fact that the law remained largely unsettled. Stephen criticised the efficacy of Bentham’s scholarly works and disavowed his contention that legal professional privilege hindered the judiciary’s ability to adjudicate effectively:

During the last generation, Bentham’s influence has to some extent declined, partly because some of his books are like exploded shelves, buried under the rules which they have made, and partly because, under the influence of some of the most distinguished of living authors, greater attention has been directed to legal history and in particular to the study of Roman Law.⁴⁸

Lord Taylor was aware of these concerns and sought to do what he could to repair the system.⁴⁹ He noted that greater consistency and the exercise of independent discretionary judgment were critical to achieving this vision.⁵⁰ Hence, in *Balabel*,

⁴⁵ Jeremy Bentham, above n 16, 123.

⁴⁶ John Wigmore, *Treatise*, cited in William Twining, above n 18, 161.

⁴⁷ *Ibid* 72. One of Bentham’s objections to judge-made law was that it operated retrospectively. See also Frederick Judson, ‘A Modern View of the Law Reforms of Jeremy Bentham’ (1910) 10 *Columbia Law Review* 1, 42.

⁴⁸ James Fitzjames Stephen, *A Digest of the Law of Evidence: With Additional Text* (MacMillan, 1918) xxi.

⁴⁹ *Ibid*. Lord Taylor lamented that that notions of judicial remoteness were perpetuated by the 18th-century robes in which judges dressed. Wigs, in particular, helped foster a less-than-true reflection of the judiciary.

⁵⁰ *Ibid*.

Lord Taylor opined that there were rules of conduct about making sure all materials were available at trial.⁵¹

1 *The Reasoning of Lord Taylor in Balabel*

Articulating a desire to confine the availability of legal professional privilege, Lord Taylor predicated its application to client–counsel communications *only* if their aim was to obtain appropriate legal advice. His judgment bore parallels to the 1730 case *Radcliffe v Fursman*⁵² in which the House of Lords had limited the scope of the privilege solely to legal advice imparted to clients by their lawyers. This rationale was amplified in the 1792 case of *Wilson v Rastall*⁵³ and again in *Williams v Mundie*,⁵⁴ both of which assist in explaining how Lord Taylor likely derived his reasoning.

In *Wilson*, which was also integral to the decision in *Derby*, Buller J emphatically stated that the rule of professional secrecy extended only to the facts stated to a lawyer for the purpose of enabling him to conduct the proceeding.⁵⁵ In that case, a lawyer named Reynolds who had ceased to act for a defendant charged with bribery, was called to testify at trial as to knowledge he had acquired through confidential communications while engaged as counsel.⁵⁶ Although Reynolds desired to testify, Buller J would not suffer him to give evidence and strongly reproached him for his anxiety to reveal the secrets of his former client.⁵⁷

The *Wilson* Court, comprising Buller J, Lord Kenyon CJ and Grose J, was unanimous that, if the evidence to be given would reveal a communication,

⁵¹ *Ibid.*

⁵² (1730) 2 Br PC 514.

⁵³ (1792) 4 TR 753. Lord Taylor expressly considered *Wilson v Rastall* in *Derby*.

⁵⁴ (1824) 171 ER 933.

⁵⁵ *Wilson v Rastall* (1792) 4 TR 753.

⁵⁶ T B Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours from the Earliest Period to the Year 1783, with Notes and Other Illustrations, Vol XX* (Longman, Rees, Orme, Brown & Green, 1816) 575.

⁵⁷ *Ibid.*

whether written or oral, between Reynolds and Petrie for the purpose of providing legal advice, then neither counsel nor client could be compelled to answer questions revealing that communication. Unconstrained by time limits, the rule was not altered by a lawyer ceasing representation, with the privilege surviving the death of either party and enduring in perpetuity.⁵⁸ Buller J noted that it must be proven that communications were made to Reynolds in his character as a lawyer, and if someone was employed as a steward he may be examined.⁵⁹

The opinion of Lord Taylor was also within the principle formulated in the 1824 case of *Williams v Mundie*.⁶⁰ In *Williams*, Abbott CJ confirmed that legal professional privilege extended only to communications between lawyer and client as related to a cause or suit existing at the time the communication was made, or a cause or suit about to be commenced.⁶¹ He added:

The rule I have invariably laid down in cases of this kind is that ... what an attorney learns otherwise than for the purpose of a cause or suit, I think he is bound to communicate ... Having formed this opinion, I think it unnecessary that the question should be further discussed here.⁶²

⁵⁸ *Bullivant v Attorney-General for Victoria* [1901] AC 196.

⁵⁹ English Reports: King's Bench Division, Vol XXIX (Stevens & Sons, 1909) 1287. This reasoning appears to have gained traction through the influence of the commentary of Samuel Philipps and Thomas Peake, both of whom followed the formulation of Buller J in *Wilson v Rastall*. Philipps observed that legal professional privilege was availed only to counsel, solicitors and attorneys, but not anyone else. Peake categorically asserted that professional secrecy was limited to the facts communicated to a legal practitioner in order for him to ably conduct a cause and any other communication was not within the protection of the law. See Samuel Phillipps, *Philipps' Treatise on the Law of Evidence* (Butterworth & Son, 2nd ed, 1815) 104; Thomas Peake, *A Compendium of the Law of Evidence* (Abraham Small, 1824) 104, 250-3.

⁶⁰ (1824) 171 ER 933.

⁶¹ *Williams v Mundie* (1824) 171 ER 933, 35 (Lord Abbot CJ).

⁶² *Ibid.*

Decided over a century prior to *Balabel*, James LJ in *Original Hartlepool Collieries Company v Moon*⁶³ commented:

The communications between a man and his solicitor, with respect to that, may be wholly irrespective of any question of professional advice or assistance of any kind ... Communications may happen to be made with a man who happens to be a solicitor, which would be of exactly the same character as, and neither more nor less privileged or confidential than, communications between a man and his steward, or between a man and his land agent, who did not happen to be a solicitor.⁶⁴

As early as 1730, the ability to raise a claim of privilege was predicated upon the lawyer having been consulted in his professional capacity for the purpose of dispensing legal advice.⁶⁵ Lord Taylor LJ, with whom Donaldson and Parker LJJ concurred, paraphrased Wigmore when he observed in *Balabel* that ‘it is common ground that the basic principle justifying legal professional privilege [arose] from the public interest requiring full and frank exchange of confidence between lawyer and client to enable the latter to receive legal advice’.⁶⁶

By adhering to Wigmore’s philosophy on his own account and following this interpretation of the rule, Taylor LJ, as he then was, arrived at a narrow view of the privilege.⁶⁷ He emphasised that the rule ‘should be strictly confined within the

⁶³ (1874) 30 LT 193.

⁶⁴ *Ibid* 585 (James LJ).

⁶⁵ Henry Bathurst, *The Theory of Evidence* (Sarah Cotter, 1761) 96. Henry Bathurst, in his 1761 treatise, documented several exemptions to the privilege which demonstrate that it was not absolute. These exceptions developed in 17th- and 18th-century case law; namely that any communication or fact learned or acquired by the lawyer either through his own knowledge, prior to a retainer or without being engaged as counsel in the cause, did not subject him to the rules of non-disclosure.

⁶⁶ [1988] Ch 317, 327 (Lord Taylor).

⁶⁷ ‘Developments in the Law: Privileged Communications’ (1985) 98 *Harvard Law Review* 1450, 1472.

narrowest possible limits consistent with the logic of its principle'.⁶⁸ While long been attributed to Wigmore, it appears this remark was borrowed from two 19th-century judgments attributed to Shaw CJ in *Foster v Hall*⁶⁹ and Truro LC in *Glyn v Caulfield*.⁷⁰ In *Foster*, Shaw CJ stated that 'this rule of privilege, having a tendency to ... prevent the full disclosure of the truth, ought to ... be construed strictly',⁷¹ while Truro LC, in *Glyn*, cautioned that legal professional privilege should not extend further than absolutely necessary to enable clients to safely obtain professional advice.⁷²

The above passages, which espouse a narrow construction of the rule, reflect a strong view about the limits of the privilege. *Balabel* was significant for discerning whether the rule extended to communications seeking or giving legal advice, or to all information passing between lawyer and client and exemplified the tension between an expansive rationale and a constrictive interpretation of the rule.⁷³ This leads into a discussion of the facts giving rise to *Balabel v Air India*,⁷⁴ including whether Lord Taylor foresaw the seeking of non-legal advice or communications made in the day-to-day course of business as coming within the ambit of the privilege.

III A DIVERGENCE OF JUDICIAL AUTHORITY

A *Balabel: The Facts*

Balabel concerned the formation of a leasing agreement in which Air India sub-leased a Bond Street property from Marchcoin Ltd, owned by Ahmed and Elsa

⁶⁸ *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48, 86.

⁶⁹ *Foster v Hall et al*, 29 Mass (12 Pick) 89 (1831). See also John Wigmore, *Treatise*, above n 15, §2292, 3204.

⁷⁰ (1851) 3 Mac & S 463, 42 ER 339.

⁷¹ 29 Mass (12 Pick) 89, 97 (1831). See also John Wigmore, above n 15, §2292, 3204.

⁷² *Ibid* (Truro LC).

⁷³ On Pp 47 and 73 of my thesis, I further outline how Lord Taylor's decision in *Balabel* narrowed the application of the privilege.

⁷⁴ [1988] Ch 317.

Balabel. Marchcoin fell into arrears on the rent, causing Air India to forfeit their sub-lease. Upon Marchcoin paying the arrears in full, relief from forfeiture was granted and they enjoyed protection under Part II of the *Landlord and Tenant Act 1954* (UK).⁷⁵ A new sub-lease was negotiated between Marchcoin and Air India, with lawyers Slaughter & May acting for Marchcoin. Mr Anthony Wade represented Air India.⁷⁶

Relying on documentation supplied by Marchcoin, including memoranda and notes, Air India sought specific performance to compel the lessee to honour the existing sub-lease, rather than subject them to a new contract. The fact in issue was whether any agreement was made with respect to a fresh sub-lease. In order to substantiate the allegation, Marchcoin sought discovery of documents; however Bulcraig & Davis cited legal professional privilege to resist discovery of:

- (1) Communications between Air India and Bulcraig & Davis outside the realm of seeking or giving legal advice;
- (2) Drafts, working papers, attendance notes and memoranda of Anthony Wade relating to the proposed new sub-lease;
- (3) Internal communications of Air India other than those seeking advice from Bulcraig & Davis.⁷⁷

When the proceeding was initially tried before Master Munrow on 14 October 1987, Air India's claim of privilege was upheld, with Munrow declaring that it was not a prerequisite for a document to incorporate a specific piece of legal advice in order to obtain the benefit of the privilege.⁷⁸ This was reminiscent of *Collins v London General Omnibus Co*⁷⁹ which first enunciated a 'dominant

⁷⁵ [1988] Ch 317.

⁷⁶ Ibid. Wade was partner at Bulcraig & Davis.

⁷⁷ Ibid 323B-C.

⁷⁸ *Balabel v Air India* [1988] Ch 317.

⁷⁹ In *Collins v London General Omnibus Co* (1893) 68 LT 831, an action in negligence was instigated by the plaintiff against the defendant company pursuant to an accident. The day following the incident, a record of accident was made by the conductor to his superiors despite no suit being threatened or commenced.

purpose' test in 1893. In that case, the *Collins* Court was content to recognise that a 'reasonable apprehension' of litigation would suffice to raise the privilege⁸⁰ and 'documents brought into existence pursuant to a standing instruction previously given were privileged'.⁸¹

In defining what conformed to 'reasonable apprehension', Charles J stated that litigation may be merely threatened or already on foot.⁸² This signalled the first time that a 'dominant purpose' was enunciated, with the doctrine of legal professional privilege now incorporating a 'reasonableness element'. In adopting the 'dominant purpose test', the Court looked behind the communication to determine its nature and was content that, even if there were two or more apparent purposes for a communication coming into existence, so long as its dominant purpose was to facilitate the giving of legal advice, then legal professional privilege would apply.

At trial in the *Balabel* case, Munrow stated that, if Wade were employed in a conveyancing transaction to mitigate legal difficulties that the client may otherwise encounter, communications passing between client and counsel remained privileged.⁸³ Marchcoin appealed this decision and issued a subpoena for the production of evidence against Anthony Wade. Deputy High Court Judge Paul Baker QC heard the appeal. He discharged the subpoena; however, upon reviewing the authorities, adopted a more restrictive view with respect to the principle of legal professional privilege.⁸⁴

Referring to the unreported judgment of Scott J in *Committee of Receivers of Galadari v Zealcastle Ltd*,⁸⁵ despite it lacking precedential authority, Baker applied a balancing test in which he upheld Marchcoin's objection with regard to

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ *Balabel v Air India* [1988] Ch 317.

⁸⁴ Ibid.

⁸⁵ *Committee of Receivers of Galadari v Zealcastle Ltd* (6 October 1986) (Unreported) (Scott J).

certain communications.⁸⁶ Baker J specifically distinguished documents which simply recorded information, transactions or meetings as not enjoying the protection of the privilege,⁸⁷ because, although negotiations for a fresh sub-lease were within the scope of ordinary business, they were not made in contemplation of giving or receiving legal advice. This clearly evidences the weighing of competing interests and serves to demonstrate that the privilege remained unsettled.

Where Munrow J ruled that legal professional privilege could be claimed over communications, irrespective of whether they contained legal advice, Baker concluded:

The defendants in my judgment are entitled to withhold all communications which seek or convey advice, even though parts of them may contain narratives of facts or other statements which in themselves would not be protected. On the other hand, documents which simply record information or transactions, with or without instructions to carry them into execution, or which record meetings at which the plaintiffs were present, are not privileged.⁸⁸

Air India brought an appeal to the Court of Appeal, constituted by Lord Donaldson MR, Parker and Taylor LJJ. Their Lords were required to decide whether Baker's pronouncement was correct with respect to limiting the privilege, or if all communications between lawyer and client within the ordinary business of professional relations were encompassed within the scope of the privilege.⁸⁹ If the latter were correct, a blanket privilege would apply over all the documents in dispute.

⁸⁶ [1988] Ch 317.

⁸⁷ *Committee of Receivers of Galadari v Zealcastle Ltd* (6 October 1986) (Unreported) (Scott J).

⁸⁸ *Ibid.* See also *Balabel v Air India* [1988] Ch 317 (Lord Taylor).

⁸⁹ [1988] Ch 317.

Balabel was significant for discerning whether the rule extended to communications seeking or giving legal advice, or to all information passing between lawyer and client.⁹⁰ Taylor LJ criticised Baker J's test as too narrow and Munrow J's as too wide. This thesis contends that Taylor LJ's formulation sat somewhere between Baker and Munrow JJ by expanding Baker J's test and reshaping Munrow J's in order to create a sustainable medium. In refining the existing formulations, Taylor LJ limited the privilege to the giving and receiving of appropriate legal advice. By the terms of this narrow qualification, the privilege had no relevance outside the realm of disseminating legal advice.

It is therefore clear that Taylor LJ did not foresee the seeking of non-legal advice or communications made in the day-to-day course of business as coming within the ambit of the privilege. Moreover, if Taylor LJ and the House of Lords were still attempting to define the parameters in which the privilege did, or ought to, operate, the logical conclusion follows that the test espoused in *Derby* was incorrect. Despite Lord Taylor's assertion that legal professional privilege had been settled since the 16th century, the privilege could not have been immutable in the four preceding centuries, nor could it have been predictably 'applied across the board in every case'⁹¹ if the 20th century *Balabel* Court was still discerning its breadth and scope.

Although it may appear that *Balabel* and *Derby* address distinct points with respect to the privilege, a close textual analysis confirms that each concerns the scope and breadth of the rule. In *Balabel*, Lord Taylor qualified the privilege by limiting it to the giving and receiving of legal advice. While it might be argued that *Balabel* merely demonstrates an instance of the settled law not being correctly applied, Hazard remarked that the privilege was 'applied with hesitation' and 'recognition of the [the rule] was slow and halting until after 1800'.⁹² Donaldson LJ in that same case conceded that the existing authorities

⁹⁰ *Ibid.*

⁹¹ [1996] AC 487, 508E (Lord Taylor CJ).

⁹² Geoffrey Hazard, 'An Historical Perspective on the Attorney-Client Privilege' (1978) 66 *California Law Review* 1061, 1070.

with respect to legal professional privilege were not as clear as they might have been prior to *Balabel*.⁹³ *Balabel* exemplified the tension between an expansive rationale and a constrictive interpretation of the rule.⁹⁴

B *Lord Taylor and the Authorities that Influenced Him in Balabel*

Admitting that a divergence of judicial authority⁹⁵ obscured the scope of legal professional privilege, Taylor LJ underscored the importance of reverting to the basic principles justifying the rule as being an exception to the general rule that all relevant evidence is discoverable and admissible.⁹⁶ Citing in his decision several English judgments which were consonant with the development of the common law as early as 1920, Taylor LJ referred to *O'Rourke v Darbishire*.⁹⁷ In that case, Finlay VC affirmed that while trustees of a trust were entitled to consult a lawyer with respect to that trust, only communications genuinely made for the purpose of obtaining legal advice could remain privileged. He cautioned that the privilege did not cover mere business or incidental communications.⁹⁸

Aligning himself with the judicial decisions that espoused a traditional justification for the privilege, Taylor LJ noted that the foundation for the 'legal advice test' was laid in *Smith-Bird v Blower*⁹⁹ and *Conlon v Conlons Ltd*.¹⁰⁰ Both

⁹³ [1988] Ch 317 (Donaldson LJ).

⁹⁴ 'Developments in the Law', above n 67, 1472.

⁹⁵ The cases cited in *Balabel v Air India* were: *Jones v Pugh* (1846) 1 Phillips 96; *Pearse v Pearse* (1846) 63 ER 950; *Lawrence v Campbell* (1859) 4 Drewry 483; *Minet v Morgan* (1873) LR 8 Chancery 361; *Carpmael v Powis* (1846) 1 Phillips 687; *Gardner v Irvin* (1878) 4 Ex D 49; *Greenough v Gaskell* (1833) 1 Mylne & Keen 98; *Original Hartlepool Collieries Company v Moon* (1874) 30 LT 193; *Wheeler v Le Marchant* (1881) 17 Ch D 675; *Smith-Bird v Blower* [1939] 2 All ER 406; *O'Rourke v Darbishire* (1920) AC 581; *Committee of Receivers of Galadari v Zealcastle Ltd* (6 October 1986) (Unreported); *Minter v Priest* [1930] AC 558; *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1; *Anderson v Bank of British Columbia* (1876) 2 Ch 644; *Conlon v Conlons Ltd* [1952] 2 All ER 462.

⁹⁶ [1988] Ch 317 (Taylor LJ).

⁹⁷ (1920) AC 581.

⁹⁸ *Ibid* 602 (Finlay VC)

⁹⁹ [1939] 2 All ER 406.

cases were decided along the same lines as *O'Rourke*. In the first of these cases, Blower wrote to his lawyer outlining his plans to sell his property. The Court of Chancery deemed the letter unprivileged because it was not created for the purpose of obtaining legal advice, but was written in response to an enquiry by his lawyers, informing them that he had agreed to sell his property to Mr Brown.¹⁰¹

In *Conlon*, Morris LJ confirmed that legal professional privilege did not encompass communications between client and lawyer authorising the latter to offer terms of settlement.¹⁰² Morris LJ ruled that, if professional communications between lawyer and client are of a confidential character for the purpose of acquiring legal advice, then, in general, privilege and protection exist, however an enquiry relating to whether or not the client endorsed his lawyer to write letters of authority was not an enquiry as to communications passing confidentially between the pair.¹⁰³

This contrasted with the earlier English authorities of *Pearse v Pearse*¹⁰⁴ and *Minet v Morgan*.¹⁰⁵ In *Pearse*, Bruce-Knight VC commented that client–counsel communications made *without* the prospect of litigation were protected from discovery on the basis that they pertained to legal work of the calibre in which lawyers were ordinarily employed.¹⁰⁶ *Pearse* concerned the bequest of the Barrow and Munscombe estates from Mark Broadfoot Westron to his eldest daughter, Jane Morse Westron, and the subsequent right of Westron to assert a claim of non-disclosure with respect to communications passing between himself and his solicitors relative to the bequest. As distinct from *Wilson*, which restricted the scope of legal professional privilege to communications necessary to conduct proceedings, *Pearse* deemed ‘the question of the existence or non-existence of

¹⁰⁰ [1952] 2 All ER 462.

¹⁰¹ *Smith-Bird v Blower* [1939] 2 All ER 406 (Luxmoore LJ).

¹⁰² *Conlon v Conlons Ltd* [1952] 2 All ER 462, 466 (Morris LJ).

¹⁰³ *Ibid* 466 (Morris LJ).

¹⁰⁴ *Pearse v Pearse* (1846) 63 ER 950.

¹⁰⁵ *Minet v Morgan* (1873) LR 8 Ch App 361.

¹⁰⁶ *Pearse v Pearse* (1846) 63 ER 950.

any suit, claim or dispute, immaterial'.¹⁰⁷ As *any* professional communication passing between client and lawyer may possibly be eligible for protection, the justification for the privilege was no longer confined to disseminating legal advice or pending litigation.¹⁰⁸

Knight-Bruce VC reminded the chancery that 'the discovery and vindication and establishment of truth [were] the main purposes certainly of the existence of Courts of Justice'. He warned that 'for the obtaining of these objects ... not every channel is or ought be open to them ... Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much'.¹⁰⁹ David Louisell reiterated this view a century later when he contended that it was 'the historic judgment of the common law ... in western society that whatever handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations'.¹¹⁰ The inference, therefore, was that legal professional privilege was a 'power to shut off inquiry to pertinent facts in court',¹¹¹ whereby truth *should* cede to confidentiality. In consequence, the protection afforded by the privilege placed the client in somewhat of a novel, if not exalted, position: beyond the reach and limits of the law.¹¹²

Adopting the rule laid down in *Pearse*, Lord Selborne, in *Minet v Morgan*,¹¹³ confirmed that a connection with litigation was not a prerequisite for legal professional privilege to attach to confidential communications. In that case, the

¹⁰⁷ Ibid 951.

¹⁰⁸ Lord Taylor stated in *Balabel* that 'there is no doubt that legal professional privilege now extends beyond legal advice in regard to litigation'. *Balabel v Air India* [1988] Ch 317, 324 (Taylor LJ).

¹⁰⁹ *Pearse v Pearse* (1846) 63 ER 950.

¹¹⁰ David Louisell, 'Confidentiality, Conformity and Confusion: Privileges in Federal Court Today' (1956) 31 *Tulsa Law Review* 101, 110.

¹¹¹ Charles McCormick, *McCormick on Evidence* (E Cleary, 3rd ed, 1984) 175.

¹¹² Ronald Goldfarb, *In Confidence: When to Protect Secrecy and When to Require Disclosure* (Yale University Press, 2009) 30.

¹¹³ (1873) LR 8 Ch App 361.

court confirmed that the litigant could not be compelled to disclose any communications made between themselves and their lawyer, irrespective of whether or not they were made before any dispute arose.¹¹⁴ Furthermore, the lawyer could not disclose their client's secrets without the client's express permission.¹¹⁵

The protection formulated around the privilege in the earlier 1730 case of *Radcliffe v Fursman*¹¹⁶ had now been expanded courtesy of Bruce-Knight VC in *Pearse v Pearse*,¹¹⁷ and Lord Selborne in *Minet v Morgan*¹¹⁸ to include communications made prior to the commencement of proceedings. His Honour Lindley MR, in *Calcraft v Guest*, stated that, in examining the earlier authorities, he was bound to follow the ruling laid down in *Minet*, 'and that if there are any documents which were protected by the privilege to which I am alluding, that privilege has not been lost. I take it that, as a general rule, one may say that once privileged, always privileged'.¹¹⁹ Despite representing the strongest possible authority for the indefinite continuation of the rule, Lord Lindley qualified his statement by adding: 'I do not mean to say that privilege cannot be waived'.¹²⁰

The degree of priority given to one rule over the other has varied. In promoting unrestrained communications between lawyer and client, all disclosures falling within this rule were now subject to a claim of privilege. A claim of privilege could be sustained so long as a practitioner demonstrated *some measure* of legal knowledge.¹²¹ The widening of this rationale in *Pearse* and *Minet* was designed to afford protection to clients who were not presently contemplating proceedings, but who would otherwise be left vulnerable and without the prospect of invoking the privilege if and when they chose to instigate proceedings. It also recognised that the type and nature of legal work carried out by lawyers was broad,

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ (1730) 2 Br PC 514.

¹¹⁷ (1846) 63 ER 950.

¹¹⁸ (1873) LR 8 Ch App 361.

¹¹⁹ *Calcraft v Guest* [1898] QB 759, 761 (Lord Linley MR).

¹²⁰ Ibid.

¹²¹ *Parker v Carter* 18 Va 273 (1814).

encompassing not only legal advice and guidance, but additional and often extraneous matter in relation to the types of precautions clients should take with respect to their legal rights and obligations.¹²²

Taylor LJ noted that the secrecy rule was firmly crystallised in *Anderson v Bank of British Columbia*.¹²³ In that case, James LJ stated that it had long been established that communications passing directly or indirectly between a client and his lawyer were privileged, with the rule extending no further. In that same proceeding, Sir George Jessel MR articulated that the protection availed by the privilege was very limited in character and was restricted to obtaining the assistance of lawyers.¹²⁴ He cautioned that it did not go beyond the obtaining of legal advice and assistance, with communications protected from production or discovery only to enable clients to obtain legal advice safely and sufficiently.¹²⁵ The object and meaning of the rule lay in the fact that litigation could only be transacted by the employment of those skilled in law. Anyone who was required to prosecute their rights or defend themselves from an improper claim should be able to place unrestricted and unbounded confidence in the assistance of professionally trained lawyers.¹²⁶ After all, ‘the first duty of a [lawyer] was to keep the secrets of his client’:¹²⁷

The meaning of the rule is, I understand, truly laid down by Lord Brougham in the case of *Greenough v. Gaskell* ... The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar

¹²² *Greenough v Gaskell* (1883) 1 M & K 98, 103 (Lord Brougham).

¹²³ (1876) 2 Ch D 644, 656 (James LJ).

¹²⁴ *Ibid* 681 (Jessel MR).

¹²⁵ *Ibid*.

¹²⁶ *Ibid* 649 (Jessel MR).

¹²⁷ *Taylor v Blacklow* (1836) 3 BN C 235 (32 ECLR) (Taylor J).

phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.¹²⁸

This echoed the basic tenets of morality, fidelity and servitude. While the ancient Roman rule of legal professional privilege was rationalised on the basis of mitigating procedural injustice by restraining potentially corrupted testimony,¹²⁹ 19th-century developments in the doctrine of legal professional privilege held that procedural rights and due process could only be facilitated through excluding professional confidences from disclosure in court.

Wheeler v Le Marchant articulated the same principle. The three-judge court comprising Jessel MR, Cotton LJ and Brett LJ, concluded that legal professional privilege was ‘confined entirely to communications which took place for the purpose of obtaining legal advice from professional persons’.¹³⁰ In *Wheeler*, the Court held that *only* those communications made ‘in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it’ could be privileged.¹³¹ Referred to by the House of Lords in *Derby*, the *Wheeler* Court held that ‘we ought not carry the rule any further than it has been carried’.¹³²

¹²⁸ *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649 (Jessel MR).

¹²⁹ Shelly Hillyer, ‘The Attorney-Client Privilege, Ethical Rules of Confidentiality, and Other Arguments Bearing on Disclosure of a Fugitive Client’s Whereabouts’ (1995) 68 *Temple Law Review* 307, 314.

¹³⁰ (1881) 17 Ch D 675, 683 (Brett LJ).

¹³¹ *Ibid* 683.

¹³² (1881) 17 Ch D 675, 682 (Jessel MR).

Wheeler refrained from extending legal professional privilege to different classes of communications, owing principally to the very limited character of the protection, whereby it was restricted to the rendering of legal assistance and advice in relation to the conduct of litigation in order that that such advice may be obtained safely.¹³³ ‘It does not appear necessary, either as a result of the principle which regulates this privilege ... to extend the rule’.¹³⁴

This reasoning continued the refrain espoused by Lord Chancellor Truro some thirty years earlier, when he warned that the privilege ought not to extend farther than was absolutely necessary to enable clients to obtain professional advice with safety.¹³⁵ In the subsequent case of *Lyell v Kennedy (No 3)*,¹³⁶ Taylor LJ again outlined the limited circumstances in which the privilege applied. In *Lyell*, Cotton LJ stated that where a party represented themselves and did not engage a lawyer, this being the very ground of privilege, whatever they learnt when the proper interrogatories were put to them they must produce or disclose.¹³⁷

By contrast, the courts in *Carpmael v Powis*¹³⁸ and *Minter v Priest*¹³⁹ advocated a broader scope of the rule, with Lord Lyndhurst in *Carpmael* opining:

[T]he privilege extends to all communications between a solicitor, as such, and his client, relating to matters within the ordinary scope of a solicitor’s duty. Now, it cannot be denied that it is an ordinary part of a solicitor’s business to treat for the sale or purchase of estates for his clients. For some purposes his intervention is indispensable in such

¹³³ Sir George Jessel MR stated: ‘The protection is of a very limited character, and in this country is restricted to the obtaining of assistance of lawyers as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining of legal advice and assistance, and all things reasonably necessary in the shape of communications to the legal advisers are protected from production or discovery.’ *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681 (Jessel MR).

¹³⁴ (1881) 17 Ch D 675, 681 (Jessel MR).

¹³⁵ *Glyn v Caulfield* (1851) 3 Mac & S 463, 42 ER 339 (Truro LC).

¹³⁶ (1884) 27 Ch D 1.

¹³⁷ *Ibid* 25 (Cotton LJ).

¹³⁸ (1846) 50 ER 495.

¹³⁹ [1930] AC 558.

transactions: he is to draw the agreements, to investigate the title, to prepare the conveyance. All these things are in the common course of his business. But it is said that the fixing of a reserved bidding and other matters connected with the sale are not of that character, inasmuch as they might be entrusted equally well to anyone else. It is impossible, however, to split the duties in that manner without getting into inextricable confusion. I consider them all parts of one transaction – the sale of an estate: and that a transaction in which solicitors are ordinarily employed by their client. That being the case, I consider that all communications which may have taken place between the witness and his client in reference to that transaction are privileged.¹⁴⁰

The *Carpmael* judgment was followed in *Minter v Priest*,¹⁴¹ in which the Court of Appeal was asked to rule on whether Priest was entitled to assert a claim of privilege over communications made in an interview with his lawyer in whom he defamed Minter. The court upheld the claim to privilege; noting that the interview was conducted within the ordinary scope of the lawyers' business.¹⁴² The House of Lords disagreed and reversed the decision on the basis that the lawyer was not acting in his professional capacity because he engaged in a malicious scheme with the intention of profiting with Priest.¹⁴³

In *Minter v Priest*,¹⁴⁴ the majority justices, comprising Lords Buckmaster, Thankerton and Atkin LJJ, stated that it was not an automatic conclusion that whatever conversation ensued between lawyer and client gained protection from disclosure. Instead, they held that, in order for communications to be privileged, they must be fairly referable to the professional client–counsel relationship and anything outside that boundary afforded no protection.¹⁴⁵ Lord Atkin altogether rejected *Carpmael* in favour of the test applied by Cotton LJ in *Gardner v*

¹⁴⁰ *Carpmael v Powis* (1846) 50 ER 495, 692 (Lyndhurst LC).

¹⁴¹ [1930] AC 558.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid* 569 (Buckmaster LJ).

¹⁴⁵ *Ibid.*

Irvin.¹⁴⁶ While emphasising that confidential communications were integral to receiving legal advice, Lord Atkin considered that any client–counsel communications not effected for the purpose of giving or receiving professional legal advice were not protected.¹⁴⁷ He concluded that information made other than for the purpose of giving or receiving legal advice was not within the rule.¹⁴⁸

Minority justices, Lawrence and Greer LJ reiterated James LJ’s position in *Anderson* when they similarly stated that it had long since been established that communications were privileged if they passed in a professional capacity.¹⁴⁹ Moreover, they deemed it unnecessary for communications to be made either during or relating to an actual or expected litigation because the privilege applied to all mutual communications between lawyer and client within the ordinary scope of professional employment.¹⁵⁰

Taking these authorities into account, Taylor LJ extended the definition of ‘legal advice’ to ‘advice as to what should prudently and sensibly be done in the relevant legal context’.¹⁵¹ He returned the scope of legal professional privilege to its 19th-century roots. This now meant that confidential communications passing between lawyer and client were immune only if they directly correlated to legal advice of a professional character.

His *dicta* did not tie the justification for legal advice privilege to the conduct of litigation; thereby reflecting the policy reasons that justified its presence in the

¹⁴⁶ (1878) 4 Ex D 49.

¹⁴⁷ *Minter v Priest* [1930] AC 558, 581 (Lord Atkin).

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid* 675 (Lawrence LJ).

¹⁵⁰ *Ibid* 683 (Greer LJ). See also *Carpmael v Powis* (1846) 50 ER 495, 692 (Lyndhurst LC).

¹⁵¹ *Ibid.* According to Richard Pike, in ‘The English Law of Legal Professional Privilege: A Guide for American Attorneys’ (2006) 4(1) *Loyola University Chicago International Law Review* 51, 72, ‘English lawyers arguably took these statements as a license to claim privilege in virtually all client communications’.

law and creating a loophole in which the veil of privilege could be pierced.¹⁵² Taylor LJ furthermore observed that the privilege originally related only to communications where legal proceedings were contemplated or on foot. He asserted that this rationale enhanced the standing of the legal profession and elevated the client–counsel relationship above other professional relations.¹⁵³

The correlation between legal professional privilege and the development and recognition of an honourable legal profession forms the central theme of Section IV. As one is inextricably entwined with the other, an analysis of the growth of the legal profession will necessarily reflect the rise of, and need for, legal professional privilege as a means of justifying the profession’s continued existence. The ways in which continued developments within the legal profession have shaped and refined its evolution will be examined.

IV A PRIVILEGE FOR OTHER PROFESSIONS

The remark that legal professional privilege elevated the client–counsel relationship above other professional relationships demonstrates that Lord Taylor CJ acknowledged a correlation between the exclusivity of the legal profession and the justification for legal professional privilege. Holding that the rationale for the rule was grounded in its ability to ‘assist and enhance the administration of justice by facilitating the representation of clients by legal advisers ... [and] keeping secret their communications’,¹⁵⁴ *R v Derby Magistrates Court; ex parte B*¹⁵⁵ espoused a Wigmorean rationale that clients should ‘make a full and frank

¹⁵² This may be said to accord with Wigmore’s own interpretation in which the latter favoured litigation values over the harm to other values. According to Stephen Saltzburg, the Wigmorean paradigm did not require evidence that a client’s need for confidential communications was *essential*; rather it favoured a narrow cost–benefit analysis which weighed the harm to litigation more heavily than the harm to other values. See Steven Saltzburg, ‘Privileges and Professionals: Lawyers and Psychiatrists’ (1980) 66 *Virginia Law Review* 597, 605.

¹⁵³ [1988] Ch 317.

¹⁵⁴ [1996] AC 487, 511A (Lord Nicholls) citing *Grant v Downs* (1976) 135 CLR. 674, 685 (Stephen, Mason and Murphy JJ).

¹⁵⁵ [[1996] AC 487.

disclosure of the relevant circumstances to the solicitor'.¹⁵⁶ Expressly citing the *Duchess of Kingston's Case*,¹⁵⁷ Lord Taylor remarked in *Derby* that it was previously thought 'the reason for the privilege was that a lawyer ought not, in honour, to be required to disclose what he had been told in confidence'.¹⁵⁸

A Duchess of Kingston & Exclusivity of Legal Professional Privilege

The House of Lords' decision in the *Duchess of Kingston's Case* was significant for discerning whether legal professional privilege belonged exclusively to the legal profession or if members of other professions in whom at least equal confidence was reposed could invoke it.¹⁵⁹ Where the modern ideology of legal professional privilege holds that the rule now belongs to clients of the profession, this change was formally recognised in 1833 when *Bolton v Corporation of Liverpool* established that, in the curial setting, the defendant, being ill-equipped to present his own case, benefitted from having a legal practitioner speak on his behalf.

In the earlier 1776 *The Duchess of Kingston's Case*, however, the orthodox view held that the privilege of non-disclosure continued to apply to members of the legal profession. This case brought into sharp relief the contrast between 18th-century notions of honour and ancient concepts of fidelity and piety. Lord Mansfield, in articulating the Court's response, stated: 'The protection of attorneys is as what is revealed to them by their client ...'

¹⁵⁶ Ibid, 511A (Lord Nicholls) citing *Grant v Downs* (1976) 135 CLR. 674, 685 (Stephen, Mason and Murphy JJ).

¹⁵⁷ *Duchess of Kingston's Case* (1776) 20 Howell's State Trials 355.

¹⁵⁸ [1996] AC 487, 504E (Lord Taylor).

¹⁵⁹ (1776) 20 Howell's State Trials 355, 572. In the *Duchess of Kingston's Case*, attorney William Berkley and surgeon Dr Caesar Hawkins each cited professional privilege to excuse them from testifying in relation to whether the defendant had married and produced issue. Hawkins asked the court to address whether he was compelled to divulge information that came before him in confidence and trust consistent with his professional honour.

This case also perfectly illustrates a point made by Charles McCormick who concluded that legal professional privilege accorded real or fancied protection or prestige to special groups of people. This assured the legal profession a competitive advantage over other professional groups and acted as ‘marketing strategy’ of sorts, which ensured practitioners were indispensable to the proper functioning of the legal system and the administration of justice.

In the *Duchess of Kingston’s Case*, Lord Mansfield enunciated that while legal professional privilege covered the rubric of instruction with regards to preparing a defence, no lawyer could exert authority sufficient to withhold evidence:

The protection of attorneys is as what is revealed to them by their client, in order to take their advice or instruction with regard to their defence ... This is no secret of the client, but is a collateral fact ... and it has been often determined that as to fact, an attorney or counsel has no privilege to withhold evidence.¹⁶⁰

Influencing Wigmore’s stance,¹⁶¹ and arguably Bentham before him, the *Duchess of Kingston’s Case* was evaluated against his own paradigm. Wigmore stated that every communication must satisfy all four elements in order to qualify as privileged.¹⁶² Failing this, the communication would be left without support.¹⁶³ The questions posed by Wigmore were whether the communications originated in confidence; whether said confidence was essential to sustaining the physician–patient relationship; whether such relations should, in the opinion of the public, be fostered and whether the injury resultant from disclosure outweighs the benefit to justice.¹⁶⁴

Contrasting the American jurisdictions in which the medical profession enjoyed no privilege for physician–patient communications against those that did

¹⁶⁰ Ibid.

¹⁶¹ John Wigmore, *Treatise*, above n 17, § 2286, 3188.

¹⁶² Ibid §2285, 3185.

¹⁶³ Ibid.

¹⁶⁴ Ibid §2380, 3350.

recognise such a provision, Wigmore concluded that patients would not abstain from seeking medical treatment absent a guarantee of privilege. He postulated that the fallacy of a physician–patient privilege lay in the misapprehension that the second element generally existed.¹⁶⁵ In fact, physician–patient communications were seldom confidential and, even if they *were*, they were historically made without a privilege to protect them from discovery.¹⁶⁶

Wigmore determined that a privilege was inconsequential for enhancing the physician–patient relationship, as only the third element was relevant to fostering physician–patient relations.

Even where the disclosure to the physician is actually confidential, it would nonetheless be made though no privilege existed. People would not be deterred from seeking medical help because of the possibility of disclosure in court. If they would, how did they fare in the generations before the privilege came? Is it noted in medical chronicles that, after the privilege was established in New York, the floodgates of patronage were let open upon the medical profession and long concealed ailments were then for the first time brought forth to receive the blessings of cure?

And how is it today in those jurisdictions where no privilege exists does the medical profession in two thirds of the Union enjoy, in a marked way, the afflux of confidence contrasting with the scanty revelations vouchsafed in that other third where no privilege protects? If no difference appears, then this reason for the privilege is weakened; for it is undoubted that the rule of privilege is intended not to subserve the party's wish for secrecy as an end in itself but merely to provide secrecy as a means of preserving the relation in question

¹⁶⁵ It will be recalled that the second element in the Wigmorean paradigm is that the confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. Henry Wigmore, *Treatise*, above n 17, §2286, 3186.

¹⁶⁶ *Ibid* § 3350.

whenever without the guarantee of secrecy the party would probably abstain from fulfilling the requirements of the relation.¹⁶⁷

Accordingly, ‘the secrecy of private confidences was no justification for a legal privilege’¹⁶⁸ and physician–patient confidentiality stood upon no better footing than other relationships.¹⁶⁹ The ‘honour’ component referenced by Lord Taylor functioned as a pledge never to breach a professional confidence, but did not establish grounds for claiming legal professional privilege over protected communications.

The *Duchess of Kingston’s Case* brought into sharp relief the contrast between 18th-century notions of honour as advanced by Wigmore and ancient concepts of fidelity and piety articulated by Bentham. The concept of ‘necessity’ determined whether a particular communication was of a protected kind. Despite medical practitioners being moved to jealously guard the honour of their profession, this case confirmed the proposition that medical practitioners were proscribed from asserting a claim of non-disclosure on behalf of their patients.¹⁷⁰

Dissatisfied with the common law framing of legal and medical privileges in the *Duchess of Kingston’s Case*, Buller J in *Wilson v Rastall*¹⁷¹ emphatically stated:

There are cases to which it is much lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose information acquire[d] by attending in their professional characters. This point was very much considered in *The Duchess of Kingston’s Case*, where Sir C. Hawkins, who had attended the

¹⁶⁷ Ibid §2380, 3350.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Danuta Mendelson, ‘The Duchess of Kingston’s Case, the Ruling of Lord Mansfield and Duty of Medical Confidentiality in Court’ (2012) 35(5) *International Journal of Law and Psychiatry* 480.

¹⁷¹ (1792) 4 TR 753.

Duchess as a medical person, made the objection himself, but was over-ruled and compelled to give evidence against [her].¹⁷²

With the broader medical profession unable to articulate its need for such a privilege, the orthodox view held that non-disclosure continued to apply to members of the legal profession. In denying members of disciplines outside the legal profession invoking a claim of privilege, this increased the value of their services which they were uniquely placed to offer. 'Every lawyer ... has the same thing to sell, even though it comes in slightly different models and at varying prices. The thing he has to sell is The Law'.¹⁷³

According to *Wilson*, only three specific classes of legal professionals – counsel, solicitor and attorney – could invoke a claim of legal professional privilege; 'for it would be an unusual sort of entitlement if they could not, insofar as a court could otherwise overcome the client's objection by calling counsel to testify and this would be counterintuitive to the right to proper legal representation'.¹⁷⁴ This demonstrates that, over the span of centuries, legal professional privilege evolved through a series of evolutionary stages which culminated in the solidarity and exclusiveness of the legal profession.

Wilson further held that the rule of privilege was absolute and communications passing between a lawyer, not in his capacity as legal adviser but as an under-sheriff, did not conform to privileged communications.¹⁷⁵ This last point derived its legitimacy from the 1413 *Bailiffs of Sheriff's etc. Act*,¹⁷⁶ which proscribed certain classes of people from competing with lawyers in the practice of law, with under-sheriffs, clerks, receivers and bailiffs prevented from acting as attorneys and taking advantage of their official position.¹⁷⁷

¹⁷² Ibid 1278.

¹⁷³ Fred Rodell, *Woe Unto You, Lawyers!* (Pageant-Poseidon, 1939) 3.

¹⁷⁴ *Wilson v Rastall* (1792) 4 TR 753.

¹⁷⁵ Ibid.

¹⁷⁶ *Bailiff of Sheriff's etc. Act 1413*, 4 Hen 5, c 3–6.

¹⁷⁷ 'Legal Profession During the Middle Ages: The Emergence of the English Lawyer Prior to 1400' (1956) 31 *Notre Dame Law Review* 4, 599. Following the *Bailiff of Sheriff's etc. Act 1413*,

It is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded. It is a subject of just indignation when persons are anxious to reveal what has been communicated to them in a confidential manner.¹⁷⁸

Joseph Chitty,¹⁷⁹ Edward Smirke and Henry Roscoe¹⁸⁰ embraced this proposition in their works; each rejecting privileges for other professional relationships. Chitty noted that, although it had been regretted by courts, the law as it stood compelled physicians, surgeons and others who were entrusted with delicate communications to make the fullest disclosure.¹⁸¹ Smirke and Roscoe similarly observed that physicians and surgeons were not privileged from compulsory disclosures, no matter how confidential their nature.¹⁸² Charles McCormick equally concluded that legal professional privilege accorded real or fancied protection or prestige to special groups of people,¹⁸³ with the *Duchess of Kingston's Case* exemplified Bentham and Wigmore's concerns that professional prestige verged on the cusp of flowing into other professions and creating new sets of privileges.

B *Bentham and Wigmore on Privileged Relations*

4 Hen 5, c 3–6, legislation was introduced in the year 1605 which echoed the 1413 Act insofar as it prohibited unqualified persons from practising law. Entitled *An Acte to Reforme the Multitudes and Misdemeanors of Attorneys and Sollicitors at Lawe, and to Avoide Sundrie Unnecessarie Suits and Charges in Lawe 1605*, 3 James 1, c 7, the statute sought to restrict the numbers of solicitors and attorneys by taking the rule one step further in preventing unqualified persons from conducting any form of practice under a duly qualified lawyer.

¹⁷⁸ *Wilson v Rastall* (1792) 4 TR 753, 759 (Buller J).

¹⁷⁹ Joseph Chitty, *A Practical Treatise on Criminal Law* (Edward Earle, 1819).

¹⁸⁰ Edward Smirke and Henry Roscoe, *Digest of the Law of Evidence on the Trial of Actions at Nisi Prius* (Stevens & Sons, 1861) 142.

¹⁸¹ Joseph Chitty, above n 179, 475.

¹⁸² Edward Smirke and Henry Roscoe, above n 180, 142.

¹⁸³ Charles McCormick, 'The Scope of Privilege in the Law of Evidence' (1937–38) 16 *Texas Law Review* 447, 469.

While 20th-century cases such as *Smith* and *Great Central Railway Co* appear to have broadened the scope of legal professional privilege, Bentham and Wigmore disavowed ‘privileges’ which accorded protection to values or professional relationships outside the legal realm.¹⁸⁴ Bentham made plain his opposition to privileges designed to protect confidential communication.¹⁸⁵ Wigmore, by contrast, argued that the rationale for the privilege was providing secrecy as a means of preserving professional relationships in which clients would otherwise refrain from communicating without a guarantee of secrecy.¹⁸⁶ In his treatment of the theme, Wigmore stated at length that there was no justification for expanding the rule beyond the legal profession. He believed there ought to be few recognised privileges; but if, at a systemic level, a privilege was necessary, it must be absolute to achieve the desired behavioural effect of promoting full and frank disclosure.¹⁸⁷

For Wigmore, legal professional privilege was a corollary to the right to counsel and promoted effective client–counsel relations at the earliest possible stage, namely pre-litigation. Given that Bentham’s philosophy was premised on the social utility of seeking the greatest good for the greatest number,¹⁸⁸ it may be concluded that Bentham would have endorsed this Wigmorean proposition from a utilitarian perspective.¹⁸⁹ Noting that Bentham failed to convince the judicature and legislature to abolish privileges in wholesale fashion, Wigmore devised a more balanced approach to correcting the ‘warring mass of judicial precedents’.¹⁹⁰

¹⁸⁴ William Twining, above n 18, 99.

¹⁸⁵ Bentham was particularly outspoken against availing a privilege to physician–patient relationships. *Ibid* 99.

¹⁸⁶ John Wigmore, *Treatise*, above n 17, § 3350.

¹⁸⁷ Edward Imwinkelreid, ‘The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges’ (2003) 83 *Boston University Law Review* 315, 148.

¹⁸⁸ James Crimmins, ‘Jeremy Bentham’, *Stanford Encyclopaedia of Philosophy Archive* (17 March 2005) <<http://plato.stanford.edu/archives/spr2015/entries/bentham/>>.

¹⁸⁹ Jeremy Bentham, above n 16, 22–5.

¹⁹⁰ John Wigmore, *Treatise*, above n 17, § 6, 6.

Adopted as ‘gospel’ by virtually all western legal scholars who succeeded him,¹⁹¹ Wigmore’s paradigm ‘was then, and remains today, typical of English legal writings’.¹⁹²

The *Harvard Law Review*¹⁹³ claimed that, on its face, the Wigmorean paradigm was sufficiently open-ended to encompass practically any form of privilege and, as a result, provided little guidance to legal analysis.¹⁹⁴ Wigmore crafted his threshold in such a fashion as to exclude other professional relationships. He ‘tried to constrict the recognition of privileges as much as possible’¹⁹⁵ and contended that the mere fact that a communication was made in express or implied confidence of a confidential relation was insufficient to create a privilege.¹⁹⁶ Wigmore held that this did not constitute adequate grounds for recognition, for no pledge or oath of secrecy could withstand the demand for truth in a court of justice.¹⁹⁷ He cited, in support of his contention, *Greenlaw v King*, which held that ‘persons in the most closely confidential relation are bound to

¹⁹¹ Jonathan Auburn, *Legal Professional Privilege: Law & Theory* (Hart Publishing, 2000) 3–4.

¹⁹² *Ibid.* 8. Dominating academic literature, Wigmore’s articulation of the privilege is imbued with a sense of absoluteness from which there can be no derogation. See also William Twining, above n 13, 9. Despite much refined and sophisticated work on a number of topics, Wigmore’s successors, namely, Professors Edmund Morgan, Charles McCormick, Zechariah Chafee Jr. and John Maguire, were left competing in the shadow of his brilliance. Edmund Morgan commented: ‘Not only is this the best, by far the best, treatise on the Law of Evidence, it is also the best work ever produced on any comparable division of American Law’. Maguire and his contemporary, Chafee, emphasised Wigmore’s ‘strong influence’, and bestowed upon it hefty praise. Acknowledging the multi-volumed compilation as a catalyst to get minds ‘thinking in entirely new directions’, Chafee noted that no other systematic legal treatise could hold a flame to Wigmore’s work nor so ably expound the law as it is, much less make the law move towards what it ought to be. Whether unable or unwilling to build theories or treatises as an extension of, or alternative to, Wigmore’s work, the first fifty years of the twentieth century were consumed by a period of intellectual stagnancy in the arena of evidentiary law.

¹⁹³ The author of this article was not credited.

¹⁹⁴ ‘Developments in the Law’, above n 67, 1472.

¹⁹⁵ *Ibid.* See also John Wigmore, *Treatise*, above n 17, § 2192, 73.

¹⁹⁶ *Ibid.*, §2286, 3186.

¹⁹⁷ *Ibid.*

disclose communications made to them'.¹⁹⁸ Wigmore also acknowledged the lament of judges who criticised the broad brush of legal professional privilege, with Best CM, in *Broad v Pitt*,¹⁹⁹ opining:

I think this confidence in the case of attornies is a great anomaly in the law. I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence. There is also no privilege of this description in the case of a medical man. A man is not acting as an attorney, when he is consulted about a deed; and I cannot distinguish his situation from that of any other man. I can make a distinction where a person requires information for the purpose of defending himself or of commencing an action. I am of opinion that the evidence ought to be received.²⁰⁰

Even Lord Brougham in *Greenough v Gaskell*, like Buller J in *Wilson*, commented that it was 'not very easy to discover why a like privilege ha[d] been refused to others, and especially to medical advisers',²⁰¹ who render equally valuable services to individuals and the public, yet are denied the right to assert a claim of privilege.²⁰² This is arguably attributable to the fact that negligible deficit would result to the integrity of the professional relationship when the benefits of encouraging communications within the relevant *class* of relation are weighed against the cost of obstructing truth seeking.²⁰³ Other professionals must, if compelled, disclose what has passed between themselves and their clients.²⁰⁴

¹⁹⁸ (1838) 1 Beav 137, 145.

¹⁹⁹ *Broad v Pitt* (1828) 3 C & P 517.

²⁰⁰ *Ibid* 519.

²⁰¹ *Greenough v Gaskell* (1883) 1 M & K 98, 103 (Lord Brougham).

²⁰² Adrian Zuckerman, 'Legal Professional Privilege: The Cost of Absolutism' (1996) 112 *Law Quarterly Review* 539.

²⁰³ 'Developments in the Law', above n 67, 1473.

²⁰⁴ Adrian Zuckerman, above n 202, 539.

Bentham would have agreed with Lord Brougham and Buller J that the elevation of the rule, in terms of its exclusivity, was inconsistent; however, Lord Brougham and Buller J both appear to have accepted that the existing authorities precluded any extension to the privilege. Turner VC in *Russell v Jackson*²⁰⁵ similarly observed that the rule which shielded client–counsel communications from disclosure did not rest purely upon the confidence reposed by the client in his lawyer, for no such protection existed in other cases in which at least equal confidence was reposed; for instance, that of physician and patient or clergyman and prisoner.

This led Wigmore to pronounce that ‘the privilege remains an anomaly. Its benefits are all indirect and speculative; its obstruction is plain and concrete’.²⁰⁶ Buried within his treatise was his seldom publicised admission that, ‘if only for the sake of the peace of mind of lawyers, it is better that the privilege should exist’.²⁰⁷ ‘In modern times, the loss to truth is a comparatively small sacrifice’.²⁰⁸ Rupert Cross enjoined that ‘the merits of the doctrine are obvious but its precise implications and limitations, if any, have not been worked out’.²⁰⁹

The Wigmorean disciple, scholar and drafter of the First Amendment, Zechariah Chafee, asserted that the relationship between lawyer and client was materially different from that of other confidences,²¹⁰ despite them being dependent upon the exercise of professional service and trust. While Chafee believed that ‘each privilege should be judged on its own merits’,²¹¹ he noted that the administration of justice could not bear to be stifled by petty claims to professional prestige or inter-professional jealousies when the correct and rightful focus should be on the

²⁰⁵ (1851) 68 ER 558, 559–60 (Turner VC).

²⁰⁶ John Wigmore, *Treatise*, above n 17, §2291, 3204.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ Rupert Cross, *Cross on Evidence* (Lexis Nexis Butterworths, 5th ed, 1996) 291.

²¹⁰ Zechariah Chafee, ‘Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor’s Mouth on the Witness Stand?’ (1942–43) 52 *Yale Law Journal* 607, 609.

²¹¹ *Ibid.*

fact that a broader right of non-disclosure could cause irreparable harm if misused.²¹²

C *R v Umoh Mfongbong*

Taylor J, as he then was, together with Lord Lane CJ and Rose J, was faced with the task of considering whether legal professional privilege should remain a preserve of the legal profession or extended to other professional relationships. The occasion for this came in *R v Umoh Mfongbong*,²¹³ where a prisoner sought legal advice from a prison officer who was acting in the capacity of legal aid officer. The facts in *Umoh* involved a fight in Mfongbong's flat, during which he was stabbed and taken to hospital.²¹⁴ Upon conducting a search of the property, police officers seized a briefcase containing two packets of drugs and brought a charge of conspiracy to supply heroin.²¹⁵ While in prison, Mfongbong spoke with the principal prison officer, Tucker, with respect to his legal aid application and also made disclosures regarding the heroin.²¹⁶

At trial, Worthington J rejected the argument that communications passing between Mfongbong and Tucker were privileged and compelled disclosure; thereby leading to a conviction.²¹⁷ On appeal, recourse was had to *Jones v Great Central Railway Co*²¹⁸ and *R v Smith (SI)*,²¹⁹ both of which stood as authority for the courts to further extend the operation of legal professional privilege. In *Jones v Great Central Railway Co*,²²⁰ the House of Lords concurred that in order to enable a client to safely and unreservedly confide in his lawyer, all communications between them, whether or not through an agent, were protected.

²¹² Ibid.

²¹³ (1987) 84 Cr App R 138.

²¹⁴ Ibid 138.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ [1910] AC 4.

²¹⁹ (1979) 69 Cr App R 378.

²²⁰ [1910] AC 4, 6 (Lord Loreburn LC).

The plaintiff sought legal assistance from his trade union pertaining to an allegation of unfair dismissal.²²¹ Prior to appointing a lawyer and enabling him to commence a suit, Jones was bound by union rules to supply certain details, which necessitated written correspondence passing between himself and union officials.²²² The question to be decided by Lord Loreburn LC, Lord Macnaghten, Lord James and Lord Shaw was whether the correspondence amounted to privileged communications.²²³

Noting that disclosure of written correspondence was commonly required between law firms and their agents, Lord Loreburn LC commented that it was rare in litigation for communications to be confined to the passing of letters between lawyer and client.²²⁴ Any organisation that transacted business by correspondence was subject to the same rule which favoured placing before a court all material circumstances which may lead to a just decision.²²⁵ Lord Loreburn LC stated:

Both client and solicitor may act through an agent, and therefore communications to or through the agent are within the privilege. But if communications are made to him as a person who has himself to consider and act upon them, then the privilege is gone; and this is because the principle which protects communications only between solicitor and client no longer applies. Here, documents are in existence relating to the matter in dispute which were communicated to some one who is not a solicitor, nor the mere alter ego of a solicitor.²²⁶

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

This judgment expanded the privilege by permitting agents to assert a claim on behalf of a party to the proceeding. In *Smith*, the defendant had been charged with murder and underwent a psychiatric evaluation in prison to assess whether his defence of automatism was physically possible.²²⁷ As the medical reports were subsequently sent to the Director of Public Prosecutions, the court ruled that communications could not be regarded as confidential.²²⁸ Smith applied for leave to appeal his conviction on the basis that confidential communications made to his psychiatrists in a patient-prisoner context were inadmissible.²²⁹ The *Smith* Court ruled that reports between doctors and prisoners were not confidential and therefore admissible in law.²³⁰

Mfongbong, in the present case, advanced a similar contention that communications passing between himself and Tucker attracted the privilege because they involved a legal aid application.²³¹ The House of Lords disagreed and ruled that the communications made scant mention of legal assistance and therefore lacked the necessary requirement of giving or receiving legal advice in order to remain confidential.²³²

Lord Lane CJ, with whom Taylor and Rose JJ concurred, stated that ‘in our view, no *privilege* analogous to that between lawyer and client can arise and such *privilege* should be strictly confined to communications with lawyers or their agents’.²³³ A legal aid officer is neither.²³⁴ The House of Lords ruled that, except in extenuating circumstances, communications between a prisoner and prison

²²⁷ *R v Smith (SI)* (1979) 69 Cr App R 378.

²²⁸ *Ibid.*

²²⁹ Smith argued, in the alternative, that it was unfair to admit the communications because they were made for a different purpose (being to determine his mental condition); and that the psychiatric evidence was inadmissible because it was for the jury to decide on the facts whether the murder was carried out in a state of automatism.

²³⁰ *R v Smith (SI)* (1979) 69 Cr App R 378.

²³¹ *R v Umoh Mfongbong* (1987) 84 Cr App R 138, 138.

²³² *Ibid.*

²³³ *Ibid* 141.

²³⁴ *Ibid.*

officer acting in the capacity of a legal officer were subject to legal professional privilege; however disclosures made to prison officers on other occasions did not fall within the scope of that protection.²³⁵ This correlates with the *dicta* of Lord Taylor in *Derby*, whereby he distinguished the continued significance of lawyers: ‘A man must be able to consult his lawyer in confidence ... The client must be sure that what he tells his lawyer in confidence will never be revealed’.²³⁶

Through confining legal professional privilege to lawyer–client communications, this reinforced the already advantaged standing of the profession and underpinned the services that lawyers are uniquely placed to offer. Claiming that the legal profession has been less than forthcoming about the real purpose for legal professional privilege, Professor Norman Spaulding remarked: ‘Our lack of candour now verges on duplicity. We seem to be ashamed to admit what we do for our clients under cover of the privilege. And with our shame and circumlocution, confusion and controversy about the doctrine has multiplied’.²³⁷

William Simon espoused a different albeit equally controversial notion as to the usefulness of confidential communications. He argued that the privilege was not merely an ideology, but a marketing strategy. Simon claimed that in the legal field’s competition with other professions, strong confidentiality rights were a more valuable advantage than legal expertise and ‘put a premium on services that lawyers were distinctly qualified to provide’.²³⁸ He concluded: ‘The net effect of confidentiality, therefore, is probably to reduce compliance with the law’.²³⁹ This is exemplified in the fact that many lawyers insist that it is their duty to exploit loopholes in the interests of their clients, whereby legal advice is framed in such a way that it assists clients bypass a law by casting their affairs in a way that

²³⁵ Ibid 138.

²³⁶ [1996] AC 487, 507D.

²³⁷ Norman Spaulding, ‘Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege’ (2013) 2013 *Journal of the Professional Lawyer* 135, 135.

²³⁸ William Simon, ‘The Confidentiality Fetish: The Problem With Attorney-Client Privilege’ (2004) 12 *The Atlantic* <<https://www.theatlantic.com/magazine/archive/2004/12/the-confidentiality-fetish/303601/>>.

²³⁹ Ibid.

technically conforms to it but ultimately defeats its purpose through skilful evasion. This reinforced the Benthamic argument that legal professional privilege impeded the administration of justice by affording lawyers an express licence to engage in wilful concealment.²⁴⁰

Noting that legal professional privilege obviously attached to communications concerning legal advice passing between lawyers and clients, Taylor LJ sought to limit the types of communications that came within the ambit of the privilege. Taylor LJ aimed to mitigate abuses of the rule by cautioning the need to re-examine its scope and keep it within justifiable bounds.²⁴¹ While accepting that legal professional privilege now extended beyond anticipated proceedings, Taylor LJ stated in *Balabel* that those cases which adopted a broad view of the scope of privilege²⁴² and extended it without limit to all client–counsel communications were too wide.²⁴³ As distinct from his ruling in *Derby*, Taylor LJ emphasised that the rule did not extend to client–counsel relations where the relationship was not essential to the outcome of the case.

V CONCLUSION

Chapter III exposed the false premise about the true nature of legal professional privilege and whether the contemporary interpretation adopted by the legal fraternity misapprehended the Wigmorean Theory. By revealing a series of shifts in judicial thinking in terms of the application of legal professional privilege, this chapter has exposed the falsity of Lord Taylor’s articulation in *Derby* that the privilege ‘applied across the board in every case, irrespective of the client’s

²⁴⁰ John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed. 1940 & Supp. 1993) 3201.

²⁴¹ *Ibid.*

²⁴² The cases which adopted a broad scope with respect to legal professional privilege were: *Pearse v Pearse* (1846) 63 ER 950; *Morgan* (1873) LR 8 Ch App 361; *Calcraft v Guest* [1898] 1 QB 759; *Carpmael v Powis* (1846) 50 ER 495; *Minter v Priest* [1930] AC 558.

²⁴³ *Balabel v Air India* [1988] Ch 317, 331 (Taylor LJ).

individual merits'.²⁴⁴ As exemplified in his *obiter* comments in *Balabel*, a divergence of judicial authority obscured the scope of the rule. Conceding that the existing authorities with respect to legal professional privilege were ambiguous and lacked clarity, Lord Taylor was required to define the parameters in which the privilege did, or ought to, operate.

It is evident that no opportunity existed in which to consistently apply the privilege and it follows that the rule was neither absolute nor balanced, given that *Balabel* reverted to basic 19th-century principles which recognised communications between lawyer and client *only* if their purpose was the giving or receiving of legal advice. All other relevant client–counsel communications were rendered discoverable and admissible. *Balabel* epitomised a trend towards narrowing the scope of the rule

This accorded with the findings in Chapter II, which highlighted that when legal professional privilege was first planted on English soil, the systematic concealment of client–counsel communications was so unnatural and so unpalatable to the judicature that it required justification in the sight of English lawyers. Chapter III demonstrated that this rationale underscored Lord Taylor's desire to constrain the privilege as narrowly as possible. Notwithstanding this fact, Lord Taylor recognised that the rationale for the rule elevated the client–counsel relationship above other professional relations and imbued them with an exceptional exclusivity unattainable by others in whom at least equal confidence was reposed.

Bentham and Wigmore wholly rejected proposals for ever-multiplying privileges. Deeming other professional relations to be undeserving of protection because they could subsist without a guarantee of privilege, Wigmore attributed the desire of other professions to enhance their own prestige and standing as the root cause of a misplaced reliance on a privilege analogous to legal professional privilege.²⁴⁵

²⁴⁴ [1996] AC 487, 508E (Lord Taylor).

²⁴⁵ John Wigmore, *Treatise*, above n 17, § 2285, 530.

Conversely, as a fundamental feature of the client–counsel relationship, the protection afforded by legal professional privilege existed not only as a legal concept, but as a matter of ethical conduct which functioned as an integral component of the English judicial system.²⁴⁶ Legal professional privilege was linked by three commonly accepted assumptions. First; the practical necessity that clients benefitted from having the assistance of lawyers who stood in their shoes. Second; that client disclosure was necessary in order for lawyers to fully and ably aid their clients. Third; in order for clients to freely and willingly confide in lawyers, it was paramount that lawyers be able to guarantee confidentiality of communications. Lord Taylor’s ruling in *Mfongbong* reproduced this justification, whereby he declined to recognise a privilege between a prisoner and prison officer acting as a legal aid officer.²⁴⁷

Chapter IV addresses whether privilege shields every secret client-counsel conversation or communication. Specifically, considering the third of Lord Taylor’s assertions, this chapter considers whether legal professional privilege has been interpreted and applied ‘irrespective of the client’s merits’. Of particular importance are the limitations imposed on the rule including waiver and the crime-fraud exception. Through utilising the contentions of Bentham and Wigmore, this chapter argues that Lord Taylor has allowed the rule to be invoked on a case-by-case basis according to specific purposes and contexts, with the doctrine of waiver on occasion restored.

²⁴⁶ William Dunham, *Radulphi de Hengham Summae* (Cambridge University Press, 1932) 4–7.

²⁴⁷ An inference may be made that Lord Taylor’s decision was informed by the Wigmorean edict that legal professional privilege need not extend beyond the legal profession.

CHAPTER IV: THE LIMITS AND EXCEPTIONS TO LEGAL PROFESSIONAL PRIVILEGE

I INTRODUCTION

Chapter III demonstrated the Wigmorean preference to accord a narrow interpretation to the rule such that all four criteria must be fulfilled in order for a claim of privilege to be maintained. Chapter IV traces the inconsistent treatment received by the privilege, in which it was abridged, enlarged and modified until a general consensus was formed as to the operation and limitation of this legal precept. The starting point is Lord Taylor CJ's assertion in *R v Derby Magistrates' Court; Ex parte B*¹ that clients must be entitled to confidentially seek legal advice, since they may otherwise refrain from revealing the whole truth.

Section II contrasts the reasoning of Lord Taylor against Bentham and Wigmore, including the instances giving rise to forfeiture of privileged communications. Using comparative case law analysis, this chapter directs particular attention to the crime-fraud exception grafted onto the common law by the leading case *R v Cox & Railton*.² Section III critiques the exception of waiver from a Wigmorean perspective, while Section IV contends that a case-by-case balancing exercise has determined whether confidential communications have been vitiated. The judgments of Lord Taylor in *Goldman v Hesper*³ and *Tanap Investments (UK) v Tozer*⁴ are employed to demonstrate that waiver has been inconsistently

¹ [1996] AC 487.

² (1884) 14 QBD 153. This proceeding concerned the perpetration of a fraudulent conveyance in which Cox posed as a purchaser of Railton's property, with intent to deprive the creditors of their dues.

³ [1988] 1 WLR 1238.

⁴ In *Tanap*, the company was unable to effect settlement on the day stipulated in a contract of sale, following the purchase of land from Tozer. Lawyers for Tanap allegedly rescinded the contract due to a discrepancy with the land boundary and sought repayment of the deposit. Tozer refused to return the deposit, prompting Tanap to lodge a writ pursuant to *Law of Property Act 1925* (UK) s 49(2) for return of same, plus interest and damages. In response, Tozer

recognised. In addition, cases specifically cited by Lord Taylor in *Derby*, including *Hobbs v Hobbs and Cousens*⁵ are recapitulated to assess whether the judicial interpretation of legal professional privilege was measured and reasonable or rigid and uncompromising.

The question addressed in this chapter is whether documents can be disclosed to a court, either voluntarily to avoid a former client misleading the court, or on the request of opposing counsel. If judicial intervention is permitted in this context, it is a small step to interpret it according to various legal scenarios. This chapter concludes that legal professional privilege is not absolute because the privilege cannot reattach to material affected by disclosure, whether or not it is misleading, criminal or fraudulent.

II PRIVILEGE AND THE CRIME-FRAUD EXCEPTION

Legal professional privilege has been deemed indispensable to private justice. In mandating a rationale for absoluteness of the rule, Lord Taylor CJ, in *R v Derby Magistrates' Court; Ex parte B* resolved that

[A] man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer will never be revealed without his consent. Legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests. It is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all

counterclaimed for specific performance, or in the alternative damages, and a declaration of forfeiture of monies. *Tanap Investments (UK) v Tozer* [1991] WL 839041; also known as *Tanap Investments (UK) Limited v (1) Thomas Christian Tozer (2) Robert Henry Stallibrass Hiscocks, (3) Rowan John Cherrington* [1991] WL 839041.

⁵ [1960] P 112.

those who might otherwise be deterred from telling the whole truth to their solicitors.⁶

While this rationale may prove true for the ordinary class of cases in which clients genuinely seek legal advice as to their rights and responsibilities, the privilege must, as a minimum, cease to be a cloak for criminal conspiracy.⁷ This was central to Bentham's hypothesis. In seeking to abrogate legal professional privilege, he claimed that the rule amounted to little more than a mechanism behind which the guilty party could shield their misdeeds.⁸ It consisted of 'illogical and indefensible technical rules'⁹ which went beyond making 'every man's house his castle'¹⁰ by enabling the guilty party to 'convert [his] castle into a den of thieves'.¹¹

Bentham's argument is compelling. Legal professional privilege, both in theory and practice, operates to prevent lawyers against divulging the wrongs of deceitful clients and may potentially transform a lawyer's office into a sanctuary and repository for material evidence of crime.¹² In consequence, lawyerly integrity is undermined, which in turn undermines the impartial protections of the legal system and the rule of law.¹³

⁶ [1996] AC 487, 507D (Lord Taylor CJ).

⁷ John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States Vol IV* (Little, Brown & Co, 1905) § 2298, 3216.

⁸ An innocent person, having nothing to fear from disclosure, would not be deterred from confiding in their legal counsel.

⁹ William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford University Press, 1985) 188–9.

¹⁰ Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice, Vol II* (Hunt and Clarke, 1827) 340.

¹¹ *Ibid.*

¹² *Frank Truman Export Ltd v Metropolitan Police Commissioner* (1977) 1 QB 952, 961 (Swanwick J).

¹³ Henry Peck, *Undermining Attorney-Client Privilege Weakens the Rule of Law* Human Rights Watch (17 April 2015) <<https://www.hrw.org/news/2015/04/17/undermining-attorney-client-privilege-weakens-rule-law>>.

Bentham's argument against the privilege remains particularly valid for occasions where clients do seek their lawyer's assistance with a view to committing a criminal or fraudulent act. The difficulty lies in defining the boundaries of this limitation. Given that the laws of England presuppose that a) one is innocent until proven guilty; and b) full and frank disclosure are the hallmarks of the contemporary privilege theory, the furnishing of legal advice to a guilty client presents a dilemma.¹⁴

A *Bentham Vindicated*

While there is a distinction between the client who conceals embarrassing information and one who harbours criminal or fraudulent intent, legal professional privilege is brought into operation only when a client professionally consults his lawyer in confidence and is justified on the basis that such confidence must be encouraged.¹⁵

Bentham posited a rhetorical question when he asked: 'Whence all this dread of truth? Whence comes it that any one loves darkness better than light, except it be that his deeds are evil?'¹⁶ The only consequence, therefore, of abolishing the rule would be to prevent a mendacious client from suppressing evidence and advancing a false claim.¹⁷

That it will often happen that in the case supposed no such confidence will be reposed, is natural enough: the first thing the advocate or attorney will say to his client, will be, 'Remember that whatever you say to me, I shall be obliged to tell, if asked about it'. What then, will

¹⁴ Jeremy Bentham as cited by John Henry Wigmore, *Treatise*, above n 7, § 2291, 3202.

¹⁵ Christopher de Courcy Ryder, *The Justification for Legal Professional Privilege* (Wellington, 1990) 18.

¹⁶ Jeremy Bentham, above n 10, 479.

¹⁷ *Ibid* 144.

be the consequence? That a guilty person will not in general be able to derive quite so much benefit from it.¹⁸

Denouncing Bentham's assertion that honesty would yield a greater good, Wigmore asserted that the rule of privilege was perfectly adapted to its end, which is the execution of the law.¹⁹ Wigmore contradicted Bentham's argument that the rule amounted to a dubious device behind which wrongdoers could shield their misdeeds. Where Bentham stated that clients predominantly relied on legal professional privilege to shield communications which supported their own guilt, Wigmore announced that 'to the man who, having no guilt to disclose, has disclosed none to his lawyer, nothing could be of greater advantage than that it should appear; as it naturally would if the lawyer were subjected to examination'.²⁰ He later conceded that it was doubtful, from a policy perspective, that greater good would result from upholding the rule rather than using evidence made available from denying the privilege altogether.²¹

The earliest step in eliminating 'deceit at law' was contained in Chapter 29 of the *Statute of Westminster I 1275* (UK) which imposed penalties on lawyers who engaged in collusion or deceit. Should a client repose no confidence by virtue of withholding information, the supposed confidence necessary for the operation of legal professional privilege is deemed not to exist and the client is not protected by the rule.²²

Legal professional privilege cannot be invoked when a client consults their lawyer with a view to the commission of a future crime or fraud.²³ In such circumstances,

¹⁸ Jeremy Bentham and John Bowring, *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring, Vol VII* (Simpkin, Marshall & Co, 1843) 473–9, cited in John Wigmore, *Treatise*, above n 7, § 3200.

¹⁹ John Wigmore, *Treatise*, above n 7, § 3200.

²⁰ *Ibid* § 3201.

²¹ *Ibid* §1061, 1230.

²² Christopher de Courcy Ryder, above n 15, 18.

²³ *R v Cox and Railton* (1884) 14 QBD 153; See also the English rules of professional conduct. These have evolved over time to include reporting requirements in relation to clients who express

the principle cannot protect confidential communications from disclosure. Interestingly, some of the older English authorities went so far as to suggest that even iniquitous client–counsel communications *were* deserving of protection.²⁴

*Cromack v Heathcote*²⁵ is an early example of this. In that matter, the plaintiff consulted Smith, a lawyer, to draw up a fraudulent assignment of goods. Smith declined to be party to a fraudulent enterprise and refused to draft the document, which would have effected an unlawful transaction. He dissolved the professional relationship and another practitioner drew the deed.²⁶ Its validity was questioned on the basis of fraud in an action against the sheriff.

During the first trial, which was heard by Richards CB, the communication between Smith and the plaintiff was rejected on the basis that it conformed to a confidential communication made to a lawyer despite the element of fraud being present.²⁷ The defence moved to have the verdict set aside on grounds that the fraudulent evidence was improperly rejected.

In determining whether the rule encompassed communications made outside the scope of legal proceedings and if it was vitiated by fraud,²⁸ the Court of Appeal, presided over by Dallas CJ, Burrough and Richardson JJ, had recourse to *Wilson v Rastall*.²⁹ Their Honours upheld the original verdict that communications were privileged and any evidence of fraud was not to be divulged by the lawyer to whom it was made. Declaring he had no doubt that it would be most mischievous if there were uncertainty as to whether such a communication were privileged, Burrough J formed the opinion that the rule of legal professional privilege was not

an intention to commit a future crime or fraud. The *Solicitors' Code of Conduct 2007* (UK) r 4(12) states that a lawyer may 'reveal confidential information to the extent necessary to prevent a client or a third party committing a criminal offence likely to result in serious bodily harm'.

²⁴ See *Cromack v Heathcote* (1820) 6 Eng C Law Rep 1; *Doe v Harris* (1833) 5 Car & P 592.

²⁵ (1820) 6 Eng C Law Rep 1.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Cromack v Heathcote* (1820) 6 Eng C Law Rep 1.

²⁹ (1792) 4 TR 753.

confined to lawyers employed in a cause and communications passing between client and lawyer were professional.

This thinking carried through to the 1833 case of *Doe v Harris*³⁰ in which Parke J stated that a lawyer could be questioned regarding whether his client sought his assistance to draw a certain deed, but not whether he sought to obtain this advice for a lawful or an unlawful purpose. In that case, the facts turned on whether a deed, by which a property was transferred from an insolvent party to the defendant, was a bona fide or fraudulent transaction.³¹ Parke J concluded that there was a significant degree of difficulty in the witness disclosing whether the communication between himself and his client was for a lawful or unlawful purpose without telling the court what it was.³² It might merely be that the litigant enquired whether a particular action could legally be carried out.³³

Proving that no matter how strict or loose the rules of confidentiality may be, clients and their lawyers have been granted a measure of ability to distort facts, withhold information and manipulate the immunity imbued by the privilege.³⁴ On this basis, ‘the argument employed as a reason against mandating disclosure would appear to be the very argument that pleads in favour of it’.³⁵ Clients who receive poor advice because they fail to be fully candid and open with their lawyers have only themselves to blame. Hazard noted that although it has always been recognised that the privilege is governed by some limits, for ‘at minimum it is inadmissible that legal consultation be a cover for thuggery and theft’, the rule is critical to the modern lawyer’s role as an adviser to clients.³⁶ The difficulty is where to draw the boundaries and define the kinds of secrets that lawyers may or

³⁰ (1833) 5 Car & P 592.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ Lloyd Snyder, ‘Is Attorney-Client Confidentiality Necessary?’ (2002) 15 *Georgetown Journal of Legal Ethics* 477, 505.

³⁵ John Wigmore, *Treatise*, above n 7, § 3200.

³⁶ Geoffrey Hazard, ‘An Historical Perspective on the Attorney-Client Privilege’ (1978) 66 *California Law Review* 1061, 1091.

may not keep.³⁷ If the client lied to their lawyer or perjured themselves and is later confronted by the truth, the government has little reason to aid them.³⁸ Ultimately, ‘the law should probably not be written for the benefit of liars or perjurers’.³⁹

An early example in which the court *was* prepared to recognise the possibility of a client–counsel conspiracy occurred in *Gartside v Outram*.⁴⁰ In that case, the employer plaintiffs sought to restrain their defendant employee from divulging information obtained by him in the course of his employment which indicated that their business had been engaged in fraudulent conduct.⁴¹ The plaintiffs denied perpetrating any fraud and alleged that the defendant had threatened to make similar unsubstantiated statements to other third parties.⁴² Sir Page Wood VC permitted interrogatories to be made on the basis that, if the defendant proved the allegation and those facts were made out, it would be a good defence and the plaintiffs’ claim would be defeated.⁴³ Formulating the proposition that no confidence could attach to an iniquitous communication, Lord Hatherley, in that same case, observed:

The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confident of a crime or fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist.⁴⁴

³⁷ Ibid.

³⁸ *Nix v Whiteside*, 475 US 157, 170–1 (1986).

³⁹ Ibid.

⁴⁰ (1856) 26 LJ Ch 113.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid 114 (Wood VC).

⁴⁴ Ibid 114 (Lord Hatherley).

This passage has been developed in England to justify disclosure of confidential client–counsel communications. Two decades later, Cockburn CJ, in *R v Orton*,⁴⁵ echoed the same sentiment when he authoritatively stated that ‘if a client had a dishonest purpose in view of the communication he makes to his attorney ... it deprives the communications of privilege ... The fraudulent character of the communication takes away the privilege.’⁴⁶

1 *R v Cox & Railton*

Stephen J subsequently adopted the reasoning of Cockburn CJ in *R v Cox & Railton*⁴⁷ when the former refused to uphold the protection of legal professional privilege involving certain types of communication. The *Derby* Court reviewed *Cox & Railton*.⁴⁸ The facts in that case were not dissimilar to *Cromack*. While it is noted that the lawyer in *Cromack* declined to be party to a fraudulent enterprise, *Cox* is distinguished on the basis that the lawyer counselled his clients as to the means by which to avoid seizure and sale of land. He advised them to dissolve their partnership and execute a bona fide sale between the two men. When Railton enquired as to whether anyone aside from themselves knew of the partnership,⁴⁹ the lawyer replied: ‘No, not that I am aware of, only my clerks’.⁵⁰ Unbeknownst to the lawyer, instead of dissolving their partnership, Cox and Railton retained it and proceeded with the fraudulent transaction.

All communications between a solicitor and his client are not privileged from disclosure, but only those passing between them in the legitimate course of professional employment of the solicitor.

⁴⁵ (1878) 39 LT 293.

⁴⁶ *Ibid* (Cockburn J) cited in *R v Cox & Railton* (1884) 14 QBD 153.

⁴⁷ *R v Cox & Railton* (1884) 14 QBD 153.

⁴⁸ [1996] AC 407, 507E-F. The *Derby* Court stated that *R v Cox & Railton* ‘was said to fall within the exception recognised by Stephen J. The argument was not that the privilege had to be balanced against some other public interest, but rather that the communications were never privileged at all’.

⁴⁹ *Ibid* 156.

⁵⁰ *Ibid*.

Communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure.⁵¹

The Queen's Bench held that, while secrets 'must be told in order to see whether [they] ought to be kept',⁵² the detection of crime deprived communications of their privileged status. Ultimately, no privilege could be said to attach if a client sought his lawyer's assistance to commit a criminal or fraudulent act. Stephen J explicated how courts should determine whether a specific communication was designed to further a crime or fraud:

In each particular case the court must determine ... whether it seems probable that the accused person may have consulted his legal adviser ... before the commission of the crime for the purpose of being guided or helped in committing it.⁵³

This judgment accorded with the position taken in *Annesley v Earl of Anglesea*,⁵⁴ namely that professional confidence cannot exist when a lawyer is an organiser, entrepreneur or willing co-conspirator in a scheme tainted with the character of fraud. This would in turn give rise to allegations of breach of the law and could not be said to form part of his professional duty.

Their dispute focused on whether a more precise definition of the privilege would include or exclude matters of the sort that [the Earl's attorney] had learned. The analysis, both because they reveal how unformed the rule of privilege was at the time and because they anticipate substantially everything that has since been said on the subject.⁵⁵

⁵¹ Ibid 153.

⁵² Ibid 168.

⁵³ Ibid 175.

⁵⁴ (1743) 17 How St Trials 1139. See also Geoffrey Hazard, above n 36, 1075.

⁵⁵ Ibid.

Client–counsel communications would be reduced to communications between two fraudulent people.⁵⁶ It was clear law that the privilege did not protect communications made in order to elicit an illegal objective. If lawyers were to find themselves bound by legal professional privilege in such circumstances, it would wring grievous hardship upon them, for ‘their lips would have to remain sealed, which might place them in the unenviable position of being suspected party to their client’s crime’.⁵⁷

Stipulating that communications were not protected if they fell outside the legitimate ambit of the client–counsel relationship, the Court, in its formulation, noted that the intention of the clients and not their lawyer was the decisive factor. The clients needed to have consulted with their lawyer ‘before the commission of the crime for the purpose of being guided or helped in committing it’.⁵⁸ Quoting from the judgment of Bovill CJ in *Tichborne v Lushington*,⁵⁹ Stephen J said:

I believe the law is, and properly is, that if a party consults an attorney, and obtains advice for what afterwards turns out to be the commission of a crime or a fraud, that party so consulting the attorney has no privilege whatever to close the lips of the attorney from stating the truth. Indeed, if any such privilege should be contended for, or existed, it would work most grievous hardship on an attorney, who, after he had been consulted upon what subsequently appeared to be a manifest crime and fraud, would have his lips closed, and might place him in a very serious position of being suspected to be a party to the fraud, and without his having an opportunity of exculpating himself.⁶⁰

⁵⁶ In *Annesley v Earl of Anglesea* (1743) 17 How. St. Trials 1139, Giffard conspired with the Earl of Anglesea to have James Annesley hanged for a murder known to be a tragic accident. This would clear the path for the Earl to inherit a vast estate rightfully belonging to Annesley. See also de Christopher de Courcy Ryder, above n 15, 18.

⁵⁷ *R v Cox & Railton* (1884) 14 QBD 153.

⁵⁸ *Ibid* 175.

⁵⁹ *Tichborne v Lushington* (Unreported, 10 May 1871) cited in *R v Cox & Railton* (1884) 14 QBD 153.

⁶⁰ (1884) 14 QBD 153, 175.

Cox and Railton did not confide their intentions in their lawyer, nor do things in combination with him, over and above what was required of the lawyer in his professional duty: ‘There was nothing to shew the defendants had any fraud in view when they went to, or, indeed, when they came away from the solicitor’.⁶¹ The privilege was not lost and the communications retained their confidential character.

The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not ‘come into the ordinary scope of professional employment’.⁶²

The presumed intention Stephen J had in mind was that a communication could not retain its privileged character because it would not come ‘within the ordinary scope of professional employment’; a phrase borrowed from Lord Brougham in *Greenough v Gaskell*.⁶³ It is submitted that the court in *Cox & Railton* need only look to the rationale espoused by Lord Brougham, which provided sufficient justification for the crime-fraud exception:⁶⁴

[I]f the client has criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is averred, the client does not consult his adviser professionally, because it cannot be the solicitor’s business to further any criminal objects ... The solicitor’s advice is obtained by fraud.⁶⁵

⁶¹ Ibid 162.

⁶² Ibid 167 (Stephen J).

⁶³ (1833) 1 Myl & K 98.

⁶⁴ Christopher de Courcy Ryder, above n 15, 18–19.

⁶⁵ *Greenough v Gaskell* (1883) 1 Myl & K 98 (Lord Brougham).

Moulding the modern scope of the crime-fraud limitation according to Bentham's proclamation, *R v Cox & Railton*⁶⁶ ruled that an iniquity exception applied to client–counsel communications made for the purpose of facilitating a crime or fraud, irrespective of whether the lawyer knowingly assisted in the furtherance of such a pursuit. The interpretation derived from this case was that, if the client had in mind a guilty purpose when seeking his lawyer's advice, legal professional privilege was out of the question.⁶⁷ This proceeding remains the leading case on the crime-fraud exception and demonstrates fidelity to Bentham's way of thinking by preventing the privilege from acting as an 'indefensible obstruction' and shield. In *Balabel*, Lord Taylor aimed to foster a judicial preference for truth finding and similarly opined that there were rules of conduct about making sure all materials were available at trial and advocated for the privilege to be strictly confined.

B *An Impossible Conspiracy*

The proceedings illustrate the historic common law position with respect to the crime-fraud exception. It was shallow in scope and operated to nullify the privilege in instances where a client specifically consulted his lawyer with a view to the commission of a crime or fraud.⁶⁸ It is argued that, where a lawyer is acting in accordance with the rules of professional conduct, he will be prepared to disclose evidence of illicit communications made with the object of furthering a crime or fraud.⁶⁹

⁶⁶ (1884) 14 QBD 153.

⁶⁷ *O'Rourke v Darbishire* (1920) AC 581, 604.

⁶⁸ *R v Cox & Railton* (1884) 14 QBD.153. See also ALE Newbold, 'The Crime-Fraud Exception' (1990) 53 *Modern Law Review* 472, 475.

⁶⁹ The English rules of professional conduct have evolved over time to include reporting requirements in relation to clients who express an intention to commit a future crime or fraud. The *Solicitors' Code of Conduct 2007* (UK) r 4(12) states that a lawyer may 'reveal confidential information to the extent necessary to prevent a client or a third party committing a criminal offence likely to result in serious bodily harm'. In addition, r 4(16) states that 'if the request is made by the police under the *Police and Criminal Evidence Act 1984* (UK) you should, where appropriate, leave the question of privilege to the court to decide on the particular

Given that the justification for legal professional privilege is to promote legitimate client–counsel communications so that clients may unbosom themselves in exchange for legal advice and representation, any clients who have illicit intentions in mind when consulting their lawyer can have no reasonable expectation that the privilege will shield such consultations.⁷⁰ In the circumstances, the obvious and necessary quality of confidentiality is lacking. It is an abuse of the client–counsel relationship, which falls within the ordinary course of professional employment and it would be unreasonable to seal the lawyer’s lips if it subsequently transpired that the client had sought legal assistance for a fraudulent or criminal enterprise.⁷¹

This last point regarding the need for communications to concern a criminal or fraudulent purpose flowed through to *R v Smith*.⁷² In this 1915 proceeding colloquially known as the ‘Brides in the Baths’ murders, George Joseph Smith was convicted of murdering a succession of wives in almost identical circumstances.⁷³ The trial judge admitted confidential communications passing between Smith and his lawyer concerning Smith’s financial gain through

circumstances’. Prior to the *Solicitors’ Code of Conduct 2007* (UK), lawyer conduct was governed by the *Guide to the Professional Conduct of Solicitors 1999* (UK). The requirements contained in the guide were not codified. Rather, they were intended to be read within the context of the whole chapter; being Chapter 16 on the subject of ‘Confidentiality’. The previous requirements matching the current code are as follows: *Guide to the Professional Conduct of Solicitors 1999* (UK) r 16.02, note 11 is the equivalent of the current *Solicitors’ Code of Conduct 2007* r 4(18). 16.02 stipulated that where a client used a lawyer to commit a criminal offence, it did not fall within the scope of the retainer and was not covered by the duty of confidentiality. In practice, there was often some overlap between the circumstances in r 16.02 note 11 and r 16.02 note 1. Rule 16.02 note 3 corresponds with the new r 4(12), while 16.02 note 8 and Annex 16A mimic the current r 4(16). Prior to 1999, the requirements were fairly unchanging. See also ALE Newbold, above n 68, 475.

⁷⁰ Norman Spaulding, *Compliance, ‘Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege’* (2013) 2013 *Journal of the Professional Lawyer* 135, 139-140.

⁷¹ *Ibid.*

⁷² (1915) 11 Cr App R 229.

⁷³ *Ibid.*

‘mutually beneficial wills and resettlement of his wives’ properties’.⁷⁴ The Court of Criminal Appeal, presided over by Lord Reading CJ, held that the trial judge had erred in admitting evidence of client–counsel communications, which he stated did not relate to the commission of a crime within the meaning of *R v Cox & Railton*.⁷⁵

Phillipps’ Treatise on the Law of Evidence states that, ‘if the case of *R v Smith* had been fully in point against the admission of the evidence, it could not be considered good law’.⁷⁶ *Phillipps* noted that the will of Smith’s last wife, Betsy Munday, was professionally deposited with the lawyer as a matter in confidence between them and solely for Smith’s own interests.⁷⁷ *R v Smith*⁷⁸ was directly on point in *R v Tylney, Henry and Jemima Tuffs*.⁷⁹ In that proceeding, the trio of Tylney, Tuffs and Tuffs were charged with intent to defraud the beneficiary of a will, namely, William Tuffs. No proof of the latter’s existence was established and the *Tylney* Court held that, if the existence of a forged will could not wrong anyone and no adverse consequence could result, it would seem that even an intent to defraud could not be imputed.

Having entertained doubts as to whether or not the defendants could be convicted on such a count, Parke B determined that a valid objection could be sustained to prevent a forged will being produced by the defendants’ lawyer on the ground that it was a privileged communication.⁸⁰ Legal professional privilege is not prevented from attaching merely because a lawyer is employed to advance an account of events known by the client to be untrue or involving a ploy to mislead his adversary and the court. An application of this principle can be seen in the later

⁷⁴ ALE Newbold, above n 68, 475.

⁷⁵ *Ibid.*

⁷⁶ Samuel Phillipps, *Phillipps’ Treatise on the Law of Evidence* (Butterworth & Son, 9th ed, 1843) 171.

⁷⁷ *Ibid.*

⁷⁸ (1915) 11 Cr App R 229.

⁷⁹ (1848) 1 Den 820.

⁸⁰ *Ibid.*

English judgments of *R v Snaresbrook Crown Court; Ex parte DPP*⁸¹ and *R v Central Criminal Court; Ex parte Francis & Francis (A Firm)*.⁸²

In the first of these two cases, a client lodged a legal aid application in which he accused a police officer of breaking his nose. He claimed damages for assault. It transpired that the injury was unrelated to the police incident and culminated in the client's prosecution for making a false allegation and attempting to pervert the court of justice. Although the police alleged that the defendant was furthering a criminal purpose, Glidewell LJ stated:

Put a little more extensively, the Law Society holds the legal aid application to enable it to decide whether to grant legal aid for pursuing a civil claim which may prove to be false, as indeed some are. But it does not, I entirely agree with the judge, hold it with the intention of furthering a criminal purpose. No intention could be further from its thoughts.⁸³

In contrast to *Cox & Railton*, which made it clear that the relevant iniquitous intention must derive from the client and not the lawyer, *Snaresbrook* decided that the Law Society's intention was a prevailing interest. In *Francis & Francis*, a third angle was considered, namely the criminal intent of a third party. In that case, trial judge, Machin J, pursuant to s 27 of the *Drug Trafficking Offences Act 1986*, ordered a law firm to produce all documents, accounts and records pertaining to a property purchase made by one of its clients using funds from an alleged drug trafficker. *Francis & Francis* sought a declaration that the order breached the rules of natural justice or related to items subject to legal professional privilege.⁸⁴ It further claimed that neither the firm nor its client intended to further a criminal conspiracy.⁸⁵

⁸¹ [1988] QB 532.

⁸² (1988) 87 Cr App R 104.

⁸³ *R v Snaresbrook Crown Court; Ex parte DPP* [1988] QB 532, 1060.

⁸⁴ *R v Central Criminal Court; Ex parte Francis & Francis (A Firm)* (1988) 87 Cr App R 104, 108 (Lloyd LJ).

⁸⁵ *Ibid.*

The question to be decided by the Court was whether the documents in the possession of the law firm were confidential or held with the intention of furthering a criminal purpose. In the circumstances, the conduct of a fraudulent third party was sufficient to nullify the privilege because that party was using the unsuspecting client and their law firm to perpetrate a fraud. Lloyd LJ, in his judgment, observed that this proceeding raised a difficult but important question as to the definition of items subject to legal privilege.⁸⁶ He resolved that courts are always reluctant not to follow their previous rulings, but if persuaded that a previous ruling is clearly wrong, they are bound to say so.⁸⁷ Ultimately, ‘disclosure of a third party’s iniquity must, in the interest of justice, prevail over the privilege of the client, even though the client may be innocent’.⁸⁸ This concept is discussed further in Chapter V, while the following section concentrates on the more established limitations and exclusions to the rule as gleaned from the judgments of Lord Taylor.

III WIGMORE ON WAIVER: THE ‘FAIRNESS’ FACTOR

Wigmore’s four-tiered paradigm accorded a narrow construction to the rule of legal professional privilege, whereby he premised the application of the privilege around four basic elements. Articulating the conditions antecedent to a valid claim of privilege, Wigmore asserted that if the following fundamental canons were not satisfied, there neither is, nor ought to be, a privilege.⁸⁹

- (1) The communications must originate in a confidence that they will not be disclosed;

⁸⁶ Within the meaning of the *Police and Criminal Evidence Act 1984* (UK) s 10. *R v Central Criminal Court; Ex parte Francis & Francis (A Firm)* (1988) 87 Cr App R 104, 105 (Lloyd LJ).

⁸⁷ *R v Central Criminal Court; Ex parte Francis & Francis (A Firm)* (1988) 87 Cr App R 104, 108 (Lloyd LJ).

⁸⁸ *Ibid* 104 (Goff L).

⁸⁹ John Wigmore, ‘A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States’ Vol IV (Little, Brown & Co., 1905) § 2285.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered;

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.⁹⁰

It logically follows that any communication or document asserted as falling *under* the rule must be tightly confined and not circulated, whether or not through a wilful act; otherwise the privileged character of the communication will necessarily be lost. Wigmore's contention that the purpose of waiving the rule over a whole document where only partial disclosure had occurred was grounded in 'fairness' so as not to mislead or deceive.

The practical foundation to Wigmore's argument can be expressed as being grounded in the fact that any form of disclosure is inconsistent with the purpose of legal professional privilege. In the narrowest sense of the term, 'waiver' occurs when a client who is entitled to assert the privilege volunteers the privileged communication in the course of legal proceedings.⁹¹ Privilege ultimately ceases if the client is not desirous of secrecy,⁹² and once confidentiality has been irretrievably lost it cannot be reclaimed. Privilege cannot re-attach.

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance

⁹⁰ Ibid.

⁹¹ Richard Pike, 'Legal Professional Privilege: A Guide for American Attorneys' (2006) 4 *Loyola University Chicago International Law Review* 51, 83.

⁹² John Wigmore, *Treatise*, above n 7, §2311, 3233.

permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.⁹³

Wigmore initially argued that, under the 16th-century justification for the privilege, the tenets of oath and honour enabled the lawyer alone to waive the rule, because it was for him to determine what oath and honour demanded;⁹⁴ yet when he identified the circumstances giving rise to waiver of legal professional privilege, he put the ball squarely in the client's court. The privilege could be displaced, Wigmore claimed, if the client revealed a confidential communication in the presence of a third party.⁹⁵

The reason for his change in viewpoint corresponded with the 17th- and 18th-century theories⁹⁶ in which the lawyer was deemed incompetent to reveal confidential client communications connected to litigation, before the law changed and prohibited disclosure except upon consent from the client. Wigmore noted that Bentham had long ago denounced the use of the term 'competent' to excuse lawyers from testifying.

Wigmore stated that the party invoking the privilege ought to be permitted to waive it and that its scope was subject to exceptions.⁹⁷ He added that waiver could occur not only through verbal communication, but by way of gestures, including partial disclosure. Defined as the renunciation of a right or entitlement, 'waiver' would prevent the client from thereafter relying on the privilege, since the dominance of the modern theory held that it belonged to the client alone; the power to waive it rested solely with the client.⁹⁸

⁹³ Ibid §2292, 3204.

⁹⁴ Justin Gleeson, James Watson and Elisabeth Peden, *Historical Foundations of Australian Law: Volume II – Commercial Common Law* (Federation Press, 2013) 136.

⁹⁵ John Wigmore, *Treatise*, above n 7, §2311, 3233.

⁹⁶ Ibid §2290, §2291 3196.

⁹⁷ Edward Imwinkelried, 'Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges' (2004) 65 *University of Pittsburgh Law Review* 145, 147.

⁹⁸ Charles McCormick, *McCormick on Evidence* (West Publishing Co, 2nd ed, 1972) 194.

Wigmore cautioned that individual circumstances would vary in each ruling and must therefore depend on the case in hand.⁹⁹ Confining his illustrations to civil cases for convenience, Wigmore borrowed from the judgments in *Greenough v Gaskell*¹⁰⁰ and *Cobden v Kenrick*,¹⁰¹ wherein he noted that privilege could not be retained where the information could not be termed the subject of a confidential disclosure.¹⁰² He distinguished voluntary assertions from communications made confidentially for the purpose of conducting a suit and cautioned that, where disclosure to a third party under legal professional privilege ordinarily constituted a waiver of the rule, this was not effected unless the party's conduct touched a certain point of disclosure.¹⁰³

Wigmore noted two further points: if the privilege had been erroneously declined or refused, said party could not appeal on the ground of error or mistake,¹⁰⁴ and upon the death of the client there was no demand for a cloak of secrecy.¹⁰⁵ He did not elaborate on whether he viewed such a scenario as an implied waiver to the privilege. Instead, Wigmore posited the question: 'What constitutes a waiver by implication? Judicial decision gives no clear answer to this question'.¹⁰⁶ Nevertheless, it can reasonably be inferred from the sum of his remarks that the *ex post* importance of confidential communications and the interests of a deceased client could not be adversely impacted by the absence of legal professional privilege.

⁹⁹ John Wigmore, *Treatise*, above n 7, §2311, 3234.

¹⁰⁰ (1883) 1 M & K 98.

¹⁰¹ (1833) 4 TR 431.

¹⁰² *Greenough v Gaskell* (1883) 1 M & K 98.

¹⁰³ John Wigmore, *Evidence in Trials at Common Law* (John T. McNaughton, 1961) § 2327, 636; Jeff Anderson, Gina Cadieux, George Hays et al, 'The Work Product Doctrine' (1983) 68 *Cornell Law Review* 760, 884.

¹⁰⁴ John Wigmore, *Treatise*, above n 7, § 2321, 3249.

¹⁰⁵ John Wigmore, *Evidence*, above n 103, § 2314.

¹⁰⁶ John Wigmore, *Treatise*, above n 7, § 2327, 3252.

Recognising that there was a want of harmony in the rulings, Wigmore resolved that ‘no doubt much ought to depend upon the circumstances of each case’.¹⁰⁷ He maintained that courts were under no obligation to guard secrets that were not, by their nature, private; for ‘the moment confidence ceases, privilege ceases’.¹⁰⁸ Wigmore articulated several points for determining whether or not waiver had occurred in a particular context.

The first tenet was that the client’s own offer to testify in proceedings did not constitute a waiver, for the purpose of either examination or cross-examination; otherwise a claim of privilege would serve only to close the client’s mouth on the stand.¹⁰⁹ The second principle was that any knowledge casually acquired by the client’s lawyer as an ordinary witness did not amount to a waiver; but any knowledge obtained outside this scope was a waiver. Considering that lawyers should not generally be called as witnesses in their clients’ cause,¹¹⁰ the client ought not employ their lawyer in a manner that would produce a double-minded attitude¹¹¹ whereby the lawyer would have to decline to invoke their legal function as an adviser if they were deemed fit to testify as a witness.¹¹²

Third, Wigmore pronounced that, if the client offered up the testimony of their lawyer as to facts confidentially communicated between them, it was a waiver.¹¹³ It had the effect of waiving the privilege over all other communications passing between the pair in a professional capacity.¹¹⁴ Should the client offer partial testimony as to communications between themselves and their lawyer, the principle of fairness dictates that it results in a waiver of the whole of the communications.¹¹⁵

¹⁰⁷ Ibid §2312, 3238.

¹⁰⁸ *Parkhurst v Lowten* (1816) 36 ER 589, 596 (Lord Eldon).

¹⁰⁹ John Wigmore, *Treatise*, above n 7, § 2327, 3253.

¹¹⁰ Ibid § 1911.

¹¹¹ Ibid § 2291, 3204.

¹¹² Ibid § 2327, 3253.

¹¹³ Ibid § 2327, 3254.

¹¹⁴ Ibid § 2113, § 2327, 3254.

¹¹⁵ Ibid.

Despite Wigmore's pronouncement, judicial opinion has varied as to whether the legal profession should, in a variety of different contexts, permit the privilege to be re-established over waived communications. As Section III will show, the courts of England have predominantly deferred to Wigmore when seeking to resolve any uncertainty with respect to the rule. This is exemplified in two cases over which Lord Taylor adjudicated: *Tanap v Tozer*¹¹⁶ and *Goldman v Hesper*.¹¹⁷ Each of these proceedings produced markedly different outcomes and added significantly to the confusion regarding the extent of legal professional privilege.

IV NATURAL JUSTICE AND LEGAL PROFESSIONAL PRIVILEGE: LIMITATIONS AND EXCLUSIONS

A *Goldman v Hesper*

The question to be decided by the Court of Appeal in *Goldman v Hesper*¹¹⁸ was whether an assertion of privilege could be claimed over a bill of taxation pursuant to Order 62 of the Rules of the Supreme Court. A dissolution of marriage suit between appellant Michael Goldman and respondent Walpurga Hesper, culminated with Calvert QC, sitting as trial judge, ordering Goldman to pay all of Hesper's costs on a common fund basis.¹¹⁹ Goldman subsequently persuaded Hesper to provide written consent voluntarily surrendering the privilege and permitting him to inspect papers relating to taxation of costs in the suit. After waiving her right to claim privilege over the documents, Hesper sought legal advice and was instructed to withdraw her consent and reassert her claim of privilege.¹²⁰

¹¹⁶ *Tanap Investments (UK) v Tozer* [1991] WL 839041.

¹¹⁷ [1988] 1 WLR 1238.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

Referring to the decisions of Stevenson J in the divorce hearing of *Hobbs v Hobbs and Cousens*¹²¹ and Hobhouse J in *Pamlin v Express Newspapers*,¹²² the Goldman Court noted that conflicting judicial decisions had emerged regarding whether or not a party was entitled to inspect documents relied upon by their adversary, including privileged communications.¹²³ Such a revelation frustrates the sole purpose of the privilege. In *Hobbs*, which was considered in *Derby*, Stevenson J emphasised the importance of the rule. He noted that, even if doubt existed as to the area covered by legal professional privilege, it was evident that in divorce litigation intolerable consequences would arise if someone in the respondent's position were permitted to see the inside of the lawyer's brief delivered on behalf of the appellant.¹²⁴ Stevenson J added that natural justice and common sense could not triumph over the privilege and decried any attempt by the respondent to inspect or closely examine the contents of counsel's brief.¹²⁵ Bentham himself noted the impracticality of reconciling legal professional privilege and natural justice.

In *Pamlin*, Hobhouse J resolved the question in favour of natural justice over confidentiality of privileged communications. Adopting the counter-view to Stevenson J, he pronounced that, ultimately, the principle that each side must have the right to see any relevant material which their adversary is placing before the trier of facts, and which is taken into account in arriving at a decision, must prevail.¹²⁶ Hobhouse J opined that it was for the appellant to elect whether they desired to waive the privilege or assert it in order to retain confidentiality over the documents.¹²⁷

Goldman relied on the *Pamlin* judgment when he advanced the position that, as a matter of natural justice, he should be entitled to inspect any communication

¹²¹ [1960] P 112.

¹²² [1985] 2 All ER 185.

¹²³ *Goldman v Hesper* [1988] 1 WLR 1238.

¹²⁴ *Hobbs v Hobbs and Cousens* [1960] P 112, 116 (Stevenson J).

¹²⁵ *Ibid.*

¹²⁶ *Pamlin v Express Newspapers* [1985] 2 All ER 185, 190 (Hobhouse J).

¹²⁷ *Ibid.*

which Hesper sought to use.¹²⁸ He stated that only through viewing the taxation bill could he know whether to challenge any of the items listed and suggested that it was wrong to permit the Registrar to see Hesper's documents while he was denied sight of them.¹²⁹ Counsel for Goldman, Mr Fleming, argued that Hesper could not recant her waiver over specific privileged material.¹³⁰

Taylor LJ, who delivered the judgment of the court with which Lord Donaldson MR and Woolf LJ concurred, contended that this argument could not succeed.¹³¹ He distinguished the material facts of *Goldman*, in which no action had been taken on the letter of waiver, from a scenario in which documents had already been dispatched for inspection and concluded that, upon taking legal advice, Hesper was perfectly entitled to withdraw permission.¹³² While this ruling went some way towards affirming Wigmore's stance that waiver was not effected unless the party's conduct touched a certain point of disclosure,¹³³ *Goldman* exemplified that waiver could be retracted upon a client subsequently obtaining legal advice.

In the course of his judgment, Taylor LJ added that the approach taken by Stevenson J in *Hobbs* was 'too rigid and uncompromising. There may be instances in which taxing officers may need to disclose part, if not all, of the contents of a privileged document in striking the appropriate balance'.¹³⁴

Just as he had done in *Balabel*, Taylor LJ again recognised that legal professional privilege was not immutable. Applying a pragmatic approach, he averred that it necessitated the weighing of competing interests through 'striking an appropriate balance' with respect to privileged communications. Taylor LJ additionally noted

¹²⁸ *Goldman v Hesper* [1988] 1 WLR 1238.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ John Wigmore, *Evidence*, above n 103, § 2327, 636. See also Anderson et al, above n 103, 884.

¹³⁴ *Goldman v Hesper* [1988] 1 WLR 1238 (Taylor LJ).

the usefulness of the view promulgated by Hobhouse J, particularly the principle that litigants must be availed recourse to any relevant material upon which their adversary relies and which is utilised by a court or tribunal in reaching its conclusion.¹³⁵

In adhering to a ‘natural justice’ approach with respect to the rule, Taylor LJ recognised that legal professional privilege was not one-directional. The rule could not have applied ‘irrespective of the client’s individual merits’, as he stated in *Derby*, because the privilege could not operate to include confidential communications on one hand, while, on the other hand, exclude further confidential communications in which partial disclosure had not compromised the integrity of that information. Taylor LJ concluded that even a voluntary waiver or disclosure to or by a third party, such as a taxation officer, would not proscribe the owner of the document from reasserting a claim of privilege in any subsequent context.¹³⁶

Taylor LJ referred to *British Coal Corporation v Dennis Rye Ltd (No 2)*.¹³⁷ In that case, the Court of Appeal, presided over by Dillon, Neill and Stocker LLJ, held that it was possible for the privilege to be waived ‘for a specific purpose and in a specific context only’.¹³⁸ In *British Coal*, communications brought into existence for a civil proceeding were subsequently disclosed in a criminal investigation.¹³⁹ The question to be decided by the Court was whether disclosure to police could be construed as a waiver of privilege in favour of the defendant for the purposes of the civil proceeding. Neill LJ stated that British Coal Corporation had divulged communications for the limited purpose of facilitating a criminal investigation in accordance with their duty, and objectively this did not conform to an express or implied waiver of privilege in relation to the civil suit.¹⁴⁰

¹³⁵ *Pamlin v Express Newspapers* [1985] 2 All ER 185, 190 (Hobhouse J).

¹³⁶ *Goldman v Hesper* [1988] 1 WLR 1238 (Taylor LJ).

¹³⁷ [1988] 1 WLR 1113.

¹³⁸ *Ibid* 1244-1245.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid* (Neill LJ).

Taylor LJ utilised the ‘limited purpose’ rationale to restore the privilege which Hesper had voluntarily surrendered. The *Goldman* judgment diverged from Bentham and Wigmore, who did not recognise a ‘limited purpose waiver’. According to Wigmore, if a client selectively volunteered information, the dictates of fairness prohibited them from withholding the remainder of it and this would be fatal to the privilege, irrespective of the client’s intent.¹⁴¹ Even accidental waiver of information would suffice to preclude any continuing confidence in privileged documents.

Although Wigmore noted that the reasoning of the courts is ‘too often loosely or obscurely stated’,¹⁴² neither he nor Bentham would have endorsed an approach in which waiver could be utilised for a limited purpose or in a limited context. If a client selectively volunteered information, this would be fatal to the privilege, irrespective of the client’s intent¹⁴³ and the dictates of fairness would prohibit them from withholding the remainder of the communication. According to attorney and lecturer Jeff Anderson and colleagues:

Wigmore grasped that the elements of fairness and consistency had to be taken into account in determining whether waiver had occurred in the context of privileged communications and suggested that, where one side could demonstrate that their adversary’s partial disclosure resulted in inherent unfairness, the courts should find in favour of waiver.¹⁴⁴

Rupert Cross disagreed with the ‘fairness’ rationale when he stated that a waiver was generally brought about by the inconsistency which the courts perceived between the conduct of the client and the maintenance of the confidentiality, as

¹⁴¹ John Wigmore, *Evidence*, above n 103, § 2327, 636. See also Anderson et al, above n 103, 884.

¹⁴² John Wigmore, *Treatise*, above n 7, §2312, 3235.

¹⁴³ John Wigmore, *Evidence*, above n 103, § 2327, 636. See also Anderson et al, above n 103, 884.

¹⁴⁴ Anderson et al, above n 103, 884

opposed to some overriding principle of fairness operating at large.¹⁴⁵ In other words, waiver of legal professional privilege required that the client intentionally, and with full knowledge, relinquish their rights. This could only be established by examining their conduct at the time when the communication was made.¹⁴⁶

Ethics scholar Charles Wolfram¹⁴⁷ similarly observed that, in order to amount to a waiver, the client's act of disclosure must have been voluntarily made to a non-privileged individual; that is, a person not recognised as being covered by the privilege.¹⁴⁸ He added that, once the privilege struggled into existence, its fragile life was threatened by forces that could extinguish it.¹⁴⁹ Those forces lie within the client's control and can be snuffed out with their consent.¹⁵⁰ Phipson put this into practical effect when he stated that the conduct of the party who volunteered material to the court is what gives rise to a waiver of privilege.¹⁵¹ He noted that, if that party elected to tender part of a document or a sequence of documents before the court, they must also tender the remainder of the information in order to ensure fairness to their adversary.¹⁵²

B *Burnell v British Transport Commission*

While the argument of 'fairness' with respect to waiving the rule was grounded in Wigmore's approach to the privilege, it was articulated at common law in *Burnell v British Transport Commission*.¹⁵³ Decided in 1956, this personal injury proceeding involved the cross-examination of a witness regarding the contents of a written statement he had made. While counsel for the plaintiff sought discovery

¹⁴⁵ Rupert Cross, *Cross on Evidence* (Lexis Nexis Butterworths, 2nd Aust ed, 1979) 827.

¹⁴⁶ *Ibid* 879.

¹⁴⁷ Cornell University Law School, *Charles W Wolfram* <<http://www.lawschool.cornell.edu/faculty/bio.cfm?id=183>>.

¹⁴⁸ Charles Wolfram, *Modern Legal Ethics* (West Publishing Co, 1986) 270.

¹⁴⁹ *Ibid* 268.

¹⁵⁰ *Ibid*.

¹⁵¹ Sidney Phipson, *Phipson on Evidence* (Sweet & Maxwell, 18th ed, 2013) 26-04, 812.

¹⁵² *Ibid*.

¹⁵³ [1956] 1 QB 187.

of the document, the defence contended it was protected from disclosure on the grounds of privilege.¹⁵⁴ The trial judge compelled disclosure and this order was upheld by Lord Denning on appeal.¹⁵⁵

Reiterating Wigmore's view that 'fairness' underpinned the privilege, he ruled that, once a confidential communication was used by counsel during cross-examination, it was waived not only for that part of the document, but for the whole of it.¹⁵⁶ Lord Denning added that it would be unfair for the plaintiff's counsel to use the portion which was most advantageous to his client and not permit the opposing party or judge to view the remainder of the material which may be to his detriment.¹⁵⁷

Lord Denning's justification for declaring that a partial waiver constituted a whole waiver of a specific document or communication lay in its ability to prevent obstruction through misleading an adversary. His commentary in *Burnell* was reiterated by Mustill J in *Nea Katerina*:

[T]he principle underlying the rule of practice exemplified by *Burnell v British Transport Commission* is that, where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.¹⁵⁸

The relevant question to ask is whether material affected by partial disclosure which is not misleading should retain its privileged character. This question was

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corporation* [1981] Com LR 138 (Mustill J).

settled in another case on which Lord Taylor ruled, namely, *Tanap Investments (UK) v Tozer*.¹⁵⁹ The judgment was strikingly different from *Goldman v Hesper*¹⁶⁰ because, where *Goldman* permitted the privilege to be reasserted once waived, *Tanap* decided that, if the privilege is partially waived in respect of a correspondence or communication, it is waived over the entire document.

C *Tanap v Tozer*

Five years prior to *Derby* being decided, Taylor LJ, together with Balcombe LJ, presided over *Tanap Investments (UK) v Tozer*.¹⁶¹ The facts leading to the *Tanap* appeal resulted from trial procedures in which Mummery J relied on Rule 19A of the *Rules of the Supreme Court 1894* (UK) when ordering disclosure of documents by the plaintiff company, Tanap. This piece of legislation deferred to Wigmore's treatise¹⁶² when making express provision for courts to inspect documents over which a claim of legal professional privilege was made.¹⁶³ Court inspection of protected communications is unlikely to constitute a disproportionate interference with the right to legal professional privilege.

The plaintiff company complied with the judicial order and disclosed attendance notes, while resisting any further disclosure of documents.¹⁶⁴ Tozer argued that partial disclosure of information constituted a full waiver of legal professional privilege and sought production of the remaining materials.¹⁶⁵ In deciding whether legal professional privilege could be claimed over client–counsel

¹⁵⁹ [1991] WL 839041.

¹⁶⁰ [1988] 1 WLR 1238.

¹⁶¹ [1991] WL 839041.

¹⁶² John Wigmore, *Evidence*, above n 103, § 2317–19. This section mentioned that the privilege was not concerned with a lawyer's desire for secrecy in their conduct of their client's case.

¹⁶³ *Rules of the Supreme Court 1894* (UK) Order 31, r 19A.

¹⁶⁴ *Tanap Investments (UK) v Tozer* [1991] WL 839041 (Taylor LJ). Lord Taylor stated: 'Any waiver of privilege ... would be liable to have the most wide ranging consequences and [would] give rise to a reductio ad absurdum if one follows it to the length to which the defendants seek to follow it in the present case.'

¹⁶⁵ *Ibid.*

communications that had been partially disclosed at trial, Taylor LJ approved of the reasoning of Hobhouse J in *General Accident Fire and Life Assurance Corporation Ltd v Tanter*.¹⁶⁶

D *General Accident Fire and Life Assurance Corporation Ltd v Tanter*

In *Tanter*, Hobhouse J averred to an expanse of judicial authority when discerning the circumstances in which privilege is waived, and the extent to which communications should thereafter be disclosed. In reviewing these authorities, he formulated eight principles in relation to the ability, at trial, to claim privilege over confidential communications. Hobhouse J first noted that, under the English adversarial process, a party could elect what evidence was adduced at trial. English law holds that, when representing a client, the lawyer has authority to bind their client in any matter pertaining to, or arising from, litigation.¹⁶⁷ This includes authority to waive the privilege that inures to the benefit of the client.¹⁶⁸ Indeed, notwithstanding the fact that a client may expressly instruct their lawyer not to waive the privilege, it is waived if the lawyer mistakenly reveals protected information to the court.¹⁶⁹ Hobhouse J next stated that the rule of legal professional privilege shielded certain categories of communication from pre-trial discovery and cited *Waugh v British Railways Board*¹⁷⁰ in support of this.

In *Waugh*, Lord Simon stated that, despite an opponent's brief containing relevant material, the other side could not see it because this was inconsistent with the adversary forensic process based on legal representation.¹⁷¹ Hobhouse J either overlooked, or elected not to mention, subsequent remarks made by Lord Simon in the same case. It is noteworthy to recount that Lord Simon clarified that the privilege should only be upheld where necessary to achieve the purpose for which it was designed and, if any document was created for a purpose quite apart from

¹⁶⁶ [1984] 1 WLR 100.

¹⁶⁷ Richard Pike, above n 91, 83.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ [1980] AC 521.

¹⁷¹ Ibid 537 (Lord Simon).

seeking legal advice, there was no need for the privilege.¹⁷² In contrast, Hobhouse J contended that it was at the discretion of each party to decide whether or not to waive the privilege and, if so, the extent to which they did. His fourth point was derived from the decisions in *Lyell*, *Burnell* and *Great Atlantic Insurance Co*, whereby he stated that the partial waiver of a communication amounted to a waiver of the whole of that communication.¹⁷³

By contrast, Lord Simon was conscious of the need to aid the truth-finding function of the courts and could see ‘no intrinsic reason why legal professional privilege should prevail in a situation where it was counter-indicative’.¹⁷⁴ He ultimately resolved that the rule was not absolute, but subject to numerous exceptions.¹⁷⁵ Hobhouse J, for his part, recapitulated Wigmore wherein he stated that the underlying principle was grounded in the need for fairness in the conduct of the trial. He confirmed that it went no further than that, nor did it extend to all matters relating to the subject of those conversations.¹⁷⁶

This was reflected in *Derby v Weldon (No 10)*,¹⁷⁷ where Hobhouse and Vinelott JJ distinguished the extent of instructions given to the lawyer from the substance or content of that advice.¹⁷⁸ In that proceeding, the plaintiff resisted an application for disclosure of instructions and enclosures to counsel on the basis that privilege was waived solely in relation to an attendance note.¹⁷⁹ It was argued that this was a complete, self-contained document that could be viewed in isolation from, and without having recourse to, other material.¹⁸⁰ Hobhouse J concluded that ‘the underlying principle is ... fairness in the conduct of the trial ... any waiver of

¹⁷² Ibid.

¹⁷³ *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1; *Burnell v British Transport Commission* [1956] 1 QB 187; *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529.

¹⁷⁴ [1984] 1 WLR 100.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ [1991] 1 WLR 660.

¹⁷⁸ Ibid 668B (Vinelott J).

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

privilege ... would be liable to have the most wide ranging consequences and [would] give rise to a *reductio ad absurdum*.¹⁸¹

Taylor LJ took up this point in *Tanap*, where he stated that, if the Court followed the argument of the defendants, ‘the waiver of privilege would give rise to a *reductio ad absurdum*’.¹⁸² Where, in *Balabel*, Taylor LJ noted that privilege attached in meetings between lawyer and client where there was a continuum of communication aimed at keeping both informed so that instructions and advice may be conveyed,¹⁸³ he and Balcombe LJ expressed agreement with the principles enunciated by Hobhouse J. When formulating their decision, they also took into consideration the pronouncement of Lloyd J in *Great Atlantic Insurance Co v Home Insurance Co*.¹⁸⁴

E *Consequences for Voluntary and Involuntary Waiver of Legal Professional Privilege*

Although ultimately decided on appeal, Lloyd L, as he then was, heard *Great Atlantic Insurance Co* in the first instance. Taylor and Lloyd LJ were two of the five judges who presided over *R v Derby Magistrates Court; Ex parte B*.¹⁸⁵ The substance of *Great Atlantic Insurance Co* was grounded in a marine insurance agreement. The agreement was authorised by Afia and entered into in 1977 between the plaintiff insurer, Great Atlantic Co and C E Heath & Co (International) Ltd on behalf of Home Insurance Company. Home Insurance Company was run by Mr Eiger who engaged in marine insurance brokerage. Mr Eiger negotiated marine insurance on behalf of clients whose policies were then underwritten by Great Atlantic Co. The Home Insurance Company would re-insure them. The following year, a quota share marine-and-aviation agreement superseded the existing contract.

¹⁸¹ *General Accident Fire and Life Assurance Corporation Ltd v Tanter (The Zephyr)* [1984] 1 WLR 100, 114.

¹⁸² *Tanap Investments (UK) v Tozer* [1991] WL 839041 (Taylor LJ).

¹⁸³ *Balabel v Air India* [1988] Ch 317, 330 (Lord Taylor).

¹⁸⁴ [1981] 1 WLR 529.

¹⁸⁵ [1996] AC 487.

By 1980, Great Atlantic Co expressed concerns about the negotiations and business practices in which Eiger engaged. An insurance expert, Mr Alexander, was called upon to investigate. He subsequently produced an adverse report, both orally and in writing, which detailed Eiger's conduct. The contents of the report were verbally conveyed to an American representative of the attorneys for Great Atlantic Co.¹⁸⁶ In response to this information, the attorneys of Great Atlantic Co sent a memorandum to their client in May 1980. It included a two-paragraph account of the discussion between Alexander and their representative and outlined other matters pertaining to Eiger.

At trial, the English firm of solicitors representing Great Atlantic Co made no attempt to invoke a claim of privilege over the first two paragraphs of the memo on the basis that it detailed a discussion which was not, in and of itself, privileged. While they allegedly intended to assert privilege over the remainder of the document, and other documents, no such claim was made despite the plaintiff arguing that the rest of the memo was protected.

Although C E Heath & Co had been unaware that the memo they received was incomplete and had no knowledge of the additional information contained therein, they sought disclosure immediately upon being made aware of the circumstances. Having already been provided copies of the first two paragraphs, they claimed that they were entitled to see the material in its entirety. Their argument was predicated on the fact that, if the whole document had been privileged and privilege had been waived in respect of the first two paragraphs, it had been waived over the whole of the document.

Judge Lloyd held that Alexander's report did not constitute a document over which privilege could be asserted. If there were such a discretion as to allow courts to restore and enable clients to reassert privilege over a portion of a document which had not yet been introduced in evidence, it would be improper

¹⁸⁶ The plaintiff, Great Atlantic Co, also retained an English firm of solicitors.

for him to exercise it in favour of Great Atlantic Co. Lloyd J ruled in favour of C E Heath & Co and granted inspection of the document in its entirety.

On appeal, Templeman LJ, with whom Dunn LJ concurred, equally observed that the memorandum did not constitute a document over which privilege could be sustained. He cited *Wheeler v Le Marchant*¹⁸⁷ as authority that no privilege could be claimed for communications passing between Alexander and the attorney's American representative as no litigation was anticipated or pending at the time the report came into existence. It was possible for C E Heath & Co (International) Ltd to access communications between Alexander and the American representative.

Templeman LJ adopted the position taken by Lloyd J that 'the court had no jurisdiction to relieve the plaintiffs from the consequences of their own mistakes'.¹⁸⁸ This reflected the Wigmorean view that 'the risk of insufficient precautions is upon the client. This principle applies equally to all documents'.¹⁸⁹ Emphasising that waiver could be said to occur in cases of involuntary disclosure such as the theft of a document, much less its inadvertent inclusion in an affidavit, Wigmore affirmed that the principle ultimately left it up to the client and their lawyer to take sufficient measures of caution.¹⁹⁰ The difference between inadvertent and involuntary disclosure is that 'involuntary disclosure' results from the intervention of an outside force over which the party has no control, whereas 'inadvertent disclosure' is the consequence of an unintentional or accidental act which results in the production of information otherwise subject to legal professional privilege.¹⁹¹

¹⁸⁷ (1881) 17 Ch D 675. The *Great Atlantic Insurance Co* judgment incorrectly records the citation for *Wheeler v Le Marchant*, stating that it was decided in 1851. It was in fact determined 30 years later in 1881.

¹⁸⁸ *Great Atlantic Insurance v Home Insurance* [1981] 1 WLR 529, 541E.

¹⁸⁹ John Wigmore, *Evidence*, above n 103, § 2325, 633.

¹⁹⁰ *Ibid* § 2325, 633-4.

¹⁹¹ Sidney Phipson, above n 151, 26-02, 812.

With reference to *Great Atlantic*, Phipson stated that it was ‘apparent that waiver of privilege [was] a doctrine of fairness’.¹⁹² The issue central to the determination of that case was whether waiver in relation to one document resulted in collateral waiver; thereby carrying an obligation to divulge additional communications pertaining to the same matter.¹⁹³ While commenting that it was for the court to apply its discretion in deciding what consequences attached to voluntary waiver,¹⁹⁴ Phipson remarked that, whether or not they were aware of it, the plaintiffs in *Great Atlantic* had sought to disclose one part of a document, while claiming privilege for another part of the same document.¹⁹⁵ The second point made by Phipson was that the doctrine of waiver operated on objective, rather than subjective, principles: ‘There are exceptional circumstances, of which fraud and obvious mistake are the most important. But unless those exceptions apply, the extent of any waiver must be judged objectively’.¹⁹⁶

Lloyd J opined that the *Tanap* appeal provided a useful reminder to the legal profession that all communications passing between lawyer and client, where the lawyer was acting in a professional capacity, were privileged subject to exceptions, and should only be waived with great caution.¹⁹⁷ He held that, once disclosure took place by introducing a portion of the material into evidence or using it in court, it could not be erased, as this may produce a result that is unfair or misleading.¹⁹⁸ Ruling that the privilege had been waived, the Court of Appeal did not reinstate the privilege over the communications.

The *Tanap* Court adhered to these cited authorities on the basis that, if privilege was waived in respect of a note outlining counsel’s advice, it was also waived in respect of any written or oral instructions given to counsel for the purposes of obtaining that advice. In the absence of disclosure, a real risk existed that the

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 (Lloyd J).

¹⁹⁸ Ibid.

advice would not be seen in its correct context and its weight and meaning may be misunderstood.¹⁹⁹

That particular ruling challenged the traditional presumption about waiver of legal professional privilege and highlighted the conflicting views which had emerged in the independent judicial approaches taken in *Goldman* and *Tanap*. The distinguishing feature of *Goldman* and *Tanap* was that waiver was effected only after the party's conduct touched a certain point of disclosure. This was irrespective of the fact each had waived their right to invoke the rule. As a consequence, the problem of whether privilege could be reasserted over waived communications was not sufficiently resolved. It is argued that the *Tanap* Court clearly stated the correct position by adopting a stricter interpretation. This was the better application of the doctrine of waiver, as it would otherwise have permitted the scope to be broadened to such an extent that any communication, whether or not divulged through intent or inadvertence, could conceivably be challenged as privileged.²⁰⁰

Opinion differs as to the appropriate balancing of fairness and consistency. James Bradley Thayer, in surveying the development of the law of evidence in his most famous work, the 1898 *A Preliminary Treatise on Evidence at the Common Law*, obliquely touched on the theme of legal professional privilege when he wrote that the law was not merely concerned with objective truth, but equally preoccupied with other elements:

There is another precept which should be laid down as preliminary, in stating the law of evidence; namely, that unless excluded by some rule or principle of law, all that is logically probative is admissible ... [yet] there are many exceptions to it ...

¹⁹⁹ *Tanap Investments (UK) v Tozer* [1991] WL 839041 (Balcombe LJ).

²⁰⁰ Charles McCormick, *McCormick on Evidence* (West Publishing Co, 2nd ed, 1972) 194-6.

These rules of exclusion have had their exceptions; and so the law has come into the shape of a set of primary rules of exclusion; and then a set of exclusions to those rules.²⁰¹

Charles McCormick and Charles Wolfram have argued that voluntary disclosure of confidential information prevents a subsequent claim of privilege.²⁰² McCormick described ‘waiver’ as the intentional relinquishment of a known right regardless of whether an individual knew about the existence of the privilege rule.²⁰³ Wolfram argued that intent should be an irrelevant consideration when determining whether privilege had been waived.²⁰⁴ While confirming that communications may be ‘stripped of their privileged status where clients elected to make a voluntary revelation of a communication or its contents after the privilege had attached’,²⁰⁵ he stated that no case had gone so far as to hold that every client repetition of information constituted a waiver and such a rule would be needlessly rigid.²⁰⁶ Wolfram noted the need to create a rule which accommodated the competing values of encouraging client–counsel disclosure, while keeping the privilege within reasonable bounds so as to provide access to facts by other parties.²⁰⁷

Through highlighting the complexity in applying, waiving and restoring legal professional privilege, this section has demonstrated that legal professional privilege is not absolute, but is subject to annulment and vitiation. Where academic opinion differed as to whether these interests have been sufficiently balanced, there is no doubt as to the impracticality of reconciling the rule with natural justice.

²⁰¹ James Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown & Co, 1898) 101.

²⁰² Charles McCormick, above n 200, 194.

²⁰³ *Ibid.*

²⁰⁴ Charles Wolfram, above n 148, 272.

²⁰⁵ *Ibid* 269.

²⁰⁶ *Ibid* 271.

²⁰⁷ *Ibid* 272.

V CONCLUSION

Through analysis of nineteenth and twentieth century case law, Chapter IV highlighted conduct sufficient to extinguish the privilege. In particular, the privilege may be vitiated by criminal or fraudulent intent or annulled by waiver. *R v Cox & Railton*²⁰⁸ was the paradigmatic case in proscribing the application of legal professional privilege if clients conspired with their lawyers to engage in illicit or equivalent underhanded conduct contrary to the interests of justice. *Burnell v British Transport Commission*²⁰⁹ articulated the argument of ‘fairness’ with respect to waiving the rule.

Fairness towards the opposing side constitutes the basis for upholding the exception of waiver and precludes one party from going to trial with the other’s evidence. The common theme which ran through these cases was the ‘Wigmorean perspective’ that it may be both unfair and misleading to an adversary if a party to a proceeding were permitted to ‘cherry pick’ which portions of a privileged communication they wished to divulge. Articulating the requirement that only client-counsel communications prompted by a reliance on secrecy could be protected from disclosure, Wigmore affirmed that any communications made voluntarily did not fall within the ambit of legal professional privilege.²¹⁰ The problem has been difficult from the beginning.²¹¹ ‘Better no light from history, however, than false light’.²¹²

If the courts had discretion to restore, and enable clients to reassert, privilege over a portion of a waived communication, it would be improper to exercise this discretion in favour of one party to the detriment of the other, yet as this thesis shows, in certain legal contexts legal professional privilege operates to the

²⁰⁸ (1884) 14 QBD 153.

²⁰⁹ [1956] 1 QB 187.

²¹⁰ John Wigmore, *Evidence*, above n 103, § 2327.

²¹¹ *Ibid.*

²¹² *Ibid.*

disadvantage of the parties. Ultimately, fairness to the adversary necessitates that all relevant material be furnished to ensure that what is presented is not partial.²¹³

This provides the impetus for Chapter V to address whether a third seldom-recognised exception exists when innocence is at stake.²¹⁴ Identifying the challenges that legal professional privilege presents for the justice system, particular emphasis is placed on the ability of criminal defendants to prove their innocence. The notion of ‘fairness’ is equally imperative in enabling criminal defendants access to potentially exculpatory information.

Owing to the immediate point of distinction being injustice and wrongful conviction, this chapter explores whether the effect of invoking a claim of privilege could produce injustice. In answering this question, it is imperative to consider the application of legal professional privilege in the civil and criminal contexts to assess whether the weight given to the principle differs in each. For the purposes of this thesis, this chapter contends that, logically, there is a difference in the application of the rule with respect to criminal matters if material sought makes a difference to the substance of decision-making or is vital to the conduct of the defence.

²¹³ Sidney Phipson, above n 151, 26-04, 812.

²¹⁴ The defendant in *Derby* endured a criminal trial in 1978 and a civil trial in 1991. See *R v Derby Magistrates' Court; ex parte B* [1996] AC 487, 501F (Lord Taylor CJ).

CHAPTER V: THE APPLICATION OF LEGAL PROFESSIONAL PRIVILEGE IN CIVIL AND CRIMINAL LAW

I INTRODUCTION

In light of the findings made in Chapter IV whereby fairness to the adversary dictated the furnishing of relevant material to ensure impartiality, it is necessary to reconsider the application and benefits of legal professional privilege. Through testing the common belief that the rule is an essential mechanism that enables lawyers to engage in effective representation of their clients, Chapter V assesses whether the privilege achieves an efficient system of justice or creates an ethical conflict by ascribing a professional duty that contradicts other ethical values, particularly the good of alleviating innocent suffering.¹

Critical of the operation of the privilege and cognisant of its defects, the objective is to establish whether a different application of the principle does, or should, apply in civil and criminal contexts, particularly when the gain to one party is offset by a loss to the other. In *Derby*, Lord Taylor asserted that ‘the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings, and whether by the prosecution or the defence’.² The House of Lords was required to determine whether times had changed such that ‘greater emphasis [should] now [be] placed upon the court being put into possession of all relevant material in order to arrive at the truth’.³

This chapter contends that when courts deal with legal professional privilege, it is not enough solely to consider the interests of the parties. This conflict is not merely theoretical. It is a practical problem relevant to the outcome in *Derby*. In

¹ Heidi Feldman, ‘Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?’ (1996) 69 *Southern California Law Review* 3, 900.

² *R v Derby Magistrates’ Court; ex parte B* 1996] AC 487, 503G (Lord Taylor).

³ [1996] AC 487, 509F (Lord Lloyd).

that case, Lord Taylor CJ denied the criminal defendant the opportunity to access potentially exculpatory evidence on the grounds it was protected by legal professional privilege and this privilege could not be balanced against competing interests of equal or greater significance.

Legal professional privilege is the ‘thin end of a wedge’ that divides process from justice.⁴ Section II defines civil and criminal law in an attempt to reconcile the clash of values between these apparently irreconcilable domains. It is necessary to understand whether the justification for legal professional privilege directly translates from the criminal legal setting to the civil one.⁵

Bentham and Wigmore were hesitant to adopt a one-size-fits-all policy with respect to the rule; however, Lord Taylor disagreed with the notion that legal professional privilege should have distinct applications in civil and criminal settings. Bentham despised the privilege on the grounds that it defeated justice. Bentham’s rationale for eliminating legal professional privilege requires the weighing of speculative benefits provided by the privilege against the real social harms that may ensue. This argument is further assessed against relevant case law in an attempt to determine whether a correlation exists between maintenance of the privilege and miscarriages of justice. Wigmore recognised the validity of Bentham’s argument and conceded that legal professional privilege was misused and abused, leading to intolerable obstruction of truth finding.

Section III investigates whether the construction of the privilege promotes or hinders the administration of justice and exposes the far-reaching consequences of the rule for the justice system. It resolves that the practical application of legal professional privilege is incongruous because of the contradiction between shielding client–counsel communications and admitting relevant evidence,

⁴ Rosalie Silberman Abella, ‘Professionalism Revisited: Opening Address at the Law Society of Upper Canada Benchers’ Retreat’ (Hockley Valley, Ontario, 14 October 1999) <www.ontariocourts.on.ca/coa/en/ps/speeches/professionalism.htm>.

⁵ Rosemary Pattenden, ‘Silence: Lord Taylor’s Legacy’ (1998) 2 *International Journal of Evidence & Proof* 141.

particularly if the need arises to prove innocence in a criminal prosecution. It is noted that Lord Taylor, in *Derby*, conceded a ‘more stringent duty of disclosure [is] now placed upon the prosecution’.⁶ Lord Nicholls, in that same case, observed that ‘all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome’.⁷

Having established the existence of a problem, this section draws upon the views of commentators who have expanded upon Bentham’s critique in asserting additional arguments against the application of the privilege on the basis that it perverts justice. Legal scholarship is introduced which supports the need to adopt a balancing approach to the application of legal professional privilege. Relevant judgments are examined in which different *rationes decidendi* have been applied according to particular legal contexts, whereby the balance comes down resoundingly in favour of disclosure. This chapter concludes that the rule, by its very nature, presents a danger to ‘truth’ by preventing criminal defendants accessing material which may prove their innocence or avoid a miscarriage of justice.

II PRIVILEGE IN CIVIL AND CRIMINAL PROCEEDINGS

Shortly after his appointment as Chief Justice, Lord Taylor listed the desirable attributes of a judge as patience and courtesy, knowledge of the law, experience of the court system and the ability to evaluate evidence and relate to people’s problems; all of which, he said, should lead to a sound judgment and a safe pair of hands. In his attempt to reconcile the clash of values between these two apparently irreconcilable domains, Lord Taylor declined to distinguish the privilege in civil and criminal proceedings. Instead, he claimed in *R v Derby Magistrates’ Court; Ex parte B*⁸ that the principle was the same irrespective of the legal context in which discovery was sought. Other critics contend that the

⁶ [1996] AC 487, 501D (Lord Taylor CJ).

⁷ Ibid 510F (Lord Nicholls).

⁸ [1996] AC 487, 503G (Lord Taylor).

privilege presents a dilemma, for ‘all confidentiality is questionable if the overriding goal is to get to the truth in an adversarial system’.⁹

To the collective legal psyche, the process of law must be upheld regardless of the outcome. Anything less is perceived as undermining the practice of the law,¹⁰ yet, in truth, ‘process’ may be the law’s biggest obstacle.¹¹ As it is presently interpreted and applied, the extreme ends of legal professional privilege have both theoretical and practical capacity to produce betrayal of client trust or draw legal practitioners into a clients’ perjury.¹² This aligns with the Benthamic and Wigmorean interpretations, both of which cautioned that the privilege may operate as ‘an indefensible obstruction’ and ‘when the course of justice require[d] the investigation of truth, no man ha[d] any knowledge that [was] rightly private’.¹³

Although the privilege has a place in both civil and criminal justice, this chapter argues that the benefits derived by the parties are distinct. The justification for legal professional privilege may have to be re-examined, particularly in relation to civil litigation, because ‘civil litigation conducted pursuant to ... Civil Procedure

⁹ Ronald Goldfarb, *In Confidence: When to Protect Secrecy and When to Require Disclosure* (Yale University Press, 2009) 28.

¹⁰ Christine Corcos, ‘Presuming Innocence: Alan Pakula and Scott Turow Take on the Great American Legal Fiction’ (1997) 22 *Oklahoma City University Law Review* 129, 137.

¹¹ Rosalie Abella, above n 4.

¹² Daniel Walfish, ‘Making Lawyers Responsible for the Truth’ (2004–05) 35 *Seton Hall Law Review* 613, 619.

¹³ John Wigmore and Colin McNaughton, *Evidence in Trials at Common Law, Vol X* (Little, Brown & Co, 1961) 72. According to Wigmore, ‘the sacrifice [stemming from disclosure of confidential communications] may be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. This inconvenience which he may suffer in consequence of his testimony, by way of enmity or disgrace or ridicule or other disfavoured action of fellow members of the community, is also a contribution which he makes in payment of his duties to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognise that it defines this unmistakable axiom. When the course of justice requires investigation of the truth, no man has any knowledge which is rightly private’.

Rules is in many respects no longer adversarial'.¹⁴ Given the weakened justification for the privilege in the civil justice system, reduced protection for the rule would cause no harm to clients' ability to gain access to justice. By contrast, *Derby* conceded 'there may be cases where the principle will work hardship on a third party seeking to assert his innocence'.¹⁵

The point of contention between the application of legal professional privilege in civil and criminal contexts lies in its potential to produce miscarriages of justice. The test is the impact of legal professional privilege on hard cases such as those in the criminal setting. In concealing from the court potentially exculpatory information, legal professional privilege may produce a wrongful conviction. The presumption of innocence and the prevention of wrongful conviction are cardinal principles of English jurisprudence.¹⁶ These values find expression in rules which require acquittal in the face of reasonable doubt, rules requiring the identity of informants to be divulged where necessary to prove innocence and the public interest that no innocent person be wrongfully convicted.¹⁷ The rationale underpinning the presumption of innocence was that 'to place the burden of proof on a defendant was repugnant to ordinary notions of fairness'.¹⁸

A *Privilege: A Threshold Question*

In a 1994 parliamentary debate in England, Lord Taylor CJ conveyed his belief that full and frank disclosure to one's lawyer was unlikely to be chilled by the prospect of communications one day being revealed, technically with the client's consent but in circumstances in which this could not realistically be refused at trial.¹⁹ Arguing that the House of Lords should, 'as far as humanly possible,

¹⁴ Paul England, 'Expert Privilege in Civil Evidence' (Hart Publishing, 2011) 165.

¹⁵ [1996] AC 487, 509H-510A (Lloyd LJ).

¹⁶ Adrian Zuckerman, 'Legal Professional Privilege: The Cost of Absolutism' (1996) 112 *Law Quarterly Review* 535.

¹⁷ *Ibid.*

¹⁸ *Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

¹⁹ United Kingdom, *Parliamentary Debates*, 'Criminal Justice and Public Order Bill', House of Lords, 23 May 1994, vol 555, col 520.

produce rules that would protect against wrongful conviction and safeguard the possibly innocent',²⁰ Lord Taylor recognised the 'anxiety to leave no pebble unturned in the client's interests'.²¹ He subsequently stressed that, if evidence could cast light on a fact in issue, it was very welcome.²² 'Client interests' may be interpreted as issues close to the heart of the client, while wrongful conviction affects not only the client, but society as a whole and the administration of justice.

The change in Lord Taylor's approach coincided with his ruling in *R v Keane*.²³ In that case, Lord Taylor CJ announced that 'the great principle is that of open justice ... If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosure'.²⁴ In this context, legal professional privilege may operate to the detriment of a third party defendant as opposed to the direct defendant having unfavourable material revealed. Lord Taylor encouraged trial judges to carry out a balancing exercise by having regard to the weight of the public interest in non-disclosure and to the importance of the documents to the defence.²⁵ He recommended that judges view the material in question and hear the reasons advanced for its exclusion prior to making a ruling on admissibility. 'The duty on the prosecution to disclose material in its possession has been broadened as a result of [this] decision'.²⁶

Addressing recent judicial developments, Lord Taylor CJ stated that the judiciary had extended the principle of legal professional privilege. He cited a recent example in which a judge ordered the privilege to be overridden in favour of an accused through compelling disclosure of government documents over which

²⁰ Geoffrey Robertson, 'Justice in All Fairness', *The Guardian*, 30 April 1997, 19.

²¹ Peter Taylor, 'The Lund Lecture' (1995) 35 *Medicine, Science and the Law* 1, 3.

²² *Ibid.*

²³ *R v Keane* [1994] 1 WLR 746.

²⁴ *Ibid* 751. See also *R v Turner* [1995] 1 WLR 264, 268. This is clarified further on Pp 35-36, 122 and 178 of my thesis.

²⁵ *Ibid.*

²⁶ [1996] AC 487, 500H (Lord Taylor).

privilege was claimed.²⁷ This, in turn, assisted three defendants to be acquitted of criminal charges.²⁸

Owing to the fact that a number of the most celebrated ‘miscarriage of justice’ cases turned on whether information had been disclosed or withheld from the defence; Lord Taylor CJ agreed that the criminal side of the justice system involved important issues of confidence. Appearing for the prosecution in one such case which culminated in the wrongful conviction of Stefan Kiszko, Lord Taylor noted that there were issues of public perception to consider²⁹ and, more compellingly, there was a need to restore public confidence in the criminal justice system.³⁰ It is certainly not easy, in a modern society, to sustain the argument that client–counsel communications should be preserved at the expense of justice.³¹ ‘Society has always been aware that any encounter between one individual and the entire judicial system is a collision of epic disproportion’.³²

In his attempt to reconcile the clash of values between these two apparently irreconcilable domains, Lord Taylor declined to distinguish legal professional privilege in civil and criminal proceedings. Instead, he reasoned in *R v Derby Magistrates’ Court; Ex parte B*³³ that the principle was the same irrespective of the legal context in which discovery was sought. This ran contrary to subsequent remarks made in the same case where, as a matter of principle, legal professional privilege should yield to disclosure in exceptional cases particularly where it may

²⁷ Peter Taylor, ‘Richard Dimpleby Lecture’, Peter Taylor, ‘Richard Dimpleby Lecture: The Judiciary in the Nineties’ (1993) 19 *Commonwealth Law Bulletin* 323, 328. See also Peter Taylor, ‘Richard Dimpleby Lecture: The Judiciary in the Nineties’ (Lecture, BBC Education, London, 30 November 1992). Lord Taylor of Gosforth CJ did not name the case.

²⁸ *Ibid.*

²⁹ Peter Taylor, ‘Lund Lecture’, above n 21, 6.

³⁰ Michael Beloff, ‘Taylor, Peter Murray, Lord Taylor of Gosforth (1930-1997), Judge’ in *Oxford Dictionary of National Biography* (Oxford University Press, 2004) <<http://www.oxforddnb.com/index/101066165/Peter-Taylor>>.

³¹ David Ipp, ‘Lawyers’ Duties to the Court’ (1998) 114 *Law Quarterly Review* 63, 72.

³² Edward Greenspan and George Jonas, *The Case for the Defence* (MacMillan Publishers, 1987) 261–2.

³³ [1996] AC 487, 503G (Lord Taylor).

establish the innocence of an accused.³⁴ He added a caveat that ‘the order for disclosure does not mean that the privilege has come to an end: it could be cited in any related civil proceedings’.³⁵

Baroness Mallett, who participated in the 1994 parliamentary debate alongside Lord Taylor CJ, reiterated the Benthamite caution that the guilty should not be able to get away with their crimes while the innocent are wrongly jailed.³⁶ ‘Justice may be being done, but it is not necessarily being seen to be done, and justice must be seen to be believed’.³⁷ It is little use having the best jurisprudence in the world if those who most need it cannot afford to tap into it.³⁸ ‘Is this law? Is this reason? I think it is absolutely contrary to both’.³⁹ Motivated by a desire to mitigate miscarriages of justice, she noted that the consequence of elevating legal procedures to the standing of evidence could culminate in the realisation of a widespread fear that more who are innocent of crime are found guilty of it.⁴⁰ If public policy prevents disclosure, it does so in all circumstances with the exception of criminal proceedings where it is necessary to establish innocence.⁴¹

Her Peers took the opposite view, with Lord Lloyd contending that the privilege was of overwhelming importance and *the* paramount public policy consideration.⁴² Lord Nicholls accepted that, while there were real difficulties in the exercise of judicial discretion, in the absence of principled answers as to how one should equate exposure to a minor civil claim against prejudicing a criminal

³⁴ [1996] AC 487, 494D-E.

³⁵ [1996] AC 487, 494E.

³⁶ United Kingdom, above n 19, 520.

³⁷ Rosalie Abella, above n 4.

³⁸ Peter Taylor, ‘Lund Lecture’, above n 21, 4.

³⁹ *Annesley v Earl of Anglesea* (1743) 17 How St Trials 1139. See also Wigmore, *Treatise*, above n 13, § 2298, 3217–18.

⁴⁰ United Kingdom, above n 19, 520.

⁴¹ *Neilson v Laugharne* [1981] QB 736, 753.

⁴² See *R v Derby Magistrates’ Court; ex parte B* [1996] AC 487, 509H (Lord Lloyd). Lord Lloyd stated that legal professional privilege was the predominant public interest.

defendant, the prospect of a proportionality test was a ‘veritable will-o’-the-wisp’:⁴³

There is no evident stopping place short of the balancing exercise being potentially available in support of all parties in all forms of court proceedings. This highlights the impossibility of the exercise. What is the measure by which judges are to ascribe an appropriate weight, on each side of the scale, to the diverse multitude of different claims, civil and criminal, and other interests of the client on the one hand and the person seeking disclosure on the other hand?⁴⁴

B *Bentham on Legal Professional Privilege and Criminal Justice*

Bentham and Wigmore were hesitant to adopt a one-size-fits-all policy with respect to the rule of legal professional privilege. As one of the earliest, and certainly most notable, detractors of legal professional privilege, Bentham despised the privilege on the basis that it was destructive and conducive to defeating justice. He espoused the view that the privilege was an indefensible obstruction which attached ‘to every man; one safe, unquestionable and ever ready accomplice for every crime imaginable’⁴⁵ and advocated for its abolition.

Forcibly setting out the injury that may inure, Bentham maintained the propriety of compelling lawyers to reveal the secrets entrusted to them by their clients.⁴⁶ To his mind, the defects inherent in the privilege would be self-evident to the lay person, save for the fact that they were hidden from view by a screen of

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice*, Vol VII (Bowring ed, Hunt and Clarke, 1827) 338.

⁴⁶ John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States*, Vol IV (Little, Brown & Co, 1905) § 2291, 3199.

technicalities and inflated, if not false, rationalisations; and lawyers who were either blind to, or pretended not to see, the problem:

A rule of law which, in the case of the lawyer, gives an express license to that wilful concealment of the criminal's guilt, which would have constituted any other person an accessory in the crime, plainly declares that the practice of knowingly engaging one's self as the hired advocate of an unjust cause, is, in the eye of the law, or (to speak intelligibly) in that of the law-makers, an innocent, if not a virtuous practice. But for this implied declaration, the man who in this way hires himself out to do injustice or frustrate justice with his tongue, would be viewed in exactly the same light as he who frustrates justice or does injustice with any other instrument.⁴⁷

He cited three specific tensions in support of his proposition. The first of these was rooted in his belief that the doctrine wrought more harm than good. Bentham reasoned that there were many a case in which communications were divulged under an assurance of their never reaching the ears of the judge, yet these revelations, if disclosed, would actually be of use to justice.⁴⁸

The second and third reasons advanced by Bentham for the wholesale abrogation of legal professional privilege were grounded in the propensity for miscarriages of justice to arise: 'If there was one sort of case, in which, if compared to another ... was particularly needful and important [of remedy], it would be a penal case ... and in particular ... a capital one, as compared with a non-penal one'.⁴⁹ As the privilege obstructed the discovery of truth, Bentham expounded the need to demolish it, so as to ensure that all matters that were just and convenient to decide

⁴⁷ Jeremy Bentham, above n 45, 473–9, cited in Wigmore, *Treatise*, above n 45, 549–51.

⁴⁸ *Ibid* 367. See also John Wigmore, *Treatise*, above n 46, §2395–6, § 3364–5.

⁴⁹ While Bentham did not suggest *how* lawyers should go about disclosing information regarding their clients, his philosophy that 'both sides to a proceeding be heard' would seem to alleviate the need for lawyers, themselves, to make difficult judgements. Jeremy Bentham, above n 45, 123.

were before the court. Bentham was opposed to privileges and rules of disqualification.⁵⁰

To borrow a phrase from Antony at Caesar's funeral, Bentham 'came to bury' privileges, 'not to praise' them ... Only the 'natural' system, permitting rational inquiry relatively free of exclusionary rules, could ensure rectitude of decision – accurate decision-making.⁵¹

Committed to evaluating everything according to its consequences, Bentham suggested that the suffering of the guilty was greater than that of the wrongfully condemned, but qualified his proposition by conceding that the evil of unjust punishment far exceeded the commission of new crimes by acquitted felons.⁵² Pitting the public interest in attaining finality and closure in legal matters against moral and ethical standards,⁵³ Bentham urged judges to act upon the presumption of innocence and to consider acquittal as the more justifiable option than the error that condemns; for 'in listening to the voice of humanity, we follow only that of reason'.⁵⁴

According to Twining, this argument provided the basis for retaining some heads of the privilege.⁵⁵ Steyn LJ explained the English common law duty of disclosure in the following terms: 'The objective of the criminal justice system is the control of crime, but in a civilised society that objective cannot be pursued in disregard of other values'.⁵⁶ Even Thomas Denman, who was an ardent admirer of Bentham, advocated limited support for his rationale when he asserted that Bentham's mode

⁵⁰ David Leonard, Edward Imwinkelried, David Kaye et al, *The New Wigmore: A Treatise on Evidence* (Wolters Kluwer, 2nd ed, 2009) 13.

⁵¹ Ibid.

⁵² Ibid 180.

⁵³ Justice must not only be done but must manifestly be seen to be done.

⁵⁴ Ibid 180.

⁵⁵ William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford University Press, 1985) 72.

⁵⁶ *R v Brown* [1994] 1 WLR 1599, 1607B-C (Steyn LJ).

of treating criminals and the accused accorded insufficient weight to their interests and safety.⁵⁷

Bentham foresaw the need for both parties to a proceeding to be in attendance and, crucially, to be heard. This, he argued, was the best way of arriving at the truth⁵⁸ and an innocent client would have nothing to fear through divulging the truth, because nothing they said or did would devalue their word: ‘A reserve thus dictated by prudence and allowed by truth, would be the sole resource of a man of sincerity and honour’.⁵⁹ Promoting the burden of proof over legal professional privilege as the most appropriate means of guarding the accused, Bentham noted that they still had the right to put the prosecution to proof and bore no legal burden in advancing a defence.

‘The ... privilege express[es] a value choice between protection of privacy and discovery of truth and the choice of either involves the acceptance of an evil betrayal of confidence or suppression of truth’.⁶⁰ Bentham underemphasised the injustice of convicting the innocent and overemphasised the importance of detecting crime. Bentham weighed in his balance the inconvenience of convicting the innocent and argued that the danger inherent in acquitting criminals was of far greater social significance than wrongful imprisonment; for the consequence flowing from acquitting criminals was the commission of more crime, while the conviction of the innocent did not result in the further wrongful conviction of innocent people.⁶¹

Given that legal professional privilege is equally deemed a corollary to the right to counsel, where the objective of ‘process’ is to protect the individual from the

⁵⁷ Thomas Denman, ‘Review of Dumont’s *Traite de Preuves Judiciaires*’ (1824) 40 *Edinburgh Review* 79, 179-80.

⁵⁸ William Twining, above n 55, 99.

⁵⁹ Jeremy Bentham, above n 45, 143.

⁶⁰ Geoffrey Hazard, ‘An Historical Perspective on the Attorney-Client Privilege’ (1978) 66 *California Law Review* 1061, 1085.

⁶¹ Thomas Denman, above n 57, 179–80.

overwhelming power of the state,⁶² rules on disclosure exemplify the extent of the state's power to control information.⁶³ The presumption of innocence and the prevention of wrongful conviction are cardinal principles of English jurisprudence.⁶⁴ These values find expression in rules which require acquittal in the face of reasonable doubt, rules requiring the identity of informants to be divulged where necessary to prove innocence and the public interest that no innocent person be wrongfully convicted.⁶⁵ The rationale underpinning the presumption of innocence was that 'to place the burden of proof on a defendant was repugnant to ordinary notions of fairness'.⁶⁶

Bentham's view on the presumption of innocence and the potential for the privilege to result in wrongful conviction was illustrated in the emphasis he placed on moral righteousness, with the main justification for affording protection to innocents expressed in terms of a fear of the public's loss of confidence in the machinery of justice.⁶⁷ For Bentham, it was a pyrrhic victory, whereby he and his works endured much criticism. His hypothesis regarding 'deterrent influences', specifically the inability of 'a guilty person to ... derive quite so much assistance from his law adviser in the way of concerting a false defence',⁶⁸ was criticised and generally regarded as more complicated than his argument suggested. Savaging Bentham's presumption that even if the privilege did benefit the guilty just as well as the innocent, French scholar Pierre Dumont commented:

[a]dmit the opinion of Mr Bentham ... and the accused have no longer counsel; they're surrounded by agents of justice and the police against whom they ought to be so much more on their guard

⁶² Rosalie Abella, above n 4.

⁶³ Peter Taylor, 'Richard Dimpleby Lecture: The Judiciary in the Nineties' (1993) 19 *Commonwealth Law Bulletin* 323, 329. See also Peter Taylor, 'Richard Dimpleby Lecture: The Judiciary in the Nineties' (Lecture, BBC Education, London, 30 November 1992).

⁶⁴ Adrian Zuckerman, above n 16, 535.

⁶⁵ *Ibid.*

⁶⁶ *Sheldrake v DPP* [2005] 1 AC 264, [9] (Lord Bingham).

⁶⁷ William Twining, above n 55, 99.

⁶⁸ John Wigmore, *Treatise*, above n 46, § 2291, 3202.

... There are so many spies and informers placed around the accused as ... to suppress the defence entirely.⁶⁹

Charles McCormick cautioned that the legal profession need not yield fully to the force of Bentham's argument because a client, whether innocent or guilty, may mistakenly think a fact is fatal to his cause and forego resort to counsel for advice in a fair claim.⁷⁰ Despite drawing this level of scorn, Bentham was not alone in his criticism of abuses of justice and misinterpretations of the rules of law. Lord Langdale MR, in *Nias v Northern and Eastern Railway Co*, remarked on the importance of each side being able to 'sift the conscience' of the other, while in *Flight v Robinson* he admitted that he 'found great difficulty in discovering any well-grounded principle upon which the exceptions to the general rule of discovery can be said to rest'.⁷¹ Rather, Lord Langdale MR noted that the privilege prevented parties getting to the truth and emphasised the need for all relevant material to be produced and all documents by which those facts may be manifested.⁷²

The arguments [justifying the privilege] ... have assumed that concealment of the truth was, under the plausible names of protection or privilege, an object which it was particularly desirable to secure, forgetting ... that the principle upon which this Court has always acted, is to promote and compel the disclosure of the whole truth relevant to the matters in question.

Phipson similarly affirmed that 'it [is] an error to treat earlier authorities as if the words falling from judicial lips had the sanctity of statute'.⁷³ The law remained a tangled mess of exceptions and distinctions interspersed with obscure technicalities developed in response to particular situations in different contexts.⁷⁴

⁶⁹ Jeremy Bentham, *A Treatise on Judicial Evidence* (Pierre Dumont ed, J W Paget, 1825) 247.

⁷⁰ Charles McCormick, *McCormick on Evidence* (E Cleary, 3rd ed, 1984) 176.

⁷¹ (1844) 8 Beav 22, 35 (Lord Langdale MR).

⁷² *Ibid* 33–4 (Lord Langdale MR).

⁷³ Sidney Phipson, *Phipson on Evidence* (Sweet & Maxwell, 2013) 815.

⁷⁴ William Twining, above n 55, 2.

This may be owing to the fact that cases tended to rely almost entirely on authority for their results, with a single rationale employed to serve a number of different rules.⁷⁵ Criminal procedure was a mass of technicalities which were little more than absurd and highly fragmented hangovers from the past.⁷⁶ By the 1820s, judges interpreted the law in a legalistic fashion and had developed doctrines that, in Bentham's view, protected the guilty even more than the innocent. By 1875, English litigation had become increasingly unprincipled. Failing to develop a clear alternative rationale, it lost sight of the original justification for its existence.⁷⁷

This was remedied to some extent in the common law of 1890, when Lord Esher MR in *Marks v Beyfus* recognised that

if upon the trial of a prisoner the judge should be of the opinion that the disclosure ... is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.⁷⁸

More recently, Lord Hailsham criticised the legal profession for its failure to cure this defect in the law.⁷⁹ He recounted that, from early days until 1898, the applicable rule in criminal cases was that an accused person, however innocent, was invariably at increased risk of being wrongfully convicted of crimes because the truth was consistently withheld.⁸⁰ This puts into practical effect the

⁷⁵ Christopher de Courcy Ryder, *The Justification for Legal Professional Privilege* (Wellington, 1990) 28.

⁷⁶ William Twining, above n 55, 21.

⁷⁷ Richard Pike, 'The English Law of Legal Professional Privilege: A Guide for American Attorneys' (2006) 4(1) *Loyola University Chicago International Law Review* 51, 60.

⁷⁸ (1890) 25 QBD 494, 498.

⁷⁹ United Kingdom, above n 19, 486.

⁸⁰ *Ibid.*

observation of Lord Denning MR in *Dallison v Caffery*,⁸¹ where he cautioned that it would be reprehensible to conceal privileged communications from the court, rather than reveal material facts, statements and information which may show a prisoner to be innocent. A similarly cogent argument was advanced by Chafee:

We can all agree that it is a misfortune when a lawsuit is won by the party who would lose it if all the facts were known, and that we increase the risk of such a miscarriage of justice whenever we allow an important witness to keep any helpful facts away from the judge and jury. Secrecy in court is prima facie calamitous, and it is permissible only when we are very sure that frankness will do more harm than good.⁸²

The ‘obligation to the public must dispense with the private obligation to the client’,⁸³ for no private obligation to one’s client by virtue of legal professional privilege ‘can cancel that universal obligation of delivering justice to the public. Humanity is interested in discovery and the lawyer has an obligation to society in general, prior and superior to any obligation to the client to make it known’.⁸⁴ Frankel J concurred with this rhetoric when he asked whether criminal lawyers, who were specifically imbued with the duty of defending the rights of the accused, should habitually be able to thwart the search for truth.⁸⁵ He declared that humanity was interested in discovery and the paramount objective of justice should be the disclosure of legally operative facts.⁸⁶

It is possible, therefore, to rebut the presumption that damage would arise from a limited exception to the rule. All arguments in favour of the privilege ceased to

⁸¹ [1965] 1 QB 348.

⁸² Ibid.

⁸³ *Annesley v Earl of Anglesea* (1743) 17 How St Trials 1139. See also Wigmore, above n 46, § 2298, 3217–18.

⁸⁴ Ibid.

⁸⁵ Marvin Frankel, ‘Clients’ Perjury and Lawyers’ Options’ (1996) 1 *Journal of the Institute for the Study of Legal Ethics* 25, 26.

⁸⁶ Ibid 38.

operate at a certain point, namely, when innocence is on the line. No privilege is said to attach to documents in the control of a lawyer which, if produced, could establish the innocence or further the defence of an accused, with the public interest in preventing wrongful conviction so powerful as to necessitate the production of evidence in criminal prosecutions.

Other commentators equally observed that no privilege could remain valid if it violated natural, human or international law; which is to say that a privilege granted to one person was unlawful if it 'injured, destroyed, defeated or prejudiced the legal rights of another or condoned conduct that was contrary to fundamental laws'.⁸⁷ Critics, including Ronald Goldfarb, contend that the privilege presents a dilemma, for 'all confidentiality is questionable if the overriding goal is to get to the truth in an adversarial system'.⁸⁸

Even Lord Simon in *Waugh* could find no intrinsic justification as to why legal professional privilege should prevail if it was counter-indicated and declared that the rule was not absolute, but subject to many exceptions:⁸⁹

I can see no intrinsic reason why the one principle rather than the other should prevail in a situation where they are counter-indicative. Neither is absolute: both are subject to numerous exceptions. For example, if a document protected by legal professional privilege (or secondary evidence of it) has been obtained by the opposite party independently—even through the default of the legal adviser—even by "dishonesty—either will probably be admissible.

⁸⁷ Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State: 1100–1322* (Lawbook Exchange, 2006) 279; see also Jesse Higgins, *Sampson Against the Philistines, or The Reformation of Lawsuits and Justice Made Cheap, Speedy and Brought Home to Every Man's Door: Agreeably to the Principles of the Ancient Trial by Jury, Before the Same was Innovated by Judges and Lawyers* (B Graves, 1805).

⁸⁸ Ronald Goldfarb, *In Confidence: When to Protect Secrecy and When to Require Disclosure* (Yale University Press, 2009) 28.

⁸⁹ *Waugh v British Railways Board* [1980] AC 521, 536-37 (Lord Simon).

The numerous exceptions to the principle that all relevant evidence should be disclosed arise partly from historical reasons (the tensions between the courts of common law, where questions of fact were tried, and the Court of Chancery, where the remedy of discovery was developed), partly from considerations of justice, partly from wider social considerations...

Lord Edmund-Davies added: ‘We should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than by suppression’.⁹⁰

Ronald Desiatnik stated that ‘every communication or document may in some way affect a right of some [other] person’,⁹¹ particularly where the privilege weighs one wrongdoing against another. If fabrication is frowned upon by the law, why should concealment differ,⁹² particularly

when a charge is so grave in its character and so fatal in its consequences that it most certainly ought to be proven by a clear preponderance of evidence? If the evidentiary bricks needed to build a defence are denied the accused, then ... the defence has been abrogated as surely as it would be if a defence itself was held to be unavailable to him.⁹³

C *Wigmore on Legal Professional Privilege and Criminal Justice*

Wigmore noted that, at first glance, the Benthamic philosophy seemed irresistible because it was premised on the notion that it was no harm to justice to deter a

⁹⁰ Ibid 543 (Lord Edmund-Davies).

⁹¹ Ronald Desiatnik, *Legal Professional Privilege in Australia* (Prospect Media, 1999) 211.

⁹² Jeremy Bentham, above n 45, 476.

⁹³ David Doherty, ‘Sparing the Complainant Spoils the Trial’ (1984) 40 *Criminal Reports* (3d) 55, 67.

guilty person from seeking legal advice.⁹⁴ Wigmore defended legal professional privilege against the Benthamic attack by pointing out that, if it were abolished in the criminal context, the incidence of criminal defendants having recourse to legal advice would not reduce.⁹⁵ Rather, one of two possible scenarios would come into play. In the first instance, guilty clients would be disinclined to confide incriminating admissions if these could later be elicited.⁹⁶ Second, if one party was sufficiently cunning in the law to know what they may and may not safely reveal to their lawyer, it would give that party an advantage over their adversary and lead to an imbalance in representation.⁹⁷

Recognising that in much litigation there was often no clear means of delineating between guilt and innocence, moral right or wrong, Wigmore sympathised with the Benthamic premise that the main objective in adjudication was rectitude of decision.⁹⁸ He pointed out, however, that no lawsuit was black and white.⁹⁹ Instead, decisions of contested rights were subject to abstract legal rules irrespective of the merits of the client's personal conduct.¹⁰⁰ He argued that, if Bentham's 'deterrence' argument were applied in the civil context, it may culminate in a civil litigant with a good cause being dissuaded from consultation with his legal adviser by virtue of his own notions of good and bad, rather than the legal standpoint of right and wrong.¹⁰¹

Wigmore noted that the concealment of client–counsel communications did not necessarily amount to abetting crime or encouraging moral delinquency.¹⁰² Even assuming a guilty client was unworthy of legal assistance or encouragement, the element of wrong is not always separated from an element of right. It did not

⁹⁴ John Wigmore, *Treatise*, above n 46, § 2291, 3202.

⁹⁵ *Ibid* § 2291, 3204.

⁹⁶ *Ibid*.

⁹⁷ *Ibid* § 2291, 3199.

⁹⁸ *Ibid*.

⁹⁹ Charles McCormick, above n 70, 176.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*.

naturally follow that the actions of one party were wholly unlawful, while those of their adversary were wholly lawful.¹⁰³

Both parties in a significant proportion of cases experience an element of fear, irrespective of the legality of their actions, for ‘rarely is guilt and innocence a matter of black and white’.¹⁰⁴ Although Wigmore contended that, in a certain percentage of cases, the privilege was accurate and well-founded in its application,¹⁰⁵ he recognised the validity in Bentham’s argument and conceded that legal professional privilege was ‘misused by the clumsy and abused by the clever, [which] has, in practice, led to intolerable obstruction of truth’.¹⁰⁶ Wigmore decreed that, ‘when justice required the investigation of the truth, no person could declare they had any knowledge which was rightly private’.¹⁰⁷

While he contended that there was ‘no limit of time beyond which the disclosures might not be used to the detriment of the client’,¹⁰⁸ Wigmore stated that ‘the judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy, nor was there any moral delinquency or public odium in breaking one’s pledge under force of law’.¹⁰⁹

Recognising that the disclosure of confidential communications could culminate in the revelation of information one would preferably keep quiet in consequence of enmity, disgrace or ridicule, Wigmore observed that such inconvenience was the contribution made in payment of one’s duties to society in its function of executing justice.¹¹⁰ He acknowledged that dangers lay in expanding the scope of the rule, which was designed, he stated, to secure the client’s confidence in the secrecy of his communications without fear that those conversations would ever

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid § 2291, 3204.

¹⁰⁶ Ibid § 686.

¹⁰⁷ Ibid § 3200.

¹⁰⁸ John Wigmore, *Treatise*, above n 46, § 2231.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

be exposed.¹¹¹ Wigmore maintained that ‘very few clients [could] perceive wherein their strength lies. The weakness of the client was compensated by the lawyer’s strength; inaccuracy, confusion and looseness of thought balanced by precision and sound judgment’.¹¹² Abiding by the conventional wisdom that absolute secrecy was necessary,¹¹³ the duty of confidentiality secured clients’ rights by enabling them to confidently gauge whether communications would later be protected from compelled judicial disclosure.¹¹⁴

Wigmore noted that it was ‘difficult to see how any moral line [could] properly be drawn at that crude boundary, or how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be’.¹¹⁵ He acknowledged the stigmatising effect of legal professional privilege, which, when invoked, entailed withholding important information from the court, which may do injustice to one or more of the litigants. Moreover, the tendency of human nature to mete out punishment, not necessarily because the defendant is, on this occasion, guilty, but because ‘their capture now makes them a deserving target for reprisal, flows like a deep-seated undercurrent which tugs at the jury, in or out of the courtroom’.¹¹⁶

Wigmore postulated that no properly instructed and ethical lawyer would assist a guilty client to propound a false defence.¹¹⁷ Enabling the client to ‘make a clean breast of it’ is viewed as being in the public interest because it ensures complete disclosure and facilitates effective assistance by way of ensuring a proficient legal

¹¹¹ Commentators such as Blackstone, Gilbert, Peake and Starkie also asserted that the policy underlying the duty of confidentiality sought to encourage full and frank disclosure. *Ibid* §2291, 3204.

¹¹² John Wigmore, *Treatise*, above n 46, § 2291, 3199.

¹¹³ Lloyd Snyder, ‘Is Attorney-Client Confidentiality Necessary?’ (2002) 15 *Georgetown Journal of Legal Ethics* 477, 484.

¹¹⁴ Edward Imwinkelreid, ‘The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges’ (2003) 83 *Boston University Law Review* 315, 320.

¹¹⁵ John Wigmore, *Treatise*, above n 46, § 2298, 577.

¹¹⁶ *Ibid* xviii.

¹¹⁷ Max Radin, ‘The Privilege of Confidential Communication between Lawyer and Client’ (1928) 16 *California Law Review* 487, 487.

defence.¹¹⁸ This is a facile argument for it overlooks the fact that criminal law lawyers do not encourage clients to confide anything incriminatory, as knowledge of client guilt would give rise to ethical constraints in defending a guilty client who pleads ‘not guilty’.¹¹⁹

The right to counsel in the criminal law context is linked to the notion of autonomy, client dignity¹²⁰ and the presumption of innocence.¹²¹ No person ‘should be required to defend a criminal charge, prosecuted by the State with its frightening power, without the assistance of an advocate trained in the law’.¹²² It is clear that the procedural limitations of the privilege are conducive to injustice through preventing full disclosure of all relevant facts.¹²³ These inaccuracies ‘make possible the conviction of persons whom the criminal law says are innocent’.¹²⁴

¹¹⁸ See Leslie Levin, ‘Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others’ (1994) 47 *Rutgers Law Review* 81, 139. Proponents assert this to be a guarantee of the privilege because greater mischief may result from requiring or permitting disclosure than from rejecting evidence altogether. By contrast, several surveys undertaken in 1962 (*Yale Law Journal*) 1977 (Tompkins County) and 1993 (Levin) established that lawyer apprehension surrounding the myth that clients would refrain from full and frank disclosure was unfounded. Out of twelve lawyers who actually *had* disclosed client information in order to prevent harm befalling an innocent victim, five reported that disclosure had resulted in a lesser degree of damage to their relationship with their clients than might be imagined, while one noted that their professional relationship with their client had been enhanced.

¹¹⁹ Michael Proulx and David Layton, *Ethics and Canadian Criminal Law* (Irwin Law, 2001) 34.

¹²⁰ *Ibid* 171.

¹²¹ Edward Greenspan and George Jonas, *above n 32*, 261–2.

¹²² Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Thomson Carswell, 4th ed, 2006) 7.

¹²³ James Gardner, ‘A Re-evaluation of the Attorney-Client Privilege (Part I)’ (1963) 8 *Villanova Law Review* 279, 284.

¹²⁴ David Doherty, *above n 93*, 67. See also *R v Seaboyer* (1991) 83 DLR 193, 260–1 (McLachlin J).

Ray Finkelstein stated that a lawyer should be imbued with a positive duty to assist the court to reach the truth.¹²⁵ While the precise nature of this duty needs to be carefully defined, Finkelstein advocated for lawyers to disclose to the court the existence of material evidence, particularly if prejudicial, which would correct any misapprehension that may arise from witnesses' testimony and to examine witnesses in a manner which aims to expose the truth.¹²⁶ This argument was bolstered by support from contemporary courts and commentators including Caulfield and French JJ in the respective cases *R v Barton*¹²⁷ and *R v Ataou*.¹²⁸ Both *Barton* and *Ataou* affirmed that legal professional privilege was designed to safeguard weighty and legitimate competing interests.

1 *Barton and Ataou: A Balancing Act*

In *R v Barton*,¹²⁹ Justice Caulfield opined that he could not conceive that the law would permit a lawyer or other individual to screen from the jury information which, if disclosed, might enable a defendant to establish innocence or resist an allegation advanced by the Crown. The defendant was charged with offences committed during his employment as a legal executive with a law firm, specifically falsifying accounts and fraudulent conversion.¹³⁰ Barton subpoenaed a lawyer of the firm to testify at his trial and furnish certain documents. The lawyer claimed the documents were protected by legal professional privilege.¹³¹

Caulfield J's reasoning is convincing and was central to Bentham's own contention that the privilege should be abrogated altogether. Espousing a broad exception to the rule, Caulfield J held that a proportionality test applied in which

¹²⁵ Ray Finkelstein, 'The Adversarial System and the Search for the Truth' (2011) 37 *Monash University Law Review* 135, 143.

¹²⁶ *Ibid.*

¹²⁷ (1973) 1 WLR 115.

¹²⁸ [1988] QB 798.

¹²⁹ (1973) 1 WLR 115, 118 (Caulfield J).

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

the privilege must yield if innocence is at stake and information might enable the defendant to prove innocence.¹³² This passage encapsulates this impression:

I think the correct principle is this, and I think it must be restricted to these particular facts in a criminal trial, and the principle I am going to enunciate is not supported by any authority that has been cited to me, and I am just working on what I conceive to be the rules of natural justice. If there are documents in the possession or control of a solicitor, which, on production, help to further the defence of an accused man, then in my judgment, no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown ... If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then ... no privilege attaches.¹³³

In making this distinction, Caulfield J championed a balancing approach to the privilege, rather than the exercise of judicial discretion. While failing to enunciate any authority for this proposition, Caulfield J derived the principle from the rules of natural justice. He perceived that, if privileged communications could assist Barton to establish his innocence, this was sufficient grounds for destroying the rule, because it was a matter of public interest that no innocent person be convicted of a crime. Barton remained good authority for 22 years and was mirrored in *R v Ataou*,¹³⁴ when French J endorsed the principle. He confirmed that legal professional privilege did not attach to documents in the control or possession of a lawyer if they could aid the defence of an accused man.¹³⁵

¹³² Ibid.

¹³³ Ibid.

¹³⁴ [1988] QB 798.

¹³⁵ *R v Barton* (1973) 1 WLR 115, 188.

In *Ataou*, the defendant made an inconsistent statement to his lawyer which was deemed admissible by the three-judge bench.¹³⁶ Justice French expressed that legal professional privilege was an interest which ‘falls to be balanced against competing public interests’.¹³⁷

When a communication was originally privileged and in criminal proceedings privilege is claimed against the defendant by the client concerned or his solicitor, it should be for the defendant to show on the balance of probabilities that the claim cannot be sustained. That might be done by demonstrating that there is no ground on which the client could any longer reasonably be regarded as having a recognisable interest in asserting the privilege. The judge must then balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it.¹³⁸

The decisions enunciated in both *Barton* and *Ataou* represent a departure from the 16th-century principle of privilege which held that the rule was a status-based exception designed to safeguard the oath and honour of the lawyer.¹³⁹ These judgments were in keeping with the ancient Roman justification for the rule, whereby it was merely customary, rather than mandatory, for a lawyer not to bear witness against his client. This view was reproduced in 19th-century English cases which deemed that ‘no privilege could be maintained with regards to facts known to a lawyer unprofessionally’,¹⁴⁰ outside the scope of the cause in which they were engaged,¹⁴¹ or if they could prove their innocence.¹⁴²

¹³⁶ The *Ataou* Court comprised Waterhouse and Woolf LJ and French J.

¹³⁷ *R v Ataou* [1988] QB 798, 807.

¹³⁸ *Ibid* 807 (French J).

¹³⁹ Michel Rosenfeld, ‘The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, The Adversary System and the Corporate Client’s SEC Disclosive Obligations’ (1982) 33 *Hastings Law Journal* 495, 496.

¹⁴⁰ *Parkhurst v Lowten* (1816) 36 ER 589; *Original Hartlepool Collieries Company v Moon* (1874) 30 LT 193.

¹⁴¹ *Williams v Mundie* (1824) 171 ER 933; *Turquand v Knight* 2 Mees & W 98, 100 (1836).

These passages explicitly employ Bentham's rhetoric in an attempt to promote an independently existing opposition to the privilege. Caulfield J's proposition was attractive because it assigned a priority to one fundamental right over another: the right that no one should be wrongfully convicted, with its ancillary right of access to evidence establishing innocence, prevailed over the right to invoke a claim of privilege.¹⁴³ The expression of the principle in *Barton* and *Ataou* exemplified that the rule of non-disclosure was inferior to the interests of criminal defendants in securing access to confidential communications which may assist their defence.¹⁴⁴

Amongst the authorities considered by *Derby*, Lord Taylor CJ stated that *Barton* and *Ataou* had been wrongly decided. He opined that those cases ought to be overruled due to the overriding importance of the privilege.¹⁴⁵ Substantially departing from precedent, Lord Taylor CJ stated that under the principle espoused by French J in *Ataou*, a judge would be required to first determine whether the client continued to have any recognisable interest in invoking the privilege and, if so, whether such interest outweighed the public interest that communications should be made available to the defence in criminal proceedings.¹⁴⁶ Lord Taylor CJ argued that *Barton* contradicted the rule formulated in *Calcraft v Guest*,¹⁴⁷ in which privileged communications continued to be protected so long as the client did not waive the privilege; for once privileged, always privileged.¹⁴⁸ He added

¹⁴² In the 1854 case of *United States v Quitman*, Campbell J stated that innocence claimed the right of speaking, while guilt simultaneously invoked the security of silence and at once pronounced moral turpitude. See *United States v Quitman*, 27 F Cas 680 (CCED La, 1854) (No. 16, 111); *Halsbury's Laws of England, Vol XIII*. (Butterworths, 4th ed, 1975) 124.

¹⁴³ Ian Dennis, *The Law of Evidence* (Sweet & Maxwell, 1999) 328.

¹⁴⁴ Colin Tapper, 'Prosecution and Privilege' (1996) 1 *International Journal of Evidence & Proof* 1, 20.

¹⁴⁵ [1996] AC 487, 501H (Lord Taylor).

¹⁴⁶ *Ibid* 493-494H (Lord Taylor).

¹⁴⁷ *Calcraft v Guest* [1898] QB 759.

¹⁴⁸ *Calcraft v Guest* [1898] QB 759, 761 (Lord Linley MR).

that the *Ataou* ruling was at odds with the view that legal professional privilege was the same in civil and criminal contexts.¹⁴⁹

The logical question is whether the justification for legal professional privilege had been undermined in the intervening years between *Barton* and *Derby*.¹⁵⁰ It is critical to note that the respective judicial pronouncements of Caulfield and French JJ survived unchallenged for decades. Throughout this period, their respective rulings – in which each denied the privilege on the basis that natural justice dictated that communications in the possession or control of a lawyer were not privileged if they enabled an accused to establish his innocence or resist an allegation made by the Crown¹⁵¹ – caused no damage to the integrity of the justice system, nor did they undermine or impair the functioning of the broader legal system.¹⁵²

The principle was additionally defeated by other less compelling policies including ‘no recognisable interest’, which was considered by the Court of Appeal in *R v Dunbar and Logan*¹⁵³ and *R v Craig*.¹⁵⁴ Both of these cases were

¹⁴⁹ [1996] AC 487, 492F (Lord Taylor).

¹⁵⁰ ‘Privilege – Prosecution Witness Acquitted of Offence of Which Defendant Later Charged – Defence Seeking to Question Witness as to Original Instructions to Legal Advisers Admitting Offence’ (1996) 190 *Criminal Law Review* 193, 193.

¹⁵¹ *R v Barton* (1973) 1 WLR 115, 118 (Caulfield J); *R v Ataou* [1988] QB 798, 807 (French J). Moreover, if the party claiming the privilege ceased to maintain an interest in it, the judge must balance whether the interest in breaching the privilege outweighs the interest in maintaining it.

¹⁵² Aside from *R v Derby Magistrates’ Court Ex parte B*, the other cases to overrule *R v Barton* were: *R v Hewitt (Peter)* (1992) 95 Cr App R 81, *R v Clowes (Peter) (No.1)* [1992] 3 All ER 440, *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch. 208, *Re R (A Minor) (Wardship: Criminal Proceedings)* [1991] Fam 56, *R v Central Criminal Court Ex parte Randle* [1991] 1 WLR 1087 and *R v Governor of Brixton Prison Ex parte Osman* [1991] 1 WLR. 281. The cases which overruled *R v Ataou* included: *R v Loizou* [2006] EWCA Crim 1719, *B v Auckland District Law Society* [2003] UKPC 38, *SCC v B* [2000] Fam 76, *General Mediterranean Holdings SA v Patel* [2000] 1 WLR. 272, *Saunders v Punch Ltd (t/a Liberty Publishing)* [1998] 1 WLR 986, *R v Clowes (Peter) (No.1)* [1992] 3 All ER 440, *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208 and *Lui Mei Lin v R* [1989] A.C. 288.

¹⁵³ (1982) 68 CCC (2d) 13. In this case, three defendants, L, D and Br, stood trial on three charges of first-degree murder. Prosecution witness G alleged that L admitted to her that he and D had

considered by Lord Taylor in *Derby*. In *Dunbar*, a distinction was drawn between the application of legal professional privilege in civil and criminal proceedings. The *Dunbar* Court observed that the adage applicable to civil cases of ‘once privileged, always privileged’¹⁵⁵ presented a danger in criminal proceedings if it screened from the jury information which would benefit an accused.¹⁵⁶ Martin, Lacourcière and Robins JJA observed that no rule of policy required the continued existence of legal professional privilege in criminal cases.¹⁵⁷ Furthermore, the privilege was not absolute if the client no longer had any ground on which to assert a recognisable interest in protecting the communications in question.¹⁵⁸ The privilege had become spent.¹⁵⁹ A balancing of interests fell in favour of admitting communications.

The *Dunbar* Court applied *Barton* when it ruled that legal professional privilege must yield where maintaining it might shield from a jury information which would assist a defendant to establish their innocence.¹⁶⁰ The court stated that the trial judge in *Dunbar* had erred in upholding legal professional privilege; for, the moment a relevant written document fell into the second defendant’s hands, the

carried out the murders as a favour to Br. Both testified in their defence and denied committing the crimes. L raised the defence of alibi. At the conclusion of their testimony, Br also decided to give evidence; however counsel for L had previously acted for Br prior to the preliminary hearing. Counsel for L stated that the canons of professional ethics precluded him from continuing to represent L. Although new counsel was to be appointed, the trial judge refused to allow L time to instruct him. The trial judge also advised counsel for D not to put questions to Br about matters to which legal professional privilege attached. In this regard, he ruled that two written statements made by Br and supplied to his former counsel, who went on to act for L, were privileged. A third statement written by Br was also deemed privileged despite it being found in Br’s prison cell and taken by his co-accused, D, without permission.

¹⁵⁴ [1975] 1 NZLR 597.

¹⁵⁵ *Calcraft v Guest* [1898] QB 759, 761.

¹⁵⁶ *R v Dunbar and Logan* (1982) 68 CCC (2d) 13, 104 (Martin JA).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* See also *R v Craig* [1975] 1 NZLR 597.

¹⁵⁹ *R v Dunbar and Logan* (1982) 68 CCC (2d) 13, 104 (Martin JA).

¹⁶⁰ *Ibid.*

privilege was waived and the first defendant no longer had any basis upon which to assert a recognisable interest.

This position was adopted by Cooke J in the New Zealand case of *R v Craig*.¹⁶¹ Cooke J commented that legal professional privilege could not survive if there was no ground on which the client could be regarded as having a recognisable interest in it.¹⁶² The phrase ‘a recognisable interest’ was not expressly defined in either case; however, an inference may be drawn that legal professional privilege did not persist indefinitely but weakened at the conclusion of proceedings.

In regards to *Dunbar and Logan*, the *Derby* Court stated that the notion of weighing competing interests was unacceptable on the basis that a client may have an ongoing interest in non-disclosure which could be outweighed by another interest if the court, in its discretion, overrode the rule.¹⁶³ Applying this reasoning to the present case, Lord Nicholls stated that no rational person, on finding themselves in the circumstances with which Brooks was confronted, would seek to maintain confidentiality. However, as A had been acquitted, A remained entitled to claim the privilege as a means of refusing to divulge communications which would infer guilt.¹⁶⁴

The *Derby* Court contended that *Craig* was similarly flawed and speculated that the ‘no recognisable interest’ argument must have been raised in numerous cases in which the privilege was upheld despite the client ceasing to have grounds for asserting a claim, yet it was never suggested that this might make a difference.¹⁶⁵ It has subsequently been stated that, ‘as long as the rule is based on its present premise and is accepted as being for its present purpose, the rule must be accepted

¹⁶¹ [1975] 1 NZLR 597.

¹⁶² Ibid 599.

¹⁶³ [1996] AC 487, 511H (Lord Nicholls).

¹⁶⁴ Ibid 513D (Lord Nicholls).

¹⁶⁵ [1996] AC 487, 512F (Lord Nicholls).

as absolute. There can be no half-way house (to accommodate, for example, the witness without a recognisable interest)'.¹⁶⁶

Demonstrating that competing interests incurred by the application of the privilege are most keenly felt in criminal law, Lord Hailsham announced in that same case: 'Any attempt to withhold relevant evidence ... must be justified and requires to be jealously scrutinised'.¹⁶⁷ These judicial pronouncements highlight that other societal values of competing and compelling interest tip the scales in favour of disclosure; with the primary principle being to the effect that the presumption of innocence and the protection of the innocent should be paramount considerations.

Any fixed rule devalues Lord Taylor's proclamation that judicial discretion is a vital and realistic safeguard for an accused.¹⁶⁸ *Derby* sought to frustrate and defeat the great principle of access to justice by effectively according protection to every client-counsel communication. The rhetoric of Lord Taylor in *Derby* is undermined by the creation of exceptions which would enable a defendant to establish their innocence or help further their defence.¹⁶⁹

2 *Legal Professional Privilege and the Presumption of Innocence*

This 'golden thread' of English criminal law is directly tied to the fundamental presumption of innocence, yet ethical issues abound regarding the limits and application of the privilege and whether or not its existence hinged on a tenuous link, with a price to pay for the confidentiality of communications. Lord Brougham earlier expressed that lawyers had less interest in diminishing the amount of business in the courts because there were not many who gained more

¹⁶⁶ JA Coutts, 'House of Lords: Evidence of Instructions to Legal Advisers' (1996) 60 *Journal of Criminal Law* 176, 180.

¹⁶⁷ *Ibid* 223 (Lord Hailsham).

¹⁶⁸ United Kingdom, above n 19, 520.

¹⁶⁹ *Ibid*.

by it, and to whom abuses were more profitable.¹⁷⁰ James Jackson, the ‘cultivated classical legal scholar’¹⁷¹ and later Chief Justice, borrowed from Bentham when he claimed that the legal profession engaged in unsavoury practices that were incompatible with elevated integrity or even common honesty. The concealment of truth and perversion of evidence were supposed to be the great attainments of legal ambition.¹⁷² Francis Bacon added that some practitioners engaged in ‘nimble and sinister tricks and shifts, in which they prevented the plain and direct course of the courts and brought justice into obliques and lines and labyrinths’.¹⁷³

According to Fred Rodell, the law’s prestige lay in the ability of lawyers to ‘blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men ... To guide us, incidentally, through a maze of confusing gestures and formalities that lawyers have created’.¹⁷⁴ He added that ‘laws’ practically invited lawyers to write their own ticket, and labelled the legal trade a high-class racket which actually believed in its own nonsense’.¹⁷⁵ Christine Corcos reached the same conclusion. She pointed out that the privilege provided additional incentive for clients with something to hide to hire lawyers so as retain control over communications and not to risk their secrets being compromised or divulged. ‘The legal system exists to protect those in power ... [who] conspire to conceal the truth (which would lead to justice), and only the exposure of their scheme ... can reveal the truth to society’.¹⁷⁶

¹⁷⁰ United Kingdom, *Parliamentary Debates*, ‘State of the Courts of Common Law’, House of Commons, 7 February 1828, Series 2, vol 18, 190.

¹⁷¹ James Jackson, ‘Law and Lawyers. Is the Profession of Advocate Consistent with Perfect Integrity?’ (1848) *Knickerbocker Magazine* 378, cited in Perry Miller, *The Legal Mind of America: From Independence to the Civil War* (Anchor Doubleday, 1962) 275.

¹⁷² *Ibid.*

¹⁷³ Francis Bacon, cited in Edmund Christian, *A Short History of Solicitors: Attorneys under Elizabeth I and James I* (Reeves & Turner, 1896), 47.

¹⁷⁴ Fred Rodell, *Woe Unto You, Lawyers!* (Pageant-Poseidon, 1939) 3.

¹⁷⁵ *Ibid* 6–7, 10.

¹⁷⁶ Christine Corcos, above n 10, 137.

The integrity of the legal profession has been periodically questioned in public discourse. In *Bleak House*, Dickens described the absurdity of the 19th-century legal profession:

The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense.¹⁷⁷

III LEGAL PROFESSIONAL PRIVILEGE: WEIGHING THE HARM TO INNOCENCE

Wigmore conceded that the benefits availed by the privilege were doubtful¹⁷⁸ and ‘when the course of justice require[d] the investigation of truth, no man ha[d] any knowledge that [was] rightly private’.¹⁷⁹ He did however reinforce the ‘winning at all costs’ argument when he commented that

the right to use a rule of procedure or evidence as one plays a trump card, or draws to three aces, or holds back a good horse til the home stretch is a distinctive result of the common law moral attitude towards parties in litigation.¹⁸⁰

¹⁷⁷ Charles Dickens, *Bleak House*, Vol II (Chapman & Hall, 1911) 128.

¹⁷⁸ John Wigmore, cited in Vincent Walkowiak, *The Attorney-Client Privilege in Civil Litigation: Protecting and Defending Confidentiality* (American Bar Association, 2008) 126.

¹⁷⁹ John Wigmore and Colin McNaughton, *Evidence in Trials at Common Law*, Vol X (Little, Brown & Co, 1961) 72. According to Wigmore, ‘the sacrifice [stemming from disclosure of confidential communications] may be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. This inconvenience which he may suffer in consequence of his testimony, by way of enmity or disgrace or ridicule or other disfavouring action of fellow members of the community, is also a contribution which he makes in payment of his duties to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognise that it defines this unmistakable axiom. When the course of justice requires investigation of the truth, no man has any knowledge which is rightly private’.

¹⁸⁰ *Ibid* 375.

Much to the chagrin of Frankfurter J, who pronounced that judges were not called to referee prize fights, but were functionaries of justice,¹⁸¹ Wigmore used the analogy of justice as ‘sport’¹⁸² and the concept of litigation as a game of skill – with legal professional privilege stationed as goalkeeper of client secrets – when he revealed that the principle was imperative for ‘winning the game of litigation irrespective of the ascertainment of truth’.¹⁸³

Conscious of the fact that innocent criminal defendants had legitimate rights, Wigmore later reversed his stance when he stated that ‘the privilege of secret consultation is intended only as an incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former’.¹⁸⁴ Acknowledging that legal professional privilege may theoretically operate to protect lawyers against divulging the wrongs of deceitful clients,¹⁸⁵ Wigmore contended that, if the law could compel a lawyer to break his client’s confidence, it would create an unhealthy moral state and double-minded attitude, with the lawyer operating in ‘dual and inconsistent capacities as confidant and revealer of his client’s secrets’.¹⁸⁶

Wigmore believed that ‘The client must state all the facts to his lawyer and leave him to form his own judgment’.¹⁸⁷ To accomplish this object, it was of great societal importance and a reflection of the public interest that anyone who desired to obtain sound legal advice should be able to do so under conditions which

¹⁸¹ *Johnson v United States*, 333 US 46, 54 (1948) (Frankfurter J).

¹⁸² John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States, Vol VIII* (Little, Brown & Co, 1961) § 2196, 2401.

¹⁸³ *Ibid.*

¹⁸⁴ John Wigmore, *Treatise*, above n 46, § 2113, § 2327, 3254.

¹⁸⁵ See also Max Radin, above n 117, 487.

¹⁸⁶ John Wigmore, *Treatise*, above n 46, § 2291, 3204.

¹⁸⁷ John Wigmore, quoting from ‘Production of Cases Prepared for the Opinion of Counsel’ (1837) 17 *Law Magazine* 68. See John Wigmore, *Treatise*, above n 46, § 2291, 3199.

induced full and frank disclosure.¹⁸⁸ While failing to discuss the mechanisms through which legal professional privilege benefitted or advanced justice, Wigmore observed that access to professional legal advice was as important for clients seeking to avoid litigation as it was for those pursuing it. He also noted that litigation often ensued when clients failed or refused to seek legal advice until they could no longer avoid having resort to the courts.¹⁸⁹ This demonstrates that Wigmore attached specific importance to legal professional privilege in the realm of litigation.

According to Stephen Saltzburg, the Wigmorean paradigm did not require evidence that a client's need for confidential communications was essential; rather it favoured a narrow cost-benefit analysis which weighed the harm to litigation more heavily than the harm to other values.¹⁹⁰ Through encouraging clients to communicate information they would otherwise withhold from their lawyers, confidentiality was deemed to enhance the quality of legal representation by building trust between lawyer and client. It ensured that no one was thrown on their own legal resources; for 'the deprivation of legal counsel is illiberal and discounts the dignity of the individual and their ability to market and defend their autonomy'.¹⁹¹

Wigmore confirmed that, if the privilege met a specified criteria, it must be classed as absolute.¹⁹² In this context, the term 'absolute' inferred that judges should be dissuaded from employing a balancing test to decide whether a party's need for disclosure of confidential communications outweighed the public interest

¹⁸⁸ *Campbell v United Kingdom* (1992) 233 Eur HR Rep 137.

¹⁸⁹ John McNaughton, *Wigmore on Evidence, Vol VIII* (Little, Brown & Co, 1961) § 2295.

¹⁹⁰ Steven Saltzburg, 'Privileges and Professionals: Lawyers and Psychiatrists' (1980) 66 *Virginia Law Review* 597, 605.

¹⁹¹ Hock Lai Ho, 'History and Judicial Theories of Legal Professional Privilege' [1995] *Singapore Journal of Legal Studies* 558, 588.

¹⁹² Edward Imwinkelried, 'Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges' (2004) 65 *University of Pittsburgh Law Review* 145, 150-1.

in maintaining legal professional privilege.¹⁹³ This is congruent with the approach taken by Lord Taylor in *Derby*, where his ruling resolved the clash of principles in favour of the paramountcy of legal professional privilege.¹⁹⁴ The *Derby* Court did not view the privilege as a question of balancing the interests of Brooks against A, despite Brooks' interest in not being wrongfully convicted outweighing A's interest in not being convicted of a crime for which he had previously been acquitted. The consequence for A, while unfortunate, was not as unpalatable as the prospect of an innocent person being falsely imprisoned.

Lord Taylor CJ declined to craft further exceptions to the privilege, even if doing so could establish innocence or aid in the defence of an accused individual. The House of Lords made no mention of this equally integral principle in English law. The prevailing interest is protecting innocent people from criminal conviction when their innocence can be proven.¹⁹⁵ Broadening, without exception, the rule of legal professional privilege, the *Derby* Court invalidated Wigmore's articulation and weakened the force of the doctrine. It now usurped the central truth-finding function of the courts and impaired the fairness and accuracy of the trial process. The balancing test was rendered obsolete and the nature of legal professional privilege placed beyond doubt.

Despite his 'absolutist' stance, Lord Taylor CJ called for a review of legal professional privilege and acknowledged that the law was in an unsatisfactory state:¹⁹⁶ 'We have a system of justice, but it is marred as we all know. In both the

¹⁹³ Ibid 147.

¹⁹⁴ Michael Bowes, 'The Supremacy of Legal Professional Privilege: The Derby Magistrates Case' (2016) 4 *Archbold News* 5.

¹⁹⁵ (1890) 25 QBD 494, 498.

¹⁹⁶ Peter Taylor, 'Speech by the Rt Hon the Lord Taylor of Gosforth, Lord Chief Justice of England, at the Lord Mayor's Dinner to HM Judges: 6 July 1994' (1995) 61 *Arbitration* 1, 4-5. According to Richard Glover, *Murphy on Evidence* (Oxford, 14th ed, 2015) 541, 'the cases establishing this [absolutist] principle are collected in the speech of Lord Taylor of Gosforth in *R v Derby Magistrates' Court; ex parte B* ... [where] it has been held by ... the Court of Justice of the European Communities to be part of Community Law (*AM & S Europe Ltd v EC Commission*)'.

criminal and civil fields, we need changes to streamline our administration and modernise its procedures'.¹⁹⁷ Lord Taylor CJ conceded that, at the conclusion of trials, judges may overpitch *dicta* when summing up.¹⁹⁸ He cautioned that restraint should be exerted when making comment on cases over which they presided because it was in everyone's interest that the administration of justice functioned well and enjoyed the respect and confidence of the public.¹⁹⁹ Lord Taylor CJ admitted that, 'unfortunately, a single remark from a judge can be picked up and is put into a litany of such remarks which is trotted every time a new one arises'.²⁰⁰ This has proven true of the sweeping, albeit fallible, pronouncement in *Derby*.

While the *Derby* decision 'may well be expected to lead to hard cases ... and hard cases may cause injustice to individuals',²⁰¹ Coutts applauded Lord Taylor's precise and succinct articulation that if but *one* exception were permitted to the privilege, it would destroy the rule itself and the basis of confidence, this being the purpose it served.²⁰² By contrast, Lord Hobhouse criticised the *dicta* of Lord Taylor when he declared that 'at the least some, and, more probably, all of these premises would benefit from further examination'.²⁰³

The question to be decided falls within a very narrow compass and since this House is differing from unanimous decisions of the courts below I will shortly state in my own words my reasons ... The

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid. Speaking in May 1996 shortly before his retirement, Lord Taylor CJ said: 'In the last three years, almost everything has been changed or thrown overboard in the criminal justice system. When you are going to legislate, you should do it less hectically and with a little more preparation and not have to introduce amendments because you had not got them ready before'.

²⁰⁰ Sue Lawley, 'Lord Chief Justice Taylor', *Desert Island Discs*, BBC Radio 4, 29 May 1992 <<http://www.bbc.co.uk/programmes/p0093xzl>>.

²⁰¹ JA Coutts, above n 166, 179.

²⁰² Ibid 180.

²⁰³ *R (on the application of Morgan Grenfell & Co) v Special Commissioner of Income Tax* [2003] 1 AC 563, 615 (Lord Hobhouse).

question is one of statutory construction. It is now accepted for the purposes of this litigation that the documents in respect of which the right to demand production remains in dispute contain or may contain information relevant to a tax liability to which Morgan Grenfell may be liable or its amount and that they are documents which are subject to legal professional privilege (advice privilege) which has not been waived. It is likewise accepted that the character of the privilege is that described in the speech of Lord Taylor of Gosforth in your Lordships' House in *Reg v Derby Magistrates' Court, ex parte 'B'* [1996] AC 487: its character is absolute and -

.... if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits."

At the least, some and, more probably, all of these premises would benefit from further examination but they have not been the subject of argument on the present appeal. The question of construction is therefore whether the statute empowers the Revenue to require the delivery up to them of documents notwithstanding that they are covered by legal professional privilege.

There is no indication in the above-quoted material that Lord Hobhouse agreed with Lord Taylor. At no stage does His Honour say words to the effect of 'I am of the view...', 'I agree...' or 'I concur...'. He simply articulates that 'At the least, some and, more probably, all of these premises would benefit from further examination'. Lord Hobhouse may have concurred with Lord Taylor overall, however on this particular point, he dissented.

Steve Uglow condemned as 'bizarre' and 'unnecessarily wide' the suggestion that courts would not be justified in applying a balancing approach to compare the public interest in legal professional privilege with the public interest in the liberty

of an individual.²⁰⁴ Just outcomes result from performing the balancing exercise, not from dispensing with it.

Winning, though, cannot be the only goal of a trial. Lord Taylor CJ forcefully remarked that, in criminal proceedings, ‘a trial should not be a game’.²⁰⁵ He added: ‘I do not myself care for analogies which liken our law and legal procedures to a game of any sort’.²⁰⁶ Criminal justice proceedings carry grave consequences, including, in some jurisdictions, death. In England, life imprisonment is the harshest sentence imposed on a convicted party. As the deprivation of life, liberty and dignity are implicated in criminal matters, the logical inference is that legal professional privilege somehow enhances the protection accorded to an accused.

The operation of legal professional privilege in criminal law is a double-edged sword which can ‘be found to lend the benediction of the law to either side of any case’.²⁰⁷ The following example of *Meehan v H M (Adv)*²⁰⁸ demonstrates that the law societies of England and Scotland did not regard the privilege as absolute where it had the potential to harm not only the parties to criminal proceedings, but the legal profession and public justice.

A *Meehan v H M (Adv)*

In *Meehan v H M (Adv)*,²⁰⁹ Scottish lawyer Joseph Beltrami was confronted with a dilemma when his client, William McGuinness, confided that an innocent man, Patrick Meehan, was serving life imprisonment for the 1969 Ayr death of Rachel Ross, whom McGuinness had murdered in concert with another. While McGuinness remained free, Meehan was voracious in protest and exalted his innocence,

²⁰⁴ Steve Uglow, *Evidence: Text and Materials* (Sweet & Maxwell, 1997) 207.

²⁰⁵ United Kingdom, above n 19 522.

²⁰⁶ Peter Taylor, ‘The Lund Lecture’ (1995) 35 *Medicine, Science and the Law* 1, 4.

²⁰⁷ Fred Rodell, above n 174, 50.

²⁰⁸ (1969 SLT (Notes) 90).

²⁰⁹ (1969 SLT (Notes) 90).

declaring that the trial judge, Lord Grand, had ‘made a terrible mistake’²¹⁰ in convicting him for a crime he did not commit. The moral and ethical dilemma faced by Beltrami was whether to honour his professional code of conduct, ‘knowing that confidences between lawyer and client were inviolable’²¹¹ or face the wrath of the inner sanctum of his profession by breaking a confidence and revealing what McGuiness had confided to him.

The privilege effectively tied Beltrami’s hands and sealed his mouth. Beltrami remained ‘bound by a golden rule that could not be broken’.²¹² The consequence, if he spoke out, may have resulted in prejudice to his client and would have exposed Beltrami to possible disciplinary sanctions under Scotland’s Ethics Committee. Instead he was ‘well and truly saddled with the crushing burden’²¹³ of keeping secret the true identity of Ross’s killer. With devotion to one’s client usurping a devotion to the truth, Beltrami, who represented both Meehan *and* McGuiness, was anguished during the year of 1973, and frequently in the next two years, when McGuiness would unexpectedly arrive at his office:

A murderer would appear in my office, always unannounced, never by appointment, and he would see only me. He would sit across the desk from me, tormenting me – although, in fairness, this was not his purpose – with more and more of his dark and dramatic secret. He and another man had been responsible for the murder of an elderly Jewish woman during a robbery at her bungalow home some four years earlier. Neither of them had been caught, although the man in front of me had escaped capture by the proverbial whisker. Now here he was, sitting in my office as a client, slowly dripping more and more information that an innocent man, Patrick Meehan, had been jailed for that murder.

²¹⁰ Anna Smith, ‘You Have Made A Terrible Mistake; Chilling Words That Sparked 7 Year Fight For Justice’, Daily Record, 23 February 2002

<<http://www.thefreelibrary.com/You+Have+Made+A+Terrible+Mistake%3b+Chilling+Words+That+Sparked+7-Year...-A083178841>>.

²¹¹ Joseph Beltrami, *A Deadly Innocence* (Mainstream Publishing, 1989) 19.

²¹² Ibid.

²¹³ Ibid.

Indeed he was saying more than that ... he was virtually telling me that he was the murderer.²¹⁴

Entrusted with such a damaging truth, Beltrami found it to be ‘the most agonising part of the case, because I had all this information and detail given to me by McGuinness, but I could do nothing about it. It was very frustrating’.²¹⁵ Beltrami’s predicament was ‘theoretically challenging and, as a practical matter, agonisingly difficult’.²¹⁶ To whom did he owe an overarching obligation and whose interests should he legitimately advance? He was essentially forced to play God, no matter what choice he made.²¹⁷

Particularly where the freedom of an accused is in jeopardy in a criminal proceeding, it may seem somewhat paradoxical that the administration of justice should accord priority to confidentiality of client–counsel communications over the interests of a fair trial. The extent to which Beltrami was prohibited from making disclosure meant that the interests of the victim were sacrificed in favour of preserving the client’s confidences even though the client’s purpose was wrongful. Helpless, and hampered by the strict rules of legal professional privilege,²¹⁸ Beltrami could do little more than bide his time until 1976 when McGuinness died. Genuinely believing his duty to his client had terminated at death, the lawyer, with consent from the executor of the estate,²¹⁹ spoke out in an attempt to clear Meehan’s name.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Leslie Levin, ‘Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others’ (1994) 47 *Rutgers Law Review* 81, 82.

²¹⁷ Alexander Marsh, ‘No Simple Answers’, *Chicago Lawyer Magazine*, October 2010 <[http://chicagolawyeromagazine.com/Archives/2010/10-\(1\)/nosimpleanswers.aspx](http://chicagolawyeromagazine.com/Archives/2010/10-(1)/nosimpleanswers.aspx)>.

²¹⁸ Joseph Beltrami, above n 211, 19.

²¹⁹ Ysaiah Ross, ‘Confidentiality after Death’ [1999] *Law Institute Journal* 290 <<http://www.austlii.edu.au/au/journals/LawIJV/1999/290.pdf>>.

The law societies of England and Scotland²²⁰ found that Beltrami had not breached the rules pertaining to legal professional privilege on the grounds that he had obtained the executor's consent prior to disclosing the revelation. It appeared that the privilege could, in certain instances, be eroded when permission had been obtained, or in defence of an accusation levelled against a lawyer. Defence counsel Nicholas Fairbairn QC admitted:²²¹

If Meehan is innocent, I do not think it would be other than very harmful to the public interest if the wrong conviction of a notorious convict carried with it the conviction of a police officer or officers of long standing and devoted service.²²²

Despite his endeavours to set an innocent man free, Beltrami was forbidden from revealing his client's confidences during his client's lifetime, with his duty turning on both legal professional privilege and the duty of client confidentiality owed to McGuinness. The miscarriage of justice in *Meehan* was entirely attributable to the suppression of confidential communications, yet 'there can be

²²⁰ See United Kingdom, *Parliamentary Debates*, above n 170, 8. In 1828, Lord Brougham stated that 'in Scotland, the law in this respect is better than ours, for no man can produce a written instrument at trial without having previously shown it to his adversary'.

²²¹ In addition, the 1960 Thomas Lund professional guide *A Guide to the Professional Conduct and Etiquette of Solicitors* stated in ch 9(a) that a lawyer's knowledge of his client's 'past illegality or irregularity does not involve a duty to disclose ... unless the act is so personally disgraceful on the part of the client as to involve the inference that he is utterly untruthful and disreputable'. Lund clarified that if a client confessed his guilt to his lawyer, such as McGuinness did with Beltrami, 'no difficulty whatever arises ... because the client has ... waived any question of privilege. It is, in that event, for the [lawyer] to decide whether it is dishonourable for him to remain silent'. The Lund Guide was succeeded by the *Solicitors' Act 1974* (UK) in which privilege and conduct were narrower concepts. Subsequent to this, Guidance Note 8 relating to Principle 12.04(7) of the *Guide to the Professional Conduct of Solicitors 1990* (UK) permitted lawyers to reveal client-counsel communications concerning a client to the extent reasonably necessary to establish a defence to a criminal charge or civil claim against *themselves* by their client, or if *their* conduct falls under investigation by the regulating authority or disciplinary tribunal. The *Guide to the Professional Conduct of Solicitors 1999* (UK) r 16.02, note 12 and *Solicitors' Code of Conduct 2007* r 4(18) contained parallel provisions.

²²² Quoted in John Hunter, *The Hunter Report, Vol II* (HMSO, 1982) 688.

no crueller tyranny than that exercised under cover of law and with the colours of justice'.²²³ Exemplifying that justice can be distorted; legal professional privilege tolerates a 'probability of error' for the sake of procedural convenience and presupposes what Bentham so drastically censured.²²⁴ On one hand, it fulfils the Benthamic caution that deceitful clients with something to hide can confide in their lawyers, while also obstructing wrongfully accused defendants from accessing information which could help prove their innocence.

This argument is reminiscent of another case considered by the *Derby* Court; namely *D v National Society for the Prevention of Cruelty to Children*.²²⁵ In that case, Lord Simon remarked on the putative moral worth of the privilege when he stated that the public interest in ensuring no innocent person was wrongfully convicted was so powerful that it prevailed over the general public interest, resulting in the need for evidence to be produced upon request to establish innocence in a criminal prosecution.

The public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged: so that, exceptionally, such evidence *must be forthcoming* when required to establish innocence in a criminal trial.²²⁶

The presumption of innocence dictated the formulation of a permanent exception, with the onus falling to the accused to show that the privileged communications came within the exemption and could be put to forensic use and that the conduct of the defence would be impeded if the information was withheld. Commentators like Deborah Rhode, Patrick O'Hagan, Zuckerman, Dodek and Fischel question why confidentiality is placed on a pedestal at all, particularly when greater emphasis should rightfully be placed on encouraging disclosure to exonerate the

²²³ *United States v Jannotti*, 673 F2d 578, 614 (3d Cir, 1982)

²²⁴ John Wigmore, *Treatise*, above n 46, § 2298, 3216.

²²⁵ [1978] AC 171, 232 (Lord Simon). This passage was also quoted in *Sankey v Whitlam* (1979) 53 ALJR 11, 20.

²²⁶ *Ibid.*

falsely accused.²²⁷ Zuckerman observed that, in the last few years, courts have expanded the privilege to the point of a break with the needs of the administration of justice.²²⁸ He added the no further change would be seen until all levels of the judiciary were persuaded to embrace the overriding objective that combines the requirements of proportionality and expedition with the need to do justice on the merits.²²⁹

Rhode expressed that the privilege failed to take adequate account of the harms produced as a result of non-disclosure, including wrongful convictions to ordinary citizens,²³⁰ while O'Hagan pointed out that clients facing the unpleasant prospect of litigation would be greatly assisted if courts could compel the lawyer representing the other side to divulge communications in the event proceedings arose.²³¹

Dodek proffered the notion that clients engaged in criminal proceedings should be entitled to a 'status-quo-plus' privilege.²³² This would have the widest possible scope and be subject to exceptions in only the most compelling circumstances.²³³ Dodek recommended that, once a defendant demonstrated that non-disclosure of privileged communications jeopardised his innocence,²³⁴ the court would be required to implement a threshold in which it revealed only as much information as was necessary to show proof of innocence.²³⁵

²²⁷ Daniel Fischel, 'Lawyers and Confidentiality' (1998) 65 *University of Chicago Law Review* 1, 3.

²²⁸ Adrian Zuckerman, above n 16, 381.

²²⁹ *Ibid* 381.

²³⁰ Deborah Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press, 2000) 113.

²³¹ Patrick O'Hagan 'Legal Professional Privilege: Some Developments' (1997) 2 *Private Client Business* 131.

²³² Adam Dodek, 'Reconceiving Solicitor-Client Privilege' (2010) 35 *Queen's Law Journal* 493, 532.

²³³ *Ibid*.

²³⁴ *Ibid*.

²³⁵ David Layton, 'Legal Professional Privilege and the Right of an Accused to Make Full Answer and Defence' (2000) 5 *Canadian Criminal Law Review* 277, 301.

It is reasonable to question whether such damage would in fact result from a limited exception to the rule. Given that justice is equally about ‘dedication to the public good’,²³⁶ Fischel argued that society would benefit far greater if legal processes facilitated, rather than hindered, disclosure.²³⁷ To phrase it another way: ‘Justice may be blind, but the public is not’.²³⁸ Abella asks whether the legal profession can, in good conscience, ‘resist experimenting with old systems of justice in order to find better ways to deliver it’.²³⁹ She suggests the need for reform, whereby outmoded practices are repealed and the public good is put before money and prestige.²⁴⁰ Abella adds that the legal profession’s monopoly places them in a fiduciary relationship with the general public, whereby they are gatekeepers and groundskeepers of the law: ‘Process is the map, lawyers are the drivers, law is the highway, and justice is the destination’.²⁴¹

‘Reclaiming justice sometimes requires speaking truth to power’²⁴² and, depending on the set of facts, a purportedly absolute privilege may have to yield in either civil or criminal matters.²⁴³ According to Imwinkelried, the public interest in trying and solving crimes outweighs the right to privacy underpinning legal professional privilege.²⁴⁴ Michael Asimow summed up his and other lawyers’ views that ‘justice is process’ when he wrote: ‘[The] general public and lawyers differ about whether justice means truth or justice means process.’²⁴⁵

²³⁶ Rosalie Abella, above n 4.

²³⁷ Daniel Fischel, above n 227, 17.

²³⁸ Rosalie Abella, above n 4.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Paul Butler, *Let’s Get Free: A Hip Hop Theory of Justice* (New Press, 2010).

²⁴³ Edward Imwinkelried, ‘Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges’ (2004) 65 *University of Pittsburgh Law Review* 145, 173.

²⁴⁴ Ibid 172.

²⁴⁵ Michael Asimow, ‘Bad Lawyers in the Movies’ (2000) 24 *Nova Law Review* 533, 536. See also Christine Corcos, above n 10, 135.

‘0.2% per cent of the community believe that justice is process’.²⁴⁶ This section has highlighted that, ultimately, when the legal system does not reflect community values and limits the ability of wrongfully accused criminal defendants to access justice, it loses its legitimacy.²⁴⁷

Sectors of both the legal profession and the general public²⁴⁸ have come to believe that process is justice; yet, in truth, ‘process’ may be the biggest obstacle to justice.²⁴⁹ *Parkhurst v Lowten*²⁵⁰ held that, in regard to facts known to a lawyer unprofessionally, ‘refusal to answer was in itself a breach of trust’. These methods of avoiding or ignoring knowledge of client guilt pose problems.²⁵¹ The doctrine of legal professional privilege suffers from an inherent instability wherein ‘it straddles a fault line in the surface of the law, where two opposing tectonic themes in its basic structure meet’.²⁵²

Presenting a conflict between two desirable policy goals, legal professional privilege operates at the expense of substantial justice both as a defence and an exception to the rule that relevant evidence must be admitted. Some justices have declared that, even if the House of Lords found a previous decision wrong, ‘the fact that they no longer had to regard previous decisions as absolutely binding did not mean that whenever they thought a previous decision wrong, it should be reversed’.²⁵³ It was deemed to be in the general interest of certainty that the decision, however erroneous or anomalous, must stand unless there were very good grounds to overturn it.²⁵⁴

²⁴⁶ Michael Asimow, above n 245, 536.

²⁴⁷ Ipp J, cited in Evan Whitton, *Our Corrupt Legal System: Why Everyone is a Victim (Except Rich Criminals)* (Book Pal, 2009) 225.

²⁴⁸ Ibid. See also Rosalie Abella, above n 4.

²⁴⁹ Rosalie Abella, above n 4.

²⁵⁰ (1816) 36 ER 589, 720.

²⁵¹ Michael Proulx and David Layton, above n 119, 38.

²⁵² Ronald Desiatnik, above n 91, 3.

²⁵³ *Miliangos v George Frank (Textiles) Ltd* (1975) AC 433, 495–6 (Lord Cross). See also Michael Zander, *The Law-Making Process* (Bloomsbury, 7th ed, 2015) 216.

²⁵⁴ *R v Kneller (Publishing, Printing and Promotions) Ltd* [1973] AC 435, 455 (Lord Reid).

Tapper argued that ‘it remained to be considered whether or not some derogation in favour of one accused of a serious crime who requires access to the evidence in order to develop his defence is justifiable, and, if so, upon what terms’.²⁵⁵ McCormick stated that ‘the solution worked out by the courts in England ... [was] to allow discovery’,²⁵⁶ although the court may, in its discretion, rule against divulging information even if it tends to prove an accused’s evidence.²⁵⁷ As a result, the doctrine provides no discernible benefit to the wrongfully accused; however its application turns critical when the probative strength of exculpatory evidence remains out of reach. Phipson noted that the privilege in criminal cases had long been confusing due to the inconsistent application of principles ‘which should logically be no different as between civil and criminal cases’.²⁵⁸

B *Legal Professional Privilege in Civil Litigation*

Distinguishing certain aspects of civil and criminal litigation, Lord Taylor CJ noted that it was ‘quite wrong to assume that all disputes which came before the civil courts were commercial enterprises with deep pockets’. While the interests at stake in civil law may overlap with those in criminal law, particularly where child welfare or political asylum are concerned, civil proceedings are interested in resolving a range of interests between private parties, organisations and corporations. The public interest is served by ‘ensuring fairness in the discovery process’ and encouraging the settlement of disputes.²⁵⁹

²⁵⁵ Colin Tapper, above n 144, 16.

²⁵⁶ McCormick stated that ‘the solution worked out by the courts in England ... [was] to allow discovery [A] routine accident report or other communication by an agent would be unprivileged, but a special report made in preparation for actual or threatened litigation would be protected’. Charles McCormick, ‘The Scope of Privilege in the Law of Evidence’ (1937–38) 16 *Texas Law Review* 447, 463.

²⁵⁷ Michael Bowes, above n 194, 6. See also Public Interest in UK Courts, *Public Interest Immunity* <<http://publicinterest.info/?q=public-interest-immunity>>.

²⁵⁸ Sidney Phipson, *Phipson on Evidence* (Sweet & Maxwell, 18th ed, 2013) 26-06, 815.

²⁵⁹ Clyde Croft, ‘Civil Procedure Act and Case Management’ (2011) *Victorian Judicial Scholarship* 54, 5.

Whether in regard to corporate or commercial transactions, legal professional privilege is said to hold a deep significance, with its existence justified through its ability to enable clients to obtain effective legal advice and ascertain their rights and responsibilities.²⁶⁰ It also ensures that the rule of law is accessible to those it governs; for ‘the law must be capable of being obeyed and guiding the behaviour of its subjects’.²⁶¹ Gavin Mackenzie commented that ‘stirring proclivities for competition and rivalry’ was ‘of dubious social value’.²⁶² Neil Williams QC remarked that civil litigation, like its criminal counterpart, is conducted in the spirit of a game; governed by rules known to the parties in advance which are no less important than the outcome of the contest.²⁶³ Just as players in a game can decide when to reveal their hand, litigants are free to select the most opportune time to present their evidence and it would hardly be expected that the system would aid them to obtain evidence from an adversary.²⁶⁴

C *R v Inland Revenue Commissioners; Ex parte Taylor (No 1)*

In *The Queen v The Commissioners of Inland Revenue Ex parte Thomas Patrick Denton Taylor*, that Lord Taylor concurred with Nicholls LJ that it would be unwise to ‘say anything which might be thought to tie the hands of the judge’.²⁶⁵

²⁶⁰ Adam Dodek, above n 232, 526.

²⁶¹ ‘Developments in the Law: Privileged Communications’ (1985) 98 *Harvard Law Review* 1450, 1506.

²⁶² Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Thomson Carswell, 4th ed, 2006) 1.2.

²⁶³ Neil Williams, ‘Discovery of Civil Litigation Trial Preparation in Canada’ (1980) 58 *Canadian Bar Review* 1, 27.

²⁶⁴ *Ibid.*

²⁶⁵ [1988] WL 624291, 917j-918a (Nicholls LJ). See Pp 164-164 of my thesis which utilises case law to craft the argument that Lord Taylor concurred with the findings of the *Inland Revenue* Court where the bench held that a degree of doubt existed with respect to the application of the rule, but later, in *Derby*, his views were less flexible. I note, for instance that O’Connor LJ, in *Inland Revenue*, stated that it was relevant to consider whether disclosure of a privilege report ‘was necessary for disposing fairly of the matter’. O’Connor LJ stated that the right answer to that is: ‘I don’t know’.

This case evidenced that the boundaries of legal professional privilege were not always clearly drawn and the court went so far as to admit that the correct answer eluded them. The court conceded that, in future cases, a different outcome may commend itself to the judiciary when examining legal professional privilege in a clearer light.²⁶⁶ Leaving the door open to the extent mentioned, he concluded that the applicant should not be proscribed from renewing his application for disclosure if such an eventuality arose.²⁶⁷ This was at odds with the *Derby* judgment which effectively bound and gagged the judiciary from engaging in any form of balancing exercise.

In *Inland Revenue*, the solicitor applicant, Thomas Patrick Taylor, specialised in tax avoidance and tax mitigation schemes for corporate and private clients. Taylor appealed a judicial review decision in which Farquharson J refused to grant inspection of two documents appended to an affidavit sworn by Mr Roberts, Under-Secretary in the Inland Revenue Office.²⁶⁸ These documents, dated 8 September 1986, detailed investigations into Taylor's personal and professional tax affairs pursuant to s 20(2) of the *Taxes Management Act 1970* (UK).

The notice sent from the Revenue Office to Taylor required him to deliver a large class of documents including books of account, business correspondence and all other records relating to his practice as a solicitor for the period 1979 to 1985.²⁶⁹ Taylor contended that if he were to comply with the s 20 notice to furnish correspondence, it would enable the Revenue Office to conduct a 'fishing expedition' in hopes of gaining information on the affairs of his corporate clients and the schemes on which he had advised them.²⁷⁰ Calling on 16th-century case law, Thomas Taylor submitted that a claim of legal professional privilege could

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ *The Queen v The Commissioners of Inland Revenue Ex parte Thomas Patrick Denton Taylor* [1988] WL 624291.

²⁷⁰ Ibid.

not be sustained by virtue of the fact that litigation was not anticipated at the time of the report coming into existence.²⁷¹

While this justification was bolstered by the early English authorities of *Lee v Markham*,²⁷² *Breame v Breame*,²⁷³ *Windsor v Umberville*²⁷⁴ and *Berd v Lovelace*,²⁷⁵ it will be recalled that *Pearse v Pearse*,²⁷⁶ *Minet v Morgan*²⁷⁷ and *Calcraft v Guest*²⁷⁸ subsequently established that ‘a connection with litigation was not a prerequisite for legal professional privilege to attach to confidential communications’.²⁷⁹

The House of Lords, constituted by Taylor LJ, together with O’Connor and Nicholls LJJ, determined that the Revenue Office was entitled to seek legal advice, including any legal consequences which may foreseeably arise from issuing the s 20 notice.²⁸⁰ In presenting the first judgment, O’Connor LJ stated

²⁷¹ *Lee v Markham* (1569) *Monro* 375; *Tothill* 48; *Breame v Breame* (1571) *Tothill* 48; *Windsor v Umberville* (1574) *Monro* 411; *Berd v Lovelace* [1577] *Cary* 62.

²⁷² (1569) *Monro* 375, *Tothill* 48.

²⁷³ (1571) *Tothill* 48. See also Ronald Bridgman, *A Digest of the Reported Cases on Points of Practice and Pleading in the Courts of Equity in England and Ireland and of the Rules and Orders of the Same Courts; from the Earliest Period to the Present Time* (Edward B Gould, 1829) 178.

²⁷⁴ (1574) *Monro* 411.

²⁷⁵ [1577] *Cary* 62.

²⁷⁶ (1846) 63 ER 950.

²⁷⁷ (1873) LR 8 Ch App 361.

²⁷⁸ [1898] 1 QB 759.

²⁷⁹ *Minet v Morgan* (1873) LR 8 Ch App 361 (Lord Selborne).

²⁸⁰ Section 20 contained no express mention of legal professional privilege; however the Revenue Office advanced the argument that communications were privileged on the basis that they had come into existence for the purpose of seeking legal advice on several points, including the form and content of the proposed notice. In reviewing the ruling of Farquharson J, who it was alleged fell into error, the House of Lords consulted the *Rules of the Supreme Court* and noted that Rule 10(1) outlined that a party may serve notice on an adversary to produce for inspection documents referenced in an affidavit and to permit copies to be made of same. Within a predetermined timeframe of receiving notice, an adversary must make available for inspection the requested documentation unless grounds for withholding production are satisfied. An

that it was pertinent to consider the question posed by Rule 13 of Order 24; specifically, whether, in the circumstances, disclosure of the 8 September 1986 report was necessary for disposing fairly of the matter. According to O'Connor LJ, the right answer to that is: 'I don't know'.²⁸¹

The uncertainty of O'Connor LJ led him to review the judgments of Lord Diplock in *O'Reilly v Mackman*,²⁸² Lord Wilberforce in *Inland Revenue Commissions v National Federation of Self-Employed and Small Businesses Ltd.*²⁸³ and Glidewell LJ in the unreported case of *R v Secretary of State for Home Affairs; Ex parte Joseph Harrison*.²⁸⁴ Where Lord Wilberforce stated that, in a proceeding brought against the Revenue Office, no court would consider ordering discovery in the hope of eliciting some impropriety,²⁸⁵ Lord Diplock confirmed that Order 24, Rule 8 of the *Rules of the Supreme Court 1894* contained express provision for discovery of documents.²⁸⁶ Although it was not an automatic process, discovery was obtainable whenever, and to the extent that, the tenets of justice dictated.²⁸⁷

Glidewell LJ similarly stated that the question in issue concerned whether a duty of fairness was owed, in that case by the Home Secretary to Harrison, which would oblige disclosure to Harrison of any material containing comment adverse to him. Referring to Order 24 of the Supreme Court Rules, Glidewell LJ concluded that, in the circumstances, it may be right to order discovery. However, if no basis existed for suggesting that an affidavit was deficient in some respect, it

objection could only be sustained if an adversary asserted a claim of privilege at the time of making the affidavit, with specific reference to the documents contained therein. Pursuant to Rule 11(c), the court may make an order for production as it deems appropriate; however Rule 13(1) predicates this upon whether the order is necessary for disposing of the suit fairly.

²⁸¹ *The Queen v The Commissioners of Inland Revenue Ex parte Thomas Patrick Denton Taylor* [1988] WL 624291 (O'Connor LJ).

²⁸² [1983] 2 AC 237.

²⁸³ [1982] AC 617.

²⁸⁴ [1988] 3 All ER 86.

²⁸⁵ *Inland Revenue Commissions v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 638 (Lord Wilberforce).

²⁸⁶ *O'Reilly v Mackman* [1983] 2 AC 237, 282 (Diplock LJ).

²⁸⁷ *Ibid.*

would be improper to permit discovery except to challenge the accuracy of the document.²⁸⁸

O'Connor LJ accepted that if, in judicial review proceedings, an affidavit referenced documents, it then followed that production should be granted upon request.²⁸⁹ He applied the judgment of Glidewell LJ and noted that, in this instance, Taylor had failed to establish that disclosure was necessary for the fair disposal of the case.²⁹⁰ He ruled that the correspondence in question remained protected by legal professional privilege because the affidavit had not been impugned.

Lord Taylor, in concurring with the Court's decision, therefore supported the findings that a degree of doubt existed with respect to the application of legal professional privilege, such that no ruling should be absolute or fixed so as to tie the hands of the judge.²⁹¹ Moreover, he advocated judicial discretion as a vital and realistic safeguard for the accused²⁹² and recognised the possibility that subsequent proceedings may necessitate a contradictory finding based on the individual merits of the case. Lord Taylor accepted that no applicant should be precluded from pursuing discovery of confidential communications even if previous attempts were denied.

Despite the findings of the Court in *Inland Revenue*, Daniel Fischel argued that, in civil law, legal professional privilege has little to nil application²⁹³ because the incentive it offered to clients was not advocacy for its own sake.²⁹⁴ Rather, Fischel pinpointed the probability of winning as being a highly motivating

²⁸⁸ *R v Secretary of State for Home Affairs; Ex parte Joseph Harrison* [1988] 3 All ER 86.

²⁸⁹ *The Queen v The Commissioners of Inland Revenue Ex parte Thomas Patrick Denton Taylor* [1988] WL 624291, 916a (O'Connor LJ).

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.* Lord Taylor agreed with each of the judgments delivered.

²⁹² United Kingdom, above n 19, 520.

²⁹³ Daniel Fischel, above n 227, 4.

²⁹⁴ *Ibid* 18–19.

factor.²⁹⁵ If this is correct, the role of the rule in ensuring equitable civil justice is marginal at best²⁹⁶ and it cannot be considered integral to ensuring fairness of outcome. In fact, clients as a class gain nothing, for access to the privilege benefits only those who can afford the high cost.

In what can be seen as a counterbalance to the supremacy of legal professional privilege over other interests promoted by the law, legal scholarship has shown that full disclosure is the more fundamental principle worthy of being upheld.²⁹⁷ Lord Brougham, in an 1828 parliamentary debate, indicated support for disclosure when he stated that the disingenuousness of conflicting parties was an embarrassment to justice which left judges to ‘guess at the truth in the trick’.²⁹⁸ Declaring that the law should never lend itself to concealments, he noted that the courts of England were interested in compelling both sides to reveal the whole of their case as early as possible, rather than divulging only as much as would further their cause and frustrate their adversary.²⁹⁹

Halsbury stated that the privilege was not irreversible in criminal proceedings and any document which may aid in establishing the innocence of an accused was not privileged from disclosure.³⁰⁰ Using the analogy of a sealed book, the *Law Magazine* declared in 1937 that, if client–counsel communications were privileged to the extent that they were invulnerable to judicial investigation as if they never had been uttered, the moral justification for the rule ‘would work very grievous injury’.³⁰¹

²⁹⁵ Ibid 19.

²⁹⁶ Adam Dodek, above n 232, 526.

²⁹⁷ This legal scholarship includes Bentham, Halsbury, Appleton CJ, Lord Brougham, Edmund Morgan, Frankel J, Fred Rodell and James Fitzjames Stephen.

²⁹⁸ United Kingdom, above n 170, 188.

²⁹⁹ Ibid.

³⁰⁰ *Halsbury's Laws of England, Vol XIII*. (Butterworths, 4th ed, 1975) 124.

³⁰¹ John Wigmore, quoted in ‘Production of Cases Prepared for the Opinion of Counsel’ (1837) 17 *Law Magazine* 68. See also John Wigmore, *Treatise*, above n 46, § 2291, 3199.

Appleton CJ similarly believed proceedings would be better served by admitting more evidence, even if its veracity was in question,³⁰² and observed that, if ‘criminals [framed] a code for their own special protection, their first provision would be to protect themselves from all inquiry into their conduct’.³⁰³ Edmund Morgan posited the question why the law felt it had any need to protect clients who were uncooperative or deceitful³⁰⁴ given that the cost to a guilty client is not of grave social concern.

James Fitzjames Stephen postulated that the law was ‘ever-changing because judges rightly interpreted its principles in accordance with the spirit of the age in which they had their being and an essentially fluctuating thing like the law cannot be stabilised’.³⁰⁵ Rodell concurred, stating that, by merely varying judges, the highest law of the land could be changed and when these laws were altered, ‘even the most ignorant of laypeople begin to wonder a little about the absoluteness of the law’.³⁰⁶

IV CONCLUSION

The rule of legal professional privilege has formed the subject of judicial uncertainty, whereby judges concede that doubt and inconsistency plague its application. Even Bentham and Wigmore admitted that, contrary to the views of justice, the privilege was misused and abused, leading to intolerable obstruction of truth. They agreed insofar as ‘the man is more important than the rule’ and where the law lends itself to concealment at the expense of truth and justice, it cannot prevail. They disagreed as to whether the law should have protections

³⁰² William Appleton, ‘Admission of Parties in Criminal Procedure’ (1835) 13 *American Jurist & Law Magazine* 50, 62.

³⁰³ Ibid 71.

³⁰⁴ Edmund Morgan, ‘Foreword’ to *Model Code of Evidence* (American Law Institute, 1942) 1, 26–7.

³⁰⁵ James Fitzjames Stephen, cited in Lloyd Duhaime, *England’s Great Failed Codification Experiment* <<http://www.duhaime.org/LawMuseum/LawArticle-1595/1873--Englands-Great-Failed-Criminal-Code-Experiment.aspx>>.

³⁰⁶ Fred Rodell, above n 174, 7.

surrounding client-counsel communications. Where Wigmore propounded that the privilege was necessary for the purpose of encouraging full and frank disclosure, Bentham posited that, by virtue of the privilege's existence, it could be invoked to shield all manner of underhanded conduct. This renders doubtful any suggestion that the privilege is perfectly adapted to its ultimate aim; being the execution of the law and the administration of justice.

Demonstrating that legal professional privilege should not be considered absolute where conduct contrary to the interests of justice arise, Chapter V resolved that legal professional privilege presents a collision of epic disproportion in which the values of life, liberty and dignity cede to the notion that client-counsel communications should be preserved at the expense of justice. The aim should be to weigh the competing interests of privacy and disclosure so that a compromise can be reached that brings about the greatest overall good. 'The fundamental condition of legal professional privilege [should be evaluated] against the fundamental condition of an efficient and honest legal profession'.³⁰⁷

The problem, though, is not merely theoretical. Within the remit of the criminal justice system, there is manifestly a need to protect innocent criminal defendants from conviction. If the scales of justice are to tilt one way or the other, it must be in favour of disclosure, for non-disclosure jeopardises the position of the innocent who are falsely accused.³⁰⁸

Despite arguments made in favour of disclosure in circumstances where innocence is on the line, the criminal defendant in *Derby* was denied access to potentially exculpatory material because it was shielded by legal professional privilege. It is logical that legal professional privilege should be applied according to the exercise of judicial discretion. Given the inability to assess the extent to which legal professional privilege advances the public interest it is supposed to

³⁰⁷ Gary Meggit, 'Privilege: A Hong Kong Perspective' (2011) 30 *Civil Justice Quarterly* 429, 432.

³⁰⁸ United Kingdom, above n 19, 520.

serve, it may well be that the rule is defeated by the need for litigation to be determined in the light of the entirety of the relevant materials.³⁰⁹

There is no single remedy appropriate to both civil and criminal contexts, because the rule ‘visibly impedes the realisation of a central objective of the legal system’,³¹⁰ namely, the advancement of justice. The individual interests in allowing an accused access to evidence to avoid possible wrongful conviction outweighs the public interest in maintaining the privilege.³¹¹

This thinking produced two distinct ideas about the way in which legal professional privilege should operate. The scholars who have contributed to this debate include Zuckerman and Fischer, who stated that a trade-off between maintaining client–counsel communications and divulging relevant exculpatory material had reached the point of a break with the needs of the administration of justice. Greater emphasis should be placed on encouraging disclosure to exonerate the falsely accused. Imwinkelried maintained that the public interest in solving crimes outweighs the right to privacy underpinning the privilege. Uglow similarly contended that courts should be imbued with a substantial margin of discretion to apply a balancing approach to compare the public interest in legal professional privilege with the public interest in the liberty of an individual. These recommendations have the potential to offer concrete solutions to an age-old dilemma; however, for Lord Taylor, the privilege could not be sacrificed for the sake of determining ‘truth’ in a criminal trial.

The principle is diametrically opposed in critical respects, specifically the contradiction between advancing the truth, while keeping client communications confidential. The case-specific analyses applied in *Barton* and *Ataou* may be entirely appropriate.³¹² There is a difference between ‘moral truth’³¹³ and ‘legal

³⁰⁹ *O’Reilly v Commissioners of the State Bank of Victoria* (1983) 153 CLR 1, 26.

³¹⁰ ‘Developments in the Law: : Privileged Communications’ (1985) 98 *Harvard Law Review* 1450, 1454.

³¹¹ Ian Dennis, above n 143, 328.

³¹² ‘Developments in the Law’, above n 310, 1487.

truth', with the fundamental point being that the effect of invoking a claim of privilege entails withholding important information from the court. Given that the current parameters of the privilege have been shaped by the criminal justice system, the integrity of criminal trials depends upon the admission of all the relevant evidence to the trial jury. This concept will form the basis of discussion in Chapter VI, which details the *Derby* defendant's petition for production of confidential communications relevant to his plea of innocence.

³¹³ Morality cannot be pitted against a practising certificate, nor can a piece of paper or a lawyerly oath usurp ethical and moral conduct.

CHAPTER VI: ABSOLUTE PRIVILEGE: A LEGAL FICTION

I INTRODUCTION

The previous chapter identified issues relating to the application of legal professional privilege in criminal and civil contexts. It noted the need to reach not only a legally correct outcome between the parties, but a morally correct outcome. Chapter VI focuses on the profound impact of Lord Taylor's aphorism in *R v Derby Magistrates' Court; Ex parte B*.¹ In that case, Lord Taylor affirmed that legal professional privilege was absolute. This contradicted his earlier judgments in which he advocated a narrow approach as to when the rule applied.² Lord Taylor went against the weight of authority espoused by other Commonwealth jurisdictions which overwhelmingly supported the proposition that the rule was not unqualified.

Section II explains the formulation used by the House of Lords in making its determination. Lord Taylor's key judicial development ushered in a new era by virtue of the fact that it could no longer determine the scope of the rule. Instead, the privilege had primacy over other compelling interests of equal or greater significance. This result left no opportunity to balance competing interests against the interest in preserving the confidentiality of privileged communications and culminated in subsequent House of Lords' judgments placing some limit on the absoluteness of that decision.

Section III critiques the factors which influenced, so should have influenced, the *dicta* of Lord Taylor to reveal that neither Bentham nor Wigmore would have endorsed a blanket application of the rule. Forming a recurrent theme in legal opinion, Bentham's philosophy was reproduced in the writings of his peers who

¹ *R v Derby Magistrates' Court; ex parte B* [1996] AC 487.

² As opposed to it being absolute all the time.

equally decreed that ‘nothing imbued with the character of permanence could long retain popular respect’.³

Section IV considers the European Court of Justice ruling in *AM & S Europe v Commission of the European Communities*.⁴ The correlation between that case and *Derby* is that *AM & S* promulgated legal professional privilege to be a fundamental human right, deserving of protection for that reason. The *Derby* Court, in turn, utilised the ‘fundamental human right’ rationale as partial justification for rendering the privilege absolute. The common denominator linking the two cases was that community law was binding on both decisions and the courts of England could not nullify its effect.

Chapter VI concludes that in the 20th century the principle has evolved into a rigid rule carrying a far greater certainty than history or Wigmore ever intended. Chapter VII reveals that the absolutist stance adopted by Lord Taylor was fatally flawed and exposes as a legal fiction the notion that the doctrine of legal professional privilege is absolute. Illuminating what courts are prepared to put into, or read into, the concept of legal professional privilege, *Derby* attempted to freeze the law of privilege at this particular point in history by proscribing courts from continuing the evolutionary development of the rule according to common law principles or in light of reason and experience.

II *DERBY*: A FALLIBLE PRONOUNCEMENT

A *The ‘Absoluteness’ Justification*

*R v Derby Magistrates’ Court; Ex parte B*⁵ involved two consolidated appeals from the Queen’s Bench division to the appellate court.⁶ The same justices who

³ Henry Brougham, ‘Present State of the Law – The Speech of Henry Brougham, Esq., M. P., in the House of Commons, on Thursday, February 7, 1828’ (1828) 38 *Quarterly Review* 75, 242.

⁴ [1983] QB 878.

⁵ [1996] AC 487.

decided *Derby* sat on these appeals.⁷ This case raised significant questions concerning the scope of legal professional privilege and s 97 of the *Magistrates' Courts Act 1980* (UK), in particular whether it empowered the court to demand production of evidence⁸ involving the murder, by A, of a teenage girl.⁹

'A' had confessed to and was charged with her murder. He later recanted his statement and claimed that his stepfather, Brooks, was the killer.¹⁰ A was acquitted and his stepfather charged. During Brooks' committal hearing, the prosecution called 'A' as a witness, at which time he was examined about confidential client–counsel communications regarding his original 1978 confession and subsequent inconsistent accounts. 'A' asserted legal professional privilege to excuse himself from giving evidence. Stipendiary magistrate, Rougier, however adopted the test formulated in *R v Barton*¹¹ and *R v Ataou*¹² when he ruled that the documents in question were not subject to legal professional privilege on the basis they were relevant to the plea of innocence asserted by Brooks, who, if convicted, faced life imprisonment.

⁶ [1996] AC 487 states at 490C-D: 'These were consolidated appeals, by leave of the House of Lords (Lord Keith of Kinkel, Lord Mustill and Lord Lloyd of Berwick) ... from the judgment of the Divisional Court of the Queen's Bench Division (McCowan LJ and Gage J) on 21 October 1994 refusing applications for judicial review of decisions dated 21 June 1994 and August 1994 in committal proceedings against the applicant's stepfather'.

⁷ Lord Keith of Kinkel, Lord Mustill and Lord Lloyd of Berwick sat on these appeals.

⁸ Ibid 487F (Lord Taylor).

⁹ The judgment incorrectly states (at 385), that the victim was murdered in 1987, but (at 388), states she was killed on 3 April 1978; the latter being the correct date.

¹⁰ [1996] AC 487, 487E (Lord Taylor CJ). The *Magistrates' Court Act 1980* (UK) s 97 states that 'Where a Justice of the Peace ... is satisfied that any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence, at an inquiry into an indictable offence by a Magistrates' Court ... or at [a] summary trial of an information or hearing of a complaint by such a court and that that person will not voluntarily attend as a witness or will not voluntarily produce the document or thing, the Justice shall issue a summons directed to that person requiring him to attend before the court ... to give evidence or to produce the document or thing'. Failure to comply may result in the person being committed into custody until evidence is given or produced.

¹¹ (1973) 1 WLR 115.

¹² [1988] QB 798.

Rougier granted a summons directing the lawyer who had represented ‘A’ to produce certain privileged communications which pertained to the murder charge, namely, all notes of attendances, proofs of evidence and factual instructions conveyed prior to 8 October 1978. Advice given by the lawyer to ‘A’ was excluded.¹³ Lord Justice McCowan sitting in the Divisional Court, subsequently upheld Rougier J’s holding.

‘A’, who was represented by Mr Francis QC, appealed to the House of Lords which was required to determine whether *Barton* and *Ataou* had been correctly decided and if the balancing test enunciated in those cases should be performed when a claim for privilege arose in respect of confidential client–counsel communications.¹⁴ Francis QC took the position that confidence in the administration of justice would erode if judges themselves could decide that the privilege was spent.¹⁵ Contrary to the *dicta* of Lord Esher MR in *Marks v Beyfus*¹⁶ and Lord Denning MR in *Dallison v Caffery*,¹⁷ Francis argued that, in the long history of legal professional privilege, there was no hint of any balancing test having been performed prior to the decision of Caulfield J.¹⁸

B *The House of Lords’ Formulation*

The *Derby* Court explicated that legal professional privilege was absolute, having been settled once and for all in the 16th century.¹⁹ The Court announced that, upon the privilege being effected, the lawyer’s mouth was shut forever.²⁰

¹³ [1996] AC 487, 487F (Lord Taylor CJ). Legal advice imparted by the lawyer to his client was excluded.

¹⁴ *Ibid* 34.

¹⁵ [1996] AC 487, 513B (Lord Nicholls). A century earlier, *R v Cox & Railton* (1884) 14 QBD 153 held that secrets ‘must be told in order to see whether [they] ought to be kept’.

¹⁶ (1890) 25 QBD 494.

¹⁷ [1965] 1 QB 348.

¹⁸ *Ibid*.

¹⁹ [1996] AC 487, 508E (Lord Taylor).

²⁰ *Ibid* 505A (Lord Lloyd).

[I]f a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits.²¹

There are three problems with this reasoning, the first of which was canvassed in Chapter II which exposed the erroneous Wigmorean notion that the privilege manifested itself in Elizabethan England. Instead, the first incarnation of the rule was characterised by an ancient Roman underpinning which was informed by servitude and loyalty rather than professionalism and honour. Moreover, the 16th-century privity of communication was justified not as a professional privilege, but on the tenets of oath and honour.

Chapter II argued that none of the 16th-century authorities, from *Lee v Markham*²² and *Breame v Breame*²³ to *Windsor v Umberville*²⁴ and *Berd v Lovelace*,²⁵ articulated the right of a lawyer to avoid testimony as a result of invoking legal professional privilege.²⁶ It was merely their 'oath and honour' that excused lawyers from testifying.²⁷ The most significant aspect of cases decided in this era was that the rule fluctuated between being a preserve of the lawyer in *Berd v Lovelace*²⁸ and *Dennis v Codrington*²⁹ – both of which exempted lawyers from

²¹ Ibid 508E (Lord Taylor).

²² (1569) Monro 375, Tothill 48.

²³ (1571) Tothill 48. See also Ronald Bridgman, *A Digest of the Reported Cases on Points of Practice and Pleading in the Courts of Equity in England and Ireland and of the Rules and Orders of the Same Courts; from the Earliest Period to the Present Time* (Edward B Gould, 1829) 178.

²⁴ (1574) Monro 411.

²⁵ [1577] Cary 62.

²⁶ Justin Gleeson, James Watson and Elisabeth Peden, *Historical Foundations of Australian Law: Volume II – Commercial Common Law* (Federation Press, 2013) 132.

²⁷ The House of Lords failed to note the fundamental differences between these Court of Chancery cases and the common law, whereby parties *could* be deposed to answer interrogatories.

²⁸ [1577] Cary 62.

being examined in relation to communications passing between themselves and clients – and, as confirmed in the *Duchess of Kingston's Case*,³⁰ belonging to the client. This additionally contradicted a statement made by Lord Taylor CJ in the 1994 case of *R v Keane*, when he announced that trial judges should ‘carry out a balancing exercise, having regard to the weight of the public interest in non-disclosure and to the importance of the documents to the defence’.³¹

The second problem with the House of Lords’ formulation lies in the refrain that the lawyer’s mouth is shut forever. This edict was not a 16th-century manifestation. Rather, it was an 18th-century pronouncement made by Buller J in *Wilson v Rastall*,³² in which he stated:

The privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is shut forever. I take the distinction to be now well settled to the three enumerated cases.³³

As discussed in Chapter III, *Wilson* declared the privilege to be absolute in very specific circumstances, with only three classes of legal professionals entitled to invoke a claim of privilege. These were counsel, solicitors and attorneys. The antecedents of *Wilson* can be traced back to the medieval *Bailiffs of Sheriff's etc. Act*³⁴ which was passed in 1413. This statute precluded sheriffs and under-sheriffs from acting as *attornati* on behalf of clients.

The third problem with the Court’s contention was that it acted in reliance on the weight of authority stemming from *Wilson* when asserting the absoluteness of the rule. The House of Lords overlooked many decisions, including but not limited to

²⁹ (1579) Cary 100.

³⁰ (1776) 20 Howell’s State Trials 355.

³¹ [1994] 1 WLR 746, 751. See also *R v Turner* [1995] 1 WLR 264, 268.

³² See *Wilson v Rastall* (1792) 4 TR 753.

³³ *Ibid* 759 (Buller J).

³⁴ *Bailiff of Sheriff's etc. Act. 1413*, 4 Hen 5, c 3–6.

Annesley v Earl of Anglesea.³⁵ In that 1743 matter, Lord Baron Bowes stated that, upon a cause ending, only then was the lawyer to be considered, with respect to his former employer, as one person to another; ‘in which case a breach of trust did not fall within the jurisdiction of the Court; for the Court cannot determine what is honour, only what is law’.³⁶

In 1753, Sir John Strange MR, in *Winchester v Fournier*, commented that, while it was ‘a very right rule that an attorney ought not to betray the secrets of his clients, if he himself did not object to it, the Court had nothing to do with it’.³⁷ *Turquand v Knight*³⁸ succeeded *Wilson* and predicated the application of the doctrine on certain qualifications in a vein similar to *Winchester*. Proving historically significant for the fact that it overruled the *Wilson v Rastall*³⁹ pronouncement that a lawyer’s lips were forever sealed, the *Turquand* Court observed that, if a lawyer were employed in a cause unrelated to their professional character, the Court would not enforce them to obey the rule of legal professional privilege.⁴⁰ In refusing to uphold the rule enunciated in *Wilson*, *Turquand* signified that, although *Wilson* might be amongst the most frequently cited cases on the subject, it was not the final word with respect to legal professional privilege.

Where Lord Taylor CJ erroneously claimed that legal professional privilege was settled in the 16th century, he subsequently contradicted himself by *admitting* that it was not until the 18th century that ‘the rule was on the way to being established on its present basis’.⁴¹ Prior to this era, the laws of England often consisted of

³⁵ (1743) 17 How St Trials 1139.

³⁶ *Ibid* 1229 (Lord Baron Bowes).

³⁷ (1753) 2 Ves Sr 445, 447 (Sir John Strange MR).

³⁸ 2 Mees & W 98, 100 (1836).

³⁹ (1792) 4 TR 753.

⁴⁰ Conversely, if his employment directly correlated with his professional character, the Court would exercise its discretion to uphold the tenets of truth, confidence and trust reposed in him by his client.

⁴¹ [1996] AC 487, 504F (Lord Taylor).

disconnected and scattered precedents.⁴² Even Wigmore observed that ‘the period from 1790 to 1830 was the full spring tide of the system of rules of evidence’,⁴³ where the principles of English law ‘began to be developed into rules and precedents of minutiae relatively innumerable in comparison with what had gone before’.⁴⁴ He emphasised that the changes to legal professional privilege ‘brought a residuum of trouble and confusion into the precedents of the 1800s ... and the shackles of the earlier precedents were not finally thrown off until the decade of 1870’.⁴⁵

This view was reproduced in the writings of William Twining. He argued that in the 19th century, the laws of England had little regard for principle or consistency and hardly deserved to be called a system; for it was the confused and confusing product of largely ad hoc and often arbitrary growth devised by lawyers and judges⁴⁶ who perceived the law as little more than a few general maxims that could be subsumed under a single principle known as ‘the best evidence rule’.⁴⁷ Hazard similarly remarked that the privilege was ‘applied with hesitation’ and ‘recognition of the [the rule] was slow and halting until after 1800’.⁴⁸

During this era, the doctrine was influenced by the radical overhaul of criminal procedure which witnessed both the changing judicial role and the evolution of ‘lawyerisation’.⁴⁹ Lawyerisation culminated in an increasingly diminished role for

⁴² William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford University Press, 1985) 1–2.

⁴³ John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States*, Vol IV (Little, Brown & Co., 1905) § 8, 60g.

⁴⁴ *Ibid.*

⁴⁵ *Ibid* § 2290, 3196.

⁴⁶ William Twining, above n 42, 21.

⁴⁷ *Ibid* 1–2.

⁴⁸ Geoffrey Hazard, ‘An Historical Perspective on the Attorney-Client Privilege’ (1978) 66 *California Law Review* 1061, 1070.

⁴⁹ John Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003) 113.

the defendant, as legal advocates dominated adversarial trials.⁵⁰ John Langbein writes that in the 19th and 20th-centuries, privileges were overwhelmingly employed to protect the accused.⁵¹ Despite the adversarial system harbouring truth-defeating tendencies,⁵² the procedures for criminal adjudication were decided at a moment in history when English courts did not want too much truth.⁵³ With lawyers permitted to represent clients, it evened up the scales.⁵⁴

III BENTHAM AND WIGMORE ON ABSOLUTISM

Having attracted its share of criticism over the course of its lifetime, legal professional privilege has faced opposition in all quarters, with a number of commentators and courts questioning whether the privilege necessitated a permanent status. This thesis has shown that Bentham was its most prominent detractor, attacking both the rule and the efficacy of the common law. Viewing the common law as a living organism capable of adjusting and adapting to the needs of society as they unfolded over time, Bentham contended that the common law was not an absolutely fixed, inflexible system⁵⁵ and precedents were not of absolute authority; judicial decisions in one age are disregarded in another.⁵⁶ It naturally follows that legal professional privilege, as a bastion of the common law, could not be of a permanently fixed character either.

This Benthamic pronouncement has been a recurrent theme in legal opinion and was adopted by his admirers, including Oliver Wendell Holmes who was equally dismissive of outworn procedures and their contribution to the law.⁵⁷ Disparaging

⁵⁰ John Jackson, 'Reviewed Work: *The Origins of the Adversary Criminal Trial* by John H. Langbein' (2004) 44 *The British Journal of Criminology* 2, 286.

⁵¹ John Langbein, above n 49, 284.

⁵² *Ibid* 334.

⁵³ *Ibid* 336.

⁵⁴ John Jackson, above n 50, 287.

⁵⁵ Jeremy Bentham, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf and Others* (John Polbemus, 1882) 29.

⁵⁶ *Ibid* 48.

⁵⁷ Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 469.

rules which persisted through blind imitation of the past,⁵⁸ Holmes would not have advocated the absoluteness of any judicial doctrine. Holmes announced that ‘general propositions do not decide concrete cases’.⁵⁹ Members of the judiciary have argued⁶⁰ that when a precedent was the only argument made to support a court-fashioned rule, it was time for the rule’s creator to destroy it.⁶¹

According to Rodell: ‘It is the legend of the law that every legal dispute can, and must be settled by hauling an abstract principle down to earth and pinning it to the dispute in question’.⁶² It was doubtful that the privilege did ‘very much to promote candour on the part of the client to his’ lawyer.⁶³ Lord Brougham notably declared that the efficacy of laws depended on the sanction of public opinion and opined that:

By long use and custom ... men especially that are aged, and have been long educated to the profession and practice of the law, contract a kind of superstitious veneration of it beyond what is just and reasonable. They tenaciously and rigorously maintain those very forms and proceedings, and practices, which, though possibly at first they were seasonable and useful, yet by the very change of matters they become not only useless and impertinent, but burthensome and inconvenient, and prejudicial to the common justice and the common good of mankind; not considering the forms and prescripts of laws were not introduced for their own sakes, but for the use of public

⁵⁸ Ibid.

⁵⁹ *Lochner v New York*, 198 US 45, 76 (1905) (Holmes J).

⁶⁰ Black J was in the minority in the 1948 case *Francis v Southern Pacific Co*, 333 US 445, 471, 68 S Ct 611, 623 (1948), where he stated that precedents should be destroyed when there was no justification for adhering to them, aside from the fact they were court-made rules. Mason J was in the majority in *O’Reilly v Commissioners of the State Bank of Victoria* (1983) 153 CLR 1, when he stated, at 26, that the benefits of the privilege were doubtful. Lord Brougham also stated that nothing imbued with the character of permanence could retain public respect.

⁶¹ *Francis v Southern Pacific Co*, 333 US 445, 471, 68 S Ct 611, 623, (1948).

⁶² Fred Rodell, *Woe Unto You, Lawyers!* (Pageant-Poseidon, 1939) 48.

⁶³ *O’Reilly v Commissioners of the State Bank of Victoria* (1983) 153 CLR 1, 26 (Mason J).

justice; and therefore, when they become insipid, useless, impertinent, and possibly derogatory to the end, they may and must be removed.⁶⁴

He went so far as to proclaim that ‘the administration of the law is more wretchedly defective than the law itself. Justice is sold at an enormous price.’⁶⁵ Edmund Morgan and Frankel J were two other notable authorities who postulated that all relevant evidence should be admissible and that clients should not be insulated from that minimum duty by invoking the veil of privilege.⁶⁶ Even Lord Diplock pronounced that discovery was obtainable whenever and to the extent that the justice of the case dictated.⁶⁷ Thorpe J wished to see it plainly stated in case law that lawyers cannot rely on legal professional privilege to resist disclosure when they are in possession of material relevant to determination of the case but contrary to their clients’ interests.⁶⁸ He affirmed that lawyers had a positive obligation to divulge information to the other parties and the court.⁶⁹

Lord Taylor’s reasoning differed from Bentham. Despite Lord Taylor cautioning that rules should be created to ‘protect against wrongful conviction and safeguard the possibly innocent’,⁷⁰ his ‘absolutist’ stance in *Derby* prevented an accused from proving his innocence or advancing a defence. Having documented the limitations imposed on the rule in the form of waiver and the crime-fraud exception, this thesis has revealed that numerous authorities argued in favour of a third exception to the rule. These authorities contended that legal professional

⁶⁴ Henry Brougham, ‘Present State of the Law – The Speech of Henry Brougham, Esq., M. P., in the House of Commons, on Thursday, February 7, 1828’ (1828) 38 *Quarterly Review* 75, 243.

⁶⁵ University of Northern Iowa, ‘Review: Life and Character of Henry Brougham’ (1831) 33(72) *North American Review* 227, 247.

⁶⁶ Edmund Morgan, ‘Some Observations Concerning a Model Code of Evidence’ (1940) 89(2) *University of Pennsylvania Law Review* 145, 153; Marvin Frankel, ‘The Search for Truth Continued: More Disclosure, Less Privilege’ (1982–83) 54 *University of Colorado Law Review* 51, 65–6.

⁶⁷ *O’Reilly v Mackman* [1983] 2 AC 237, 282 (Diplock LJ).

⁶⁸ *Essex County Council v R* [1994] Fam 167, 168 (Thorpe J).

⁶⁹ *Ibid.*

⁷⁰ Geoffrey Robertson, ‘Justice in All Fairness’, *The Guardian*, 30 April 1997, 19.

privilege could not be absolute in criminal proceedings where innocence was on the line.

Despite Lord Taylor's preference to accord the rule a narrow scope in accord with its 19th-century roots and confine the privilege to the legal profession, this thesis has demonstrated that he misunderstood both the origin and justification for legal professional privilege. Lord Taylor stated that a balancing act had been conducted in the 16th century, with the standard justification for the existence of the rule being initially grounded in gentlemanly honour, and later, to ensure clients could consult lawyers in confidence without fear of those communications being divulged.⁷¹

Wigmore, by his own measure, would never have endorsed a blanket application of the rule. Instead, he affirmed that the privilege should be abrogated where it served a higher public interest, for in the end, the needs of 'man' were more important than adherence to a rule.⁷² In his estimation, the privilege was 'worth preserving for the sake of a general policy'; although it was 'nonetheless an obstacle to the investigation of the truth'.⁷³

While Wigmore expressed the opinion that legal professional privilege should be strictly construed 'within the narrowest possible limits consistent with the logic of its principle',⁷⁴ the judgment of Lord Taylor CJ in *Derby* conveyed the message that, if but one exception were permitted to the privilege, it would destroy the rule itself. With reference to Stevenson J in the 1960 case of *Hobbs v Hobbs and Cousens*,⁷⁵ Lord Taylor CJ remarked that legal professional privilege had a sound basis in common sense and, once it attached to client–counsel communications, it

⁷¹ [1996] AC 487, 507D.

⁷² John Wigmore, *Treatise*, cited in William Twining, above n 42, 161.

⁷³ John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States, Vol IV* (Little, Brown & Co, 1905) § 2291, 3204.

⁷⁴ *Ibid.*

⁷⁵ [1960] P 112.

remained for all time and in all circumstances.⁷⁶ This sentiment was at odds with the principles enunciated in *Barton, Ataou, Dunbar and Craig*.

A *Derby and the Commonwealth Authorities*

In addition to recognising the rule from its early English origins, the House of Lords adverted to modern precedents set in the Commonwealth jurisdictions of Australia,⁷⁷ South Africa,⁷⁸ Canada⁷⁹ and New Zealand.⁸⁰ Where the latter two have been discussed throughout the body of this work — for present purposes — Australia and South Africa, together with the International Court of Justice case, *Timor-Leste v Australia*,⁸¹ have been selected as comparators to *Derby*, owing to the fact that these seminal cases contributed to the modern-day approach to legal professional privilege. In particular, these Commonwealth authorities overwhelmingly support the proposition that the privilege is not unqualified. Rather, each provides a strongly consistent view of the nature and scope of the privilege as it evolved in each of the said jurisdictions. *Timor-Leste* is equally significant for raising previously untested, albeit novel, questions which require new legal reasoning about the limitations of the rule in an international setting.

1 *Australia*

The first of these to be examined is the 1976 Australian case, *Grant v Downs*,⁸² in which the High Court was required ‘to determine and state the relevant legal

⁷⁶ Ibid 116–17 (Stevenson J).

⁷⁷ *Grant v Downs* [1976] HCA 63; *Baker v Campbell* (1983) 153 CLR 52.

⁷⁸ *S v Safatsa* 1988 (1) S.A. 868.

⁷⁹ *Regina v Dunbar and Logan* (1982) 68 C.C.C. (2d) 13.

⁸⁰ *R v Craig* [1975] 1 N.Z.L.R. 597.

⁸¹ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Order of 28 January 2014, I.C.J. Reports 2014.

⁸² [1976] HCA 63. In *Grant*, the question before the Court centred on whether certain medical records, relating to the type and nature of injuries sustained by patients in mental hospitals, were exempt from discovery on the basis that they attracted the privilege. The deceased, Neville William John Grant, had been an inpatient at North Ryde Psychiatric Centre when, during an

professional privilege principle to operate in Australia'.⁸³ Barwick CJ commented that no such statement of authority presently bound the courts in this country.⁸⁴ Although the *Grant* Court noted the necessity of the privilege, with the majority stating that its existence was so firmly entrenched in the law that it could not be exorcised by judicial decision, they cautioned that powerful considerations suggested that the privilege should be strictly contained.⁸⁵ The Court labelled it more of 'an impediment, not an inducement, to frank testimony [which] detracted from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise'.⁸⁶

In a 3:2 decision, the Court formulated the 'sole purpose' test as the applicable criterion for legal professional privilege: the rule applied to documents brought into existence for the single indivisible purpose of legal advice or for use in legal proceedings.⁸⁷ Through confining the application of the privilege to documents *solely* created for the purpose of legal advice or use in litigation, the High Court restrained the privilege from 'travel[ing] beyond the underlying rationale to which it is intended to give expression'.⁸⁸ In simple terms, if the privilege's sweep was too broad, the search for the truth would be compromised because a greater number of justifications would exist to shield communications from discovery.

unsupervised period, he escaped from his room overnight and died from exposure to cold. Outlining the material purposes for which the documents were brought into existence, Wilfred James Maundrell, an officer of the Health Commission of New South Wales, cited several reasons as necessitating exclusion from inspection, namely: disciplinary action against staff, coronial proceedings and the possibility of a civil suit for damages.

⁸³ *Grant v Downs* [1976] HCA 63, 66 (Barwick CJ).

⁸⁴ *Ibid.*

⁸⁵ *Ibid* 685 (Stephen, Mason and Murphy JJ).

⁸⁶ *Ibid* 686.

⁸⁷ *Ibid* 688 (Stephen, Mason and Murphy JJ).

⁸⁸ *Ibid.*

Although the adoption of the ‘sole purpose’ test would seem a permanent fixture of the modern rationale⁸⁹ and it outwardly appeared an easy test to satisfy given that it was easily understood and provided a bright-line for determining when the protection began and ended,⁹⁰ it was deemed less than workable for swinging the balance in favour of disclosure.⁹¹

The second Australian case considered by the House of Lords was *Baker v Campbell*,⁹² in which Mason J indicated that it was by no means self-evident that legal professional privilege was superior to the public interest in facilitating the availability of all relevant materials for production in litigious disputes. Due to the complexity of this case, detailed analysis is warranted. Reminiscent of *The Queen v The Commissioners of Inland Revenue Ex parte Thomas Patrick Denton Taylor*⁹³ as discussed in Chapter V, the facts in *Baker* centred on the privity of documents retained by a lawyer⁹⁴ pertaining to a sales tax minimisation scheme. The documents included legal opinions and other communications, the scope of which fell outside the ambit of the ‘sole purpose’ test as settled in *Grant v Downs*.⁹⁵ Specifically relevant were ‘things being the original or copies of:

⁸⁹ *National Employers Mutual General Insurance Association Ltd v Waind* (1979) 24 ALR 86, 91–2 (Mason J). See also G L Peiris, ‘Legal Professional Privilege in Commonwealth Law’ (1982) 31 *International and Comparative Law Quarterly* 609, 622.

⁹⁰ Elizabeth Turnbull, ‘Case Note: Sole Purpose Test vs. Dominant Purpose Test: *Esso Australia Resources Limited v The Commissioner of Taxation*’ (2000) 21(1) *University of Queensland Law Journal* 120, 123 <<http://www.austlii.edu.au/au/journals/UQLJ/2000/12.pdf>>.

⁹¹ The ‘sole purpose’ test framed in *Grant v Downs* was condemned in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49. By a ratio of 4:2, the majority of the High Court, comprising Gleeson CJ, Gaudron, Gummow and Callinan JJ (with Kirby and McHugh JJ dissenting) determined that the appropriate test for determining the existence of legal professional privilege was the ‘dominant purpose’ test: ‘The correct test is the dominant purpose test, which is the common law test for claiming legal professional privilege’. In *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, Kirby J announced: ‘A brake on the application of legal professional privilege is needed to prevent its operation bringing the law into disrepute’.

⁹² (1983) 153 CLR 52, 75 (Mason J).

⁹³ [1988] WL 624291.

⁹⁴ The lawyer was O’Connor of Stone, James & Co.

⁹⁵ [1976] HCA 63

correspondence, prospectuses, notes, opinions of Counsel, contracts, agreements, and other documents and instruments'.⁹⁶ It was for the High Court to decide whether, if legal professional privilege *were* taken to attach to such documents, they could form the basis of an administrative proceeding in the form of a search warrant issued under the relevant Act.⁹⁷

In a 4:3 judgment, the majority, comprising Murphy, Wilson, Deane and Dawson JJ (Gibbs CJ, Mason and Brennan JJ dissenting) overruled *Grant*, holding that the documents were exempt from search and seizure, thereby subjecting them to a claim of privilege. The view articulated by Wilson J was particularly significant because, he distinguished his judgment in *Baker* from an earlier privilege case on which he ruled⁹⁸ and acknowledged that he had finally 'arrived at the only result which afford[ed him] lasting satisfaction'.⁹⁹

Wilson J accepted that a heavy reliance upon English authority influenced his narrow interpretation of the privilege in which the public interest was confined to the context in which the common law had evolved.¹⁰⁰ Wilson J conceded that he had been plagued by 'much anxious thought, in the course of which [his] opinion fluctuated from one conclusion to another'.¹⁰¹ It must be borne in mind though, that 'the power to disturb settled authority is ... to be exercised with restraint and only after careful scrutiny of the earlier course of decisions and full consideration of the consequences'.¹⁰² Finally, though, he resolved that the perfect administration of justice was not limited to legal proceedings and cited, as an example, the public interest in fostering a professional client–counsel relationship as a means of mitigating the need for litigation.¹⁰³

⁹⁶ *Baker v Campbell* (1983) 153 CLR 52, 111.

⁹⁷ *Ibid.*

⁹⁸ *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.

⁹⁹ Caron Beaton-Wells, 'Case Note: *Commissioner, Australian Federal Police v Propend*' (1998) 24 *Monash University Law Review* 210, 212.

¹⁰⁰ (1983) 153 CLR 52, 93 (Wilson J).

¹⁰¹ *Ibid.*

¹⁰² *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 55.

¹⁰³ (1983) 153 CLR 52, 95 (Wilson J).

Wilson J also deferred to Wigmore when he opined that the lineage of the 16th- and 17th-century privilege was crafted out of a respect for professional confidences as a matter of honour for lawyers until such time as the status-based justification for special treatment gave way to the realisation that that the privilege induced clients to hire lawyers.¹⁰⁴ Wilson J embraced the century-old rationale espoused by Lord Selborne LC in *Minet v Morgan*¹⁰⁵ that the privilege extended beyond the curial setting. He emphasised that the public interest now extended beyond legal proceedings when he commented that the privilege was an essential mark of a free society which attached to the relationship between lawyer and client and could only be abrogated or abridged by statute.¹⁰⁶

Wilson J was not alone in exploring the rationale of the privilege, with Murphy J branding the concept of the *client's* legal privilege 'ancient', having existed in English jurisprudence for over 400 years.¹⁰⁷ Murphy J restated that 'the important public policy which justifie[d] the privilege would often be defeated if the privilege were not generally available'.¹⁰⁸ Deane J similarly reiterated Wigmore's analysis of the origins of the privilege when he pronounced that the doctrine was recognised during the reign of Elizabeth I as being the professional obligation of the lawyer to guard the secrecy of their client's communications.¹⁰⁹

¹⁰⁴ Daniel Fischel, 'Lawyers & Confidentiality' (1998) 65 *University of Chicago Law Review* 1, 3-4.

¹⁰⁵ (1873) LR 8 Ch App 361.

¹⁰⁶ (1983) 153 CLR 52, 95 (Wilson J).

¹⁰⁷ Ibid 84 (Murphy J). Murphy J declared that the term ascribed to the privilege was unfortunate and opined that legal professional privilege suggested that the privilege belonged to the legal fraternity, which misconstrued its ownership as it rightfully belonged to the client and could be waived at the clients's discretion. As a result of this single remark, the Australian Law Reform Commission recommended the adoption of the term 'client legal privilege'. In fact, this phrase was eventually written into the *Uniform Evidence Act 1995* (Cth) and accorded a 'dominant purpose' in statute, while legal professional privilege was reserved for the common law.

¹⁰⁸ (1983) 153 CLR 52, 88 (Murphy J).

¹⁰⁹ John Wigmore, above n 73, § 2290.

Deane J was persuaded that the principle underlying the privilege was fundamentally important to the protection and preservation of the rights, dignity and equality of citizens and labelled it a precondition of full and unreserved communication.¹¹⁰ He promulgated Wigmore's belief when he articulated that the general principle accorded protection to the client against the modern state and assured those requiring independent legal advice that they could obtain it without the risk of prejudice by compulsory disclosure.¹¹¹

The pronouncement of Deane J highlighted that the privilege was one of fundamental importance which transcended the rules of evidence and had higher status than communications arising out of other confidential relationships such as doctor-patient or priest-penitent.¹¹² According to Deane J, the established justification for the rule lay in the fact that the proper functioning of the legal system was predicated on freedom of communication between lawyer and client which would erode if either could be compelled to disclose what passed between them for the purpose of giving or receiving legal advice.¹¹³

Although Dawson J observed that the ability to compel disclosure of professional confidences carried significant consequences and was likely to destroy freedom of communication, he pronounced that the rule curtailed the judicial search for truth and attracted critics from the outset, including Bentham.¹¹⁴ Dawson J opined that recent case law had placed the traditional doctrine on a new plane.¹¹⁵ The privilege was no longer regarded merely as a rule of evidence which shielded communications from discovery,¹¹⁶ for, 'the Courts, unwilling to so restrict the concept, have extended its application well beyond those limits'.¹¹⁷

¹¹⁰ (1983) 153 CLR 52, 118 (Deane J).

¹¹¹ Ibid 120 (Deane J).

¹¹² Ibid 685 (Dawson J).

¹¹³ Ibid.

¹¹⁴ Ibid 131 (Dawson J).

¹¹⁵ Ibid, citing *Solosky v The Queen* (1979) 105 DLR (3d) 745, 757 (Dickson J).

¹¹⁶ (1983) 153 CLR 52, 118.

¹¹⁷ Ibid.

With respect to the Australian authorities, the House of Lords concentrated on a singular quote in *Grant*, specifically that legal professional privilege promoted the public interest by facilitating the representation of clients by legal advisers and was so firmly entrenched that it could not be exorcised by judicial decision. The *Derby* Court disregarded all references to the sole purpose test in which *Grant* adopted a narrow scope of the rule so as not to compromise the search for truth by shielding from discovery a greater number of communications. The *Grant* Court cautioned that the privilege should be strictly construed on the basis that it impeded frank testimony and diminished fairness by denying a party access to relevant documents.¹¹⁸

The House of Lords appears to have been persuaded by the reasoning in *Baker*, which led Lord Taylor CJ to describe legal professional privilege as ‘a fundamental condition on which the administration of justice as a whole rests’.¹¹⁹ Lord Taylor conceded, however, that it was difficult to justify why communications between client and lawyer should be privileged if litigation was not anticipated. In seeking to apply his ‘absoluteness’ justification to legal professional privilege only in the context of litigation, Lord Taylor saw no value in extending it to legal advice privilege:¹²⁰ ‘... To extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide’.

This view accords with the Wigmorean presumption in which the latter favoured litigation values over the harm to other values. Advice that was not sought in anticipation of litigation was not privileged. Lord Taylor reasoned there would be little to fear if the privilege was not available under these circumstances, for client–counsel communications would not be inhibited.¹²¹

2 *South Africa*

¹¹⁸ (1983) 153 CLR 52, 685.

¹¹⁹ [1996] AC 487, 507D (Taylor LJ).

¹²⁰ *Balabel v Air India* [1988] 1 Ch 317, 330-331 (Taylor LJ).

¹²¹ *Ibid.*

In the South African appeal case of *S v Safatsa*,¹²² Botha JA, on delivering the judgment of the court, criticised the *Baker* ruling when he cautioned that any claim to relax the privilege should be approached with great circumspection. While he did not doubt that, as a matter of principle, the rule could be relaxed, Botha JA elucidated that this could occur only through the exercise of judicial discretion, based on a consideration of all relevant information.¹²³ He could not fathom how judges could otherwise be called upon to carry out any form of balancing exercise with respect to the privilege, weighing the conflicting principles of public policy, without being supplied information relevant to the issue in question.¹²⁴

He also departed from the general principle laid down by Caulfield J in *Barton* that a mere *allegation* of innocence would suffice to destroy the privilege and compel production of client–counsel communications. In his view, disclosure could be compelled only through the exercise of discretion by the trial judge.¹²⁵ Botha JA had regard to Wigmore when he affirmed that the public policy underlying legal professional privilege was to promote freedom of consultation and remove apprehension of compelled disclosure.¹²⁶ This protected clients who consulted lawyers for the purpose of obtaining professional legal advice of any kind, by ensuring that confidential communications relevant to that purpose were permanently protected except where the client waived the protection.¹²⁷

¹²² 1988 (1) SA 868, 886 (Botha J). The Court was constituted by Botha JA, Hefer JA, Smalberger JA, Boshoff AJA and MT Steyn AJA.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ John Wigmore, above n 73, §2292, 3204–5. Botha JA expressly referred to *Wigmore on Evidence, Vol VIII*, § 2291 and § 2292. Botha JA also considered *Wheeler v Le Marchant* and *Burnell v British Transport Commission*, which confined legal professional privilege to communications which passed for the purpose of obtaining legal advice, with any communications used during cross-examination waiving the privilege over the whole of the communication.

¹²⁷ *S v Safatsa* 1988 (1) SA 868, 886 (Botha JA). See also Wigmore, above n 73, §2291, 3204.

The *Derby* Court touched briefly on *Safatsa* when recognising the need to exert caution over any claim to relax the privilege. Lord Taylor CJ formed the opinion that no exception should be allowed to the absolute nature of the rule once it had been established.¹²⁸ Lord Taylor borrowed from Lord Brougham in *Greenough v Gaskell*¹²⁹ when he concluded: ‘It is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those who might otherwise be deterred from telling the whole truth to their solicitors.’¹³⁰

3 *International Court of Justice*

*Timor-Leste v Australia*¹³¹ provides an international perspective on legal professional privilege and is noteworthy for discerning whether a national security exception exists to legal professional privilege. Stirring debate that ‘the bedrock principle of [the doctrine] is being eroded under the national security rubric’,¹³² this International Court of Justice case was presided over by Keith, Cançado Trindade, Greenwood, Donoghue and Callinan JJ.

The proceeding centred on the seizure of materials pursuant to a warrant issued under s 25 of the *Australian Security Intelligence Organisation Act 1979* (Cth).¹³³ The documentation confiscated by Australian officials related to a pending Timor Sea Treaty arbitration between Timor-Leste and Australia, including correspondence between the Timorese government and its legal advisers with respect to mounting a legal strategy.¹³⁴

¹²⁸ [1996] AC 487, 508H (Lord Taylor).

¹²⁹ (1883) 1 M & K 98.

¹³⁰ [1996] AC 487, 508H (Lord Taylor).

¹³¹ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Order of 28 January 2014, I.C.J. Reports 2014.

¹³² Stephen Tully, *Timor-Leste v Australia: Privilege, Security and International Law* (2014) *Law Society of NSW Journal* 5, 85.

¹³³ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Order of 28 January 2014, I.C.J. Reports 2014.

¹³⁴ Stephen Tully, *Timor-Leste v Australia: Privilege, Security and International Law* (2014) *Law Society of NSW Journal* 5, 84.

Timor-Leste contended that ‘as a general principle of law, the materials were subject to legal professional privilege¹³⁵ and it enjoyed the sovereign right under international law to protect communications between itself and its legal advisers. It sought an ICJ ruling that provisional measures be implemented to prevent Australia being able to inform itself of the nature of these communications, including but not limited to advice relating to the Timor Sea.¹³⁶ Australia responded that any claim to privilege was forfeited because communications were made in pursuance of a criminal offence.¹³⁷

Callinan J suggested that the entitlement to inviolability of communications in the possession of a lawyer in another country was a novel claim.¹³⁸ Further, the extent to which the principle was immune to any limitation in an international context was unsettled and necessitated careful consideration.¹³⁹ He observed that the evidence relied on was untested and involved double hearsay, leading to doubt surrounding which party was entitled to claim legal professional privilege in respect of the seized communications’.¹⁴⁰

While acknowledging that the privilege was important and extensive in application, Callinan J recognised that national security was an exception to the rule and expressed concern about the absoluteness of the privilege if it jeopardised a nation’s security. Where questions arose as to whether access by one nation to the privileged communications of another during ongoing arbitration would compromise peaceful dispute resolution in a manner consistent

¹³⁵ Ronald Bettauer, ‘Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia). Provisional Measures Order’ (2014) 108 *American Journal of International Law* 4, 765.

¹³⁶ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Order of 28 January 2014, I.C.J. Reports 2014, 163 (Keith J).

¹³⁷ Ronald Bettauer, above n 135.

¹³⁸ I.C.J. Reports, above n 136, 221 (Callinan J).

¹³⁹ Ibid.

¹⁴⁰ Ibid.

with justice,¹⁴¹ Callinan J affirmed that ‘any court, [including the ICJ] would be conscious of the unlikelihood that any nation ... would regard [itself] as bound to treat national security as inferior, or subject to, legal professional privilege’.¹⁴²

In a separate opinion, Cançado Trindade J remarked that it could not ‘be denied with certainty that, with the seizure of documents and data containing privileged information, Timor-Leste [had] already suffered irreparable harm’.¹⁴³ In order to mitigate the detrimental effect on Timor-Leste’s position, he recommended that the ICJ order the documents be sealed and delivered into the court’s custody.¹⁴⁴ Greenwood J concurred that Timor-Leste should enjoy the right to conduct arbitration proceedings without Australian officials interfering in its communications with its legal advisers.¹⁴⁵

Donoghue J, in a separate opinion, concluded that Australia should be prohibited ‘from interfering in any way in communications between Timor-Leste and its legal advisers in connection with the pending arbitration’.¹⁴⁶ Donoghue J was prompted to adopt this stance on the basis that Australia saw ‘no legal impediment to interfering with communications between Timor-Leste and its counsel in the future, so long as such actions complied with [domestic] law’.¹⁴⁷ She did, however, form a different conclusion about whether the legal position of Timor-Leste was irreversibly weakened or exposed to any remaining element of risk given that Australia had given an undertaking not to divulge the communications.

Timor-Leste v Australia highlighted that at an international level, legal professional privilege was not absolute. Rather, it must cede to the interests of national security.

¹⁴¹ Ronald Bettauer, above n 135, 769.

¹⁴² I.C.J. Reports, above n 136, 221 (Callinan J).

¹⁴³ Ibid 51.

¹⁴⁴ Ibid 52-3; 54 (Cançado Trindade J).

¹⁴⁵ Ibid 199 (Greenwood J).

¹⁴⁶ Ibid, 213 (Donoghue J).

¹⁴⁷ Ibid.

B *The Weight of Authority*

By attaching equal importance to any prejudice suffered by clients as a result of disclosure and prejudices faced by the accused through non-disclosure, Goldberg QC, for the respondent, advocated a balancing test whereby the privilege could be breached only in truly exceptional circumstances.¹⁴⁸ He submitted that the balance between competing interests should not be snuffed out and prevailed upon the *Derby* Court to weigh each case individually rather than apply a crude ‘all or nothing’ approach.¹⁴⁹ The phrase ‘truly exceptional circumstances’ was not defined. Asserting that times had changed, he argued that greater emphasis was now being placed on putting courts in possession of all relevant material in order to arrive at the truth.¹⁵⁰

Although Lord Taylor CJ observed that the privilege was integral to the administration of justice, the rule should not be understood as being the sole ingredient in the whole recipe for justice or the cornerstone upon which the legal profession was built. A number of other pillars are equally integral to the administration of justice. These include trust, competence, ethical and professional conduct, integrity and the efficacy of the legal profession.¹⁵¹ Lords Keith and Mustill concurred with the Chief Justice and added nothing further to his pronouncement. However, Lord Nicholls noted the tension between the doctrine of legal professional privilege and the public interest, when he countenanced that

All relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the

¹⁴⁸ Ibid.

¹⁴⁹ [1996] AC 487, 511E (Lord Nicholls).

¹⁵⁰ Ibid 509F (Lord Lloyd).

¹⁵¹ *Vance v McCormack* (2004) 184 FLR 62, 42 (Crispin J).

contents of documents or other material which, if disclosed, might well affect the outcome.¹⁵²

It becomes evident that he rejected the idea of a balancing test because it would present the courts with an impossible task.¹⁵³ He concluded that, in the absence of any measure by which judges could ascribe an appropriate weight to civil and criminal actions of differing severity, the prospect of such an exercise was illusory.¹⁵⁴

Derby represented a change from treating legal professional privilege as a rule of admissibility. This was the view a generation before, per Lord Denning and other members of the judiciary.¹⁵⁵ The modern view, initially taken in Australia in *Baker*, holds that the principle constituted a fundamental right. A fundamental human right is defined as ‘the freedom accorded equally, and without distinction, to each and every human being’.¹⁵⁶ In the context of legal professional privilege, the important principle underpinning this ‘fundamental right’ is the public interest in enabling clients to speak to their lawyers in confidence without fear of ever having those conversations exposed.

Despite the prevalence of doubt that the privilege did ‘very much to promote candour on the part of the client to his’ lawyer,¹⁵⁷ the *Derby* Court proved that the common law now classed the privilege as a fundamental asset which had morphed into an important common law immunity.¹⁵⁸ Favouring a more

¹⁵² [1996] AC 487, 510F (Lord Nicholls).

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Lord Denning MR, in *Dallison v Caffery* [1965] 1 QB 348, cautioned that it would be reprehensible for counsel to conceal evidence rather than make available to the defence information which might aid a defendant in proving their innocence.

¹⁵⁶ Lloyd Duhaime, *Duhaime’s Law Dictionary*

<<http://www.duhaime.org/LegalDictionary/H/HumanRight.aspx>>. See also *Universal Declaration of Human Rights*, adopted 10 December 1948, GA Res 217A (III).

¹⁵⁷ *O’Reilly v Commissioners of the State Bank of Victoria* (1983) 153 CLR 1, 26 (Mason J).

¹⁵⁸ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

expansive approach to legal professional privilege, *Derby* resolved the clash of principles in favour of the paramountcy of the doctrine and placed its status beyond doubt when it assigned it an absoluteness from which there was no derogation. Despite being at odds with the principles enunciated in several Commonwealth decisions, the House of Lords couched the rule in the rhetoric of rights when it determined that no balancing act was required when applying the rule in litigation; with client-counsel communications permanently privileged from disclosure.

While recognising that the refusal of A to reveal secrets wrought grave harm upon Brooks, the decision not to compel A's confidential communications went against Lord Taylor's earlier efforts to satisfy the judicial conscience. Contrary to his desire to leave no pebble unturned, Lord Taylor's *Derby* pronouncement was inconsistent with his previous judicial opinions.

Cautioning the need to re-examine the scope of the rule to keep it within justifiable bounds, Lord Taylor's ruling in *Balabel v Air India*¹⁵⁹ introduced a rigid requirement and restored the scope of the rule to its 19th-century roots. This aligned with the Wigmorean paradigm in which client-counsel communications attracted legal professional privilege *only* if they directly correlated to legal advice of a professional character.

This clearly signified that, if a client sought advice which was not by nature professional legal advice, the resultant communication was not protected by legal professional privilege. Criticising cases which extended the doctrine without limit to all communications, the *Balabel* Court remarked that the privilege was not as clear as it might have been prior to Lord Taylor's ruling. This evidences that, in limiting the breadth of the principle, *Balabel* succeeded in developing a firm rule.

Lord Taylor's judgment in *R v Umoh Mfongbong*¹⁶⁰ also aligned with Benthamic and Wigmorean pronouncements in confirming that legal professional privilege

¹⁵⁹ [1988] Ch 317.

¹⁶⁰ (1987) 84 Cr App R 138.

should remain a preserve of the legal profession. Rejecting ever-multiplying privileges for other professional relationships in which at least equal confidence was reposed, Lord Taylor denied protection to communications passing between prisoner and prison officer where the latter was acting in the capacity of a legal aid officer.

With respect to the waiver of privileged communications, Lord Taylor passed two conflicting rulings. In *Tanap v Tozer*,¹⁶¹ he remained faithful to Wigmore's philosophy that the dictates of fairness required full disclosure on the basis that a party to a proceeding should not be permitted to 'cherry pick' which portions of a privileged communication they wished to divulge and those they wished to guard from disclosure. Conversely, in *Goldman v Hesper*,¹⁶² he again recognised that the privilege was not absolute and emphasised the need to weigh competing interests through 'striking an appropriate balance' with respect to privileged communications. In a deviation from Wigmore, he resolved that a voluntary disclosure of privileged information would not prevent the owner of a document from reasserting a claim of privilege in any subsequent context.

Balabel signalled a trend towards narrowing the application of the rule and returned to the position which upheld the right to a fair trial. *Derby* reformulated the standard of this protection to encompass within its ambit all client-counsel communications. *Tanap* and *Goldman* were decided on the particular merits of each case owing to fairness and the need to strike an appropriate balance, however *Derby* applied a rigid rule of nondisclosure. In *Inland Revenue*, Lord Taylor concurred with Nicholls LJ that it would be unwise to say anything which might bind the hands of the judge, yet the *Derby* judgment effectively bound and gagged the judiciary from engaging in any form of balancing exercise.

According paramountcy to the rule is to create an unwarranted extension to the privilege. Lord Lloyd in *Derby* was the sole justice to acknowledge that legal professional privilege may bring hardship to those seeking to assert their

¹⁶¹ *Tanap Investments (UK) v Tozer* [1991] WL 839041.

¹⁶² [1988] 1 WLR 1238.

innocence; however, he concluded that it was better to preserve the principle intact for the sake of the administration of justice.¹⁶³ This contradicted his ruling in *Francis & Francis* as discussed in Chapter IV, where Lloyd LJ observed that, while courts were reluctant to depart from their previous rulings, if persuaded that a prior judgment was clearly wrong, they were bound to say so.

The *Derby* Court resolved that client–counsel communications were

absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence.¹⁶⁴

After looking at the authorities, Lord Taylor continued with these words:

Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) ... as to which we did not hear any argument ... difficulty is this: whatever inroads may have been made by Parliament in other areas, legal professional privilege is a field which Parliament has so far left untouched.¹⁶⁵

Neither of these arguments is sufficient to explain why the privilege warrants an absolute status. The *Derby* decision was overruled three years later, with the absolutist rationale undermined in *Re L*.¹⁶⁶ This decision produced cracks in the intellectual armour of the original *Derby* decision and represented the principal occasion in which the House of Lords was confronted with the unenviable task of considering the correctness of *Derby*.

¹⁶³ [1996] AC 487, 510A (Lord Lloyd).

¹⁶⁴ *Ibid* 510G (Lord Nicholls).

¹⁶⁵ *Ibid* 507H (Lord Taylor).

¹⁶⁶ *Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16.

Proving that *Derby* was incorrectly decided, a differently constituted House of Lords in *Re L*¹⁶⁷ was left to mop up the overeager ‘spill’ by placing some limit on the absoluteness of that earlier decision.

1 *Re L (A Minor)*

The *Derby* Court’s ruling that privileged communications could not be overridden in deference to a more compelling interest does not detract from the power of the House of Lords to depart from a previous decision where there are cogent reasons to do so. There are strong indications that *Derby* may not be good law on this point. *Derby*, if correct, would have the effect of enabling all communications, even those with dubious causal nexus, to be shielded. This proposition was contested in *Re L*.¹⁶⁸

In that case, Lord Nicholls opined that the privilege may be curtailed if the interests of a minor were at stake, with the court ultimately resolving that this constituted a legitimate public interest,¹⁶⁹ and that legal professional privilege could be forced to cede to competing interests of higher value. In order to eschew the stranglehold of *Derby*, the Court in *Re L*¹⁷⁰ held that expert reports obtained with a view to litigation were not privileged.¹⁷¹ They were discoverable in the same way as any other material.¹⁷² *Re L* indicated that the broad principle stated in *Derby* was incorrect.¹⁷³ Referring to the privilege as ‘essentially a creature of

¹⁶⁷ [1997] AC 16. The Court comprised Lord Jauncey of Tullichettle, Lord Lloyd of Berwick, Lord Mustill and Lord Steyn. In *Re L*, a child ingested methadone.

¹⁶⁸ *Ibid.*

¹⁶⁹ [1997] AC 16. In spite of his pronouncement in *Re L*, Lord Nicholls nevertheless affirmed his absolutist stance when he maintained that legal professional privilege was so integral to the administration of justice that only express statutory wording could abrogate its scope or absolute application.

¹⁷⁰ *Ibid.*

¹⁷¹ Adrian Zuckerman, ‘Legal Professional Privilege: The Cost of Absolutism’ (1996) 112 *Law Quarterly Review* 535, 538–9.

¹⁷² *Ibid.*

¹⁷³ See Patrick O’Hagan, ‘Legal Professional Privilege: Some Developments’ (1997) 2 *Private Client Business* 131. Patrick O’Hagan, writing about developments in legal professional

adversarial proceedings’,¹⁷⁴ Jauncey LJ held that the rule could not be invoked to protect confidential communications that were investigative or inquisitorial in nature.

Demonstrating a willingness to discard traditional views of the inviolable nature of legal professional privilege when it conflicted with the interests of children,¹⁷⁵ the majority justices distinguished communications passing between lawyer and client from reports prepared by third parties on a client's instructions for the purposes of litigation:¹⁷⁶

In these proceedings, which are primarily non-adversarial and investigative as opposed to adversarial, the notion of a fair trial between opposing parties assumes far less importance. In the latter case, the judge must decide the case in favour of one or the other party upon such evidence as they choose to adduce ... In the former case, the judge is concerned to make a decision which is in the best interest of the child in question.¹⁷⁷

In dissent, Lord Nicholls reaffirmed his stance in *Derby* when he stated in *Re L* that ‘the public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being made available to courts when deciding cases’.¹⁷⁸ In spite of his pronouncement in *Re L*, Lord Nicholls nevertheless affirmed his absolutist stance when he maintained that legal professional privilege was so integral to the administration of justice that only express statutory wording could abrogate its scope or absolute application. *Derby* denied the defendant access to confidential third-party

privilege, observed that *Re L* demonstrated the ability to balance competing public interests, with the House of Lords indicating that each case turned on its facts.

¹⁷⁴ [1997] AC 16, 26 (Jauncey LJ).

¹⁷⁵ Mary Hayes, ‘Protecting Children in England and New Zealand’ (1999) 7 *Canterbury Law Review* 297 <<http://www5.austlii.edu.au/au/journals/CanterLawRw/1999/4.html>>.

¹⁷⁶ [1997] AC 16.

¹⁷⁷ [1997] AC 16 (Nicholls LJ).

¹⁷⁸ [1997] AC 16, 32 (Nicholls LJ).

communications which could have assisted the preparation of his defence during committal proceedings. Lord Taylor's decision to regard the privilege as 'absolute' prevented disclosure of material relevant to the defendant's claim of innocence.

Zuckerman states that, 'in *Derby*, Lord Nicholls...warned against adopting any discretionary power to override LPP. In Speaking in *Re L*, Lord Jauncey seemed to defer to this advice'.¹⁷⁹ Zuckerman adds, 'there is no escaping the need for balancing interests'. He continues:

The refusal to deal with the entire question is doubly unfortunate because of the approach of the house of Lords adopted in this very case... The House of Lords seems to have adopted an all-or-nothing policy; either LPP obtains in whole or it does not obtain at all'. Mr Zuckerman surmises that 'this approach was dictated, one cannot help but feeling, not so much by the all-or-nothing approach as by the need to escape the shackles of *Derby*'.¹⁸⁰

Patrick Hagan, in writing about developments in legal professional privilege, observes that *Re L* demonstrated the ability to balance competing public interests, with the House of Lords indicating that each case turned on its facts.¹⁸¹ Mary Hayes, in 'Protecting Children in England and New Zealand' comments in two separate passages that 'in *Re L*, their Lordships demonstrated that they were willing to adopt a robust approach and discard long held views of the sacrosanct nature of legal professional privilege where these views appeared to conflict with the interests of children'.¹⁸² Ms Hayes adds that

The House of Lords was deeply divided on whether the special attributes of children cases justified the Court of Appeal's approach, and only approved it by a 3:2 majority. Lord Jauncey, speaking for the

¹⁷⁹ Adrian Zuckerman, above n 171, 536.

¹⁸⁰ Ibid 538-39.

¹⁸¹ Patrick Hagan, above n 173.

¹⁸² Mary Hayes, above n 175.

majority, said that, in his opinion, a distinction should be drawn between a communication between solicitor and client, to which absolute legal professional privilege applies, and the privilege attaching to reports by third parties prepared on the instructions of a client for the purposes of litigation ... His Lordship was of the opinion that if a party was able to conceal, or withhold from the court, important matters relevant to the future of the child, there would be a risk that the welfare of the child would not be promoted...¹⁸³

2 *Three Rivers*

Derby was again overruled in a later English case colloquially known as *Three Rivers*.¹⁸⁴ In that long-running dispute, the correctness of Lord Taylor's decision was again called into question during litigation between the Bank of England and liquidators and creditors of the collapsed Bank of Credit and Commerce International SA (BCCI).¹⁸⁵ That proceeding turned on whether the bank was compelled to furnish to the court communications disclosed during an earlier inquiry into the collapse.¹⁸⁶ At trial, Tomlinson J dismissed the claimants' request for specific disclosure against the bank.

On appeal in *Three Rivers (No 1)*,¹⁸⁷ Lord Justice Chadwick MR and Lord Justice Keene upheld the judgment of Tomlinson J because the circumstances of the case

¹⁸³ Mary Hayes, above n 175.

¹⁸⁴ *Three Rivers District Council v Governor and Company of the Bank of England (No 1)* [2003] CP Rep 9; *Three Rivers District Council v Governor and Company of the Bank of England (No 2)* [2002] EWHC 2309; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] EWCA Civ 474; *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2004] 3 WLR 1274; *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48.

¹⁸⁵ *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48 was presided over by Lord Scott, Lord Rodger, Baroness Hale, Lord Carswell and Lord Brown.

¹⁸⁶ Chaired by Bingham LJ, the inquiry was known as the 'Bingham Inquiry'.

¹⁸⁷ *Three Rivers (No 1)* was heard before Lord Justice Chadwick MR and Keene LJ. *Three Rivers DC v Bank of England (No 1)* [2003] CP Rep 9.

were so highly unusual since the documents were never in the physical possession of the bank, nor did the bank have a right to possession. No obligation of disclosure existed. Conversely, *Three Rivers (No 2)* held that a breach of privacy ‘was necessary for the protection of the rights and freedoms of the parties to the litigation’.¹⁸⁸ Appeals (No 3 and No 4) cited, with approval, the authority of *Derby* when confirming that legal assistance and advice could be effectively rendered only if clients were candid and forthcoming, this being the very consideration which justified the absolute character of the privilege in the first place.¹⁸⁹

In *Three Rivers (No 5)*, the House of Lords restricted the definition of ‘client’ when it ruled that, for the purpose of legal professional privilege, information tendered by an employee was akin to information received from an independent agent and was not subject to protection.¹⁹⁰ *Three Rivers (No 6)* reined in the privilege and reduced its ambit to those communications pertaining to the giving or receiving of legal advice in a professional capacity.¹⁹¹

Declaring that legal professional privilege should be accorded a scope which reflected the policy reasons that justified its presence in our law,¹⁹² Scott and Carswell LJ were conscious of the need to discern the bounds of the privilege. Lord Scott proposed a test for discerning the relevant legal context in which advice attracted legal professional privilege. He specifically stated that, if a communication pertained to the rights, liabilities, obligations or remedies of the

¹⁸⁸ The Court stated that, for this reason, Article 8 of the *European Convention on Human Rights 1950* did not apply to the parties. *Three Rivers DC v Bank of England (No 2)* [2002] EWHC 2309.

¹⁸⁹ *Three Rivers DC v Bank of England (No 4)* [2004] 3 WLR 1274.

¹⁹⁰ *Three Rivers DC v Bank of England (No 5)* [2003] EWCA Civ 474 (Longmore LJ).

¹⁹¹ *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48 (Lord Scott). This statement was borrowed from Lord Taylor in *Balabel v Air India* [1988] Ch 317.

¹⁹² *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48, 35.

client under private or public law, it would be privileged.¹⁹³ This was premised on the purpose and occasion for which the communication was made.¹⁹⁴

The House of Lords cited Wigmore, who emphasised that ‘the privilege should be strictly confined within the narrowest possible limits consistent with the logic of its principle’.¹⁹⁵ The Court concluded that it would continue to adhere to the historical practice of English courts in limiting the ambit of the privilege to communications made in confidence between lawyer and client for the purpose of obtaining legal advice or assistance.¹⁹⁶

Section III highlighted the manner in which *Derby* distinguished itself from judgments in specific Commonwealth jurisdictions. The standard, though, was changing. In curing the uncertainty and complexity of the law by restating the principles of the privilege, *Re L* and *Three Rivers* opened a modest crack in the doctrinal wall.¹⁹⁷ Section IV now examines the second stream of thought which informed the reasoning of Lord Taylor CJ.¹⁹⁸

IV PRIVILEGE: FUNDAMENTAL RIGHT AND A MATTER OF SUBSTANCE

Where the House of Lords misunderstood the older English authorities and failed to adequately survey the cases that advocated a balancing approach, the Court was instead persuaded by a ruling stemming from *AM & S Europe Ltd v Commissioner of the European Communities*.¹⁹⁹ The correlation between the ECJ

¹⁹³ Ibid 1277 (Lord Scott).

¹⁹⁴ Ibid.

¹⁹⁵ Ibid 86.

¹⁹⁶ Ibid.

¹⁹⁷ James Moliterno, ‘Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client’s Confidences to Rectify the Wrongful Conviction of Another?’ (2011) 38 *Hastings Constitutional Law Quarterly* 4, 812.

¹⁹⁸ The first being Lord Taylor CJ’s adherence to Wigmore’s fallible pronouncement that legal professional privilege was settled in the 16th century.

¹⁹⁹ *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878. AM & S is an abbreviation for ‘Australian Mining and Smelting’. In the *Derby* transcript, it is stated: ‘The

case and *Derby* lies in the fact that *AM & S* promulgated legal professional privilege to be a fundamental human right, deserving of protection for that reason.

The rationale expounded in *AM & S* held that, irrespective of whether it was described as a fundamental human right of the client or the duty of the lawyer, the principle of legal professional privilege had nothing to do with the protection or privilege of the latter.²⁰⁰ It was founded in the need for clients to turn to lawyers for advice, aid and legal representation.²⁰¹ The *Derby* Court utilised the ‘fundamental human right’ rationale as partial justification for rendering the privilege absolute.

A *AM & S Europe: A Global Community*

In *AM & S Europe Ltd v Commission of the European Communities*,²⁰² the European Court of Justice²⁰³ ruled for the first time on whether client–counsel

appeal was argued on June 12, 13, 14 and 15, 1995, when the following additional cases were cited: *A M & S Europe Ltd v Commission of the European Communities* (Case 155/79), [1983] QB. 878; *Baker v Campbell* (1983) 153 CLR 52; *Bullock & Co v Corry & Co* (1878) 3 QBD. 356; *Clowes* (1992) 95 Cr App R 440; *Derby & Co Ltd v Weldon (No. 7)* [1990] 1 WLR 1156; *Evans v Chief Constable of Surrey* [1988] QB 588; *Horseferry Road Magistrates' Court, ex p. Bennett (No. 2)* (1994) 99 Cr App R 123; *Knight v Marquess of Waterford* (1835) 2 Y & C Ex 22; *Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)* [1980] 1 WLR 627; *Minet v Morgan* (1873) LR 8 Ch App 361; *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow (a firm)* [1995] 1 All ER 976; *Nias v Northern and Eastern Rly Co* (1838) 3 M & C 355; *Oxfordshire County Council v M* [1994] Fam LR 151; *Reece v Trye* (1846) 9 Beav 316; *R v Blastland* (1985) 81 Cr App R 266; *Chief Constable of West Midlands Police, ex p. Wiley* [1995] 1 AC 274; *R v Lewes Justices, ex p. Secretary of State for Home Department* [1973] AC 388; *R v Ward (Judith Theresa)* [1993] 96 Cr App R 1; *Riley* (1866) 4 F & F 964; *Sphere Drake Insurance Plc v Denby, The Times*, December 20, 1991; *Tompkins* (1978) 67 Cr App R 181; *Wright* (1866) 4 F & F 967 .

²⁰⁰ *Ibid* 913 (A G Slynn).

²⁰¹ *Ibid*.

²⁰² *Ibid*.

²⁰³ Hereafter referred to as the ECJ. The European Court of Justice comprised Menens de Wilmars, President, G Bosco, A Touffait and O Due (Presidents of Chambers), P Pescatore, Lord Mackenzie Stuan, A O’Keefe, T Koopmans, U Everling, A Chloros and F Grévisse, JJ, with Advocate General, Sir Gordon Slynn and Registrar, A Van Houtte.

communications were privileged from disclosure under community law.²⁰⁴ The ECJ pronounced the principle to be a fundamental human right which was ‘deserving of special protection for that reason’.²⁰⁵ AM & S Europe Ltd had a subsidiary-owned zinc smelter which distributed zinc metals, alloys and concentrates.²⁰⁶ Concerned about AM & S adhering to competitive conditions, three inspectors from the Commission of the European Communities were tasked with investigating the subsidiary’s production and distribution to ensure they were not in violation of Articles 85 and 86 of the European Economic Community Treaty.²⁰⁷ The inspectors, in concluding their investigation, took with them copies of documents and requested access to further specified correspondence.²⁰⁸

AM & S furnished certain documents, but refused to avail the commission with communications which its lawyers deemed privileged and directed the commission to contact its lawyers should further clarification be required regarding the character and nature of the documents.²⁰⁹ AM & S emphasised that under community law, which was defined as part of a wider area of international law or the law of international organisations,²¹⁰ the confidential relationship between lawyer and client was entitled to protection from disclosure.²¹¹ In a subsequent meeting²¹² between the appellant’s lawyers and the commission, AM & S expressed a desire to reach a consensus that the documents were privileged

²⁰⁴ Lloyd Duhaime, *Duhaime’s Law Dictionary*

<<http://www.duhaime.org/LegalDictionary/C/CommunityLaw.aspx>>. Community law is defined, in *Duhaime’s Law Dictionary* as: ‘The law of the European Union as established by treaties and cases of the European Union courts’.

²⁰⁵ *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878.

²⁰⁶ *Ibid* 1579.

²⁰⁷ *Ibid*.

²⁰⁸ *Ibid* 1614.

²⁰⁹ *Ibid* 1579.

²¹⁰ Rene Barents, *The Autonomy of Community Law* (Kluwer Law International, 2004) 2.

²¹¹ *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 1581.

²¹² The meeting between the lawyers representing AM & S and the commission took place in Brussels on 18 September 1979.

due to the necessity of upholding the secrecy of client–counsel communications.²¹³

AM & S relinquished certain documents to the inspectors in order to satisfy them that the materials were indeed privileged.²¹⁴ The commission inferred from this that their inspectors could exercise their right to access and read documents in their entirety²¹⁵ and argued that the extent to which documents were accorded protection was predicated on the purpose for which discovery was sought.²¹⁶ The greater the importance of having available all of the evidence, the weaker the protection.²¹⁷

Had the ECJ ruled in favour of the respondent, there would be no possibility of maintaining privilege even over documents of which the protected nature was wholly undisputed.²¹⁸ Noting that individual circumstances informed the question of whether compliance with community law was more effectively obtained by disclosure than protection,²¹⁹ the ECJ sustained the appellant’s claim of legal professional privilege on the ground that the circumstances justified the communications as ‘falling within the context of rights and the lawyer’s specific duties in that connection’.²²⁰

The ECJ held that such a privilege did exist in community law, and that communications were protected and were beyond the commission’s powers of investigation provided they emanated from an independent practising lawyer in a member state.²²¹ Advocate-General Gordon Slynn stated: ‘If one considers the real purpose of the protection ... I can for my part see no justifiable distinction

²¹³ *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 1580.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid* 1584.

²¹⁷ *Ibid.*

²¹⁸ *Ibid* 1582.

²¹⁹ *Ibid* 1584.

²²⁰ *Ibid* 1614.

²²¹ *Ibid.*

between such documents in the hands of the lawyer and in the hands of the client'.²²² Furthermore, for the purpose of invoking the privilege, and provided that the lawyer was bound by a code of professional ethics, Slynn made no distinction between a salaried lawyer and one engaged in private practice.²²³

This is an important point, owing to the fact that the test laid down in *AM & S* resolved the privilege in favour of client–counsel communications when the client had employed the services of an ‘independent practising lawyer’. By enunciating the requirement of independence, the ECJ mandated that only external lawyers representing clients in community law proceedings had the right to assert a claim of legal professional privilege.

Commenting that *AM & S* left open several issues concerning its scope, Arianna Andreangeli, in *EU Competition Enforcement and Human Rights*,²²⁴ speculated that the non-existence of a common code of ethics to bind the legal profession may have contributed ‘to the exclusion from the scope of the privilege of communications emanating from lawyers authorised to practise in a non-Member state’.²²⁵ The European Court of Justice, she stated, justified the absence of a professional relationship between lawyer and client on the basis that legal assistance was an overriding interest which necessitated full autonomy of the legal profession.²²⁶

B *Derby & AM & S: The Common Denominator*

Although the *Derby* Court stated that ‘little assistance is to be gained from European decisions touching on legal professional privilege such as *AM & S Europe Ltd. V Commission of the European Communities* ... with [respect to] the

²²² Ibid 1614.

²²³ Ibid 1611.

²²⁴ Arianna Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar, 2008).

²²⁵ Ibid 95.

²²⁶ Ibid.

scope of the domestic system’,²²⁷ the common denominator linking *Derby* and *AM & S* was that community law was binding on both decisions and the courts of England could not nullify its effect. Community law encompassed the common elements of the member states’ domestic laws in respect of legal professional privilege.²²⁸ In order to appreciate why the ECJ imbued legal professional privilege with the status of a ‘fundamental, constitutional or human right’,²²⁹ as reiterated by Lord Taylor CJ in *Derby*,²³⁰ it is first necessary to revert to the *European Convention on Human Rights and Fundamental Freedoms 1953*,²³¹ which decreed the privilege to be part of the right to privacy guaranteed under Articles 8²³² and 10.²³³ This convention, which opened for signatures in 1950,²³⁴

²²⁷ (Case 155/79) [1983] QB 878. See [1996] AC 487, 493G.

²²⁸ Jeffrey Makoff, ‘Attorney-Client Privilege in the European Communities after *A.M. & S. v. Commission: The Secret is Out*’ (1983–84) 7 *Hastings International & Comparative Law Review* 459, 463.

²²⁹ *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 1600.

²³⁰ It will be recalled that Lord Taylor CJ stated that ‘legal professional privilege was a fundamental human right protected by the *European Convention for the Protection of Human Rights and Fundamental Freedoms (1953)*’.

²³¹ Hereafter referred to as the ECHR.

²³² The provisions contained in Article 8(1) of the convention stipulate that ‘Everyone has the right to respect for ... his correspondence’; and 8(2) ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

²³³ The provision contained in Article 10(1) states: ‘Everyone has the right to freedom of expression ... [which] shall include freedom to receive and impart information ... without interference by public authority and regardless of frontiers’; and 10(2) ‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law ... for the prevention of ... crime, for the protection of ... morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary’.

²³⁴ *Explanatory Memorandum: Recommendation No R (97) 18 of the Committee of Ministers to Member States concerning the protection of personal data collected and processed for statistical purposes* <<https://rm.coe.int/CoERM/PublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806846ca>>.

was created through the efforts of the Council of Europe²³⁵ and enabled democratic European governments to safeguard their joint ideals. As England was a signatory to this convention, its courts were bound by it and were required to accept the compulsory jurisdiction of the Court of Human Rights.²³⁶ According to Lord Taylor CJ, judges applied European law without special difficulty just as they would apply English law.²³⁷

Lord Taylor CJ enunciated that English judges were ‘not bound by the Convention and in the event of any conflict, English law prevailed’,²³⁸ except if an aggrieved party appealed to the ECJ. In that instance, several possible scenarios may result. If the ECJ ruled in favour of the appellant, the domestic law must be amended per the tenets of the treaty, to accord with the ECJ judgment. Other English cases decided along similar lines may, in light of the ECJ ruling, be incorrectly decided, thereby bringing the English justice system into disrepute. As Lord Taylor expressed: ‘We have the worst of both options. Our ratification of the Convention obliges us ... to accept it, but our refusal to incorporate it means acceptance only occurs after ... much delay and humiliation.’²³⁹

²³⁵ The Council of Europe was created in 1949.

²³⁶ See also Peter Taylor, ‘Richard Dimbleby Lecture: The Judiciary in the Nineties’ (1993) 19 *Commonwealth Law Bulletin* 323, 329. See also Peter Taylor, ‘Richard Dimbleby Lecture: The Judiciary in the Nineties’ (Lecture, BBC Education, London, 30 November 1992). Lord Taylor CJ concluded that ‘40 years on, we have not made the Convention part of our domestic law ... and although there is provision to refer legal points for decision by the European Court in Luxembourg, this is rarely necessary’. He further explained that the ECHR was complemented by the 1957 *Treaty establishing the European Economic Community (TEEC)*, which was absorbed into English law through statute, whereafter European Community law became binding upon the courts of England.

²³⁷ See *ibid* 329. Article 189 confirmed the precedence of community law over domestic legal provisions. This regulation stipulated that community law, as an independent source of law imbued with a special and original nature, was binding and directly applicable to all member states and carried with it a permanent restriction on their sovereign rights, against which any act incompatible with the concept of community law could not prevail.

²³⁸ *Ibid*.

²³⁹ *Ibid*.

In its explanatory memorandum, the European Court of Human Rights stipulated that the freedoms contained in Article 8, namely, the privacy of correspondence, could be curtailed by a public authority for the defence of a number of legitimate aims.²⁴⁰ Article 10 acts as an adjunct to Article 8 by laying down the freedom to receive and impart information without interference.²⁴¹ This provision is understood to imply the freedom to seek information,²⁴² including the exchange of communication between lawyer and client. Any interference with client–counsel communications is therefore said to contravene the treaty, except in defence of a number of legitimate aims. An inference may be made that the types of communications passing between clients and lawyers, whatever their purpose, were of a private and confidential nature. Nevertheless, the European Court of Human Rights was prepared to balance competing interests and did not declare legal professional privilege to be an absolute right. Contrary to the conclusion reached in *Derby*, the European Court of Human Rights implied that a balancing test should apply such that the privilege could be derogated from with reasonable cause where ‘such interference is proportionate and in furtherance of other legitimate aims’.²⁴³

C Lord Taylor’s Absolutism: A Rebuttable Presumption

The previous section documented two planks where *Derby* fell short; specifically in misconstruing the historical authorities and later, *AM & S*, as a means of fusing

²⁴⁰ Pursuant to Article 8, these legitimate aims were presupposed to mean the existence of facts or information which a reasonable person would infer as the abuse of the privileged channel of communications. As a result, Article 8 is not absolute and could be overridden when it ‘is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

²⁴¹ *Explanatory Memorandum: Recommendation No R (97) 18 of the Committee of Ministers to Member States concerning the protection of personal data collected and processed for statistical purposes* <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806846ca>>.

²⁴² *Ibid.*

²⁴³ Richard Pike, ‘The English Law of Legal Professional Privilege: A Guide for American Attorneys’ (2006) 4(1) *Loyola University Chicago International Law Review* 51, 55–6.

‘fundamental human rights’ with an ‘absoluteness rationale’. This section examines the third plank where *Derby* failed; being its correlation of legal professional privilege with express statutory authority.

The premise that legal professional privilege is absolute and cannot be breached by any court for any reason is premised on faulty logic and overlooks the common law decision of *Re L*²⁴⁴ in which the rule yielded, in exceptional circumstances, to the interests of a minor. This thesis has demonstrated that the privilege is a creature of common law and does not derive its authority from statute. Bentham illustrated that the common law was not an absolutely fixed, inflexible system²⁴⁵ and precedents were not of absolute authority; judicial decisions in one age were disregarded in another.²⁴⁶ It naturally follows that legal professional privilege, as a bastion of the common law, could not be of a permanently fixed character either.

This view was borne out in the decisions of the Commonwealth authorities discussed throughout this thesis. Those cases variously described the privilege as ‘an impediment, not an inducement, to frank testimony’,²⁴⁷ which ‘curtailed the judicial search for truth’.²⁴⁸ Further; ‘...the correct principle [is that] if there are documents in the possession or control of a solicitor, which ... help to further the defence of an accused man, no privilege attaches’.²⁴⁹ ‘The judge must then balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it.’²⁵⁰

‘The basic principle of legal professional privilege [is that it is] not absolute’.²⁵¹ Legal professional privilege must yield where there is no recognisable interest in

²⁴⁴ *Re L (A Minor)* [1997] AC 16.

²⁴⁵ Jeremy Bentham, *Codification of the Common Law*, above n 55, 29.

²⁴⁶ *Ibid* 48.

²⁴⁷ *Grant v Downs* [1976] HCA 63.

²⁴⁸ (1983) 153 CLR 52, 131 (Dawson J).

²⁴⁹ *R v Barton* (1973) 1 WLR 115, 118 (Caulfield J).

²⁵⁰ *R v Ataou* [1988] QB 798, 807 (French J).

²⁵¹ (1983) 153 CLR 52, 129 (Dawson J).

maintaining it, when to do so would otherwise shield information which would assist a defendant to establish their innocence.²⁵²

Owing to the fact that the privilege is now understood to represent a fundamental human right²⁵³ and is underpinned by the public interest in availing clients of the right to access legal representation, Lord Taylor CJ announced that it was not presumed that parliament intends to intrude on the common law, generally, but will adopt a statutory construction which preserves rather than interferes with its operation

Lord Taylor subsequently resolved that parliament had left the realm of legal professional privilege untouched.²⁵⁴ In fact, by the time *Derby* came before the House of Lords in 1995, a number of English statutes expressly overrode the rule. One of these, the *Criminal Justice Act 1988* (UK), provided at ss 93A and 93B²⁵⁵ that the privilege could not be maintained in instances where a party had assisted another to make or retain benefits through criminal conduct²⁵⁶ or the proceeds of crime.²⁵⁷ Given that a judge, in upholding this legislation, would be required to satisfy him or herself as to whether the privilege had been made out or was vitiated by virtue of a crime, a balancing exercise would have to occur to determine which interest should prevail.

This was at the heart of the Benthamic and Wigmorean philosophies. Bentham argued against the privilege on the basis that it was conducive to defeating justice. He claimed that it immunised clients who consulted their lawyers with a view to committing illicit conduct, suppressing evidence or advancing a false claim. Wigmore equally questioned how any moral line could be drawn regarding ‘absolutism’ of the rule. According to his four-tiered paradigm for assessing

²⁵² *R v Dunbar and Logan* (1982) 68 CCC (2d) 13, 104 (Martin JA); *R v Craig* [1975] 1 NZLR 597 (Cooke J).

²⁵³ Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 395.

²⁵⁴ [1996] AC 487, 507H (Lord Taylor).

²⁵⁵ *Criminal Justice Act 1988* (UK) ss 93A and 93A were repealed on 24 February 2002.

²⁵⁶ *Ibid* s 93A.

²⁵⁷ *Ibid* s 93B.

whether communications met his threshold, the privilege warranted a balancing exercise. Wigmore emphasised that when justice required the investigation of the truth, no one could declare they had any knowledge which was rightly private.²⁵⁸

In spite of the ‘absolutist’ stance taken by the House of Lords, Lord Taylor CJ called for a review of legal professional privilege and acknowledged that the law was in an unsatisfactory state.²⁵⁹ Although the ECJ in *AM & S* formally accorded legal professional privilege a place in community law, it failed to resolve legal professional privilege in the context of litigation privilege or third party communications. While the *Derby* decision was supported by *AM & S*, this ECJ judgment actually limited the breadth of protection for client–counsel communications to independent lawyers of member states. In-house counsel were proscribed from asserting a claim. There is no evidence prior to *AM & S* which suggests that legal professional privilege was expressly read into human rights’ discourse, nor did it have an impact on national laws with respect to legal professional privilege except to the extent of any inconsistency with domestic law. In addition, the ECHR was not incorporated into domestic laws until three years post-*Derby*.²⁶⁰

An argument may therefore be made that legal professional privilege is not absolute in relation to litigation privilege or third party communications.²⁶¹ In limiting *Derby* to client–counsel communications about past conduct, Lord Taylor CJ also left the door open for a ‘future harm’ exception. The judgments in *AM & S* and *Derby* that viewed legal professional privilege as a vital principle have been sharply criticised. Edward Imwinkelried stated that some commentators had

²⁵⁸ John Wigmore and Colin McNaughton, *Evidence in Trials at Common Law, Vol X* (Little, Brown & Co, 1961) 72.

²⁵⁹ Peter Taylor, ‘Speech by the Rt Hon the Lord Taylor of Gosforth, Lord Chief Justice of England, at the Lord Mayor’s Dinner to HM Judges: 6 July 1994’ (1995) 61 *Arbitration* 1, 4–5.

²⁶⁰ See Michael Beloff, ‘Taylor, Peter Murray, Lord Taylor of Gosforth (1930-1997), Judge’ in *Oxford Dictionary of National Biography* (Oxford University Press, 2004) <<http://www.oxforddnb.com/index/101066165/Peter-Taylor>>. Only when the *Human Rights Act 1998* (UK) came into force did the ECHR apply to domestic laws.

²⁶¹ This being so, these forms of communication do not demand the same response.

called for parliament to overrule the judgment, declaring that even a purportedly absolute privilege must cede in exceptional circumstances.²⁶² Imwinkelried himself hoped that ‘the absolutist approach to legal professional privilege would be short-lived; [with a] discretionary jurisdiction offer[ing] a better solution’.²⁶³

Instead of relying on authority and precedent, the policy considerations for and against the rule should be thoroughly analysed to address conflicting policy goals which cannot be simultaneously achieved.²⁶⁴ A balancing of conflicting interests to straighten out ‘confused areas of the law which give rise to constant litigation, inconsistent decisions and perhaps even plain wrong decisions’²⁶⁵ would prevent interference with the administration of justice.²⁶⁶ As the public interest in the proper administration of justice should prevail over all else, judges should be accorded a discretionary power to examine the privileged communications, together with a statement supporting the reasons for non-disclosure and decide, on that basis, whether or not the material should be produced.²⁶⁷

Thorpe J supported a departure from the current concept of privilege and the development of a rationale which promotes judicial discretion, when he advocated an alternate rationale and confirmed his desire to see the common law plainly stipulate that lawyers in possession of confidential communications relevant to determining a case, but adverse to the interests of their client, should be unable to resist disclosure by relying on legal professional privilege, but have a positive duty of disclosure to the other side and the court.²⁶⁸

²⁶² Edward Imwinkelried, ‘Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges’ (2004) 65 *University of Pittsburgh Law Review* 145, 175.

²⁶³ *Ibid.*

²⁶⁴ Christopher de Courcy Ryder, *The Justification for Legal Professional Privilege* (Wellington, 1990) 28.

²⁶⁵ *Ibid.*

²⁶⁶ Harry Street, ‘State Secrets – A Comparative Study’ (1951) 14 *Modern Law Review* 121, 185.

²⁶⁷ *Ibid.*

²⁶⁸ *Essex County Council v R* [1994] Fam 167, 168 (Thorpe J).

This view is reinforced by commentary from academics including Charles Hollander QC. In *Documentary Evidence*, he claimed that ‘in truth, absolutism may be subject to challenge under relevant human rights guarantees’²⁶⁹ because the right to a fair trial is an obvious right which is hampered when information that can prove innocence or aid in a defence of an accused is omitted from evidence. The right of every accused to a fair trial is a basic and fundamental right. He added: ‘The law of legal professional privilege is an area which has to adapt’.²⁷⁰

Harry Street denied that there was any justification for the assumption that legal professional privilege overrode all other considerations and petitioned for judges to be empowered to decide whether disclosure of communications would be injurious to the public interest.²⁷¹ Colin Passmore similarly commented that the *Derby* decision raised a few questions about whether the defendant, Brooks, ought now be given recourse to the *Human Rights Act 1998*,²⁷² particularly with respect to invoking Article 6 of the Convention in order to challenge the House of Lords’ ruling on grounds that the unavailability of A’s communications deprived him of due process and the right to a fair trial.²⁷³

When determining a question arising in connection with a Convention right, the court or tribunal is obliged, pursuant to s 2 of the *Human Rights Act*, to consider the jurisprudence of the Strasbourg institutions to the extent of their relevance to proceedings. This duty fixes notwithstanding the date on which judgment was

²⁶⁹ Charles Hollander, *Documentary Evidence* (Sweet & Maxwell, 7th ed, 2000) [9]–[15].

²⁷⁰ Charles Hollander, ‘The Legal Spotlight: A Question of Privilege’ in *Legal Week Intelligence, Funding in Focus Content Series: Report 1* (2015) 10, 26.

²⁷¹ Harry Street, above n 234, 184.

²⁷² *Human Rights Act 1998* (UK) art 6 stipulates: ‘The right to a fair trial is fundamental to the rule of law and to democracy itself. The right applies to both criminal and civil cases, although certain specific minimum rights set out in Article 6 apply only in criminal cases. The right to a fair trial is absolute and cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The procedural requirements of a fair hearing might differ according to the circumstances of the accused’.

²⁷³ Colin Passmore, ‘The Future of Legal Professional Privilege’ (1999) 3(2) *International Journal of Evidence & Proof* 71, 73-74.

pronounced.²⁷⁴ While it is inevitable that divergences between British and European jurisprudence may arise under British legislation, ‘the British judiciary has indicated that Convention rights will be construed in a manner consistent with the approach of the Strasbourg organs’.²⁷⁵

Intrinsic to the Convention is a desire to foster a fair balance between the general interest of the community and the protection of an individual’s inherent human rights. In this spirit, *Soering v United Kingdom*²⁷⁶ held that:

The right to a fair trial in criminal proceedings, as embodied in Article 6 holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 ... in circumstances where the [defendant] has suffered or risks suffering a flagrant denial of a fair trial ...²⁷⁷

Beloff states that Convention rights are to be ‘a compelling, if not, overriding aid, to interpretation’ in acting as a guide to judges when interpreting Human Rights legislation.²⁷⁸ He opines that ‘there will be a rebuttable presumption in favour of an interpretation consistent with Convention rights’.²⁷⁹ In acknowledging the absorption of the European Convention into domestic law, the English Court of Appeal in *R v Toogher Doran and Parsons*,²⁸⁰ remarked that it would be unfortunate if the approaches adopted of the European Court of Human Rights and the British courts diverged.

²⁷⁴ Julie Debeljak, ‘The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection’ [2003] *Australian Journal of Human Rights* 9, 187-8.

²⁷⁵ *Ibid* 192.

²⁷⁶ *Soering v United Kingdom* (1989) 11 EHRR 439.

²⁷⁷ *Ibid*, 479, § 113.

²⁷⁸ Michael Beloff, ‘What Does it All Mean?’ as cited in Lammy Betton (ed) ‘The Human Rights Act 1998: What it Means’ (Martinus Nijhoff Publishers, 1999) 11-12; 29.

²⁷⁹ *Ibid* 40-42.

²⁸⁰ *R v Toogher, Doran and Parsons* (2000) (Unreported) CA, 32.

In *R v Director of Public Prosecutions, ex parte Kebilene and Others*,²⁸¹ Lord Hope of Craighead observed that the incorporation of the Convention into English law would ‘subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary’.²⁸² Furthermore, under the Convention, not every right is inalienable. Qualified rights, such as the right of non-disclosure is guaranteed subject to enumerated criteria and competing interests.²⁸³ As the Convention is concerned with the party’s *actual* and not merely *legal* predicament, Courts are encouraged to pierce the veil to examine ‘the realities of the procedure in question ... in light of the object and purpose of Article 6; specifically the protection of the rights of the [defendant]’.²⁸⁴

This position formed the central contention of Bowes’ argument, in which he offered comment on *Derby* from a legal practitioner’s viewpoint. Observing that many practitioners, and possibly justices, would prefer to follow the reasoning of Caulfield J in *Barton* and French J in *Ataou*, Bowes claimed that the supremacy of legal professional privilege clashed with the principle that the overriding consideration in the administration of justice was the need to avail the defendant of the right to a fair trial.²⁸⁵ He accepted that clients must be able to speak freely to their lawyers and a practical limit should be imposed on communications sought from third parties; however the end result must never foist injustice on a defendant or produce a miscarriage of justice.²⁸⁶

This accorded with the view adopted by Dodek that the legal system should not regard the privilege as absolute, but apply it more as a matter of case-by-case

²⁸¹ *R v Director of Public Prosecutions, ex parte Kebilene and Others* [1999] 3 WLR 972.

²⁸² *Ibid* 993-994.

²⁸³ Julie Debeljak, ‘The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection’ [2003] *Australian Journal of Human Rights*, 9, 187-8.

²⁸⁴ *Adolf v Austria* (1982) 4 EHRR 315, 323-24.

²⁸⁵ Michael Bowes, ‘The Supremacy of Legal Professional Privilege: The Derby Magistrates Case’ (2016) 4 *Archbold News* 5, 7.

²⁸⁶ *Ibid*.

balancing.²⁸⁷ Christopher de Courcy Ryder proposed that, if dual rationales existed for legal professional privilege in judicial decision making, the process of that decision making would be significantly improved.²⁸⁸ Zuckerman stated that, while all courts recognised that a balancing test was necessary in order to determine whether or not to order disclosure of protected communications,²⁸⁹ the House of Lords proceeded from the notion that clients, in order to disclose the entire truth to their lawyer, should be availed of uninhibited access to legal representation.²⁹⁰ In order to facilitate this, their communications must remain immune from disclosure.²⁹¹

Johannes Chan tackled the issue from a different perspective when he contended that Lord Taylor's reference to legal professional privilege as an absolute right simply inferred that, as a matter of common law, it could not be overridden by a greater public interest.²⁹² As a result, it was not open to the court to conduct any further balancing exercise between legal professional privilege and other public interests and it was in this isolated sense that legal professional privilege was absolute.²⁹³ This argument overlooks the common law decision of *Re L*²⁹⁴ in which the rule yielded, in exceptional circumstances, to the interests of a minor.

The irony inherent in these remarks is that litigation cannot be correctly concluded without a fair trial, yet a fair trial cannot be guaranteed when potentially spurious claims to legal professional privilege are freely asserted. By permitting exculpatory or decisive evidence relevant to the establishment of a

²⁸⁷ Adam Dodek, 'Reconceiving Solicitor-Client Privilege' (2010) 35 *Queen's Law Journal* 493, 526.

²⁸⁸ de Courcy Ryder, above n 264, 28.

²⁸⁹ *Conway v Rimmer* [1968] AC 210, 940 (Lord Reid).

²⁹⁰ Adrian Zuckerman, above n 171, 535.

²⁹¹ *Ibid.*

²⁹² Johannes Chan, 'Legal Professional Privilege: Is it Absolute?' (2006) 36 *Hong Kong Law Journal* 461, 465.

²⁹³ *Ibid.*

²⁹⁴ *Re L (A Minor)* [1997] AC 16 .

party's defence or claim of innocence to be withheld from the court, it is foreseeable that grave injustices may result.

This view accorded with developments in the Commonwealth jurisdictions of Canada and Australia. Contrasting the *Derby* approach with the approach taken earlier by the Canadian Supreme Court in *Descoteaux v Mierzwinski*,²⁹⁵ Chan observed that the Canadian court rejected the approach adopted by the House of Lords and instead subjected legal professional privilege to the same balancing test as any other fundamental constitutional right.²⁹⁶ Gavin Murphy added that the House of Lords' inflexibility was out of sync with the right to a fair trial.²⁹⁷ Similarly, in the Australian case of *Carter v Managing Partner, Northmore, Hale, Davey & Leake*,²⁹⁸ the High Court of Australia specifically referenced *Barton*,²⁹⁹ *National Society for the Prevention of Cruelty to Children*³⁰⁰ and *Ataou*.³⁰¹ That court ruled that there was a legitimate argument to be made that, as a matter of policy, legal professional privilege should be relinquished in any case, but particularly a criminal one, when the considerations favouring disclosure of confidential communications outweighed those favouring the preservation of confidentiality.³⁰²

The cases in which legal professional privilege significantly impede the ascertainment of the truth are so exceptional that they do not justify its curtailment. In the hands of a skilled legal practitioner, the refusal of access to privileged communications is likely to be a more potent weapon than would the communication or document itself and that, if there ever were a case where it

²⁹⁵ (1982) 141 DLR (3d) 590, 601–60.

²⁹⁶ Johannes Chan, above n 292, 461.

²⁹⁷ Gavin Murphy, 'The Innocence at Stake Test and Legal Professional Privilege: A Logical Progression for the Law ... But Not in England' [2001] *Criminal Law Review* 728, 730.

²⁹⁸ (1995) 129 ALR 593.

²⁹⁹ *R v Barton* (1973) 1 WLR 115.

³⁰⁰ *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171.

³⁰¹ *R v Ataou* [1988] QB 798.

³⁰² *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 129 ALR 593, 178 (Deane J).

became apparent that refusal of access precluded a fair trial, it would be possible to invoke the inherent power of the courts to stay proceedings. The compelling answer to the argument in this Court is, however, that which has already been indicated, namely, that the argument was considered and firmly rejected in the course of the development of the common law when it was established, as a fundamental principle, that the confidentiality which should be afforded to communications and documents protected by legal professional privilege.

V CONCLUSION

Judicial rulings surrounding the application of legal professional privilege have been fraught with anxiety, fluctuating from one conclusion to another as judges in Commonwealth jurisdictions seek to reconcile this tension. Lord Taylor CJ in his rulings preceding *Derby* did not recognise the supremacy of legal professional privilege. Only when the House of Lords distinguished *Derby* from cases which had previously stood for decades as good authority was the rule overbalanced and resolved in favour of non-disclosure. Reversing the priorities of ‘innocence at stake’ when it overruled both *Barton* and *Ataou*, the House of Lords confirmed that the substantive dimension of legal professional privilege was absolute in nature such that no exception should be allowed to it.³⁰³

This was clearly a change from treating legal professional privilege as a rule of admissibility, which was the view a generation ago, to the modern view, initially taken in Australia, in *Baker*, and subsequently in England. The Lords’ sole justification for elevating legal professional privilege into something resembling a constitutional principle,³⁰⁴ was a questionable belief that the courts of England remained bound by public policy considerations that had prevailed centuries earlier.³⁰⁵ Representing a paradigm shift from the fundamental concepts that had historically guided legal professional privilege, it was extraordinary that the

³⁰³ Ian Dennis, *The Law of Evidence* (Sweet & Maxwell, 1999) 327, 329.

³⁰⁴ As mentioned in *Three Rivers DC v Bank of England (No 4)* [2004] 3 WLR 1274, 1304.

³⁰⁵ Ian Dennis, above n 303, 329.

Derby Court should abolish an exception to the privilege that was recognised by Caulfield and French JJ as a matter of natural justice.³⁰⁶

Derby now conferred an absolute immunity from disclosure, with the major consideration behind the House of Lords' formulation laying, first and foremost, in the erroneous Wigmorean pronouncement on the origins of legal professional privilege and, second, in a ruling stemming from *AM & S Europe Ltd v Commissioner of the European Communities*.³⁰⁷ This facilitates the making of an important distinction, as neither the European Court of Justice in *AM & S* nor the *European Convention on Human Rights and Fundamental Freedoms 1953* pronounced legal professional privilege to be above reproach. The reliance on, or misinterpretation of, Wigmore and *AM & S* led Lord Taylor CJ into error, whereby he overlooked or disregarded the fact that these authorities were prepared to balance competing interests, such that the privilege *could* be derogated from with reasonable cause and in defence of legitimate aims. This indicates that the privilege was not unqualified. No decisive answer exists as to why Lord Taylor CJ refrained from applying *AM & S* in his earlier judgments, all of which occurred after the European Court of Justice ruling. He did not provide clear reasoning as to why he elected to follow it only in *Derby*.

As a general principle which contributed to respect for fundamental rights, legal professional privilege, in the modern English context, was elevated to the realm of 'fundamental human right' when the European Court of Human Rights affirmed that it could be departed from only in exceptional circumstances. The legal basis for this assertion is framed in two such cases; namely, *Michaud v France*³⁰⁸ and *Versini-Campinchi and Crasnianski v France*.³⁰⁹ The Court in *Michaud* held that the right to professional confidentiality was a fundamental entitlement, with interference permitted only when necessary in the interests of

³⁰⁶ Ibid.

³⁰⁷ [1983] QB 878.

³⁰⁸ *Michaud v France* (2014) 59 EHRR 9.

³⁰⁹ *Versini-Campinchi and Crasnianski v France* [2016] ECHR 533.

public safety [and] for the prevention of disorder or crime’.³¹⁰ In *Versini-Campinchi*,³¹¹ the interception and transcription of a telephone conversation between French attorneys and their client was deemed ‘valid under the circumstances’ and while it constituted a breach of the right to privacy, such a right was not absolute. The European Court ruled that legal professional privilege did not ‘preclude the transcription of exchanges that contain evidence that the attorney participated in a crime, as long as the exchanges are not used against the attorney’s client’.

The House of Lords endorsed this expansive approach when it favoured the paramountcy of the doctrine and placed its status beyond doubt. Assigning it an absoluteness from which there was no derogation, it extended the rule further than necessary to enable clients to obtain legal advice. The notion of ‘absolutism’ placed clients in the novel position of being beyond the reach of the law.

This thesis concludes that Lord Taylor’s rigid and unyielding application fell out of step with the historical interpretation of the privilege and ceased to avail any degree of flexibility or judicial discretion. An ‘absoluteness’ rationale does not accord with the historical justification for the rule, as discussed in Chapter II, nor the fact that the privilege has been held to be subject to some legitimate restrictions by virtue of waiver and the crime-fraud exception as canvassed in Chapter IV. As the result of a misplaced preoccupation with process and procedure, Lord Taylor’s ruling removed any margin of judicial discretion and witnessed a change from the fundamental concepts that had guided legal professional privilege.

³¹⁰ *Michaud v France* (2014) 59 EHRR 9, 422.

³¹¹ *Versini-Campinchi and Crasnianski v France* [2016] ECHR 533.

CONCLUSION: A REFLECTION ON LORD TAYLOR AND ABSOLUTISM

The authoritative historical and contemporary statements surrounding the absolute nature of legal professional privilege demonstrate that *Derby* was an anomaly in the wheel of judicial machinery. Producing a radical break with the predominant tradition, the harsh and uncompromising stance taken by Lord Taylor eliminated the possibility for an objective analysis to be carried out to assess what a party had done. Restraining itself from inquiring into a party's affairs, the *Derby* Court placed the client in the novel position of being beyond the reach of the law. To borrow a Benthamism, the court effectively excused itself from rendering service to justice by virtue of the fact that it could no longer determine the scope of the rule.

I LORD TAYLOR OF GOSFORTH: A JUDICIAL LEGACY

Derby's rigid and unyielding application of legal professional privilege is out of step with the general interpretation of the privilege and strips the ideals of the privilege of much of its meaning by ceasing to avail any degree of flexibility or judicial discretion. *Derby* illuminates what courts are prepared to put into, or read into, the concept of legal professional privilege. Freezing the law of privilege at this particular point in history, *Derby* prevented legal professional privilege from evolving and adapting according to judicial discretion.

Depicted as a standard by which to measure lawyerly conduct in a given situation, the absoluteness of privilege is antithetical to a system which purports to have, as its end, rational decision making.¹ Justice does not exist merely in the microcosm of a courtroom. The keystone of legal reasoning and the life of the law 'has not been logic; it has been experience'.² *Derby* clarified a number of important points concerning criminal procedure. It ruled that the right of a witness, 'A', to claim privilege could not be weighed against the public interest in ensuring that all

¹ John Noonan, 'The Purposes of Advocacy and the Limits of Confidentiality' (1966) 64 *Michigan Law Review* 1485, 1489.

² Oliver Wendell Holmes, *The Common Law* (Lawbook Exchange, 2005) 1.

relevant evidence was made available to Brooks in defending his innocence. Lord Taylor decreed the privilege to outweigh all other public interests, including the safety of the realm and of the public.³ Declaring that no exception should be permitted to the absolute nature of legal professional privilege, Lord Taylor articulated that it ‘was in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors’⁴ that the rule should be maintained.

The prevailing orthodoxy holds that legal professional privilege is absolute. Lord Taylor’s conception of legal professional privilege is, however, fundamentally flawed, for no matter how it is framed, the doctrine cannot be absolute if cases such as *Re L*⁵ and *Three Rivers*⁶ continue to apply a balancing test with respect to the rule. To label the doctrine ‘absolute’ is misleading. Despite acquiring precedential authority, legal professional privilege was not enshrined in a monolithic body of precedent; rather only presumed to be so. A misplaced preoccupation with process and procedure created ‘turbulence in the profession’s quest to narrow the gap between professional ideals and competing realities’.⁷

Legal professional privilege appears to have broadened in scope, it has remained a contentious topic in England for the last few years and there has been something

³ See also ‘Privilege - prosecution witness acquitted of offence of which defendant later charged - defence seeking to question witness as to original instructions to legal advisers admitting offence’ (1996) 190 *Criminal Law Review* 193, 193.

⁴ *R v Derby Magistrates’ Court; Ex parte B* [1996] AC 487, 508H (Lord Taylor).

⁵ *Re L (A Minor)* [1997] AC 16 .

⁶ *Three Rivers District Council v Governor and Company of the Bank of England (No 1)* [2003] CP Rep 9; *Three Rivers District Council v Governor and Company of the Bank of England (No 2)* [2002] EWHC 2309; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] EWCA Civ 474; *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2004] 3 WLR 1274; *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48.

⁷ Rosalie Silberman Abella, ‘Professionalism Revisited: Opening Address at the Law Society of Upper Canada Benchers’ Retreat’ (Hockley Valley, Ontario, 14 October 1999) <www.ontariocourts.on.ca/coa/en/ps/speeches/professionalism.htm>.

of a backlash against it.⁸ Irrespective of the responsibilities of a lawyer to their client or the need to protect the confidence between them, the public will not readily accept silence when it comes to deciding serious cases.⁹ By demarcating the privilege in criminal and civil proceedings, heightened protection could be accorded defendants in the criminal paradigm.¹⁰

In elevating the doctrine to a position of reverence, *Derby* sought to frustrate and defeat the great principle of access to justice by effectively according protection to every client–counsel communication. This theoretically enabled clients to entrust information and materials to the custody of lawyers in order to avoid detection or disclosure. While ‘the boundaries of the privilege have not always been clear’,¹¹ an ‘absoluteness’ rationale does not accord with the historical justification for the rule, nor the fact that the privilege has been held to be subject to some legitimate restrictions such as waiver and the crime-fraud exception.

Far from clear and consistent, a consideration of the history of legal professional privilege reveals a constantly shifting scope, its proportions narrowing and expanding in line with the judicial fashion of the day. The formulation adopted by Lord Taylor CJ in *Derby* subverted the purpose for which legal professional privilege was historically created¹² and muddied the waters for decades. This thesis challenges the historical and theoretical accuracy of Lord Taylor CJ’s basic premise that the privilege was settled in the 16th century. Having initially asserted that legal professional privilege was formed in Elizabethan England, Lord Taylor CJ proceeded to quote 19th-century case law to bolster his *Derby* dicta; however, neither era supported an ‘absolutist’ rationale.

⁸ Richard Pike, ‘The English Law of Legal Professional Privilege: A Guide for American Attorneys’ (2006) 4(1) *Loyola University Chicago International Law Review* 51, 89.

⁹ David Ipp, ‘Lawyers’ Duties to the Court’ (1998) 114 *Law Quarterly Review* 63, 72.

¹⁰ Adam Dodek, ‘Reconceiving Solicitor-Client Privilege’ (2010) 35 *Queen’s Law Journal* 493, 497.

¹¹ Charles Hollander, *Documentary Evidence* (Sweet & Maxwell, 7th ed, 2000) [9]–[36].

¹² This being giving and seeking of legal advice so that litigation may be avoided or, in the alternative, properly concluded.

The evolution of the principle reveals that the ancient Roman justification, as endorsed by Bentham, was based on servitude. In the 16th and 17th centuries, the rationale was rooted in an esteem for the legal profession. By the 18th century, the parameters surrounding legal professional privilege were narrowed to facts stated to lawyers for the purpose of enabling them to conduct a cause. Anything said or learned outside that realm was not subject to inviolability¹³ and the lawyer was bound to communicate it.¹⁴ The legitimacy of legal professional privilege was still under consideration until its 19th-century incarnation heralded that the basic purpose of a trial was the determination of truth.

It is apparent that ‘absoluteness’ is not a legitimate end for which legal professional privilege was created. Indeed, the notion of ‘absoluteness’ only makes sense when viewed through the lens of the politics of the legal profession and the ‘exclusivity rationale’ propounded by Wigmore and, more recently, Lord Taylor CJ in *Balabel* and *Mfongbong*. Confining legal professional privilege to lawyer–client communications, an absoluteness justification reinforces the already advantaged standing of the profession and underpins the services that lawyers are uniquely placed to offer.

Lord Taylor CJ believed the privilege to be so irrefutably established in law that it was a necessary measure rather than an intellectual artifice. Such was its foothold that the principle pierced the laws of evidence and ethics to become not merely a rule of evidence, but a substantial body of evidentiary law in a judicial system which is founded on the presumption of innocence. Having analysed the earlier cases over which Lord Taylor CJ presided, this thesis has exposed the manner in which his articulation of the rule gradually evolved. One explanation for his paradigm shift lays in the fact that he was acutely aware that ‘accountability’ had become the ‘in’ phrase:

The days have gone when a judge’s pronouncements were accepted as the product of an arcane process of reasoning supposedly beyond

¹³ *Wilson v Rastall* (1792) 4 TR 753.

¹⁴ *Williams v Mundie* (1824) 171 ER 933 (Lord Abbot CJ).

the comprehension of lesser mortals. Judgments or sentences of the Court are matters of public interest and should be subject to comment. It is salutary for judges to have some feedback as to the impact of their decisions and as to public opinion.¹⁵

II BENTHAM, WIGMORE AND THEIR INFLUENCE ON LORD TAYLOR OF GOSFORTH

The perspectives of Bentham and Wigmore present many contrasts, there is little practical difference between the two. Both viewed themselves as legal reformers, with Bentham espousing radical thinking and Wigmore proposing a limited strategy that would not unnecessarily obstruct the ‘investigation of truth’ and ‘the administration of justice’.¹⁶ The notion of ‘accountability’ resonates with a Benthamic logic, whereby Bentham argued in favour of public scrutiny. Although the pronouncements of Bentham and Wigmore sufficiently enunciated the ethical responsibility on members of the legal profession, Lord Taylor CJ’s pronouncement in *Derby* departed from the Benthamic and Wigmorean contentions, both of which abhorred the notion of an absolutely fixed rule of privilege. By extending the reach of legal professional privilege beyond the Benthamic and Wigmorean limitations, Lord Taylor permitted the rule to become entrenched as an immovable, inviolable cornerstone of the legal profession; firmly and unshakably enshrined at its core.¹⁷

Bentham said legal doctrines or legal propositions are not inflexible or absolutely fixed.¹⁸ If one accepts the contention of Bentham, namely that the common law is not an absolutely fixed, inflexible system, it naturally follows that the privilege, as a bastion of the common law, could not be of a permanently fixed character either. It is apparent that the *Derby* Court dismissed the Benthamic remark that

¹⁵ Peter Taylor, ‘Richard Dimpleby Lecture: The Judiciary in the Nineties’ (1993) 19 *Commonwealth Law Bulletin* 323, 324. See also Peter Taylor, ‘Richard Dimpleby Lecture: The Judiciary in the Nineties’ (Lecture, BBC Education, London, 30 November 1992).

¹⁶ John Wigmore, *Evidence in Trials at Common Law* (John T McNaughton, 1961) § 2192, 73.

¹⁷ Anthony Collins, ‘A Privilege, Not an Honour’ (2010) *European Lawyer* 97, 23-26.

¹⁸ Jeremy Bentham, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf and Others* (John Polbemus, 1882) 29.

precedents were not of absolute authority, with judicial decisions in one age disregarded in another.¹⁹

Wigmore would have endorsed the rule from the perspective of reinforcing the fundamental right that clients should be able to speak candidly to their lawyers, he would not have advocated an ‘absoluteness’ rationale. Having evidenced that legal professional privilege bore the undeniable stamp of Bentham and Wigmore’s influences, this thesis demonstrates that *Derby* witnessed a dramatic and unwarranted departure from their jurisprudential teachings.

Judicial opinion has varied as to whether the legal profession should permit disclosure of client information in a variety of different contexts. The judiciary has predominantly deferred to Wigmore, and to a lesser extent Bentham, when seeking to resolve any uncertainty with respect to the rule. This came to an abrupt halt in *Derby*, whereafter few contemporary academics or judges have accorded detailed consideration to their philosophies and nomenclature.²⁰ Far too little attention is now paid to Wigmore’s treatise, which is often used as ‘no more than a rich repository of materials, rather than as an elaboration of a complex concept of the subject’.²¹

The fourth element of the Wigmorean paradigm involved a balancing test in terms of weighing the injury²² wrought by disclosure against the correct disposal of

¹⁹ Ibid 48.

²⁰ See Colin Tapper, ‘Prosecution and Privilege’ (1996) 1 *International Journal of Evidence & Proof* 1, 21; William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford University Press, 1985) ix. While Wigmore’s *Treatise* has monopolised the field since its inception, it came to be perceived more as a great work of reference rather than as a contribution to scholarly theory. Bentham similarly achieved a degree of success with his proposed reforms, but his *Rationale* has been largely ignored.

²¹ Colin Tapper, above n 20, 21.

²² The author submits that, in the absence of further clarification, Wigmore’s fourth element constitutes a highly subjective test, with ‘injury’ undefined. Presumably, it includes unfavourable information that would bring embarrassment or disgrace to the client.

litigation,²³ the irony inherent in *Derby* was that litigation could not be correctly concluded without a fair trial, yet a fair trial could not be guaranteed when potentially spurious claims of privilege were freely asserted. The importance of legal professional privilege must not be overemphasised and arguments in favour of absolutism that accord it heightened protection are unconvincing. Wigmore propounded that, in furtherance of justice, no one could refrain from divulging relevant information.²⁴ Legal professional privilege could not be inviolable.

III LEGAL PROFESSIONAL PRIVILEGE IN THE POST-DERBY ERA

Post-*Derby* developments including *Re L*²⁵ and England's now-leading case on the subject, *Three Rivers DC v Bank of England*,²⁶ represent a concerted effort by the House of Lords to reduce the scope of the rule.²⁷ Reinstating the principle in a form befitting its original justification, *Three Rivers* clarified that neither the privilege, confidentiality or the adversary system was absolute;²⁸ with each justified pragmatically according to their ability to serve the public interest.

Derby represents a change from the fundamental concepts that have guided legal professional privilege. By proving that the absolutist stance adopted by Lord Taylor CJ was fatally flawed, this thesis has exposed, as a legal fiction, the notion that the doctrine of legal professional privilege is absolute. The courts of England

²³ John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of All Jurisdictions of the United States, Vol IV* (Little, Brown & Co, 1905) § 2285.

²⁴ *Ibid* 72.

²⁵ *Re L (A Minor)* [1997] AC 16 .

²⁶ *Three Rivers DC v Bank of England (No 1)* [2003] CP Rep 9; *Three Rivers DC v Bank of England (No 2)* [2002] EWHC 2309; *Three Rivers DC v Bank of England (No 3)* [2003] EWCA Civ 474; *Three Rivers DC v Bank of England (No 4)* [2004] 3 WLR 1274; *Three Rivers DC v Bank of England (No 5)* [2003] EWCA Civ 474; *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48. The full name of this case is: *Three Rivers District Council v Governor and Company of the Bank of England*.

²⁷ Alexander Ruck Keene, 'Privilege returns? Legal professional privilege following the House of Lords decision in *Three Rivers (No. 6)*' (2005) 91-97 *Journal of Personal Injury Law* 1, 97.

²⁸ John Noonan, above n 1, 1489.

formulated rules that did not adhere to either the Benthamic or Wigmorean philosophies and Lord Taylor CJ arguably was therefore led into error. This proves that the contemporary interpretation adopted by the 20th-century legal fraternity misapprehended the Wigmorean theory.

The rule evolved into a rigid principle carrying a far greater certainty than Wigmore, or history, intended. It is arguable that subtle traces of Wigmore's influence may be found in Lord Taylor's judgment, for the Chief Justice only sought to apply his 'absoluteness' rationale to legal professional privilege in the context of litigation and could see no value in extending it to legal advice privilege. This may be said to accord with Wigmore's own interpretation in which the latter favoured litigation values over the harm to other values. As only minimal analysis has been accorded to the exploration of this theme, other academics have failed to make this connection.

'While it is not necessary for all lawyers to know what the history of a rule is, it is a wonderful accomplishment to know how it now stands resolved and, without it, a lawyer cannot be accounted learned in the law'.²⁹ Having traced the judicial evolution of the rule in Lord Taylor's jurisprudence and how he came to erroneously pronounce the rule of legal professional privilege absolute, this thesis exposes the falsity of his ruling. Lord Taylor's conception of legal professional privilege is inherently flawed and his judgment in *Derby* had the effect of eroding the primacy of the rule.

VI LEGAL PROFESSIONAL PRIVILEGE: LOOKING TO THE FUTURE

The solutions that address this dilemma are neither simple nor straightforward. Although legal professional privilege might be 'one of the marks of a civilised society',³⁰ the application of the principle 'is a question more easily asked than

²⁹ Roger North, cited in William Holdsworth, *A History of English Law, Vol IX* (Methuen & Co, 3rd ed, 1944) title page.

³⁰ Charles Sweeney, 'Revenue Note' (1983) 57 *Australian Law Journal* 357 at 360; see also *Baker v Campbell* (1983) 153 CLR 52 at 95 per Wilson J.

answered, despite all that is to be found in the decided cases and all that has been said in the learned articles'.³¹ Despite 'truth' being the end goal of every trial, *Derby* and the accompanying case studies canvassed throughout this thesis exemplify that justice is not what comes out of a courtroom in every instance,³² nor does the law uncover the truth at every turn in each trial. This feeds back into the notions espoused by Knight-Bruce VC and Lord Denning. Where Knight-Bruce VC countenanced that 'truth, like all other good things, may be loved unwisely, pursued too keenly and cost too much',³³ Lord Denning pronounced that it was better to have a few innocent men suffer in prison than bring the integrity of the legal system into disrepute.³⁴

Justice, though, cannot exist in the microcosm of courtrooms. There can be no doubt that the law is in an unsatisfactory state, with legal professional privilege impeding the truth-finding objective. Indeed, truth might be a matter of degree, but freedom, life and liberty — the core considerations of justice — are absolutes.

The need for reform is also demonstrated by what happens in practice: the complexities are ignored, oversimplified versions of the law are applied and judges try to discourage use of its technicalities.³⁵

Although legal professional privilege may be overcome by the exceptions of national security, future harm and crime-fraud, due process was denied in *Derby*, when Brooks was unable to access potentially exculpatory evidence. Legal professional privilege must adapt to the changing needs of an informed, intelligent and progressive global community. If 'the will of the people shall be the basis of the authority of government',³⁶ then public opinion surely holds sway

³¹ *Grant v Downs* [1976] HCA 63 at 682 per Stephen, Mason and Murphy JJ.

³² Clarence Darrow, 'The Story of My Life' (Da Capo Press, 1932).

³³ *Pearse v Pearse* (1846) 63 ER 950.

³⁴ Lord Denning (Having Succumbed To Dementia) On The Birmingham Six, As Cited By Evan Whitton, 'The Cartel: Lawyers And Their Nine Magic Tricks', (Griffin Press, 1998) 117.

³⁵ Clifford Einstein, "'Reining in the Judges'?" – An Examination of the Discretions Conferred by the Evidence Acts 1995' 19 *University of New South Wales Law Journal* 2, 269.

³⁶ *Universal Declaration of Human Rights*, Article 21(3).

over the need to amend the inconsistent application of legal professional privilege that has to-date, caused far greater harm than good.

Decisions about ethical dilemmas should not hinge on a code. Honesty and honour should be prized above all, as these govern the legal practitioner in his or her dealings with the Court and throughout their representation of clients. Where honour is inextricably linked to the practitioner's conscience, *Derby* demonstrates that privilege — the oldest evidentiary principle known to common law³⁷ — causes severe adversarial tension.

We must never forget that 'the record on which we judge these defendants today is the record on which history will judge us tomorrow'.³⁸ Legal practitioners are foundational to the function of law – so it becomes their duty and obligation to make sure 'law' works,³⁹ yet the moral and ethical underpinnings of the profession are considerably weakened, and integrity compromised, when the judicial system, whose primary aim is to search out justice, commands officers of the court to remain silent as innocent individuals are unjustly jailed when exculpatory information is suppressed. The concealment of secrets does not engender the respect of the contemporary community, nor does it promote public confidence in the administration of justice. After all, justice delayed is still justice denied.

'The difficult problem is where to draw the boundaries — how to define the kinds of secrets that a lawyer may not keep ... the problem has been difficult from the

³⁷ Daniel Northrop, 'The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention That the Attorney Draft a Document To Be Released to Third Parties: Public Policy Calls for at Least the Strictest Application of the Attorney-Client Privilege' (2009) 78 *Fordham Law Review* 8, 1481.

³⁸ Ian Renard, 'Chancellor's Human Rights Lecture: Criminal Defence Lawyers: Unwitting Human Rights Defenders - In Defence of the Defence', *University of Melbourne* (24 November 2008) 13

<https://www.unimelb.edu.au/speeches/Docs/Chancellor's_Human_Rights_Lecture08.pdf>.

³⁹ Neil Watt, Queensland Law Society: Ethics Centre, <<http://www.ethics.qls.com.au/content/thelawyerscompass>>.

beginning'.⁴⁰ Issues that afflict the doctrine today have been present since its inception. If justice moves at a glacial pace, then legal professional privilege, whose sixteenth century beginnings were marred by defects, has made little progress. As cracks continue to appear in the principle, thereby weakening and reducing its scope,⁴¹ it will inevitably take on a fragility as attested to by numerous discarded doctrines superseding it. A discretionary or mandatory disclosure rule 'cannot help but advance the debate about the rules that should govern legal practitioners confronted with clients who intend to harm others',⁴² including by way of wrongful imprisonment and denial of exculpatory information protected by the privilege.

A positive change in the application of, and exception to, legal professional privilege has the potential to produce a recognised and lasting effect. Accordingly, an innocence exception should be favoured because 'freeing the innocent ought to be a paramount goal of any fair system of criminal justice'.⁴³ Such an exception should be enacted in recognition of the adverse impact on defendants like Brooks in *Derby* who have little or no opportunity of redressing the balance. Any changes to the rules of ethics and codes of conduct to create further exceptions to prevent wrongful incarceration need to be supplemented by changes in the law to prevent repercussions for the legal profession if confidential communications are disclosed in legal proceedings. Without doubt there has been, and will continue to be, debate surrounding the erosion and potential abolition of legal professional privilege in contemporary criminal justice systems around the world.

⁴⁰ Geoffrey Hazard, 'An Historical Perspective on the Attorney-Client Privilege' (1978) 66 *California Law Review* 1061, 1091.

⁴¹ Ronald Desiatnik, 'Legal Professional Privilege in Australia' (Prospect Media, 1999) 3.

⁴² Leslie Levin, 'Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others' (1994) 47 *Rutgers Law Review* 81, 154.

⁴³ Louis Natali, 'Should We Amend Or Interpret The Attorney-Client Privilege To Allow For An Innocence Exception?' (Summer 2003) 37 *American Journal Of Trial Advocacy* 93, 93.

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