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CONFIDENCE AND THE PROFESSIONS

Relating To Confidentiality
England And Canada
mparisons To Developments In
he United States

by

ER W. WAKEFIELD

THESIS

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled

....THE DUTY OF CONFIDENCE AND THE PROFESSIONS.....

.....

submitted by .....PETER W. WAKEFIELD.....

in partial fulfilment of the requirements for the degree of

.....J.M. Sharp.....
Supervisor

.....W.T. Anderson.....

.....W.H. Charles pp M.C. Edwards.....

.....

.....
External Examiner

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I N T R O D U C T I O N

The individual today is forced to rely, to an increasing degree, on the advice or help of professional persons. To obtain this he is often forced to divulge confidential facts.

Mr. X. might see his accountant one morning, concerning the latter's discovery that Mr. X. has been mismanaging the books of his business. He would have to furnish the accountant with an explanation. Perhaps the afternoon would be filled with a visit to his bank manager to explain the overdraft his business activities had forced him to build up. Business worries might have effected his health. Perhaps sleepless nights would have caused him to consult his family doctor, who no doubt would have advised him to see a psychiatrist. Worries might also have led him to neglect his wife and the two of them would, no doubt, benefit from speaking to a marriage guidance counsellor, or possibly a priest or other clergyman,about the break-down of their relationship. If all failed, a lawyer would have to be consulted. A clerk in the latter's office, noticing that Mr. X., a well-known personality, was having business and domestic problems might inform a journalist friend, in confidence, of the fact. The latter might write a story in his newspaper and later be subpoenaed to give evidence in court concerning the source of his information.

Each relationship above would demand that some confidential information be imparted from one party to the other. Although the suggested situation is perhaps unlikely to occur in reality, it does illustrate that the problem of the respecting of confidences concerns everyone. Yet, too often it would seem, confidentiality is taken for granted by the average person, who fails to realise that his confidences are sometimes required to be imparted to other departments or persons, or to be recorded. Government participation in medicine and the social services has meant that extensive records are now being compiled and often merged with others. The computer has enabled this to be carried out more easily. Extensive clerical departments are often involved in the recording process, meaning that communications are known to other persons besides the doctor or social worker with whom the patient or client had contact. Are the safeguards adequate for individual confidences to be protected?

Evidence that they are not is not difficult to discover. The Medical Defence Union in Britain[1] refers, in a recent report, to the case of a welfare recipient who attended her local Ministry of Social Security office to claim her benefits. She was horrified to find a dossier, which the clerk had left open on the public counter, to contain a note written by her doctor querying whether she might

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1. Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence 7, at p. 41 (1970).

be suffering from venereal disease.

It would appear to be obvious that some sort of protection should be given to communications imparted in confidence. It is necessary to determine, however, how far this should extend. It is important to remember that communications are often imparted without the mentioning of any express desire that they remain confidential. The nature of the office of the recipient or, less likely, the type of communication, may mean that a duty of confidence should be implied.

A duty of confidence will not always be owed by the recipient of the communication merely because of the office he holds. The communication, it would seem, must firstly be made in confidence. Furthermore, there may be instances when the recipient's own interests, or the public interest generally, would demand that a confidence be breached. Again, if the person who communicated the confidence expressly or perhaps impliedly consented to its divulgence, the duty of confidence ought to cease to exist to the extent covered by the consent.

Professional secrecy seems a particularly important area. The New Catholic Encyclopedia has stated:[2]

> Professional secrecy must be jealously guarded as a feature of civilised living.

A leading authority on the moral aspect of professional

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2. New Catholic Encyclopedia, vol. 13, at pp. 29-30.

confidences has treated these as secrets, to which the communicator or 'owner' has a right of possession, use and disposal. He is of the opinion that it is morally wrong to make use of another's secret contrary to the reasonable will of its 'owner'.[3]

In most continental European countries, the breaching of professional secrecy is made a crime. The Swiss Penal Code,[4] for example, states that priests, lawyers, auditors, doctors, dentists, pharmacists and midwives, and also their assistants, are punishable by a fine or imprisonment if guilty of divulging secrets that have been imparted to them on account of their professional standing. It has been said that such measures denote the difference between the British and North American way of thinking and that of continental Europe. The latter regards the individual, and the respect of his intimacy, as a thing of higher value than do the former.[5]

After years of neglect, the Common Law has recently begun to provide increased protection to privacy, generally. The legislatures in three Canadian provinces, Quebec, British Columbia and Manitoba, have enacted Privacy Statutes, and Manitoba has, by its Personal Investigations Act, provided safeguards for the amount and accuracy of data able, lawfully, to be collected on individuals. In Ontario,

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3. R.E. Regan, Professional Secrecy in the Light of Moral Principles (Washington D.C.: Augustinian Press, 1943).

4. Swiss Penal Code, Art. 321(1).

5. "The Professions and Society", Report of the Commission of Inquiry on Health and Social Welfare, Quebec, 1970.

a recent decision of the Ontario High Court suggests that there is a possibility of the Common Law recognising an individual's right to privacy, aside from any proprietry or contractual interests that may be involved. Haines, J., granted the plaintiff a remedy on the basis of a proprietary interest that he had, but he stated, regarding the defendant's assertion that protection of privacy was a novel claim:[6]

> Were it necessary for me to decide this point to determine this issue, this novelty would not be an excuse in and of itself, for me to deny the plaintiff relief.

He continued:[7]

> It is true that for the common law to maintain its respected place in our society it must grow according to the needs of society.

This shows that there is a realisation that a broader protection than has hitherto existed ought to be extended to privacy generally, which would include confidential communications in its ambit.

In England, the Younger Commission is at present investigating "whether legislation is needed to give further protection to the individual and to commercial and industrial interests against intrusion into privacy by private persons or private organisations or by companies, and to make recommendations".

Privacy has been the subject of debate for some years, but a

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6. Krouse v. Chrysler Canada Ltd. (1971), 25 D.L.R. (3d) 49, at p. 56 (Ont. H.C.).

7. Ibid.

fairly recent case shows that there is now a recognition in England that confidences ought to be respected, and an awareness that the law ought to play its part in this. In Argyll v. Argyll,[8] an interlocutory injunction was granted to the Duchess of Argyll to restrain publication by the Duke, of secrets relating to her private life, personal affairs and private conduct which had been communicated to him during their marriage. One of the grounds for the decision was that the policy of the law favoured the view that confidential communications between husband and wife were within the scope of the court's protection against breach of confidence. Ungoed-Thomas, J., considered the practical difficulty of deciding what communications in this relationship deserved protection. He stated, and this holds out hope for future developments, that if communications deserved protection, the court should not be deterred from effecting this...[9]

> ...merely because it is not already provided with fully developed principles, guides, tests, definitions and the full armament for judicial decision. It is sufficient that the court recognises that the communications are confidential, and their publication within the mischief which the law as its policy seeks to avoid, without further defining the scope and limits of the jurisdiction.

Similarly,there is a large group of cases, which have occurred in the past few years, which protect, in their own right, confidential

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8. [1965] 1 All E.R. 611 (Ch. D.).

9. Ibid., at p. 625.

communications made in the field of industry. This protection has not been based on proprietry or contractual concepts, as had normally been the way in the past.

There remains doubt, however, about the extent of legal protection that now exists for confidential communications in general. For example, the Manitoba Privacy Act states:[10]

> A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

An example of a violation of privacy is given as the use of a person's letters, diaries and other personal documents without his consent or without that of any other person who is in possession of them with his consent.[11] This Act, generally, would cover many confidential communications, but it is doubtful if it would extend to all those that require protection.

The object of this study is to examine the law relating to confidentiality as it now exists in the context of several specific professions, to consider the adequacy of the protection at present afforded, and to offer suggestions for possible future improvements.

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10. S.M. 1970, c.P125, s.2(1).

11. Ibid., at s.3(d).

CHAPTER I

THE LAW AND CONFIDENTIALITY

It is necessary, initially, to give some indication of the type of situation which the courts have deemed leads to the formation of a confidential relationship, worthy of the court's protection. American sources have defined a confidential relationship as involving...[1]

> ...two elements, that of secrecy and that of trust and confidence; and that its essentials are a reposed confidence and the dominant and controlling position of the beneficiary of the transaction. The dominance must be of the mind, and the dependence must be upon the mind...

An example of a confidential relationship would be where a parent relied heavily on her child to manage her business affairs, since she, herself, was not able to read or write.[2] Similarly the relationship between husband and wife has been held confidential and deserving of the court's protection.[3] A confidential relationship exists in business between employer and employee,[4] and between partners. In a

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1. 15A. C.J.S., Confidential, 355.

2. Bass v. Smith, 189 Md. 461, 56 A. 2d 800 (Md. App. 1948).

3. Argyll v. Argyll, [1965] 1 All E.R. 611 (Ch. D.).

4. Robb v. Green, [1895] 2 Q.B. 315.

recent case[5] Megarry, J., considered whether one partner could, behind the other partner's back, copy partnership documents and remove them to other premises for his own use at a later date when the partnership became dissolved. He decided the answer in the negative, stating that such acts and breaches of confidentiality...[6]

> ...seem to me to be a plain breach of the duty of good faith owed by one partner to another.

The number of confidential relationships is not limited, yet although it would seem to be a fundamental concept of law that parties should act towards each other in good faith, the courts have been reluctant to recognise a cause of action based on breach of confidence alone. It is now necessary to trace the line of cases which illustrate this point. The early cases will be considered under the categories in which the courts have viewed them.

WAYS IN WHICH REMEDIES WERE TRADITIONALLY GRANTED FOR BREACH OF CONFIDENCE.

(i) Property as a basis for the action.

It is quite feasible to regard one's secret as a thing capable of dominion by the owner, as was indicated in the Introduction, and the law has indeed viewed confidentiality through property concepts. The most famous example concerned drawings and etchings made by Prince

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5. Floydd v. Cheney, [1970] 1 Ch. 602, [1970] 1 All E.R. 466.

6. Ibid., at pp. 608, 450.

Albert and Queen Victoria for their own pleasure and use, not being intended for publication.[7] The defendant had surreptitiously taken impressions of these artistic creations and intended to make a public exhibition of them, having also produced a descriptive catalogue. The Prince brought this action to prevent such publication. Lord Chancellor Cottenham held that the right and property of the author or composer of any work rests exclusively with him, and an injunction was granted to stop both the exhibition of the work and the publication of the catalogue.

This reasoning is sound as regards the actual work produced but tends to break down when one realises that the catalogue merely contained descriptions of the work. It was said that the effect and object of the description was the same as would have been any exhibition of the things described. It would have made known something about an unpublished work and composition of the author, which he is entitled to restrict to his own use.

Warren and Brandeis[8] pointed out that literary form or artistic composition does have attributes of property such as value which is capable of being realised by publication, and transferability. However, a list or description of the work would not be prohibited under copyright law and itself is certainly not the creation of the artist. They point out that it is not the fact that an artistic or literary

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7. Albert (Prince) v. Strange (1849), 1 Mac. & G. 25, 41 E.R. 1171 (Ch. D.).

8. S.D. Warren, L.D. Brandeis, "The Right to Privacy" (1890), 4 Harv. L. Rev. 193.

property right is involved that ensures protection in such a case since it is mentioned in Albert v. Strange that valuable stones or gems would similarly be protected. What is being protected here is "the peace of mind or the relief afforded by the ability to prevent any publication at all."[9]

In other words, the courts are protecting the thought, sentiment or emotion that led to the final work being created and certainly it should be the right of every man to exercise dominion over these things. This should mean that any person, in any way, attempting to abuse a man's rights to the products of his mind should be prevented from doing so. However, the law prefers to have definite, concrete things to which it may attach rights. It is obviously much easier to stop a man copying one's engraving or picture than it is to stop a man copying one's thoughts. Who can prove what his thoughts were at any particular moment, unless he has some concrete form of proof through his actions or deeds? Thus in Prince Albert the court claims to be protecting the owner's right in the etchings and drawings. Yet in prohibiting the publication of the catalogue it is really protecting the artist's right to keep secret the products of his mind, since the artist himself has no property right in a descriptive catalogue, the compilation of which he had nothing to do with.

The cases concerning the rights the writer of a letter has over it after dispatching it support this idea. The first case is Pope v.

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9. Supra, footnote 8, at p. 200.

Curl[10] where the poet, Alexandre Pope, wished to prevent publication of a book compiled from letters written by himself, Jonathan Swift, and others. The judgement was very vague with regard to the property rights in the letter of the sender and receiver, but it did say that the receiver only had a "special" property in the letter...[11]

> ...possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer.

Letters written by Pope, but not those he had received, remained free from publication through the continuance of an existing injunction.

In Gee v. Pritchard[12] the decision in Pope v. Curl was followed, when letters of a private and confidential nature, sent by the plaintiff over a period of many years to the defendant, were adjudged to be protected from publication. Lord Eldon stated:[13]

> I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff; but if mischievious effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.

It seems obvious from the way Lord Eldon worded his judgement, that he was not entirely satisfied that property rights were the correct ones under which protection should be given.

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10. (1741), 2 Atk. 342, 26 E.R. 608 (Ch. D.).

11. Ibid.

12. (1818), 2 Swan. 402, 36 E.R. 670 (Ch. D.).

13. Ibid., at pp. 425, 678.

Once more in Lardlaw v. Lear,[14] the property rights in documents which had been compiled from notes or drafts of private letters dictated to a stenographer, were held to be in the sender of the letters.

Brandeis and Warren suggest that it is the fact communicated through the letter which is being protected rather than the intellectual act of recording.[15] Their example consists of a letter from a man stating that he did not dine with his wife. In normal circumstances the man does not care to protect the special way in which he strung his words together. He is concerned about protecting the confidential information which the letter imparts, that is, the fact that he did not dine with his wife.

An unreported case adds further substance to this theory. Wyatt v. Wilson was mentioned by Lord Cottenham, L.C., in Albert v. Strange.[16] In it Lord Eldon is reported to have said that if one of George III's physicians had kept a diary of what he heard and saw, the court would not have allowed him to publish it in the King's lifetime. In this example the diary was the property of the physician. It seems to be stretching the concept of property to say that the information contained in the diary was the King's property.

However, it might well be possible to conceive of a secret, or information of a type similar to that in the above example, as being an item of property, even before it is reduced to a concrete form.

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14. (1898), 30 O.R. 26 (Div. Ct.).

15. Supra, footnote 8, at pp. 200-201.

16. Supra, footnote 7, at pp. 46, 1179.

Intangible property can exist, for example one can assign one's right to be paid a debt.

International News Service v. The Associated Press,[17] a decision of the United States Supreme Court, dealt with the question of what constituted property. Mr. Justice Pitney, delivering the majority opinion, said that in a common law controversy it might be an answer to say the item to be protected, news material, was of too fugitive or evanescent a character to be the subject of property. However, this case was one being considered in equity, the case concerning unfair competition through the appropriation by a competitor of news material which had been collected by the plaintiff. It was stated that that which the complainant acquired fairly at substantive cost, may be sold fairly at substantial profit. News material was seen to have all the attributes of property necessary for the purpose of determining whether its misappropriation by a competitor could be unfair competition. Similarly a confidence or secret might be seen as property for the purpose of its misappropriation, at least in a court of equity. He seems to be saying news material is not really property but here it will be considered as such for the purpose of protecting them.

Mr. Justice Brandeis, dissenting, felt that as a general rule of law the noblest of human products i.e. knowledge, truths ascertained, conceptions and ideas, became, after communication to others, as free as the air to common use. Upon these incorporeal productions the

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17. 248 U.S. 215, 39 Sup. Ct. 68 (1918).

attribute of property continues only in certain classes of cases, following communication. Public policy has confined this to productions involving creation, invention or discovery. Literary, dramatic and musical creations have been recognised as property at common law and been protected also under copyright and patent laws. He continues by saying that there are many other cases in which the courts interfere concerning incorporeal productions and in which the right to relief is often called a property right, but he says that this is only in a special sense. In these cases there is no absolute right, but merely a qualified protection given in special relationships, or because of the knowledge, or on account of the manner in which he is using it. Thus, he does not consider the secret a true item of property.

In a comparatively recent article entitled "The New Property"[18] 'various valuables' currently being dispensed by government in Western countries were discussed as possibly taking the place of traditional wealth as now seen in the form of tangible items of property. Licenses, benefits, franchises and services performed by various government departments were given as examples. In the future such things might become more valuable than the things which now are associated with wealth, particularly if government's paternalism increases. An interesting observation of what constitutes property was also featured in this article.[19] Property, it was said, is a legal institution, the essence of which is the creation and protection of certain private rights

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18. C.A. Reich, "The New Property" (1964), 73 Yale L.J. 733.

19. Ibid., at p. 771.

in wealth of any kind. Indeed, it seems, the right to have one's confidences respected might certainly be seen as included in such a concept of property.

However, one questions whether it is necessary to argue in this way concerning confidentiality. Does not the law of contract often revolve around a party's right to the ownership or control of an item of property? Are not many of the trustee's duties revolving around property which he holds for a beneficiary? These rights of action are not classified under property law, though they involve property. Similarly a breach of confidence action may concern items that can truly be called property, yet there is no reason why the action should be framed in property law, which only leads to reasoning of the type which Warren and Brandeis exposed. If a duty of confidence can be shown to have existed and to have been breached then a remedy should exist for breach of confidence, not for infringement of a property right.

(ii) Contract as a basis for the action.

Contract is a potential cause of action in most areas of the law, and has been seized on by the courts wherever possible. The leading case concerning confidentiality in this sphere is Pollard v. The Photographic Co.[20] A professional photographer had been paid by the plaintiff to take pictures of her family for her. Later the

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20. (1888), 40 Ch. D. 345.

defendant displayed one of these photographs in the form of a Christmas card and it was proved that he had sold at least one copy of the card. The plaintiff sued for breach of the implied contractual term that he would not use the negative for such purposes, and also on the ground that such sale or exhibition of the photograph was a breach of confidence. North, J., said that where a person obtains information in the course of a confidential employment the law does not allow him to make any improper use of the information so obtained. Lindley, L.J.'s, remarks in the case of Tuck v. Priester[21] were quoted as applicable to the case at hand:

> He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of good faith, and in my judgement, clearly entitles the plaintiffs to an injunction whether they have a copyright in the picture or not.

Where professional services are given for consideration of any sort, it is clear that a contractual obligation of secrecy is implied in the relationship. An example of this in the medical profession arose in the Scottish case of A.B. v. C.D..[22] The plaintiff brought an action against her husband for judicial separation, on the ground of cruelty affecting her health. She employed the defendant doctor to examine her and report on her medical condition, in preparation for

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21. (1887), 19 Q.B.D. 629, at p. 639.

22. (1904), 7 Sess. Cases (Fraser), 72 (Scot.). See R.G. Fox, "Professional Confidences and the Psychologist" (Dec. 1968), U. of Tasm. L. Rev. 12, at p. 23.

the litigation. The doctor formed an adverse opinion. When the case came for trial, one year later, the same doctor was nominated by the husband to examine the wife. Despite the reminders by the plaintiff's solicitors of the fact that he had earlier examined the wife and that he owed her a strict duty of confidence, the doctor proceeded with the second examination, at the same time showing the husband the notes he had taken at the first examination. He gave evidence in court for the husband, using these same notes and as a result the plaintiff lost her action. She sued the doctor for breach of an implied contractual term. Although for technical reasons of pleading the court refused to allow the issue of whether the disclosures to the husband amounted to a breach of confidence to proceed to trial, it is reported that there was little doubt that in other circumstances the action would have been successful.

The difficulties inherent in placing reliance on contract for a remedy in such a relationship are shown, however, by a United States case, Quarles v. Sutherland,[23] in 1965. The plaintiff was injured in a store, and was attended, free of charge, by a physician employed by the store. In an action, brought for wrongful disclosure of the individual's injuries to the store's attorney, the court found no duty attached to the relationship, because the services were given free of charge, and there could, therefore, be no implied contractual obligation to respect the patient's confidences. In stating that a remedy would only have been possible through contract, this case

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23. 389 S.W. 2d 249 (Sup. Ct. Tenn. 1965).

is out of line with other United States authorities,[24] but it does show the limitations of an action based on a contractual duty.

The contractual element in professional relationships has been shown in Groom v. Crocker[25] where the solicitor-client relationship was the subject of litigation. In this case it was held by Sir Wilfred Greene, M.R., that for a breach of duty in a contractual relationship, damages granted might be nominal, although mental suffering and social discredit result. However, the action could not be sustained in tort and damages thereby gained, since the duty arises through the contract. A similar decision was reached in Clark v. Kirby-Smith[26] where the issue was on what basis the plaintiff could sue for breach of confidence. It was held that a long line of cases showed the cause of action for a client against his solicitor was in contract, not tort.

An early case, that of Merryweather v. Moore,[27] seemed to attack the problem from a different angle suggesting that...[28]

...it is sometimes difficult to say whether the

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24. Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (Utah Sup. Ct. 1958).
Smith v. Driscoll, 94 Wash. 441, 162 P. 572 (Wash. Sup. Ct. 1917).
Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142 (Pa. Super. Ct. 1962).
Clark v. Geraci, 29 Miss.2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960).

25. [1939] 1 K.B. 194 (C.A.).

26. [1964] Ch. 506, [1964] 3 W.L.R. 239.

27. [1892] 2 Ch. 518.

28. Ibid.

> Court has proceeded on the implied contract or the confidence... Perhaps the real solution is that the confidence postulates an implied contract...

A clerk left the employment of the plaintiff, having removed from the latter's premises, two days earlier, some tables concerning the dimensions of various engines. His new employer produced a similar engine to that of the plaintiff. It was held that the action for breach of confidence did not necessarily depend on the existence of a contractual obligation and that the action succeeded because of the abuse of the confidence existing between a clerk and his employer, or for breach of an implied contract arising from the confidence.

In considering breach of contract as the appropriate cause of action, the same arguments apply as in the discussion on property law as a basis of the action. The obligation of confidence may be derived from a contractual obligation, either express or implied, but often there will be no contract and yet justice will still demand a remedy for the breach of confidence that has occurred. As with property law, the contract is far more likely to be the occasion for the arising of the duty, rather than the cause of it. The real foundation for the obligation lies in the relationship which gives rise to it. Furthermore, to say that the duty of confidence gives rise to an implied contract is really akin to shutting the barn door after the horse has bolted. Once the cause of action is recognised to be the breach of a confidence, there is no point at all in calling it breach of an implied contract, which is all that this argument does.

(iii) Negligence as a basis for the action.

There is only one case, to date, in which negligence has been used as a basis for the action for breach of confidence. This occurred in 1958 in New Zealand, being Furniss v. Fitchett,[29] yet its logic is sound and its implications for the professions studied later in this work are obvious.

The plaintiff and her husband were regular patients of a doctor and when their marital relationship became strained the husband asked the doctor for a certificate relating to his wife's sanity, her consent not being sought. One year later, when the wife sued her husband for separation and maintenance, the certificate was produced in court and as a result the wife suffered nervous shock. An action founded on breach of contract was not persued, on technical grounds, and an action for defamation was also abandoned, presumably because the statements in the certificate were true. However, damages were awarded on the basis of a claim in tort. Barraclough, C.J.,held that although the claim was novel, it fell within the law as propounded by Donoghue v. Stevenson,[30] in that the relationship of doctor and patient gave rise to a duty of care. The doctor, as a reasonable man, should have foreseen that disclosure to the wife of her mental condition would be harmful. Furthermore, although he had not told the wife, by giving a certificate to her husband he should have realised that the contents of it were likely

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29. [1958] N.Z.L.R. 396. See also (1958), 34 N.Z.L.J. 65.

30. [1932] A.C. 562 (H.L.).

to come to the wife's knowledge.

(iv) Breach of confidence as an action (the earlier cases).

In the cases earlier considered the courts may have based their decisions concerning breach of confidence on grounds of property and contract, but there is considerable evidence to support the contention that actions would lie for breach of confidence in its own right, when the necessity arose. In Albert v. Strange, Lord Cottenham, L.C. said...[31]

> ...but this case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract, would of itself entitle the Plaintiff to an injunction.

In Tuck v. Priester, the making of extra copies of the picture was held to be...[32]

> ...a gross breach of contract and a gross breach of good faith...
>
> (Emphasis added)

In an early case,[33] in 1825, an injunction was granted for breach of confidence, though this was not expressly stated in the judgement. A distinguished surgeon sought to restrain the publication of lectures which he had given at St. Bartholomew's Hospital, London. Lord Eldon doubted whether there could be a property right in the lectures (which had not been reduced to writing) and there was not sufficient to establish an implied contract between the plaintiff and

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31. Supra, footnote 7, at pp. 44, 1178.

32. Supra, footnote 21.

33. Abernethy v. Hutchinson (1825), 3 L.J.Ch. 209.

defendant, who had been a student of his...[34]

> ...but whether an action could be maintained against them [student and publisher] on the footing of implied contract, an injunction undoubtedly might be granted.

It was reasoned that although parties admitted to the lectures might make shorthand notes of them in their entirety, yet they could do so only for the purposes of their own information and they could not publish, for profit, that which they had not obtained the right to sell.

One might also remember the statement of Lord Eldon in Gee v. Pritchard,[35] where he worded his judgement so as to cast doubts as to his faith in property rights as being the true basis for an action for breach of confidence.

However, the case most relied on in recent English decisions to establish an action for breach of confidence is Morison v. Moat from the year 1851.[36] The plaintiff sought an injunction to restrain the use of a secret formula for a medicine, which was not patented, and also to restrain the sale of it by the defendant, who had acquired knowledge of it, it was alleged, by violating his contract with the party who had communicated it to him, as well as breaching his duty of trust and confidence. It was held that the plaintiff did not have a right to secrecy against the world, since the formula was not patented, but that he did have a right against the defendant. The two

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34. Supra, footnote 33, at p. 219.

35. Supra, footnote 12.

36. (1851), 9 Hare 241, 68 E.R. 492 (Ch. D.).

parties had been partners, but the plaintiff had himself invented the medicine and generally prepared it. The following extract from the judgement of the Vice-Chancellor, Sir G.J. Turner, is relevant:[37]

> That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence, meaning, as I conceive, that the Court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred...

The Vice-Chancellor then proceeded to consider the earlier case law. In Williams v. Williams (1817),[38] a father divulged a secret formula for medicine to his son and delivered to him a stock of medicines, in contemplation of a future partnership being formed between them when the son was of age. Lord Eldon said:[39]

> If, on a treaty with the son, while an infant, for his becoming a partner when of age, the Plaintiff had, in the confidence of a trust reposed in him, communicated to him this secret, and at the same time given him the possession of the articles mentioned in the Bill; and, instead of acting according to his trust, the son had taken to himself the exclusive dominion over these articles, and begun to vend them without permission, it must be said that he had no right in any case so to act - and that he was bound, either to abide by, or to waive, the agreement.

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37. Supra, footnote 36, at pp. 255, 498.

38. (1817), 3 Mer. 157, 36 E.R. 61 (Ch. D.).

39. Ibid., at pp. 159, 62.

The Vice-Chancellor in Morison v. Moat concluded that this statement lays down the doctrine...[40]

> ...that articles delivered over upon the faith and in the confidence of a future arrangement cannot be used for a purpose different from that for which they were delivered over.

It is of relevence to note that these observations, however, relate solely to the misuse of confidential information rather than to its wrongful publication or divulgence, and it is pertinent to note what Lord Eldon said in Williams v. Williams about the latter situation:

> But so far as the injunction goes to restrain the Defendant from communicating the secret, upon general principles, I do not think that the Court ought to struggle to protect this sort of secrets in medicine.

A few lines later he questioned whether protection ought to be given 'by restraining a party to the contract from divulging the secret he has promised to keep' and continued that 'that is a question which would require very great consideration'[41] for which the case at hand did not call.

In Morison v. Moat the Vice-Chancellor referred also to Yovatt v. Winyard,[42] a case involving a defendant who had surreptitiously copied 'recipes for medicines' whilst in the plaintiff's employment. This case was referred to as one in which Lord Eldon granted an injunction upon the express ground of breach of trust and confidence, which indeed is correct, yet it is important to note that the plaintiff's

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40. Supra, footnote 36, at pp. 256, 499.

41. Supra, footnote 38, at pp. 160, 62.

42. (1820), 1 J. & W. 394, 37 E.R. 425 (Ch. D.).

counsel, Mr. Wetherell thought it necessary to distinguish Williams v. Williams[43] in the following way...[44]

> ...contending that though the Court might not protect a secret from disclosure by one to whom the proprietor had himself communicated it, yet it would, when the person sought to be restrained had clandestinely possessed himself of it. In those cases the knowledge was communicated for a particular purpose, and it was attempted to prevent the party from using it for any other; but here the first discovery was obtained by a breach of duty, and in violation of a positive agreement.
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> (Emphasis added.)

It is contended that, at most, these two cases show that it was uncertain when protection would be given from a breach of confidence, and such protection, if given, would seem to be limited to the misuse of confidential information in ways other than disclosure of it, despite Lord Eldon's judgement in the latter case.[45]

Morison v. Moat, however, has been followed in recent cases, as being the important decision granting a remedy for breach of a confidence The conclusions reached in it, and from it, moreover, seem to be logically correct. If a remedy is to be granted for the misuse of confidential information, through the employing of it for ends not authorised by the person who divulged it, there is no reason why one should not be given for misuse of information, through the wrongful disclosure of it. In both cases the confidence imposed in the receiver

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43. Supra, footnote 38.

44. Supra, footnote 42, at pp. 395, 426.

45. Also referred to were: Abernethy v. Hutchinson, supra, footnote 33, Albert (Prince) v. Strange, supra, footnote 7, Duke of Queensbury v. Shebbeare (1758), 2 Eden 329, 28 E.R. 924 (Ch. D.).

of the information by its donor, has been abused, and a remedy based on the wider concept of good faith is warranted.

THE NEW APPROACH TO THE DUTY OF CONFIDENCE

(i) Confidential information - basis and reasons for protecting it today.

The leading case concerning confidential information is Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.[46] The facts are as follows:

(a) S. owned the copyright for drawings of leather punching tools.

(b) The defendants, C., were instructed to manufacture these tools as agents or subcontractors for S.

(c) It was an implied condition of delivery of the drawings to C. that they treat the drawings as confidential, and that they use them only to construct tools for S.

(d) C. had kept the drawings, converted them to their own use, constructed tools, and had sold them on their own account, in infringement of copyright.

When the case reached the Court of Appeal, the only substantial, relevent cause of action was for breach of confidence. Lord Greene, M.R., stated that breach of confidence may arise as an action without the necessity of a contractual relationship existing. If two people were

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46. (1948), (C.A.), noted at [1963] 3 All E.R. 413.

to make a contract, under which one of them obtained, for the purpose of it, or in connection with it, some confidential matter, then, even though the contract were silent on the matter of confidentiality, the law would imply an obligation to treat the confidential matter in a confidential way, as one of the implied terms of the contract.[47] He remarked that the judge below had failed to find a contract so he had found no breach of confidence. He had not dealt, however, with the substantial point in the case: whether the defendants had committed a breach of confidence, infringing S.'s rights.

This view was expanded upon by Lord Salmond in Initial Services Ltd. v. Putterill[48] where he said:

> As I understand it, this duty of confidence is put in two ways. First of all, it is said that there is an implied term of the contract of employment that the servant will observe this confidence; alternatively, it is said that this is a duty which is imposed by the law because, manifestly in the public interest, servants should not disclose to the world what they are confidentially told about their master's business...

A recent decision in Ontario[49] illustrated that an employee owes a certain duty of confidence to his employer, should he come to know customers or clients of the latter in the course of his job. He will not be allowed to use such knowledge, on leaving his employer, for his own or another's interests. This case is interesting, since a covenant

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47. Supra, footnote 46, at p. 414.

48. [1968] 1 Q.B. 396, at p. 408 (C.A.), [1967] 3 All E.R. 145, at p. 150 (C.A.).

49. Management Recruiters of Toronto v. Bagg (1970), 15 D.L.R. (3d) 684 (Ont. H.C.).

in the contract of employment preventing the employee competing with his former master was declared unenforcable on the grounds of public policy; yet it was felt necessary to restrain the servant's breach of confidence by granting the master an injunction regarding 32 job orders and 148 prospect files which the servant had gained knowledge of whilst in his employ. In this case the court was forced to uphold the duty of confidence in its own right.

Similarly in Fraser v. Evans, Lord Denning, after mentioning earlier cases, said:[50]

> These cases show that the court will in a proper case restrain the publication of confidential information. The jurisdiction is based, not so much on property or on contract, but rather on the duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so.

(ii) Misuse of confidential information in ways other than by disclosure.

Disclosure of a secret is not the only way that the confidence of its 'owner' is abused. It will be remembered that the foundation for an action for breach of confidence per se lay in cases that dealt not with the revelation of secret matters, but with situations in which confidential information had been used in ways other than those intended for it by the person who divulged it.[51] It is now necessary to view

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50. [1969] 1 Q.B. 349, at p. 361 (C.A.), [1969] 1 All E.R. 8, at p. 11 (C.A.).

51. Supra, at pp. 22-27.

particular developments in this aspect of confidentiality.

The principles behind the law in this area seem to be those of good faith. This was illustrated by an Ontario case, Lindsey v. LeSueur.[52] The defendant had been allowed access to a private collection of manuscripts, to help him in writing a biography about an early Canadian pioneer. He represented to the owner of the manuscripts that his book would present a favourable impression of its subject, but, in fact, it turned out to be unfavourable. Britton, J. stated that no question of copyright was involved, but that it was a question of some-one getting access to the house of another, and using property in it, for purposes different to those consented to by the owner. He stated:[53]

> I deal with this matter simply as a matter of contract and good faith...

He stated the basic facts of the case in no uncertain terms:[54]

> But this is a question of how the defendant came to get possession of what is now the plaintiff's property, and of the use he made of it, as distinguished from the use the plaintiff supposed the defendant would make of it, and as distinguished from the use the defendant led the plaintiff to think would be made of it, and as to the use the defendant now proposes to make of it.

This principle has been employed in later cases. These have often involved the wrongful use of plans or designs, which had been

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52. (1913), 27 O.L.R. 588 (Ont. H.C.).

53. Ibid., at p. 591.

54. Ibid.

communicated to the defendant for a special purpose only. In Ackroyds Ltd. v. Islington Plastics Ltd.[55] the defendants manufactured swizzle sticks for pleasure boats, to the plaintiff's order, for which purpose the plaintiff gave them a plastic moulding tool. In fulfilling their contractual obligations the defendants learnt certain confidential information, as, for example, the name of the plaintiff's principal customer. They made an improved moulding tool, using know-how acquired whilst under contract with the plaintiff, and began to supply the plaintiff's customer directly. There was held to be a clear breach of contract, but also, a breach of confidence was seen. The tool was given over under an obligation that it be used solely for the plaintiff's purposes, as was information received as a result of using the tool. Thus, use of the tool and information for means other than for which it was given, amounted to a breach of confidence.

A Canadian case, Breeze Corps. v. Hamilton Clamp and Stampings Ltd.[56] brought about a similar result. Information had been given to the defendants on all aspects of the plaintiff's manufacture and sale of hose clamps. The defendants began to manufacture a similar clamp with variations to avoid infringing the patent. Damages were awarded because it was held that the information was meant to be used for a limited purpose, in accordance with licensing agreements into which the plaintiff and defendant had entered. The defendants' use of the information was outside this limited purpose.

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55. [1962] R.P.C. 97 (Q.B.D.).

56. (1961), 30 D.L.R. (2d) 685 (Ont. H.C.).

It is apparent that the misuse need not be intentional. This is shown by the case of Seager v. Copydex,[57] where the plaintiff had disclosed his ideas for a new type of carpet grip when trying to sell to the defendant company another sort of grip. The latter, some time later, made a similar type of grip to that disclosed to them by the plaintiff, fully believing it to be their own idea. Lord Denning held that on broad principles of equity the plaintiff was entitled to a remedy. The plaintiff's information had at least provided them with a 'springboard'.[58]

The above cases would seem to show that misuse of information occurs most frequently in the field of industry. Actions are brought in this area because of the financial losses that a company can suffer when its confidential information is wrongly used. However, it is clear that misuse could very well, and undoubtedly does, occur elsewhere and the professional field can be no exception. Two factors might prevent actions arising here: that of ignorance of the misuse; and the difficulty of showing any harm occasioned, especially in financial terms, to make the bringing of an action worthwhile. The important fact, however, is that a potential remedy must exist for anyone injured in this way.

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57. [1967] 2 All E.R. 415 (C.A.).

58. Accord, Terrapin Ltd. v. Builders Supply Co. Ltd., [1967] R.P.C.375. Peter Pan Mfg. Corp. v. Corsets Silhouette Ltd., [1963] 3 All E.R. 402 (Ch. D.).

(iii) When is information confidential?

It is necessary to consider a fundamental point at this time, namely, when information can be classed as confidential.

Lord Greene, M.R. gave the most obvious answer to the above question in Saltman Eng'r Co. Ltd. v. Campbell Eng'r Co. Ltd. when he stated that...[59]

> ...it must not be something which is public property and public knowledge.

However, this statement is not so self-explanatory as it might seem at first sight. A note in the All England Law Reports[60] suggests that the taking of a patent seems to render it impossible to maintain an action against a former employee to restrain disclosure. Yet Lord Greene continued, following the above quotation, to the effect that it would be possible to have a confidential document (formula, plan, sketch etc.) which is the result of work done by the maker on materials, and which may be available for the use of anybody...[61]

> ...what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

The meaning of this was brought to light through three cases. The first, Mustad v. Dosen[62] concerned the employee of a Norwegian firm, with whom he had signed an express contract requiring secrecy

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59. Supra, footnote 46, at p. 415.

60. [1963] 3 All E.R. 403.

61. Supra, footnote 46, at p. 415.

62. (1928), [1963] R.P.C. 41 (H.L.).

regarding information learnt through his employment. When the firm went into liquidation, believing himself to be no longer bound by this contract, he disclosed particulars about an engine to his new employers. M. had bought the liquidated firm and applied for an injunction against the defendant. It was held, however, that because essential parts of the engine were revealed in its patent specification, the information could be considered no longer secret, and since no ancillary secrets had been revealed, the injunction was set aside.

In the second case, Terrapin Ltd. v. Builders Supply Co.Ltd.[63] Roxburgh, J. sought to explain the Saltman case stating:[64]

> As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.

The defendants had manufactured prefabricated buildings, to the plaintiff's design, and, after termination of the contract, had continued to build similar buildings for their own profit, making use of confidential information, given to them by the plaintiffs, for the purposes of the earlier contract. It had been argued in the defense that the selling of the buildings and the publication of a brochure, disclosing all features of it, by the plaintiff, had destroyed the confidential element.

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63. (1959), [1967] R.P.C. 375 (Ch. D.), aff'd [1960] R.P.C. 128 (C.A.).

64. Ibid., at p. 391.

Roxburgh, J., continued:

> The brochures are certainly not equivalent to the publication of the plans, specifications, other technical information and know-how... It is, in my view, inherent in the principle upon which the Saltman Case rests that the possessor of such information must be placed under a special disability in competition to prevent an unfair start.

It would appear that these two cases conflict to some extent and this was the basis of the defense counsel's argument in the third case, Cranleigh Precision Engineering Co. Ltd. v. Bryant,[65] where it was claimed that the Terrapin Case was wrong, in so far as it conflicted with Mustad v. Dosen. B., the managing director of the plaintiff company, had invented an above ground swimming pool with two unique features: a plastic clamping strip which held the outside walls to their inside lining, and the constitution of the frame of the pool. B. left the plaintiffs and formed his own company, producing a swimming pool with these features, using a foreign model of pool as his basic model and adding the special features. The makers of the foreign pool had patented their product.

In considering the decision in Mustad v. Dosen, it was said that the effect of that decision was that if a master published his secret to the world, his servant could not be bound to secrecy concerning that matter. In the present case, the master of B. had never published anything; it was the foreign firm who had patented their product. It was further held that the Terrapin decision was consistent with that in

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65. [1966] R.P.C. 81 (Q.B.D.).

the Saltman case. In other words, knowledge that a certain clamping strip was the correct one to use, and the ability to define it to a plastics manufacturer, as well as knowing which one to approach, gave the other company a 'springboard' which the issue of a leaflet and the marketing of the pool by the plaintiffs did not supply. The other company thus avoided having to use their brain and go through the same process as the plaintiff company through B., their servant, had been forced to. Therefore, B. had committed a breach of confidence, in giving this advantage to the other company.

Thus the law which Mustad v. Dosen seemed to lay down, that publication to the world (through the taking out of the patent) meant the information was no longer confidential,has been severly restricted by the other two cases, which followed the principles set out in the Saltman case. One must consider its effect today. Because Cranleigh distinguished Mustad as a case where the employer patented his design, it has been suggested that Mustad is confined to cases involving a breach of confidence between employer and employee,[66] though why the law should see adequate disclosure in these cases and not in others is difficult to imagine. Another suggestion is that Mustad be confined to cases involving publication through a patent specification,[67] though Cranleigh involved such a matter, and disclosure was not seen. The issue really seems to revolve around how much is disclosed, either by

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66. J.Jacob and R. Jacob, "Confidential Communications" (1969), 119 New L.J. 133, at p. 134.

67. Ibid.

the patent specification or by whatever other means may be used. If there is any chance of the receiver of the information gaining any sort of advantage, in any way (e.g. money, time, or effort), then the information must still be regarded as confidential between the parties handing over and receiving it.

This is apparent from the case of Seager v. Copydex.[68] Lord Denning stated at page 417:

> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it.

He continued by saying that information divulged can be both public and private in nature. The public knowledge would be that gained through the patent specification. The private knowledge would concern difficulties in manufacturing the product (there, a carpet grip), the necessity for it to have certain features (there, a strong, sharp tooth for gripping) and the alternative ways in which these features might be made available. He continues:[69]

> They thought that, as long as they did not infringe his patent, they were exempt. In this they were in error. They were not aware of the law as to confidential information.

The Cranleigh case brings out another point also: the simplicity of a secret does not mean that it can not be confidential. It was claimed that anybody could buy the plastic strip and use it for clamping

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68. [1967] 2 All E.R. 415 (C.A.).

69. Ibid., at p. 418.

the lining of the pool to its walls. Similarly it was said, any competent engineer or sheet metal worker could have constructed the interfitting outer wall on viewing a model of the pool or the leaflet. However, Roskill, J., held that these elements were nonetheless confidential.[70] The knowledge that this particular clamp was the right one to use, the ability to define to a plastics manufacturer what was required, and the knowledge of which one to approach were trade secrets. Following Terrapin[71] the leaflet and marketing of the pool did not sufficiently disclose the features of the interfitting frame to mean that these were not confidential. Time and effort would have been needed to work them out.

Thus, it has been shown when, and for how long, information can be classed a confidential in order that an action may arise for breach of confidence. However, the plaintiff must have also been owed a duty by the defendant.

(iv) A duty must be owed.

The fact that the plaintiff must be owed a duty by the defendant was stated by Somervell, L.J., in the Saltman Case[72] as being the first matter to be considered in any action of this kind. Fraser v. Evans[73] showed how this applied in practice.

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70. Supra, footnote 65, at p. 90.

71. Supra, footnote 63.

72. Supra, footnote 46.

73. Supra, footnote 50.

The plaintiff's firm was employed by the Greek government as a public relations consultant. There were express conditions in the contract between the two parties to the effect that the plaintiff owed the Greek government a duty of confidence, but nothing was mentioned about the latter owing the plaintiff any such duty. A document prepared by the plaintiff's company for the Greeks, fell into the hands of a journalist, and, because of its content, the plaintiff sought to prevent publication. It was held that the person complaining about breach of confidence must be owed a duty, and that although it was evident that the plaintiff owed such an obligation to the Greek government, no similar duty was expressed, or could be implied, in their contract with the plaintiff. The only evidence in the latter's favour was an affidavit stating that, as a matter of practice, the Greeks kept these reports confidential. This policy, however, left them free in law to circulate the documents to whom they wished. They had paid for the information and as the owners of it, they were entitled to use it as they wished. They had, therefore, committed no breach of confidence.

It appears that the important point here is that the plaintiff had relinquished all rights he might have had to the information when he sold it to the Greek government. The element of property in the confidential information is evident in this case, but property is not the foundation for the decision. The very nature of confidentiality demands that two parties have interests in the information or idea, which is the subject of the confidence. One might have possession

or use of it, yet the other still retains 'ownership' of it. Once the 'ownership' of the secret passes to the other person, it is he to whom the duty of confidence is owed. In other words the right to have the confidence respected follows the 'ownership' of the secret, whether this is capable of being called property or not.

Thus, the information is confidential in nature, and a duty of confidence is owed. Yet there may be occasions when one is justified in breaching the duty of confidence. This is the next point that must be considered.

(v) When disclosure is justified.

The duty of confidence can not be an absolute one, and legally, as well as morally, disclosure will, in certain circumstances, be justified. The leading case on this is Tournier v. National Provincial and Union Bank of England,[74] a Court of Appeal case. It was laid down that the duty could be breached where:

(a) disclosure was compelled by law, as where a statute compelled it;

(b) there was a duty to the public to disclose; for example, where crimes were about to be committed; (Some recent cases on this point are discussed immediately below).

(c) the interests of the bank (holder of the duty of confidence) required disclosure, as where it was being sued by the

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74. [1924] 1 K.B. 461 (C.A.).

customer to whom it owed the duty;

(d) there was implied or express consent by the customer that disclosure be made.

It is of more value to relate these headings to concrete situations than to talk about them generally, and thus each is considered as it applies to the various professions in later chapters. It is of value, however, to discuss the second heading, concerning the duty to the public to disclose, at this point, since the applicable cases are not directly related to any of the professions considered later.

The policy behind the law of confidentiality was laid down in the nineteenth century in Gartside v. Outram,[75] where Wood, V.C.,said:[76]

> The true doctrine is, that there is no confidence as to the disclosure of iniquity.

This was expanded upon in Weld-Blundell v. Stevens[77] where Bankes, L.J., suggested that the exception to the duty of confidence which an employee owed to his employer was limited to proposed or contemplated crimes or civil wrongs. Lord Denning in Initial Services Ltd. v. Putterill[78] claimed that this was too limited and that disclosure should be allowed for crimes, frauds or misdeeds, whether committed or contemplated, if divulgence was in the public interest.

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75. (1856), 26 L.J.Ch. 113.

76. Ibid., at p. 114.

77. [1919] 1 K.B. 520, at p. 527 (C.A.).

78. Supra, footnote 48, at pp. 405, 148.

In the latter case P. left his employers, I.S. Ltd., taking with him documents from the Company's file. He disclosed these to a newspaper, which published them. They contained information to the effect that there existed a liaison system between a group of laundries to keep up prices, and that after selective employment tax was imposed, I.S. Ltd. had increased their prices, issuing a circular in which they claimed this was due to the tax, but that they had also made a large profit as a result of this increase. A writ was issued against P. and the newspaper company for an injunction, damages were claimed for breach of confidence, and delivery up of the confidential papers was called for.

Lord Denning viewed P.'s justification, which was that section 6 of the Restrictive Trade Practices Act (1956) applied, and that the agreement between the laundries should have been registered, while it was not. It was also claimed that the circular was misleading to the public. He decided that the obligation of confidence was subject to exceptions. There was justification for disclosure in certain circumstances:[79]

> It extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others.

Here the agreement should have been registered, and once on the register anyone could pay a nominal sum and view it. There was thus an argument, at least, that this information was not within the realm of confidentiality to which a master could hold his servant.

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79. Supra, footnote 48, at pp. 405, 148.

Lord Salmond drew an analogy between the present case and an express term in a contract not to divulge the agreement with the other laundries, to the registrar. He concluded that the court would not, in his opinion, enforce such a term.[80]

These then are the principles to consider when weighing up whether disclosure is justified. That is, is the information about wrongful conduct, and if so, is it of such a nature as to require disclosure in the public interest? However, Lord Denning points out that disclosure should always be only to a person who has a proper interest in receiving the information. He gives examples, such as that a crime should be reported to the police, or a breach of the Restrictive Trade Practices Act to the registrar. Yet he adds that the misdeed may be of such a character that the public interest may demand publication on a broader field, even to the press, and presumably this would be justified in a case similar to the present, where the public stood to lose as a result of the wrongful act.

Since a remedy has been given in many of the cases earlier described, on the equitable grounds of breach of good faith, it is as well to consider how the disclosure of a confidence has been justified in the light of equitable principles. In the cases immediately above no remedy would be given for an iniquity - equity will not protect something which is, in itself, wrong. Thus there can be no breach of confidence in the revelation of an unlawful act. One might include the above in the general equitable principle: that he who goes to

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80. Supra, footnote 48, at pp. 409-410, 151.

equity, must go with clean hands. This principle was considered from two different viewpoints in Argyll v. Argyll.[81] The Duchess in this case wished to prevent her husband, the Duke, from disclosing marital confidences in a newspaper. The Duke claimed that, because she herself had disclosed similar confidences earlier in another newspaper, she should not be granted a remedy for breach of confidence, owing to the existence of the equitable principle stated above. Basically, the difference between this and the Initial Services Ltd. case is that the disclosure there was of wrongful acts. In the Argyll case the disclosure was mostly of innocent confidences, the wrongful act relating to previous, unconnected acts. The issue was thus judged in a different way in Argyll. It was held that the Duke's breaches were of the most intimate confidences, and were of an altogether different order of perfidity to those breaches earlier by the Duchess.[82] Thus no justification for disclosure existed here.

It is also important to note that it was claimed that the Duchess had further 'dirtied her hands' by acting immorally during the marriage. Ungoed-Thomas, J., held that such behaviour made the confidential relationship of marriage impossible, but because the misconduct occurred after the confidences had been imparted, these still deserved protection. It was 'confidences' imparted following the misconduct that would be effected since the confidential element

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81. [1965] 1 All E.R. 611 (Ch. D.).

82. Ibid., at p. 625.

in them would have been undermined.

It seems that one can conclude from the above cases that:

(i) disclosure of most wrongful acts will be allowed, but only to the right persons.

(ii) wrongful acts of the donor of the secret which are independant of the information contained in the confidence, will not permit disclosure unless they have resulted in the lack of a confidential element in the first place. The confidential element will only be destroyed in 'confidences' imparted after the wrongful act.

(iii) disclosure of confidences in the past by the donor, will only allow the receiver to disclose confidences of the same order.

(vi) Confidentiality in the United States.

It has been shown that an action for breach of confidence originally had to be founded on a proprietary or contractual right, but that today an action in England or Canada might arise on negligence grounds, or, more importantly, on the ground of breach of confidence itself.

It might be of value to compare developments in the United States in this field. The most relevant cases appear to involve the doctor-patient relationship, and actions for wrongful disclosure by the doctor of confidential information. The possibilities of such

an action arising independantly of any contract were shown in Smith v. Driscoll[83] in 1917. It was said:

> Neither is it necessary to persue at length the inquiry of whether a cause of action lies in favour of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say it will be assumed that, for so palpable a wrong, the law provides a remedy.

The duty has been based on the licensing provision for doctors which exists in many, if not all, states. The famous case of Simonsen v. Swenson[84] is an example. The license could be revoked, here, for unprofessional conduct, and was seen to make mandatory the doctor's obligation to preserve as secret, confidential information about his patients.[85]

> By this statute, it appears to us, a positive duty is imposed upon the physician, both for the benefit and advantage of the patient as well as in the interest of general public policy.

However, the doctor was held justified in making disclosure of a patient's contagious disease, to the latter's landlady. He had earlier warned the man to leave the hotel in question, and informed on the patient merely to protect other guests in the hotel.

In Berry v. Moench[86] in 1958, it was said, after quoting from

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83. 94 Wash. 441, 162 Pac. 572 (Wash. Sup. Ct. 1917).

84. 104 Neb. 224, 177 N.W. 831 (Neb. Sup. Ct. 1920).

85. 177 N.W. 831, at p. 832.

86. 8 Utah 2d 191, 331 P. 2d 814 (Utah Sup. Ct. 1958).

Smith v. Driscoll,[87] that:[88]

> It is our opinion that if the doctor violates that confidence and publishes derogatory matter concerning his patient an action should lie.

This followed a statement that the privilege statute protecting confidential communications between doctor and patient from being divulged in court, showed the policy of the law, namely that confidence between them be encouraged.

In another case[89] the duty of care owed by a doctor was stated to be more than just covering medical care, rather it was a total care. In yet another, a prima facie tort through deliberate disclosure was held to have been justified by waiver of the patient.[90] A possible action based on breach of implied trust has also been indicated:[91]

> Those confidences in the trust of a physician are entitled to the same consideration as a res in the control of a trustee, and the activities of a doctor in regard to those confidences must be subjected to the same close scrutiny as the activities of a trustee in supervising a res.

It would thus seem that in certain confidential relationships at least the possibility of a remedy for breach of confidence in its own right exists.

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87. Supra, footnote 83.

88. 331 P.2d 814, at p. 817.

89. Alexander v. Knight, 197 Pa. Super. 79, 177 A.2d 142 (Pa. Super. Ct. 1962).

90. Clark v. Geraci, 29 Miss. 2d 791, 208 N.Y.S.2d 564 (Sup. Ct. 1960).

91. Hammonds v. Aetna Casualty & Surety Co., 237 F. Supp. 96 (Ohio D.C. 1965).

(vii) Some conclusions

Having viewed the United States position, one must now turn again to the English and Canadian developments; and see what conclusions can be drawn from them.

Firstly, the idea of splitting the law up in tidy compartments has been criticised often in the past for its artificiality and impracticability. A good example of such criticism follows:[92]

> It is inadvisable, and indeed, practically impossible to consider 'law' as a study of a series of compartments, for instance dealing with agreements (contracts) or protection of the individual against another (torts and crimes). As soon as any proposed categories are set alongside each other it becomes obvious that they overlap. The purpose of the category or compartment, therefore, should be emphasis rather than exclusion. That part of the legal rules relating to 'property' concerns the relationship of a subject of the legal system (a creature of rights and duties) with an object (a'thing' which may be controlled by the subject): but this must not be taken to exclude rights and duties founded on the relationship of subjects but which concern objects (as e.g. rights flowing from the relationship of marriage), simply because the foundation of such a right exists in the relationship between the subjects rather than between subject and object.

It seemed that the case-law in England had fallen into this trap as regards the law relating to breach of confidence. Rights were generally found in property law or through contract, though it is to be noted that some cases e.g. Abernethy v. Hutchinson,[93] in order to administer justice, were forced to go outside these areas. However,

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92. D.C. Jackson, Principles of Property Law (Australia: The Law Book Co. Ltd., 1967), at pp. 3-4.

93. (1825), 3 L.J.Ch. 209.

the courts were generally reluctant to do so.

Recent cases, however, as may be seen above, give remedies expressly for breach of confidence. What is perhaps most encouraging, though, is the fact that they blatantly decline to base their decisions on property or contract. In Saltman,[94] for example, the drawings of the tools, were the property of the plaintiff and remained so throughout the transaction or agreement with the defendant. Lord Greene,M.R., pointed this out, and also the fact that the defendant knew this to be so. However, the case is dealt with solely on the grounds of breach of confidence. In Triplex Safety Glass v. Scorah[95] the plaintiff's claim on an express contract of service was dismissed, because the contract was too wide and in restraint of trade. Yet a remedy was given on the grounds of breach of confidence. The employee was seen as a trustee of his employer's trade secret and bound to respect it since the employer, as beneficiary, had to expressly or impliedly release him from the obligation before he was free of it. This seems to show that contract is not the basis of the action for breach of confidence - and in no uncertain way.

It seems, therefore, that the protection granted from breach of confidence can only increase as further examples of the latter come to light. At present the cases seem confined mainly to fields

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94. Supra, footnote 46.

95. (1938), 55 R.P.C. 21 (Ch. D.). Accord, Management Recruiters of Toronto v. Bagg, supra, footnote 49.

of industry but there is every reason why the principles expounded so far should be extended to further horizons. The professions seem to be a likely area for further development.

CHAPTER II

THE LEGAL PROFESSION

Before viewing the other professions which form the main subject matter of this study, it will be useful to consider briefly the legal profession, which receives wide protection through the Common Law. It is an established fact that the lawyer owes his client a duty to act towards him in good faith. In Common Law he has an obligation to act skilfully and carefully, and if he fails to do so he may be liable in contract[1] or negligence.[2] Equity imposes an obligation upon him also - to act with strict fairness and openness towards his client.

The case which clearly defined this latter duty was Nocton v. Lord Ashburton.[3] It seemed that the solicitor in that case had not been fraudulent, and that therefore no action for the tort of deceit could be brought against him. However, Viscount Haldane, L.C., was of the opinion that, despite this...[4]

> ...there are other obligations besides that of

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1. Groom v. Crocker 1939 1 K.B. 194 (C.A.).
2. Nocton v. Lord Ashburton 1914 A.C. 932, at pp. 956, 964 (H.L.).
3. Ibid.
4. Ibid., at p. 947.

> honesty the breach of which may give a right to damages.

He later pointed out that the courts have taken it upon themselves to stop a man from acting contrary to the dictates of conscience; common instances of this being cases arising out of a breach of duty by persons standing in fiduciary relationships, such as the solicitor to his client.

Lord Dunedin explained that such a relationship would impose a duty on the solicitor to make a full, and not misleading disclosure of facts known to him when advising his clients. Equity would grant a remedy for any breach of this duty...[5]

> ...quite apart from the doctrine of Derry v. Peek (1889), 14 App. Cas. 337, 58 L.J. Ch. 864, for in that case there was no fiduciary relationship, and the action had to be based on the representation alone.

A solicitor must communicate all material facts to his client, especially in cases involving personal transactions between them. Moreover, this duty outlasts the actual relationship of solicitor and client, if any confidences are involved. This was illustrated by McMaster v. Byrne where a solicitor bought shares from a former client. The solicitor had previously acted for him in connection with these. It was held that,because of this, he had a duty to disclose all material facts to the former client, which would have included the fact that it was likely that the shares would rise in value, owing to the probable success of an imminent take-over bid for the

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5. Supra, footnote 2, at p. 965.

company whose shares were involved. Furthermore, the fact that the client's reaction would probably have been to sell anyway, since he had been trying to dispose of the shares for some time, did not effect the solicitor's duty to disclose to him all material facts. The test was what the reaction of a reasonable man would have been.

Although the solicitor owes a duty to communicate all material facts to his client, it has been held, in Sykes v. Midland Bank Executor & Trustee Co. Ltd.,[6] that in the case of a modern partnership, where there might be twenty partners, communication need not be made to each one.

The instance in which the confidential duty of the solicitor to his client is most likely to be strained is where one solicitor acts for two parties to a transaction. It is clear that the solicitor can so act. In Rakusen v. Ellis, Munday and Clarke,[7] M. and C. were partners in a firm of solicitors, but they saw their own clients and conducted their business separately. The plaintiff had consulted M. but later changed solicitors. He brought an action, in which the defendant employed M.'s partner, C., to be his solicitor. The plaintiff applied for an injunction to prevent C. so acting.

It was stressed that the solicitor owes his client a fiduciary duty but that this was not likely to be breached in this case.

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6. [1971] 1 Q.B. 113, [1970] 2 All E.R. 471 (C.A.).

7. [1912] 1 Ch. 831 (C.A.).

Fletcher Moulton, L.J., set out the test that he thought should apply in such cases:[8]

> I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers, and the practical necessities of life, it ought to interfere and say that a solicitor shall not act.

Some Canadian cases illustrate when the Court might feel that it should restrain the solicitor from acting thus. In The Queen v. Burkinshaw[9] a solicitor had acted for the defendants in connection with the giving of guarantees, liability for which the defendant had later denied. He then sought to act for the plaintiff in enforcing the guarantees. He was restrained from so doing because of the probability of mischief arising. In that case, Farmer Mutual Petroleum v. U.S. Smelting, Refining and Mining Co.[10] was quoted. However, there it was held that it could not be said that in acting for the defendants the solicitors were contesting a transaction for which they had acted for the plaintiff. They had not been the architects of the agreement sued upon, nor had they brought the transaction to maturity. No grounds for inferring that probable mischief would result were seen.

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8. Supra, footnote 7, at p. 841.

9. (1967), 60 D.L.R. (2d), 748 (Alta. S.C.).

10. (1961), 34 W.W.R. 646 (Sask. C.A.).

Earlier in Malenchuk v. Fremit,[11] a solicitor had acted for both the vendor and purchaser, regarding the sale of a business. When the defendant purchaser refused to go through with the transaction, the solicitor acted for him against the plaintiff's claim for specific performance. It was held that he should have withdrawn from the case and that it ought to have been "repugnant" to him to act for one client against another. Halsbury states:[12]

> In proceedings of a purely friendly or formal description, where there is no real conflict of interests, a solicitor may properly represent different parties; but, as soon as any conflict of interests arises, it is the solicitor's duty to cease to represent any party whose interests conflict with those of his other client.

The courts have expressed doubts on many occasions about the advisability of one solicitor acting for both parties. Jessel, M.R., pointed out in an early English case[13] that it does not follow that because a solicitor may be at liberty to act for an opponent of his former client that he is at liberty to disclose the latter's secrets to that opponent. Scrutton, L.J., stated that a solicitor who tries to act for both parties may put himself in such a position that he must be liable to one or the other, whatever he does.[14] Danckwerts,

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11. [1948] 1 W.W.R. 525 (Man. K.B.).

12. Halsbury, 3rd. ed., vol. 36, at pp. 97-98.

13. Little v. Kingswood and Parkfield Collieries Co. (1882), 20 Ch. D. 733, at p. 742 (C.A.).

14. Moody v. Cox and Hart, [1917] 2 Ch. 71, at p. 91 (C.A.).

L.J., has also denounced the practice. In one case, he stated:[15]

> It seems to me practically impossible for a solicitor to do his duty to each client properly when he tries to act for both a vendor and a purchaser.

Another area in which the duty of confidence is involved concerns the solicitor's making secret profits from transactions which his client has engaged him to administer. If the solicitor received any profit or benefit other than his professional remuneration he will be guilty of breaching his duty to his client, unless, of course, the latter knew and approved of such activities. In Tyrrell v. Bank of London[16] a solicitor had a private arrangement with R. that he was to receive a share in property belonging to R., and also a share in the profits from the sale of that property. In his character as a solicitor, he acted for the Bank, his client, in its purchase of a large portion of the property, not revealing to the Bank, his own interests in it. He was held to be a trustee for his client in respect of his share of the property that had been purchased. Lord Westbury pointed out that a solicitor should give his client the full

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15. Goody v. Baring, [1956] 2 All E.R. 11, at p. 12 (Ch. D.). See also Smith v. Mansi, [1962] 3 All E.R. 857, at p. 860 (C.A.). For instances where a solicitor represented both parties see Earl Cholmondeley & Darner v. Lord Clinton (1815), 19 Ves. 261, 34 E.R. 515 (Ch. D.).
Robinson v. Mullett (1817), 4 Price 353, 146 E.R. 488 (Ex.).
Neushul v. Mellish and Harkary (1966), 110 Sol. J. 792 (Q.B.D.).
Osher v. Ford, [1936] O.W.N. 159 (Ont. H.C.).
Eastholine Realty Ltd. v. Grundy & Grundy,[1954] O.W.N. 583 (Ont. C.A.).

16. (1862), 10 H.L. Cas. 26, 11 E.R. 934.

benefit of his best exertions on the latter's behalf and he reiterated that the relation of solicitor and client carries with it more duties than attach to the relation of principal and agent. The solicitor should observe his duties honourably and faithfully and it is the court's duty to ensure that he does. Lord Chelmsford summed up the court's view in these words:[17]

> ...it would be contrary to those principles of equity which are so justly applied to a person standing in a fiduciary relation to another if he were allowed to retain from those who trusted him, the benefit which he has derived from the abuse of their confidence.

It is on account of the solicitor's important position as an officer of the court that the duty of confidence is maintained at such a strict level. The solicitor's duty is emphasised by his being granted a privilege from having to reveal confidential communications in court. He is the only professional person to have been granted a Common Law privilege.

Furthermore, the court is anxious to ensure that the privilege is given effect to. In Howley v. The King[18] it was stressed that a client's consent was required before privileged communications could be disclosed by a legal advisor, and in Kulchar v. Marsh & Bekert[19] the court rejected a solicitor's affidavit which would have disclosed

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17. Supra, footnote 16, at pp. 57, 946.

18. [1927] S.C.R. 529.

19. [1950] 1 W.W.R. 272 (Sask. K.B.).

the same.

For the privilege to apply, however, several conditions must be satisfied. The communication it is wished to protect must have been made confidentially. Thus if the client waives the privilege[20] or when communications are made for the purpose of being repeated to the other party[21] no privilege can be claimed. Similarly, no privilege exists for non-confidential matters, such as, in most cases, the name of a client.[22]

The solicitor must be approached in his professional capacity. Even though there may be a desire to benefit from his professional knowledge, if he was approached as a friend, for example, no privilege attaches.[23] Thus where a solicitor was approached in his capacity as under-sheriff, no privilege could be claimed by the 'client'.[24] However, litigation need not be contemplated or pending so long as the solicitor is approached in his professional capacity as such.[25]

Where foreign legal advisers are involved, the privilege attaches under the same conditions. In Re Duncan (deceased)[26] proceedings

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20. Minter v. Priest, [1930] A.C. 558, at p. 579 (H.L.).

21. Conlon v. Conlons, Ltd., [1952] 2 All E.R. 462 (C.A.).

22. Bursill v. Tanner (1885), 16 Q.B.D. 1 (C.A.).
Pascall v. Galinski, [1970] 1 Q.B. 38 (C.A.).

23. Greenough v. Gaskell (1833), 1 My. & K. 98, 39 E.R. 618, at pp. 104, 621 (Ch. D.).

24. Wilson v. Rastall (1792), 4 Term Rep. 753, 100 E.R. 1283 (K.B.D.).

25. Minet v. Morgan (1873), 8 Ch. App. 361.

26. [1968] P. 306, [1968] 2 All E.R. 395.

were already afoot in a foreign court and documents in connection with these, had been prepared. Ormrod, J., held that if a party prepares his case for one type of litigation but proposes to use it in another it is no less his case and he would be "no less damnified" were disclosure allowed. Similarly, in Morrison-Knudsen Co. Inc. v. B.C. Hydro and Power Authority[27] an action was commenced in British Columbia, but communications containing legal advice had passed between three attorneys who were entitled to practice law only in the United States. The communications were held to be privileged.

The privilege will remain even if the solicitor[28] or client[29] employs agents to act on his behalf. Complications arise only where the solicitor or his client communicate with third parties. In Anderson v. Bank of British Columbia[30] it was stated that if a solicitor required further information which he could obtain from a third party, such would be confidential and privileged if obtained for the purpose of the litigation, or for the purpose of knowing whether he ought to defend or prosecute the action,or for collecting evidence for such prosecution or defense. However, litigation must be contemplated or have been commenced, and a mere vague apprehension of litigation is not enough as was shown by Greenlaw v. King,[31]

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27. [1971] 3 W.W.R. 71 (B.C.S.C.).

28. Wheeler v. Le Marchant (1881), 17 Ch. D. 675 (C.A.).

29. Reid v. Langlois (1849), 1 Mac. & G. 627, 41 E.R. 1408 (Ch.D.).

30. (1876), 2 Ch. 644, at pp. 649-650 (C.A.).

31. (1838), 1 Beav. 137, 48 E.R. 891 (Ch. D.).

where letters written 18 years previously in case a transaction entered into at that time should have been impeached, were held not privileged when proceedings were subsequently brought.

Communications between the client and a third party must be made in answer to inquiries instituted by the client at the request of the solicitor,[32] or if no such request has been made, for the purpose of being laid before a solicitor to obtain his advice or to enable him to prosecute or defend an action or prepare a brief.[33] In any case, however, litigation must be existing or in contemplation at the time.[34] Thus Jessel, M.R., stated in Wheeler v. Le Marchant:[35]

> Again, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation.

In this case it was argued that the privilege ought to be extended to instances where third parties communicated with the solicitor, and although they were not agents of the client, their communications enabled the solicitor to better advise the client. The argument was rejected, since such an extention of the rule was not thought to be necessary in order to ensure that a man might

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32. Supra, footnote 30, at p. 650.

33. Ibid., at pp. 648, 656, 658.

34. See infra, at p. 128.

35. Supra, footnote 28, at p. 682.

obtain legal advice with safety - the policy behind the privilege.

The privilege will not be available where the client has communicated with his legal adviser in furtherance of a crime or a fraud, or other illegal purpose.[36] In Reg. v. Perverseff,[37] for example, a case concerning the fraudulent use of cheques, solicitors were forced to testify in court, since the communications made to them had been in furtherance of a crime.

The issue of what constitutes the necessary fraudulent act has been the subject of contention. There are two ways of viewing the problem. First, one can say that where a communication is relevant to a fraud, the privilege should be lost, regarding that communication. This was the view of the court in Williams v. Quebrada Railway Land and Copper Co.[38] Secondly, one might contend that for the privilege to be lost it must be shown that the professional advice was in furtherance of a crime or a fraud. In O'Rourke v. Derbyshire,[39] it was said that some prima facie evidence of fraud, which has some foundation in fact, must be produced. A mere allegation would not be sufficient. That latter, narrower interpretation was preferred by Goff, J., in Butler v. The Board of Trade.[40] He followed this decision in Crescent Farm (Sidcup)Sports

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36. For cases on what constitutes "illegal" purpose see infra, at p. 129.

37. [1972] 2 W.W.R. 523 (Sask. Mag. Ct.).

38. [1895] 2 Ch. 751.

39. [1920] A.C. 581 (H.L.).

40. [1971] Ch. 680, [1970] 3 All E.R. 593.

Ltd. v. Sterling Offices Ltd.[41] in 1971, where he stated that 'fraud' does not extend to every act or scheme which is unlawful in the sense of giving rise to a civil claim. Parties, he said, are entitled to seek legal advice as to what liability they would incur in contract or tort by a proposed course of action, without in every case thereby losing their right to professional privilege. He found that neither the tort of inducing breach of contract nor the narrow form of conspiracy present in that case were covered by fraud.

In Canada, it seems that a wide interpretation of the term should be given. In Re Income Tax Act, Re Milner,[42] although a case of prima facie fraud was seen, it was stated that it was questionable whether the mere allegation of fraud would have been enough for the privilege to have been lost.

In one case,[43] it was held that the solicitor must know of the fraudulent activities before the privilege is lost. However, such reasoning would seem to be illogical,and it is better to follow the opinion of Stephen, J., in R. v. Cox and Railton. There he stated, regarding privilege:[44]

> In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal

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41. [1971] 3 All E.R. 1192 (Ch. D.).

42. (1968), 66 W.W.R. 129 (B.C.S.C.).

43. Charlton v. Coombes (1863), 4 Giff. 372, 66 E.R. 751 (Ch. D.).

44. (1884), 14 Q.B.D. 153, at p. 168.

> 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 avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist.

It would seem that,since the issue has not been contested recently despite the number of cases concerning the privilege and fraud, the solicitor need not be aware of the illegal activities for the privilege to be lost. This makes sense, since the privilege is the client's, not the solicitor's, and therefore it should be the former's wrongful acts rather than anything the solicitor does or does not do, which should decide whether a privilege is warranted.

Generally, it would seem that the courts view the solicitor's duty of confidence very highly. They grant remedies to clients who have been injured through a breach of the duty and they restrain a solicitor from acting when there is the possibility of a future breach. This attitude is illustrated by an early case, Beer v. Ward, where Lord Eldon stated that the solicitor ought not to answer questions concerning confidential communications in a court of law and that if he did so knowingly he would be guilty of a great offence.[45]

The duty of confidence is seen to be of such importance that a privilege to the clients of solicitors has been granted. Furthermore,

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45. (1821), Jac. 77, 37 E.R. 779, at pp. 82, 781 (Ch. D.).

the courts have been reluctant to extend the idea of fraud to include many acts that might easily be seen as "illegal". Throughout, the courts have been cognisant of the purpose of the privilege: to enable a man to safely gain the benefit of legal advice. It is recognised that the client must be able have confidence in his legal adviser and thus the fullest protection has been given to the client's right to have his confidences respected. Jessel, M.R., stated in Anderson v. Bank of British Columbia...[46]

> ...that as, by reason of the complexity and difficulty of our law, litigation can only be conducted by professional men, it is absolutely necessary that a man...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...

It has been stressed that it is out of regard to the interests of justice, and its administration, that the privilege exists, and that it is...[47]

> ...not...on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection.

One questions, however, whether it is really possible to make such a distinction. The legal profession by its very nature involves the administration of justice and vice versa. Whatever the stated motive may be in granting a privilege to solicitors (or psychiatrists, or social workers, or any group of persons) it surely must be on account

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46. Supra, footnote 30, at p. 649.

47. Supra, footnote 23, at pp. 103, 620.

of the function they perform. It seems to be impossible to separate the function of the practitioner's work from his work, yet surely this is what the above distinction does. Thus, the arguments which propound the unique position of lawyers regarding their right to a privilege can be seen to be based on unsafe foundations. If other professions,in which the maintaining of confidences is essential, perform similarly vital functions in society, their claims to privilege should be adjudged on the same footing as the lawyer's claim really has been, in the past.

It must be remembered that the duty of confidence owed by the lawyer received recognition long before the present century, which has seen the growth of the newer professions of psychotherapy and social work. If protection was given to the legal adviser in the public interest, one questions whether it is not time that the whole area of confidentiality was reviewed. Have developments been such in the present century that other areas besides the legal profession now merit a degree of protection as regards confidentiality? Is the law granting the duty of confidence necessary for the functioning of these professions the attention it deserves? The following chapters will perhaps provide some answers.[48]

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48. For a wider consideration of the lawyer's ethical obligations see M.M. Orkin, Legal Ethics (Toronto: Cartwright & Sons Ltd., 1957).

CHAPTER III

BANKING

The banking profession has undoubtedly played a vital part in the economic life of the community for centuries. Its contribution in this sphere is twofold, in that it serves the interests of both business and the individual. The importance of the confidential element in the relationship between the banker and his customer is shown by the fact that it has always been granted at least implicit recognition by them, and on many occasions has been expressly mentioned in the banking contract. Perhaps for the very reason that its existence was thought to be so obvious, the duty of secrecy was not always expressly imposed on the banker by contract, and for this reason, until the case of Tournier v. National Provincial and Union Bank of England[1] in 1923, it was not certain that a remedy would always exist for its breach in England and Canada.

THE RELATIONSHIP OF BANKER AND CUSTOMER

A banker was defined by Dr. Hart as...[2]

...a person or company carrying on the business of

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1. [1924] 1 K.B. 461 (C.A.).

2. Law of Banking (4th ed.), as quoted by L.C.Mather, Banker and Customer Relationship and the Accounts of Personal Customers (3rd rev. ed.) (London: Waterlow & Sons, 1966), at p. 17.

> receiving moneys and collecting drafts for customers, subject to obligation of honouring cheques drawn upon them from time to time by customers to the extent of the amounts available on their current accounts.

L.C. Mather concludes that the essential elements of a banker are the acceptance of money on deposit and current account and the payment and collection of cheques.[3] He defines a customer in the following terms:[4]

> Generally it may be said that a customer is any person, whether incorporated or not, who has some sort of an account with a banker. But the relationship commences as soon as the account is opened...

The latter point is worth noticing, since a customer is normally one with whom a person has habitual or continued dealings. However, in banking a customer attains this status as soon as he opens an account with the bank in question, although the latter may still have to collect the proceeds of the cheque with which the account has been opened. The rights and duties of banker and customer start at this point.

HOW THE COURTS PROTECTED THE RIGHTS OF EACH PARTY

The first banking duties were performed by goldsmiths, who accepted gold and valuables for safekeeping as a sideline to their usual work. Bailment enabled the customer to recover his goods, should the goldsmith have taken a fancy to them, so the original

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3. Supra, footnote 2.

4. Ibid., at pp. 18-19.

banker-customer relationship was seen by the law as one of bailor-bailee. As banking acquired its modern form, however, problems arose in relation to bills of exchange and since bailment provided no remedies, it seemed that the banker was more akin to being an agent of his client. The concept of agency, though, would require that the banker, as agent, account to his client for all use that he made of the money which the latter deposited with him, the impracticality of which is obvious.

The case of Foley v. Hill[5] established the relationship as being one of debtor-creditor, which left the banker free to use money deposited with him as he wished. Refinements, however, were obviously needed, owing to the special nature of the banker's relationship with his customer. The case of Joachimson v. Swiss Bank Corporation[6] laid down that payment of money by the bank does not become due until a demand for such is made. However, it is now clear that despite this a debt is still owed before any such demand is made.[7]

A further refinement was established by Tournier v. National Provincial and Union Bank of England,[8] namely, that a duty of secrecy was owed regarding the customer's affairs at the bank. The fiduciary element present in banking had its roots in the concepts of bailment and agency and the obligation of secrecy was considered to be so obvious that the parties to the banking contract must necessarily have

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5. (1848), 2 H.L.C. 28, 9 E.R. 1002.

6. [1921] 3 K.B. 110 (C.A.).

7. Arab Bank Ltd. v. Barclays Bank (Dominion, Colonial and Overseas), [1954] A.C. 495 (H.L.), [1954] 2 W.L.R. 1027 (H.L.).

8. Supra, footnote 1.

had it in their contemplation when they entered into it.

THE DUTY OF SECRECY

(i) Its origins in case-law.

The earliest case in which breach of the duty of secrecy was made the subject of an action was Tassell v. Cooper,[9] in 1850. No decisive opinions on the matter were delivered because the plaintiff, winning his case on another count, conceded on this one.

The duty was recognised, however, to some extent in Foster v. Bank of London,[10] twelve years later. A creditor had taken the plaintiff's cheque to the bank, to be told there were insufficient funds to meet it. He then inquired of, and was told, the plaintiff's balance, so that he could pay in enough money to enable the cheque he had to be met and the money paid to him. The plaintiff sued the bank for disclosing the state of his account to the creditor. The jury agreed with Erle, C.J., that a banker could only legally say that there were insufficient assets available to meet the cheque. On being asked if this meant that the duty of a banker was in no way to disclose the state of his customer's account, the jury replied that this was their opinion. Erle, C.J., said he was not aware of any law against that, and a verdict on that finding was given for the plaintiff.

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9. (1850), 9 C.B. 509, 137 E.R. 990 (C.P.D.).

10. (1862), 3 F. & F. 214, 176 E.R. 96 (Assizes).

This case was considered in Hardy v. Veasey and Others.[11] The defendant had divulged the state of the plaintiff's account to a money-lender so that the latter might obtain a loan to pay off overdrawn cheques. Disclosure was found to have been made on a reasonable and proper occasion, but the remarks of the justices on appeal, who upheld the direction to the jury, are worthy of note. Kelly, C.B., said that it had certainly not previously been decided that there was no duty to disclose. His use of the negative shows his reticence. He thought that the language of the judge in Foster's Case[12] was such that it was impossible to say there was a total absense of duty. Martin, B., was less hopeful. He stated:[13]

> There may be such a duty, but I confess I should like to see some authority in its support.

He added that there was a lot of difference between a moral and a legal duty and that Foster's Case was the subject of an obvious conspiracy by a creditor to gain advantage over other creditors. Channell, B., agreed:[14]

> It was not so much there the case of a disclosure of the customer's account, as of a trick, by which the bank conspired with one of the plaintiff's creditors to the prejudice of the rest...

He also mentioned the fact that the language of the Chief Justice

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11. (1868), L.R. 3 Exch. 107.

12. Supra, footnote 10.

13. Supra, footnote 11, at p. 112.

14. Ibid., at p. 113.

had been very guarded in that case, in that he had only stated that he knew of no law against the action being maintainable.

Although a moral duty seems to have been recognised, the above cases failed to establish with any degree of certainty that a duty of secrecy was owed in law by a banker to his customer. It was not until Tournier's Case[15] that the matter was decided.

(ii) The duty is established - Tournier's Case.

A bank manager telephoned the employer of T., his customer, in order to find out T.'s address. T. had not kept up payments, as he had agreed to, to erase a small debt which he owed the bank. The employer wanted to know why the inquiry was being made, in reply to which the bank manager disclosed that T. was overdrawn at the bank, that he had not kept his promises to repay, and that it seemed that he was betting, since one cheque written by T. had been traced to the account of a bookmaker. There was some dispute as to the actual way in which the information was disclosed, but these basic facts of Tournier's Case were undisputed.

The three members of the Court of Appeal were all of the opinion that a duty of secrecy did exist between a banker and his customer. Atkin, L.J., based his finding on the fact that:[16]

The bank find it necessary to bind their servants to

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15. Supra, footnote 1.

16. Ibid., at p. 484.

> secrecy; they communicate this fact to all their customers in their pass-book, and I am satisfied that if they had been asked whether they were under an obligation as to secrecy by a prospective customer, without hesitation they would say yes.

The duty has also been recognised in Canadian law. In Hull v. Childs and The Huron and Erie Mortgage Corporation[17] the plaintiff, whilst critically ill, had signed three blank cheques. It had been thought he was about to die, but he had subsequently recovered. It transpired that his niece, who had received one of the cheques, had used it fraudulently. The plaintiff claimed the bank had assisted her, by revealing to her the amount of money in his account, and by helping her complete the blank cheque. It was held that a breach of duty had occurred in that disclosure of the plaintiff's account had been made without his express or implied instructions. However, the action was dismissed because the bank's breach had merely been ancillary to the niece's plan to defraud her uncle.

In the United States, in Peterson v. Idaho First National Bank[18] a claim for breach of the duty, based on the grounds of invasion of privacy failed, since disclosure had not been made to the world, but only to a third party. However, a remedy, based on the breach of an implied contractual term was given. It was stated:[19]

> It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolable

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17. [1951] O.W.N. 116 (Ont. H.C.).

18. 367 P.2d 284 (Idaho Sup. Ct. 1961).

19. Ibid., at p. 290.

> secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors.

In Milohnich v. First National Bank of Miami Springs,[20] Pearson,J., suggested that a more appropriate remedy than one in contract would be one in tort. This lends support to the idea that contract is not the real basis for the duty of secrecy, as will be discussed below. In the same case the American Bankers' Association was quoted as saying:[21]

> A bank should, as a general policy, consider information concerning its customers as confidential, which it should not disclose to others without clear justification.

The existence of the duty today, in law, seems to be undisputed.

The basis of the duty.

In Tournier's Case, Bankes, Scrutton and Atkin, L.J.J., all held that the duty of secrecy owed by the banker to his customer was an implied term of the contract between them.[22] The writer questions whether contract is the real basis of the duty.

Bankes and Atkin, L.J.J., believe that the duty of secrecy outlasts the contract between banker and client. Bankes, L.J., says:[23]

> I certainly think that the duty does not cease the moment a customer closes his account. Information gained during the currency of the account remains

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20. 244 So.2d 759 (Fla. App. 1969).

21. Ibid., at p. 761.

22. The decision might have been based on an express contractual term contained in the customer's pass-book. Supra, footnote 1, at p. 463.

23. Supra, footnote 1, at p. 473.

> confidential unless released under circumstances bringing the case within one of the qualifications I have already referred to.

Atkin, L.J., says:[24]

> It seems to me inconceivable that either party would contemplate that once the customer had closed his account the bank was to be at liberty to divulge as it pleased the particular transactions which it had conducted for the customer while he was such.

It will be seen from the above quotations that both Lord Justices refer to information learnt only while the account or contract is still in existence. Scrutton, L.J., seems to give no opinion on this type of information. (His judgement refers only to information which is learnt after the account has been closed.) Since his judgement is closer to the established principles of contract than are those of his two associates, one might surmise that he deliberately declined to give an opinion on this point since it would appear, that, relying on principles of contract, all rights and duties originating from the contract end once this is terminated. Thus it would not seem to be possible for a customer to sue on a term, expressly or impliedly contained in his contract with his banker, once this has been terminated. However, Bankes and Atkin, L.J.J., both suggest that the implied term regarding secrecy, could be sued on by the customer after the contract has ended, since they say that the duty of secrecy outlasts the length of the contract. On

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24. Supra, footnote 1, at p. 485.

moral grounds, it would seem that a remedy should exist for the wrongful disclosure of a professional secret, even after the relationship between the professional man and his customer or client has ended. Yet contract would not seem to provide one. It would seem more logical to say that the duty of secrecy does not arise because of the contract between the banker and his customer, but is rather the result of the confidential relationship existing between them.

One can attack the idea that contract is the basis of the duty, from another position also. The duty was held to be an implied term of the contract. Scrutton, L.J., in saying that...[25]

> ...we have only to imply terms which the parties must necessarily have contemplated...

states the traditional definition of an implied term. Bearing this in mind, we should view how the Lord Justices deal with information learnt from sources outside the customer's account and his dealings with the bank. Does the bank owe an obligation to the customer not to disclose this?

Scrutton, L.J., applying his definition of an implied term says that the duty does not extend to information gained from other sources. He says:[26]

> For instance, the banker hears from an entirely independant source that one of its customers has

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25. Supra, footnote 1, at p. 481.

26. Ibid., at p. 481-482.

> speculative dealings in oil, may it disclose that fact to another of its customers also interested in oil? As we have only to imply terms which the parties must necessarily have contemplated, how can it be said that the bank shall not talk about the customer at all, though the subject matter of its conversation is not derived from its dealings with the customer... It appears to me, therefore, that we cannot imply an obligation to keep secret information about a customer derived not from that customer or his account, but from the account of another customer.

Bankes and Atkin, L.J.J., disagree and suggest that the duty of secrecy does extend to knowledge gained from outside sources if, as Bankes, L.J., says the banker is acting "in the character of a banker" when he learns of the information,[27] or as Atkin, L.J. says:[28]

> ...if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers...

One could argue forcefully that any information learnt while the banker was acting in his professional character must necessarily have been contemplated by the two parties to the contract as being included in the duty of secrecy. The problem to be resolved here would be when a banker is acting as a banker. However, the opinion of Scrutton, L.J., must give some weight to the opposing viewpoint, since he bases it upon the decisions on this matter concerning legal advisers, and concludes that the parties to a contract could not be taken to have necessarily contemplated that information, not derived from their dealings with each other, would be covered by an implied

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27. Supra, footnote 1, at p. 474.

28. Ibid., at p. 485.

term requiring secrecy.[29]

The whole discussion serves to show the impracticality of using contract as a basis for the action. It also illustrates that treating law as a series of compartments can cause irrational results, since the contents of the categories so often overlap. The breach of confidence could be a breach of contract; it could give rise to an action in tort; it could be seen as infringement of a property interest; or an analogy might be drawn to the law of trusts. One cannot, however, overlook the basic fact: a breach of confidence deserving a remedy has been occasioned. Why not admit this in straight-forward language?

The scope of the duty.

In Tournier, Atkin, L.J., stated, regarding the duty of secrecy:[30]

> It clearly goes beyond the state of the account, that is, whether there is a debit or a credit balance. It must extend at least to all the transactions that go through the account, and to the securities, if any, given in respect of the account...

The other Lord Justices were in agreement with this opinion as to the scope of the duty. Bankes, L.J., thought it extended to information derived from the account itself,[31] while Scrutton, L.J.,

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29. Supra, footnote 1, at pp. 481-482.

30. Ibid., at p. 485.

31. Ibid., at p. 473.

thought it covered the account and transactions relating to it.[32]

With regard to the source from which the information was derived, Bankes and Atkin, L.J.J., thought that it was within the duty if it was discovered while the banker was acting in his professional capacity. Scrutton, L.J., however, disagreed, being of the opinion that only matters learnt from the customer's dealings with the bank through his account would be covered. He might be correct as regards contract law, but his associates would appear to be supported by moral principles.

Information learnt before the contract came into existence might be included in the duty if the parties must have intended this when they entered into the relationship. Otherwise it seems it would not be. However, there seems to be no way that information received after the contract had ended could be covered. Bankes, L.J., does not mention either of these instances in his judgement; Scrutton, L.J., says that neither would be within the duty; Atkin, L.J., says information received after the account was closed would not be covered. On moral grounds one might argue that information learnt before the banker-customer relationship had begun, would impliedly be covered if learnt by the banker qua banker. It would seem, however, that it would be somewhat fanciful to suggest that the law would follow morality in this instance.

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32. Supra, footnote 1, at p. 480.

WHEN IS DISCLOSURE ALLOWED?

Tournier's Case established that although a duty of secrecy was imposed on the bank, this duty was not absolute but qualified. Bankes, L.J., laid down four cases in which disclosure might be allowed. These seem to cover the points mentioned on the subjects by his fellow Lord Justices. They are:[33]

(a) Where disclosure is under compulsion by law;

(b) Where there is a duty to the public to disclose;

(c) Where the interests of the bank require disclosure;

(d) Where the disclosure is made by the express or implied consent of the customer.

(a) Disclosure under Compulsion by Law.

(i) The English Bankers' Books Evidence Act, 1879,[34] and similar provisions contained in the Evidence Acts of the Provinces in Canada and the Federal Evidence Act.[35]

The object of the Act.

Before the English Act, the only way a court could receive evidence relating to business conducted by a bank was through the sworn testimony of one of its clerks. He would obviously have to

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33. Supra, footnote 1, at p. 473.

34. 1879, 42 & 43 Vict., c.11 (U.K.).

35. The wording of the English Act is followed closely in all Common Law jurisdictions in Canada;
e.g. R.S.C. 1970, c.E 10, s.28.
R.S.M. 1970, c.E 150, s.50.

resort to the banker's books in order to refresh his memory and, in practice, no counsel ever thought about insisting on the laborious proof of all items contained in them. The purpose of the Act was to officially allow the books to be used as prima facie evidence in court of what was contained in them.[36]

The English Act does not define a banker's book very fully but the Irish Bankers' Books Evidence (Amendment) Act of 1959 might provide a useful guideline:[37]

> Schedule 9(2):
>
> Expressions in this Act relating to "bankers' books" -
> (a) include any records used in the ordinary business of a bank, or used in the transfer department of a bank acting as registrar of securities, whether comprised in bound volumes, loose-leaf binders or other loose-leaf filing systems, loose-leaf ledger sheets, pages, folios or cards, and
> (b) cover documents in manuscript, documents which are typed, printed, stencilled or created by any other mechanical or partly mechanical process in use from time to time and documents which are produced by any photographic or photostatic process.

Section 9 of the English Act demanded that the book be "used in the ordinary business of the bank." This does not mean it must be used every day, it need only be kept for reference purposes, as and when required. Such was the decision in Asylum for Idiots v. Handysides and Others.[38] The same case also decided that books handed down by the original bankers to their successors were within the provisions of the Act.

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36. Arnott v. Hayes (1887), 36 Ch. D. 731.

37. 1959, Acts of the Oireachtus, No. 21, sched. 9(2).

38. (1906), 22 T.L.R. 573 (C.A.).

The books are prima facie evidence of their contents.

The importance of the books being prima facie evidence in court is demonstrated by two Newfoundland cases. In Kelly v. Harbor Grace Savings Bank[39] a cashier in a savings bank claimed to have paid money over to the plaintiff. The latter denied that he had. It was held that entries in various books of the bank, including the customer's pass-book, entitled the cashier's evidence to greater credence than the plaintiff's unsupported testimony. Similarly in Mare v. Winter[40] on the winding up of a bank, the plaintiff sought to recover money which the banker's books showed the defendant owed. The defendant's denial did not avail him against the banker's books.

Under section 6 of the English Act a party wishing to produce bankers' books in court, when the bank is not a party to the action, must seek the permission of a judge to do so. It would appear that this can be granted by any judge, arbitrator or any person before whom a legal proceeding is taking place. In R. v. Kinghorn[41] a magistrate was held to be entitled to make the order.

However, it is clear that a discretion rests with the judge as to whether or not he will grant an order for inspection or disclosure. In South Staffordshire Tramways Co. v. Ebbsmith[42] Lord

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39. (1881), 6 Nfld. R. 357 (Nfld. S.C.).

40. (1900), 8 Nfld. R. 388 (Nfld. S.C.).

41. [1908] 2 K.B. 949.

42. [1895] 2 Q.B. 669 (C.A.).

Esher said that counsel ought to show that the items which it was sought to reveal would be material evidence in the case. "Fishing expeditions" will not be allowed. In Arnott v. Hayes,[43] Cotton, L.J., stated that the judge ought not to make his order wider than necessary. It seems that the potential danger to the confidential element inherent in the banker-customer relationship was recognised early on, and the courts have generally tried to limit disclosure, even in court, to matters relevent to the case at hand.

In Waterhouse v. Barker[44] it was considered whether the Act was intended to effect the rules relating to discovery in pre-trial proceedings. Bankes, L.J., stated that section 7 had allowed litigants to become possessed of essential information before trial but that great caution should be exercised by the judge and the rules appertaining to discovery should be applied. A party should also be entitled to seal up on oath irrelevent parts of the books, until the matter should come to trial. Atkin, L.J., agreed, but Scrutton, L.J., was in favour of seeing a wider right of inspection having been granted by the Act. In his view, only if the matters sought to be disclosed were irrelevent, should an order be refused. Otherwise, section 7 would permit disclosure, since the Act could not have intended that the trial commence before the books be viewed, and an adjournment be called for this purpose. It provided an exception to the ordinary rules relating to discovery. The effect of this case,

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43. Supra, footnote 36, at p. 737.

44. [1924] 2 K.B. 759 (C.A.).

however, is that the ordinary rules relating to discovery must be read as governing the provisions in the Act.

The libel issue.

Two English cases have held that bankers' books may not be inspected before trial in order to prove justification in the defence of a libel action. In Emmott v. The Star Newpaper Co. it was stressed that the judge had a discretion to refuse or permit an order for inspection before trial, but in the opinion of the court, the proving of justification for libel was not an instance when inspection ought to be allowed.[45] In R. v. Bono[46] it was stressed that the Act had not meant to increase facilities for discovery, and that a party was not entitled to inspect a banker's books to see what he could find to support his case. He should wait until trial.

Canadian law differs on this point from English law. On the basis of the Evidence Act of British Columbia,[47] which contained similar provisions to the English Bankers' Books Evidence Act, the court in Sommers v. Sturdy[48] distinguished Emmott. It stated that there was no reason why a libel action should be distinguished from any other as far as the ability to inspect a banker's books was concerned. Davey, J.A., noted that in this case a precise description

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45. (1892), 62 L.J.Q.B. 77.

46. (1913), 29 T.L.R. 635 (K.B.D.).

47. Evidence Act, R.S.B.C. 1948, c.113, s.36.

48. (1957), 10 D.L.R. (2d) 269 (B.C.C.A.).

of the bank transaction sought to be inspected had been given, and he was satisfied...[49]

> ...that the real purpose is not to obtain a species of discovery, although that will be an important but incidental advantage, but to select the material entries and secure certified copies thereof under s-ss.(2) to (4) in order to facilitate proof of the transactions recorded in the books and records of the bank.

Yet even in this case it seems inspection was only allowed after the court was convinced of the materiality of the evidence sought.

Inspection of bank books with regard to the accounts of third parties.

The general reluctance of the courts to allow inspection of bankers' books has meant that those books relating to the accounts of persons who are not parties to the action have remained free from disclosure unless the circumstances set out in the South Staffs Tramways Case[50] are present. There Lord Esher, M.R., said, that though it was impossible to define it exhaustively, the rule of conduct in such cases should be, that if the court were satisfied in truth that:

(a) the account which purported to be that of a third party was the account of the party to the action, against whom the inspection was applied for or...

(b) though not his account, it was one with which he was so much concerned, that items in it would be evidence against him at the trial...

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49. Supra, footnote 48, at p. 273.

50. Supra, footnote 42, at p. 675.

and there was no reason for refusing inspection then it might be ordered.

An example of such a case was Ironmonger v. Dyne,[51] where it was shown that a woman debtor was really in control of her husband's account, since she had been transferring money and securities from her account to his.[52]

Conclusion.

Before inspection of books will be allowed under the Act the party calling for the inspection ought to show the materiality of the facts he seeks to disclose and also be able to set out with certainty the things he hopes to find. The rules relating to discovery will generally still apply. The statement of Lindley, L.J., in Perry v. Phosphor Bronze Co.Ltd.[53] perhaps puts it in a nutshell:

> The court would be reluctant to throw open to inspection a party's accounts in the books kept by his bankers unless a strong case were made out for so doing.

(ii) Income Tax Legislation - England

Another area in which disclosure can be compelled by law is that regarding Income Tax. The provisions of the English Income Tax

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51. (1928), 44 T.L.R. 579 (C.A.).

52. Accord, Howard v. Beall (1889), 23 Q.B.D. 1.
M'Gorman v. Kierans (1901), 35 I.L.T. 84 (K.B.D.).

53. (1894), 71 L.T. 854, at p. 855 (C.A.).

Act, 1952,[54] relevent to this discussion have been replaced by the Taxes Management Act, 1970,[55] but their effect is unchanged.

Receipt of money or profits of another.

Section 22 of the 1952 Act has been replaced by Section 13 of the 1970 Act, and requires any person in receipt of the money or profits of another to deliver a list to an inspector, when so requested, of:

(a) the money, value, profits or gains;

(b) the names and addresses of the people to whom these belong;

(c) a declaration whether any such people are of full age, or are married women, or residents in the United Kingdom, or incapacitated persons.

It was thought that the Act in which this provision first appeared could hardly be meant to justify an inquisitorial investigation into every customer's account held by a bank. Thus, when information was requested under the Act, the National Provincial Bank refused to divulge it until ordered to do so by the court. A friendly action was therefore brought.[56] Information had been required to be delivered up, under four heads. They were:

(a) when the bank was acting under a will or settlement as trustee or executor;

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54. Income Tax Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 10 (U.K.).

55. Taxes Management Act, 1970, c. 9 (U.K.).

56. Attorney General v. National Provincial Bank Ltd. (1928), 44 T.L.R. 701 (K.B.D.).

(b) when stock was taken by the bank as direct security for a loan;

(c) when stock was taken as direct security for the account of a third person.

(d) when stock was registered in the names of nominees of the bank at the request of a stockholder.

It is fairly obvious the extent to which disclosure had been called for in this case, and the bank was obviously worried about potential actions being brought against it by aggrieved customers for breach of the duty of secrecy, even though Tournier's Case had not yet taken place.

Judgement in the case was for the crown, and the bank had to deliver up, in all four cases, the information sought. The purpose of such a provision is to prevent tax evasion and the court obviously felt the common good was best served through such prevention, at the cost of this information being available to the tax authorities.

Interest paid - no tax deducted.

Section 17 of the 1970 Act, formerly section 29 of the 1952 Act, is guided by a similar policy to the section just discussed. It requires a bank, among other bodies or persons, to deliver, upon request, a list to the tax authorities of all interest over the sum of fifteen pounds, (paid or credited on money held), where no tax deduction has been made at source. Similar provisions exist for

interest paid on securities held.[57]

In Canada.

Canada's Income Tax Act[58] also has provisions allowing investigation of customers' accounts. Section 231(3) allows the Minister, for any purpose related to the administration or enforcement of the Act to require from any person:

> (a) any information or additional information, including a return of income or supplementary return, or
>
> (b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents...

This requirement has, like English equivalent, been the subject of a court action, because of its potential invasion of the confidential aspect of the banker-customer relationship. In Canadian Bank of Commerce v. Attorney General of Canada [59] the Minister had called for inspection of all the bank's records of transactions involving the Bank of Switzerland, under the same statutory requirement existing at that time. The Canadian bank claimed that it was not under tax review and that the result of supplying the information would be to divulge much information concerning private individuals who were not under review either. It was held, however, that the

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57. Supra, footnote 55, s.24 (formerly supra, footnote 54, s.234).

58. R.S.C. 1970, c.I-5, s.186(2), as amended by S.C. 1970-71, c.63, s.231(3).

59. (1962), 35 D.L.R. (2d) 49 (S.C.C.).

purpose of the request related to the administration and enforcement of the Act, and the Minister's acts were administrative and not, therefore, subject to review.

It is interesting to examine the reasoning in this case. Kerwin, C.J.C., held that from the letter requesting the information it seemed that the Union Bank of Switzerland was under review. Since the Swiss bank was subject to tax, and it was part of the administration and enforcement of the Act to see whether it was liable to tax, the wording of the Act allowed the inspection. Moreover, its wording was wide enough to allow inspection not just of the Swiss bank, but also of that bank's customers, and the fact that persons, not under review, would be affected by the inspection,did no affect the power of the Minister to order it. The Minister did not have to be definite or limited in his request for information.

Cartwright, J., however, found there to be no necessity for him to base his decision on the fact that the affairs of the Swiss bank were under investigation. The purpose of the Act's provisions was to allow the Minister to obtain information which was relevent to some person or persons, whose liability to tax was under review. The result seems to be that the Minister can be as general as he likes with his request, so long as he is reviewing somebody's tax liability.

Conclusion

As was mentioned in examining the similar English case, the common good is being protected by tax evasion or avoidance being prevented. On the grounds of morality this would allow inspection of individuals' bank accounts. Yet it would seem that morality would allow disclosure only to the extent necessary to protect the common good, and it would seem fair to say that the requests considered in the two cases above were too general in nature. Sound reasons should be given for any sort of general inquiry. It is appreciated that unnecessary work might be saved as well as valuable time in the preparing and evaluating of claims for inspection to be adjudged by the court, and that generally the authority to order the inspection rests in a competent, responsible, high-ranking official. This may be so, but it seems that broad, sweeping inquires of the nature described above should be supported by sound reasons. "Big Brother" might as yet still be small, but we must be careful not to give him the opportunity to increase in stature.

(iii) The Companies Acts.

When the affairs of a company are under inspection, either because it is being wound up, or because there is reasonable suspicion that its business is not being conducted in a lawful manner, the court is authorised in certain circumstances to order the company's banker to disclose data relevant to its financial affairs.

Investigation

The Companies Act, 1948,[60] makes the banker an agent of the company for the purposes of production of documents, books etc. when its affairs are being investigated by an inspector, appointed by the Board of Trade.[61] Under section 164 of the Act, the Board may appoint inspectors on the application of one tenth of the company's register. The bank, as an agent of the company, must give every assistance it is reasonably able to give to the inspectors. It has been questioned whether a bank could ever "reasonably give" information which was detrimental to a director of a company and derived from him.[62] However, it seems that the Board of Trade has a discretion to appoint inspectors for this function; a discretion which would not be exercised where the directors of the company had supplied to the shareholders that information required by law to be provided in or with the accounts. An instance where inspectors might be appointed is where information which the company has promised to give in its general undertaking to the Stock Exchange, has not been given.

Similar provisions are to be found in the Companies Acts of the individual provinces in Canada. Manitoba's Act is typical. On the application of one tenth of the shareholders or of one fifth of the members on the company's register, the court may appoint inspectors to investigate the company's affairs. Every director, officer and

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60. 1948, 11 & 12 Geo. 6, c.38 (U.K.).

61. Ibid., s.167(5).

62. J.Paget, Law of Banking (7th ed.) (London: Butterworths, 1966), at p.158.

agent of it, shall then produce to the inspectors all books, documents etc. in its custody or control.[63]

Winding up.

In England, on the winding up of a company, the court may summon before it any officer of the company or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.[64] This provision could obviously include a banker in its scope, but it is noticable that it is the court which will receive the information in this case. Canadian provincial legislation has similar provisions.[65]

The Federal Winding-Up Act[66] contains similar terms, but in these the banker is specifically mentioned as liable to be called on by the court to deliver up relevent materials.

Section 334 of the English Companies Act allows a similar investigation when in the winding up of a company the liquidator suspects any of its past or present officers of any criminal offence in relation to its affairs. The agents of the company, which include its banker, must then give the inspector appointed, all assistance

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63. The Companies Act, R.S.M. 1970, c.C-160, s.204.

64. Supra, footnote 60, s.268.

65. e.g. supra, footnote 63, s.232 (though the power lies with the Att. Gen. in Manitoba).

66. R.S.C. 1970, c.W-10.

they can reasonably give. However, a rather complicated procedure must be gone through before an inspector is appointed. The liquidator must report his suspicions to the Director of Public Prosecutions, who, if he thinks fit, will refer the matter to the Board of Trade, who can then apply to the court for power of investigation. It seems unlikely that a banker will be called on to produce confidential materials, unless there appears to be a strong case against an officer of the company.

Offences

The D.P.P., Board of Trade, or the police, can also apply to the court for an order allowing them to inspect a bank's books in relation to any offence reasonably believed to have been committed relating to a company's management.[67] Once again it is the court who must grant the order.

Conclusion

In general, it would seem that the provisions relating to the viewing of a banker's books regarding a company's affairs are soundly drafted to prevent undue intrusion into matters which are inherently the subject of confidence between a banker and his client. A provision in the English Companies Act, 1948 illustrates this general policy. Section 175 says:[68]

Nothing in the foregoing provision of this Part

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67. Supra, footnote 60, s.441.

68. See also, The Companies Act, 1967, c.81, s.116 (U.K.).

> of this Act shall require disclosure to the Board of Trade or to an inspector appointed by them...
>
> b) by a company's bankers as such of any information as to the affairs of any of their customers other than the company.

Other forms of compulsion by law.

The occasions on which disclosure of a customer's dealings with his banker may be compelled by law, cannot be exhaustively given. Legislation relating to companies and income tax are merely examples. Others might be compulsion to disclose under the Exchange Control Act 1947,[69] or when garnishee orders are sought, or when writs of sequestration are issued.[70]

(b) Duty to the Public to Disclose.

This is the second occasion mentioned by Bankes, L.J., on which disclosure would be permitted. He suggested in Tournier's Case[71] that Weld-Blundell v. Stephens[72] should be referred to as a guide to when a higher public duty would take precedence over the bank's private duty not to disclose its customer's affairs. Denning, L.J., recently in Initial Services Ltd. v. Putterill[73] considered

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69. 1947, 10 & 11 Geo. 6, c.14, s.34 & sched.6.

70. See M. Holden, Banker and Customer (London: Pitman & Son Ltd., 1970), at p. 68.

71. Supra, footnote 1.

72. [1920] A.C. 956, at p. 965 (H.L.).

73. [1968] 1 Q.B. 396, at p. 405 (C.A.).

this guide as too narrow in its limitations and thought that the public duty should take precedence over the duty of confidence when crimes, frauds or misdeeds have been committed or are contemplated, provided that disclosure is in the public interest and to a person competent to receive the information.

By reference to moral principles disclosure is not only permitted but demanded whenever the state is in sufficient danger that the danger threatened through non-disclosure is greater than the harm that non-observance of the duty of secrecy would occasion. It will be seen from a United States case[74] that the danger threatened to society must be great. An erroneous impression of the financial state of a company given to potential investors in that company, by a bank through its dealings with that company, was held to incur no liability on the bank. It was held that a bank had no power, let alone any duty, to furnish to depositors in any way, any information concerning the solvency, condition or reputation, whether financial or otherwise, about any of its customers.

Another United States case illustrating this point was Brex v. Smith.[75] Here a public prosecutor asked that the bank accounts of all members of Newark Police Department be submitted to him for examination, in order to assist him in an investigation he was making. It was held that because there existed an implied obligation on the

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74. Sparks v. Union Trust Co. of Shelby, 256 N.C. 478, 124 S.E.2d 365 (N.C. Sup. Ct. 1962).

75. 104 N.J. Eq. 386, 146 A. 34 (N.J. Ct. Ch. 1929).

bank to keep its records secret, unless ordered to do otherwise by a court of competent jurisdiction, any investigation that was of a merely fishing or exploratory nature ought not to be premitted.

Bankes, L.J., in Tournier's Case dealt with the example of a police officer who went to the bank to inquire about a customer's account, because the latter was charged with a series of frands. He stated that the bank ought not to divulge the information in such a case. Anyway,the police could use the Bankers' Books Evidence Act, 1879[76] to inspect the books of the bank, if the court deemed this to be necessary.

However, where no charges have been laid, and the police merely suspect a customer to be guilty of a crime there does not seem to be any legal process by which the books of his bank may be examined. J.M. Holden says that it depends on the gravity of the case as to whether a bank would be justified in allowing disclosure. He adds, however:[77]

> In practice, the police only request assistance in serious matters, and such requests are carefully considered by senior officials of the bank. Sometimes, a bank asks the police to address a letter to the bank stating that the information is necessary for the due administration of justice and undertaking, that the information will not be given in evidence unless the bank is served with the appropriate order.

In conclusion, the courts usual view in this matter can be seen

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76. Supra, footnote 34.

77. Holden, op. cit. footnote 70, at pp. 69-70.

from a Canadian case[78] where it was stated, with regard to disclosure, that since it is a prima facie right of a customer to prevent the viewing of his account, and because irrepairable damage might be caused if this right were ignored, if there are any doubts as to whether disclosure ought to be permitted before trial, inspection, until trial at least, ought to be refused.

(c) The Interests of the Bank require Disclosure.

Whenever there is litigation between the bank and its customer the interests of the bank will require disclosure of some of the details of the customer's account.[79]

> A simple instance...is where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft.

Although on moral grounds, the professional secret should generally never be divulged by its holder for his own protection, where the "owner" of the secret, here the owner of the account, is the cause of the harm threatened to the holder of it, the latter will be justified in making disclosure sufficient to protect himself. Thus if the customer by not paying off his overdraft has directly caused the "harm" to the bank, the bank is justified in making the necessary disclosure. Similarly, where the bank brings an action not against the customer but against a guarantor, disclosure would be justified.

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78. Kaufman v. McMillen, [1939] 3 D.L.R. 446, at pp. 453-455 (Ont.S.C.).

79. Per Bankes, L.J., in Tournier's Case, supra, footnote 1, at p. 473.

Once again, it is the customer, by not fulfilling his obligations to the bank who has been the initial cause of the action being brought.

However, were the customer merely the occasion as opposed to the cause of the bank being threatened with some kind of harm, the weight of opinion would seem to be in favour of disclosure not being made.

The case most frequently cited under this heading generally is Sunderland v. Barclays Bank Ltd.[80] The disclosure there was not in litigation, and there must be some doubt as to whether the true ground of the decision was that the bank was protecting its interests, since the judgement also talked about implied consent of the customer as being one factor to be considered in reaching a verdict. Mrs. S. had written a cheque for her dressmaker which had been dishonoured by her bank for lack of funds, though the real reason for non-payment was that the bank thought an overdraft ought not to be permitted on her account, because she had drawn several cheques in favour of bookmakers. Her husband had told her to complain to the bank, so she telephoned the manager. After a while the husband joined in on the conversation and was informed of the cheques in favour of bookmakers. The wife sued the bank. Through the disclosure of this information the bank's action was being justified and thus its interests being protected. It is questionable, however, whether the facts of this case would permit disclosure solely on these grounds. Disclosure

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80. The Times, 24th and 25th November, 1938. ("Sunderland" is sometimes quoted as "Sutherland".).

to protect one's reputation, or to defend one's actions when the harm threatened to one is comparatively slight, does not seem justified. One must also remember that only facts necessary to prevent the harm occurring should be revealed. No court action seems to have been threatened in this case, and the bank's only foreseeable loss seemed to be that of the business of any angry customer, who, as the bringing of the case showed, was not placated by the disclosure of the information. It seems likely that the more substantial reason for the defendant bank's success in this case, was that the customer had impliedly consented to the disclosure being made to her husband by handing the telephone over to him to argue her case for her against the bank manager.

(d) Consent

(i) Express Consent.

There would seem to be no difficulty attached to the effect express consent to disclosure can have on the bank's duty of secrecy - it will relieve the bank of its obligation. An example would be when a customer asked his bank manager to give him a reference.

(ii) Implied Consent.

The area of implied consent is a delicate one and some of the problems arising in it are still not decided. An example of where consent might be implied is the Sunderland Case.[81] It might be suggested that when a customer has approached a potential guarantor, and the latter calls at the customer's bank for the purpose of signing a form of guarantee, but then proceeds to ask questions about the customer's account, that implied consent has been given for the bank to reply. This situation has been the subject of disagreement between two of the foremost authorities on banking law.[82] It would appear that the safest course is to see no consent implied and banks apparently arrange, in most cases, joint meetings between customer, banker and guarantor when questions of this nature can be asked.[83]

The most uncertain facet of implied consent seems to revolve around the banker's right to give a "banker's opinion". Banker's have traditionally made it a practice of theirs to inform each other of a customer's credit-worthiness without first gaining the express consent of the customer. Atkin, L.J., in Tournier's Case[84] declined to give an opinion on the legality of this practice, but said that

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81. Supra, footnote 80.

82. See Paget, op. cit. footnote 62, at p. 583, and Lord Chorley, Law of Banking (5th ed.) (London: Pitman & Sons Ltd., 1967), at p. 244.

83. Holden, op. cit. footnote 70, at pp. 72-73.

84. Supra, footnote 1, at p. 486.

if justifiable, it must be on the grounds of implied consent.

The banking authorities once more disagree as to the legality of the practice. Lord Chorley says it would appear to be a breach of the duty of secrecy.[85] Mr. L.C. Mather, however, says that the practice is justified by implied consent.[86] There seem to be several ways in which consent might be implied for banker-to-banker inquiries. One might argue that it is in the interests of the customer that the bank inquiring learn of his credit worthiness, yet this could hardly be the case where the opinion given was unfavourable. Mather says that...[87]

> ...it is considered that the practice is so well established and so well known that a customer could not raise any objection.

The matter is dealt with in more detail by F.R. Ryder in the Journal of the Institute of Bankers.[88] (Although Ryder's argument is based on the presumption that the duty of secrecy arises in contract, there would appear to be no reason why the salient points of it should not apply, on whatever basis the duty of confidence is found to lie.) He states that a term allowing consent might be implied because it was necessary for the business efficacy of the contract, yet since the basic obligation is one of secrecy, the

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85. Chorley, op. cit. footnote 82, at p. 176.

86. Mather, op. cit. footnote 2, at pp. 31-32.

87. Ibid., at p. 32.

88. F.R. Ryder, "Custom and Usage between Banker and Customer", J. Inst. B., Feb. 1965.

performance of the contract can not be said to be dependant upon disclosure. More plausible is a term implied on the basis of usage. It cannot be said that all customers know of the practice of bankers of giving each other references concerning customers. The new customer, unaware of the practice would be bound by it if it were reasonable. It would certainly be possible to build up a strong argument on this ground for the legality of the practice. If the customer already knew of the practice, a term would be implied as a course of dealing and the customer could only object if he could prove that the reference was given exceptionally.

The practice that causes most concern among the text-book writers mentioned above is that of hire purchase companies addressing their enquiries to banks through their own banks. This seems to be a blatant misuse of what may well be a legitimate practice, and it could threaten the whole concept of the banker's duty of secrecy with regard to the affairs of his customer.

CREDIT BUREAUX

A similar problem has been the subject of study in North America. This concerns the practice of banks of supplying credit bureaux with information about the accounts of customers, though this information seems to be confined mainly to loan accounts. The credit bureau has a valuable part to play in any society which uses credit facilities to the extent that that of North America does.[89] It is argued that

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89. See J.Sharp, Credit Reporting and Privacy (Toronto:Butterworths, 1970).

a person who wishes to use credit cards must be prepared to sacrifice some of his privacy, in order that the system can be made to work efficiently. The main question is to what extent this sacrifice must be made.

One should first view the problem from the point of view of the credit bureau. One might define the aforesaid as an agency which collects data about individuals who have in any way applied for any form of credit. Thus a person who purchases his house by taking out a mortgage, or who uses his credit card at the local department store would be covered. So it seems would be a person who rents an apartment and pays his first month's rent after his first month's occupancy. The information collected would all be factual and would be sold to anyone who was able to prove that he required it for a legitimate purpose. It was emphasised by Mr. McCuaig the representative of one Winnipeg credit bureau[90] that no Tom, Dick or Harry off the street would be given information unless he had substantial proof that he was engaged in some way in granting credit to people.

The information held is stored by the credit bureaux in files, though some of them are now turning to the more sophisticated method of computer storage, and the day would not appear to be far away when computers are used on a large scale in this business. The use of computer data banks has its advantages in that it is easier to add, revise and up-date material, and also to manipulate it,[91] but

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90. Interview with Mr. M.J. McCuaig of Credit Bureau of Winnipeg.

91. D. Balmer, "Data Banks" (1969), 76 Can. Banker No.2, 26.

it can also increase the dangers to the privacy of the individual in that the information becomes more easily accessible and vast amounts of it can be held. This is important when one realises that arrangements between credit bureaux for transfer of information are common and that mergers between them are not only possible but very likely and have occurred already. The widescale transfer of delicate information of this type will be facilitated by computers being used in the business of credit bureaux, and the problems concerning errors, to be explained below, will be aggravated.

(i) The problems

J.M. Sharp, in his book,[92] pointed out the problems which credit bureaux can bring to the right of the individual. He might not know of the existence of the report on him, and if he does he ought to be able to look at it to see if it is accurate. Information contained in the report might well be inaccurate, and though the percentage of cases in which errors occur is very small, the actual number of mistakes takes on sizable proportions when one considers the number of reports prepared. There are also dangers that out of date information will be used, which might give a totally false picture of the individual as he is when the report is prepared.

One of the first statutes which attempts to counter these problems is The Personal Investigations Act of Manitoba.[93] The first

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92. Supra, footnote 89, c.6.

93. S.M. 1971, c.23.

problem is dealt with by section 3 of the Act. Consent, expressly in writing,must be obtained from the subject of the report, or notice must be given to him by the person (i.e. the user) approaching the credit bureau, within ten days of the granting or denial of the benefit for which the subject had applied. The consent, however, may be contained in the application for credit, insurance etc. Furthermore, the user of the report must in any case advise the subject upon the denial of any benefit, of his right to view the report if he wishes.[94]

If, upon inspecting the report, the subject of it wishes to protest as to any information contained in it, he can object either to the user or the bureau, or both.[95] It is then their responsibility to verify the information and if this cannot be done, it must be excluded from the personal file of the subject. Even if the information protested against is verified, the protest must still be recorded on the personal file.[96] The subject still has a further right of protest to the "director" appointed under the Act by the government to supervise its administration.[97]

The Act also limits the information that can be contained in a personal report on anyone. Unless supplied voluntarily by the subject, or otherwise permitted by the Act, no adverse information on the subject which is over seven years old can be recorded. A

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94. Supra, footnote 93, s.6.

95. Ibid., s.10.

96. Ibid., s.11.

97. Ibid., s.12.

notable exception is information regarding his bankruptcy which can be used for up to fourteen years after the bankruptcy occurred.[98]

A very real danger, which the Act does not cover is that of international agencies exchanging information on subjects from various countries. The financial security of one country might be threatened if information concerning large numbers of its citizens was held by bureaux in another country. In the main, however, it would seem that, bearing in mind that credit bureaux perform a necessary function in a credit granting society, that the privacy of the individual is protected to an adequate degree by the Manitoba Act.

(ii) Credit bureaux, the banks and the duty of secrecy.

It is now necessary to consider how much information the banks give to credit bureaux and whether this disclosure amounts to a breach of the duty of secrecy, but first, why do the banks aid the bureaux at all? Mr. McCuaig[99] said that until ten or fifteen years ago banks in Canada would divulge nothing to the bureaux that was of any real value. However, banks are greatly involved in granting loans and because finance companies complied with the bureaux' requests and gave them information on customers, they were in turn aided in their business by the bureaux. The banks, who are in competition with finance companies in the lending field, similarly, if they wished to

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98. Supra, footnote 93, s.4(b).

99. Supra, footnote 90.

be helped by the bureaux, obviously had to co-operate in some way with them.

(iii) What information do the banks divulge.

From a survey conducted among branches of banks in Winnipeg,[100] it appeared that practice varied from bank to bank. This was confirmed by a letter received from The Canadian Bankers' Association. However, only information on loan accounts is given in any detail and this can vary from exact figure statements, to a credit rating, to generally worded statements. The C.B.A., after contacting several bankers concluded in their letter that...

> The banks give the following information to credit bureaux regarding instalment loan plan customers: Date the loan is obtained or re-financed; amount of loan; terms of loan; date of last payment; existing balance; how paid.

Remarks received from various Winnipeg banks included the fact that information would only be given on reasonable requests, under which fell those from credit bureaux; the bank must know who is inquiring and why; and no information is given over the telephone. Every bank completing the questionnaire stated that the precautions taken before revealing information about a customer's account never vary. The type of account in question, the state of the account, or the status of the customer make no difference at all. One should have a right to expect this.

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100. Conducted by the writer.

A similar questionnaire was sent out to at least one branch of all the main banks in England. It should be remembered that credit bureaux are somewhat of a rarity in England, and credit nowhere near as widely used as it is in North America. The pressures placed on banks to disclose are therefore comparatively slight. However two banks did reply that information was, by tradition, given to "three or four old-established mercantile agencies" in the form of generally worded statements, or an opinion might be given as to whether a customer was good for a specific figure mentioned by the agency. Another bank's credit information office replied, on receiving the questionnaire from one of its branches, to the effect that in the City of London the central Credit Information Office of the bank deals directly with the equivalent of Canada's credit bureaux and other agencies. General, worded statements are usually given but "sometimes to a specific figure when this is requested. Credit ratings as you know them are not used." It would thus seem that the beginnings of the practice as seen in Canada are present today in England.

(iv) Is the duty of secrecy breached?

One might be able to claim that "usage" as described earlier justified this type of disclosure here if one could show the practice of giving information to credit bureaux was reasonable. Again, one might say that by applying for credit, the customer impliedly consents

to the credit grantor obtaining information about his banking affairs. However, this argument would not really stand up, if the customer did not know of the practice, since if he did there must be a fair chance that he would resent anybody viewing the state of his bank account, particularly if it was not very healthy.

A better approach might be to distinguish the sort of information given to credit bureaux from other information which is not divulged. It appears banks only disclose details about a customer's loan account; his current account is almost always kept secret. Yet the banks are still concerned that they might be breaching their duty of confidence, as might be implied from the conduct of one Winnipeg bank, the four branches of which who received the questionnaire declined to answer it, on the grounds that it dealt with attitudes and bank policy. The duty of secrecy was established by Tournier's Case.[101] This was decided in 1923, when credit facilities as they exist in North America today, were unknown. The case dealt with the disclosure of the state of a customer's current account, though its judgements discuss a bank's duties in general terms. It seems that one could argue that since social and economic conditions have changed so much in the past fifty years, if disclosure by the banks is limited to details of loan accounts, then as regards this type of account only, the banks should be able to divulge information to credit bureaux, particularly in provinces where legislation exists to ensure that the standards of

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101. Supra, footnote 1.

these are maintained at a high level as far as the information they deal in and its accuracy is concerned.

Perhaps the real question to be asked is whether Bankes, L.J., in Tournier's Case, would have intended his four categories allowing disclosure to be rigid or flexible as time went on. One thing was established beyond doubt, however, and that was that the duty is not an absolute, but a qualified one. There is a strong argument in favour of adding a fifth qualification to those expounded by Bankes, L.J.: that the duty not be taken to include the divulging of information about loan accounts to persons competent to receive this.

CONCLUSION

It might be useful to compare the North American and English concept of the banker's duty of secrecy with that of Switzerland. Switzerland's long established position of neutrality has meant refugees have poured into the country over the centuries, from the religious wars in the 17th century, to the French Revolution, to the Nazi persecution of German Jews. Swiss banks came under great pressure in the 1930's to reveal information about the accounts of German clients, particularly Jews, and it was felt that a client whose confidence was betrayed might not be able to obtain adequate compensation through the bringing of a civil action. Therefore a law was passed to make violation of banking secrecy a criminal offence.

Article 47 of the Federal Law on Banks and Savings Banks in 1934 made violation punishable by a fine or imprisonment. Apart from criminal sanctions the banker who breaches his duty of confidence is liable for damages under Article 97 of the Swiss Code of Obligations.

Public officials who might have access to bank records whilst enforcing Swiss banking law must "keep secret all facts perceived" under Article 9 of the Banking Law. Tax officials receive no help from bankers since Article 47 of the Banking Law forbids the banks distributing data on their clients' holdings to tax authorities. Article 47 would also prohibit the banks supplying information to credit agencies.

Revelation in court by a bank of matters relating to the account of one of its customers, is regulated by the law of the canton (similar to state), in which the rule is generally that only in criminal cases will disclosure be called for. The only real exception to the duty of secrecy appears to be in bankruptcy cases where the debtor's general position must be disclosed according to federal law. Apart from this, the duty is a fixed one, and a foreign court asking for revelation by Swiss bankers of a client's account would be refused unless disclosure to a Swiss court would be permitted. Political, military or fiscal requests are met by total rejections.[102]

It will be seen that the Swiss see the banker's duty of secrecy as well-nigh absolute. Yet does this mean that they place more value

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102. See "Swiss Banking Secrecy" (1966), 5 Colum. J. of Transnat'l L. 128.

on the maintaining of the duty than do the English or North Americans? Part of the reply received from one English bank in answer to the writer's questionnaire would seem to show that this is not so:

> In this country secrecy is one of the main pillars of the banking system...

Similarly, a Canadian bank replied that...

> ...secrecy regarding a client's affairs is not only a high priority but a duty of the bank...

In answer to the final question on the questionnaire as to whether the obligation of secrecy was placed high on the bank's list of priorities when dealing with customers' affairs, every bank returning it replied that it was, several that it was of very high priority. One must conclude that the duty of secrecy is recognised as being one of importance in England and Canada. However, public policy has demanded that it yield on certain occasions in the public interest - in other words the duty is a qualified one. This fact alone does not mean that the importance of the duty is seen to be any less in England and Canada than it is in Switzerland. It merely means that the law in the two former countries sees, that there may be occasions, to be specifically indicated by statute or the courts, when the duty of secrecy must give way to some higher duty. Apart from these occasions the duty is as mandatory as it is under Swiss law. Thus, it should when applicable, be strictly adhered to.

Different social and economic circumstances have meant that banks are now making disclosures to credit bureaux and, as has been argued, this practice would not seem to be a breach of the duty of

secrecy as regards loan accounts, since the use of credit cards is so widespread in North America, and increasing in England also. The English Institute of Bankers stated in a letter to the writer, regarding this point, that...

> ...it is certainly true that British banks are extending their credit facilities, but so far, I think, no radical changes in the law seem to be on the cards.

This might be true for the immediate future, but it would seem to be short-sighted to say that developments of some sort in this area are unlikely to occur in the next five years or so.

However, the above is merely an example of an occasion when the public interest might demand that the duty of secrecy be breached. The banks must still impress upon their employees that secrecy must otherwise, with regard to customers' dealings with the bank, be maintained. An indication that this is not being done to a sufficient degree is the practice of some Winnipeg banks to divulge the balance of a customer's current account over the telephone, merely on being told his name. Some proof of the identity of the inquiring customer should be demanded. A representative of one Winnipeg bank stressed that this practice was not fostered by management, but his excuse that a manager cannot watch over his underlings all the time, seems to be somewhat weak. It is hoped that qualifications to the duty of secrecy will not result in it losing any of its importance in the eyes of bankers. It is in the interests of both customer and banker that confidential dealings between them be respected, and thus their

relationship be made use of to its full potential. The gain has also been, and will be, society's.

C H A P T E R I V

ACCOUNTANCY

WHAT IS AN ACCOUNTANT?

The traditional picture of an accountant is perhaps a small man in a black bowler hat and a long grey overcoat,carrying a well-used briefcase, trundling up the street to his office, which resembles that of Scrooge in Dickens' "A Christmas Carol". On arrival he picks up a bundle of papers, and, as he did the day before and will do tomorrow, pores over the endless streams of figures contained therein. The light by which he works is, of course, very dingy.

The average accountant today would hardly fit this picture. One probably thinks of him as working in private practice, advising clients on financial and business matters and auditing their accounts. Yet in England today, five out of every six members of the recognised bodies of accountants are recorded as not being in private practice.[1] Industry and commerce have enticed away many of them, but the role of central and local government in this sphere should not be minimised.

The functions of the accountant have been laid down by one

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1. M. Barradell, Ethics and the Accountant (London: Gee & Co.Ltd., 1969), at p. 72.

writer as including:[2]

(1) Taxation work - income tax returns; necessary accounting information for this; advice on tax matters; help in tax planning.

(2) Accountancy work - including preparation of normal financial statements for clients without the necessary staff to do it themselves; advice to larger clients on the preparation of financial accounts.

(3) Auditing - often includes work and advice on final accounts and consultative work on the installation of systems of internal control.

(4) Secretarial and Company work of an administrative nature - keeping of share registers; work for associations, institutions, clubs etc.; work as liquidator and in bankruptcy.

(5) Financial advice - on the general conduct of a business.

(6) Management services - a new development: some firms provide advice and consultation on management services of a type provided by management consultants.

(7) Company directorates - accountants are invited to join the boards of companies, so that their advice is available to the board engaged in top management decisions.

The same writer points out that the work recorded at the top of

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2. A. Donnelly, The Practice of Public Accounting (2nd ed.) (Australia: Butterworths, 1963), at p.20.

this list is the traditional work of the accountant, while that in the lower half, on a graduating scale, constitutes the newer developments. He concludes that the public accountant today has moved from being present solely at the death of a company to being its family doctor throughout its life.

It will be obvious to the reader that an accountant is well positioned to give advice on many management problems, since he knows much about the methods, organisation and business of a company through studying its accounts. The Wall Street Journal stated in October 1961, quoting a partner of a major public accounting firm:[3]

> The future of management consulting belongs to the accounting firms because of a continuing, close, confidential relationship with our clients.

Similarly, the Chief Executive Officer of the City of Coventry, England stated:[4]

> Accountants will tend to take a leading role in developing information systems because of their interest in providing financial and other information to management.

In other words they are able to provide management with data that has been processed to its specifications, so that a decision is all that remains to be taken. The accountant is able to give the raw data shape and meaning. It would appear that the areas in which the accountant can be of service will continue to expand.

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3. Supra, footnote 2, at pp. 203-204.

4. Letter to writer.

THE DUTY OF CONFIDENCE OWED BY THE ACCOUNTANT

The realm of accountancy, unlike that of banking, has no leading case which defines the duty of confidence owed by its practitioners to their clients. However, there seems little doubt that such a duty does exist and that a remedy would lie for its breach. A statement for the guidance of its members is issued by the Institute of Chartered Accountants in England and Wales, which deals at length with the occasions on which a member is, and is not permitted to divulge confidential information. It is drawn up in consultation with counsel and adopted also by the English Association of Certified and Corporate Accountants. It would seem that its provisions would generally be relevent to Canadian accounting practice also. Thus it forms a basis for much of the underlying material. It will generally be referred to as "the Statement".

Its introductory paragraphs are indicative of its general nature. The following is worthy of notice:[5]

> A practising member of the Institute, when acting as auditor, accountant, or otherwise in a professional capacity, has access to much information of a private nature and it is essential that he should normally treat such information as being available to him for the purpose only of carrying out the professional duties for which he has been engaged. Members are well aware that to divulge information about a client's affairs would normally be a breach of professional confidence, which might have the most serious consequences.

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5. Council of The Institute of Chartered Accountants in England and Wales, Unlawful Acts or Defaults by Clients of Members. A Statement by the Council for the Guidance of Members (1957, rev. 1968), at p. 2.

As with banking, however, there will be some occasions when the duty of confidence needs to be ignored, on being outweighed by some higher duty. It is noticable that the Statement follows the basic qualifications laid down as applicable to bankers by Bankes, L.J., in Tournier v. National Provincial and Union Bank of England.[6] They are:

(i) Where disclosure is authorised by the client either expressly or by implication;

(ii) Where the disclosure is compelled by process of law;

(iii) Where the member's interests require disclosure;

(iv) Where the circumstances are such as to give rise to a public duty to disclose.

Each of these headings will be discussed below. Similarities to the area of banking will be noticed.

DISCLOSURE ALLOWED

(a) Express and Implied Consent of Client.

It would appear that this title is self-explanatory. Generally, no disclosure should be made without the consent of the client where it is possible to contact him and obtain an answer within the necessary time. The professional secret is of such importance that there must be very strong reasons for implying consent.

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6. [1924] 1 K.B. 461, at p. 473 (C.A.).

Client's Consent and Information to Successor.[7]

The retiring accountant's legal position, with regard to what communications he can make to his successor, is governed by whether his client has consented to him discussing the client's affairs with a prospective successor. The Statement stresses that any accountant proposing to take up an appointment should first confer with the person he is replacing and that if the client objects to this, he should refuse to accept the appointment.

The consent may be contained in the contract the client had with his accountant. Otherwise,express permission to disclose the client's affairs must be sought. However, the Statement advises that even without authorisation, if the accountant being replaced was subsequently sued in defamation, he would probably be protected by the defence of qualified privilege, if he spoke without malice. The reason for this is that he would have been speaking in the public interest.

The possibility also exists that the accountant would be sued for breach of contract, yet the Statement is of the opinion that such breach would normally result in only nominal damages being granted. A remedy might also lie for breach of confidence. The same arguments for such an action, as opposed to one based on contract, would apply here as did in the chapter on Banking.[8] However, if the client has

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7. See supra, footnote 5, at p. 20, para. 59.

8. See pp. 73-77.

acted in an unlawful manner, the limited disclosure that is involved in communications between the retiring and succeeding accountants, would probably justify a breach of confidence in these circumstances, in the public interest.

The Statement warns the retiring member that the initiative in matters of communication rests with the prospective successor and that he should not volunteer information. On being contacted, he should give the general nature of the reasons for the change of accountant, and disclose facts sufficient to put the prospective successor on his guard, where necessary.

Where the retiring member merely suspects his client of malpractices the Statement leaves it to the judgement of the accountant in the circumstances as to what disclosure should be made. It is, however, as well to remember that suspicions in themselves cannot generally afford grounds to justify a breach of confidence.

Where the retiring member has not been given adequate information required by him for the performance of his duties, he should communicate this fact to his successor.

It is impressed on the receiver of any of the above information that he holds it in the strictest confidence. It is divulged to him only for the purposes of him reaching a decision on whether to accept the position offered to him. It should be a duty of the retiring accountant to firmly establish this point.

(b) Where Disclosure is compelled by Law.

The courts have the power to subpoena an accountant to give evidence in a court of law. This matter will be discussed later.[9] Otherwise, unless a statute expressly provides for revelation by an accountant of his client's affairs, it should not be made. As with the banker the main statutes which so provide are concerned with Income Tax and Companies legislation.

(i) Income Tax Legislation.

England

Any person, including an accountant, can be summoned by the General or Special Commissioners under section 52 of the Taxes Management Act, to appear before them in many appeals or proceedings under the tax legislation generally. However, under subsection(2) of this section, any person confidentially employed in connection with the affairs of the appellant or defendant in question need only appear at the hearing, and may refuse to be sworn, or to answer questions to which he objects. This power given to the Commissioners extends to Capital Gains Tax and Corporation Tax proceedings, under section 1(1) of the Taxes Management Act, 1970.[10] Since the accountant is employed in a confidential capacity, he should appear at these proceedings, but should not answer questions.

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9. Infra, at pp. 160-164.

10. 1970, c.9 (U.K.).

Under section 20 of the above Act the Commissioners have the power to serve a notice on a person requiring him to produce accounts and to make available for inspection all books, accounts and documents containing information about transactions carried out in his trade, profession or vocation. It is extended to Corporation Tax by subsection(1)(b). The power is exercisable where a person has failed to deliver a statement, or the Commissioners are not satisfied with that delivered. Yet the power only allows a notice to be served on a client, not on an accountant acting for him.

The Commissioners might, however, make use of their powers under section 29 of the above Act to make a sufficiently high assessment on the taxpayer that he appeals against it. The Commissioners or the appellant may then produce the information to support either of their cases. Under the same Taxes Management Act, 1970, section 51, the Commissioners in appeals can give notice to the other party to make available to them all books, accounts or other documents which in the Commissioners' opinions relate to the proceedings taking place. Again, the power only relates to the client of the accountant, not to the accountant, himself. This is important, as in the earlier provision, and necessitates a definition of what papers belong to the accountant and which ones to his client. The former cannot be inspected by the Commissioners.

The Accountant's Working Papers.

Unless statute specifically states that the accountant is to be regarded as an agent of his client, he will not be considered as such: the relationship is one of professional adviser and client. This means that the accountant's working papers are his property, and not that of his client. Several cases have illustrated this point.

In London School Board v. Northcroft[11] it was held that papers, calculations, and memoranda prepared by quantity surveyors were their property, and not that of the building owners who had employed the surveyors to work for them. In Leicestershire County Council v. Faraday & Partners[12] rating valuers were employed by the county council for five years, to give advice and assistance in connection with hereditaments in the council's area. At the end of their employment, the council claimed all documents, maps and plans prepared by the valuers during the five years. The Court of Appeal held that:[13]

> ...the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. I think that it would be entirely wrong to extend to such a relation what may be the legal result of the quite different relation of principle and agent. These pieces of paper [the defendant's working papers], as it seems to me, cannot be shown to be in any sense the property of the plaintiffs, any more, as I suggested to Mr. Macaskie during the argument, than his solicitor client or his lay client could assert that

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11. (1889), 2 Hudson's B.C., 4th ed., 147.

12. [1941] 2 K.B. 205 (C.A.).

13. Ibid., at p. 216.

> his notes of the argument which he addressed to us could be claimed to be delivered up by him when the case is over either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal...

Finally, in Chantrey Martin v. Martin[14] a firm of accountants objected to an order for "discovery" of documents, on the grounds that these belonged to their clients, who were not parties to the action. The Court of Appeal held, however, that the working papers were the property of the accountant, not that of his client.

These instances are to be distinguished from those where the final product of the accountant's work is given to his client in the form of a report. In London Guarantee v. Henderson[15] an auditor's report submitted to the directors of a company was held admissible as evidence.

The Statement issued by the Institute of Chartered Accountants states that:[16]

> Normally, a request by an Inspector or by the Enquiry Branch for production of his working papers would be regarded by a member as being a reflection upon either his competence or his integrity and dealt with accordingly, in the knowledge that there is no statutory power under which the request can be enforced.

Working papers are regarded by the Inland Revenue in England as

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14. [1953] 2 Q.B. 286 (C.A.).

15. (1915), 9 W.W.R. 268 (Man. K.B.).

16. Supra, footnote 5, at p. 13, para. 37.

including:[17]

(i) analyses of banking accounts;

(ii) schedules supporting the statements submitted with the report;

(iii) correspondence such as with bankers and stockbrokers;

(iv) correspondence with the client and with solicitors;

(v) notes of questions and answers between the client and the accountant.

Since the working papers are the accountant's property, even if the client consents to them being made available for inspection, he has no obligation to comply. The Statement, however, suggests that in cases (i), (ii), (iii), above,there normally would be no objection, on his gaining the consent of the client, for the accountant to reveal the papers, if they are likely to support his report. However, for the items in (iv) and (v) above, since these may be of a highly confidential nature, they should be produced to the Inland Revenue only in exceptional circumstances. If the client does not give his consent "the accountant will seldom be justified in producing the papers."[18]

Canada

The statutory provision relevent here, is the same one as was discussed in the chapter on Banking: section 231(3) of the Income

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17. Supra, footnote 5, at p. 13, para. 38.

18. Ibid., at para. 39.

Tax Act.[19] It will be remembered that the Minister is given very wide powers of inspection under the Act for any purpose related to its enforcement. A recent article has pointed out, not only the implications of this section (at the time of writing the same provision was in the 1952 revised statutes), but the actual effect it has had regarding accountants.[20] It gives the illustration of one case in 1961, one in 1966, and six in 1968, to support its contention that...[21]

> Indeed it is likely that with the use of more sophisticated compliance techniques and increasing interest with which the Revenue are regarding tax planning and avoidance schemes in general this weapon may become steadily more popular.

However, the Act repeats the provisions of the old Act in expressly stipulating that the Common Law privilege of solicitor and client is preserved.[22] The courts have taken advantage of this to include the accountant's papers in it whenever possible. The position prior to the cases to be discussed below, in relation to the accountant being seen as within the solicitor-client privilege, may be set out as follows: litigation, for the solicitor-client privilege to apply, need not be in view. However, when the communications it is wished to protect are between third persons (e.g. accountants) and the solicitor, the communications must be made with:

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19. S.C. 1970-1971, c.63.

20. R. Lewis, "Income Tax Act, R.S.C. 1952, c.148 as amended s.126, 126A-Solicitor-Client Privilege-Other Professional Advisors of the Taxpayer without Privilege..." (1970), 8 Alta. L. Rev. 145.

21. Ibid., at p. 146.

22. Supra, footnote 19, s.232.

(i) litigation in mind;

(ii) the third person (accountant) must have intended the communication to be submitted to the solicitor so that the solicitor could advise the client. The accountant could not render advice independently to the client.[23]

The Canadian courts have taken the broadest view possible of the lawyer's privilege, to give protection to the accountant. In Re David Sokolov,[24] the Manitoba Court of Queens Bench purported to broaden the rule that litigation had to be in view for protection to be given. A typical set of documents, as used in many tax avoidance schemes, was sought to be inspected. The bulk of these were within the privilege without any doubt; however two memoranda which were the summaries of a meeting between accountants, the client and his special tax counsel to discuss a proposed scheme, were in question. The accountants acted as agents of the client by transmitting the memo's to the solicitor so that he could advise the client. A letter, also in question, written to the client by the accountants, and tendering their advice to him, could not be seen as privileged, since it did not pass through the solicitor's hands. However, the memo's were held to be privileged since although litigation was not in view, the other criteria needed for the solicitor-client privilege to apply were met.

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23. See Anderson v. Bank of British Columbia, [1876] 2 Ch. D. 644 (C.A.).

24. (1968), 68 D.T.C. 5266 (Man. Q.B.).

Two cases[25] show that tax avoidance (as opposed to evasion) schemes are not illegal under the Act, although they may be improper, and their existence does not vitiate the privilege. However, another case, In re Modern Film Distributors Ltd.,[26] by its use of broad terminology,might be seen as contradicting this.

It would seem that the accountant's position as far as privilege goes, is very uncertain. To have any hope of protection he must not communicate with his client directly, but must deal through the client's solicitor.[27]

The writer of the article mentioned above[28] contends that there is a need for the Minister to be able to view a full account of various transactions in order to assess the tax payable on them. What he objects to is the Minister having the power to read a person's mind and discover why certain procedures were adopted.

Indeed it would seem to be necessary to distinguish motives from the results they bring about. Motives in themselves cannot be illegal and therefore the Authorities should have no interest in documents concerned with the reasoning behind taxpayers' transactions. However, such documents have been in question in several recent cases, as above. It would seem reasonable that the Minister should not be allowed to

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25. Missaien v. M.N.R. (1968), 68 D.T.C. 5039 (Alta. S.C.).
In re Goodman & Carr v. M.N.R. (1968), 68 D.T.C. 5288 (Ont. S.C.).

26. (1968), 68 D.T.C. 5349 (B.C. S.C.).

27. The question of whether the accountant should be granted a privilege is discussed later at pp. 160-164.

28. Supra, footnote 20.

inspect these. The result of the Act is that to gain any protection at all, the accountant must act through a solicitor - a procedure which is both costly and time-wasting. However, the granting of a privilege is not the only possible answer. Some changes in this section of the Income Tax Act would perhaps prove more useful.

(ii) Companies Legislation

Investigation - England

Under section 164 of the Companies Act 1948,[29] Inspectors may be appointed to investigate the affairs of a company on the application of a certain number of shareholders.[30] Under section 167(5) the auditor is one of the persons who has a statutory duty to produce books and documents, and to attend before the Inspectors when required to do so by them. Section 109 of the Companies Act 1967[31] gives wide powers to the Board of Trade's officers to require production of any books or papers they may specify, by any person in possession of them. Under these powers it would seem that the working papers of an accountant can be inspected, in contrast to the Income Tax provisions in England.

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29. 1948, 11 & 12 Geo. 6, c.38 (U.K.).

30. See section on "Banking", for further details, at p. 91.

31. 1967, c.81 (U.K.).

Investigation - Canada

Under the Canada Corporations Act,[32] section 114(3) all officers and agents of the company shall produce to Inspectors all books and documents in their custody or power. In provincial legislation, similar duties are laid upon officers, agents and servants of the corporation under the Companies Acts, e.g. Manitoba Companies Act, section 232.[33] It is doubtful whether the accountant's working papers could be viewed under these provisions. However, the accounts submitted to a company obviously would be capable of being inspected.

Winding Up - England

Under the Companies Act 1948, section 334(5), if an investigation is called for by the liquidator of a company on its winding up, the auditor is under a statutory duty to give all assistance that he is able, to the Director of Public Prosecutions. The complicated procedure to be gone through in instituting an investigation under this section was described in the chapter on Banking.[34]

Under section 268, after the appointment of a provisional liquidator or the making of a winding up order, the court may summon before it "any person the court deems capable of giving information concerning the promotion, formation, trade, dealings or affairs or

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32. R.S.C. 1970, c.C-32.

33. R.S.M. 1970, c.C.160.

34. Supra, at pp. 92-93.

property of the company." Subsection (3) gives the court power to order such persons to produce books, papers, documents etc. concerned with the company's affairs.

Winding Up - Canada

Under the Canadian Federal Act,[35] section 119 a similar provision to section 268 of the English Act exists. Section 121 adds that any such person may be called upon to produce any book, paper, deed, writing or other document in his custody or power relating to the Company. However, the power to order this rests in the court.

(c) Where the Member's Interests require Disclosure[36]

The English Statement explains its third head as one that must be strictly interpreted, and examples given are where a member wishes to sue for his fees, or to defend an action for negligence brought against him by his client or some third person. If a third person did sue the accountant for negligence it is difficult to see how, without the client's consent, the accountant would be able to disclose anything about his client's affairs. This seems to be a case of the

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35. R.S.C. 1970, c.W-10.

36. Supra, footnote 5, at p. 4, para. 7.

client not being the cause of the harm (i.e. the suing) to the accountant, but merely the occasion of it. Since the professional secret should be valued highly, moral grounds would not allow for disclosure here, unless the client was in some way responsible for the "harm" befalling the accountant.

The Statement gives other examples, of where an accountant wishes to clear himself of suspicion of a criminal offence, or to defend himself against a criminal charge, as where he protects himself when it is suggested that he has aided his client in making an incorrect return. In these cases, the accounts of the client will be the reason for suspicion or for charges being laid against the accountant - it will be the client who is usually being charged primarily - the accountant is just his aid in crime. Therefore, unless the client is totally unaware of any criminal connotations connected to the accounts, the accountant will be justified in making disclosure to defend himself. The client will be the cause of the "harm" befalling him. It must be remembered, however, that only necessary revelations must be made, and these only to persons entitled to receive them.

The Statement would, overall, appear to be somewhat biased towards the accountant in this area. It would be unfortunate if the interests of the innocent client were to be forgotten when the accountant himself was in trouble.

(d) Public Duty to Disclose

The Statement indicates that there is no contractual ban on disclosing information:[37]

a) as to an intended criminal offence whether it be serious or trivial

b) as to an intended civil wrong or breach of statutory duty if the damage to an individual is likely to be serious or if the wrong is likely to affect a large number of individuals

c) as to a past arrestable[38] offence whatever its nature or even as to a past non-arrestable offence or breach of statutory duty if the non-disclosure is likely to cause public harm, for example by enabling the offence to be repeated with impunity or by enabling the perpetrator of some serious fraud to go unpunished.

These instances are reminiscent of those laid down by Denning, L.J., in Initial Services v. Putterill,[39] and as was decided in the chapter on Banking seem reasonable, as far as generalities can be.

The Statement stresses that the ability to disclose without impunity does not mean that disclosure should necessarily be made. It states, regarding the professional duty of secrecy, that it is in the public interest that in general confidence should be maintained,[40] and that clients, relying on the confidential relationship they expect to have with an accountant are often frank in their discussions with him. This confidence can be used best through the giving of sensible

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37. Supra, footnote 5, at p. 4, para. 7.

38. These replaced felonies and misdemeanors in English law in the Criminal Law Act, 1967, c.58.

39. [1968] 1 Q.B. 396, at p. 405 (C.A.). Supra, at pp. 41-43, 94.

40. Supra, footnote 5, at pp. 4-5, para. 7.

advice against any unlawful schemes he may have in mind. By running to the authorities, the accountant would not only undermine the general relationship of trust existing, but also fail to prevent contemplated malpractices in the future since the client will not reveal his unlawful schemes to him but simply carry them out alone. The Statement continues in bold print:[41]

> The Council therefore recommends that members, albeit they may be contractually free to do so, should not disclose past or intended civil wrongs or crimes (except treason, which they are legally obliged to disclose...) unless they feel that the damage to the public likely to arise from non-disclosure is of a very serious nature and that in any such case members should if time allows always take legal advice before making disclosure.

It is stressed, however, that the accountant should be careful never to actively assist in any malpractice,that the accounts, past or present, should always, to the best of his knowledge, present a true picture, and he should if necessary decide whether he is willing to work for a client, whose activities do not entirely find favour with him.

It is now necessary to view some instances in greater detail when disclosure is possible, in the public interest.

(i) Taxation

The Statement deals with cases in which there is no statutory duty on the accountant to disclose, because he has not been requested

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41. Supra, footnote 5, at p. 5, para. 10.

to by the Inspectors or the Court, yet malpractices have occurred, and a duty to the public would seem to call for revelation by the accountant. This is a question of balancing whether the harm to be caused to the public through the breach of professional secrecy, is less or greater than the harm that will ensue through non-disclosure of the wrong.

Errors found later.

If an accountant discovers that accounts prepared by him or returns based on these were defective, and this is because his client withheld information from, or deceived him, and these accounts or documents have already been submitted to the tax authorities, it would be improper for the accountant to allow the latter to rely on them. Yet, without the client's consent he should not make disclosure. His duty of confidence to his client is not outweighed by his duty to the public to inform the tax authorities of inaccurate information given to them.

He should advise the client to inform the tax authorities himself, warning him of the unlawfulness of his acts and of the possible penalties attaching to them. If this has no effect, the accountant should tell his client he can no longer act for him, that he will have to inform the tax authorities that his statements cannot be relied on, and also that he has ceased to act for the client. However, he will not be permitted to reveal any details concerning the errors in the

returns submitted.[42]

This advice of the Council in the Statement is obviously a compromise solution to the problem. It says that the accountant must not reveal any details, yet he must warn the authorities of the errors, and they will presumably waste no time in bringing the wicked client to justice. Is this not tantamount to disclosure? The Statement does not classify this or the following three matters dealt with here under the duty of the accountant to the public to disclose. Perhaps there are good reasons for this, since taxation fraud might not be sufficient excuse for the breach of professional confidence. (The Statement seems to admit this when it does not advise disclosure of details to the authorities by the accountant.) The real balancing here seems to be between the good name, reliability and high standing of the accounting profession and the duty owed to a client who wishes to break the law. One might argue that the accountant's role in society is so much related to taxation matters that it is for the good of the community that anything he observes to be unlawful should be revealed to the proper persons. This will enhance the respect society in general has for the profession.

It is difficult to argue on the side of some-one who is injuring society in any way, when one is trying to show that the profession exists for society's good. However, does this mean that the duty of

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42. Supra, footnote 5, at pp. 6-8, paras. 13-19.

secrecy can be breached? The arguments either way are fairly even, and perhaps the deciding factor does not come from the "public interest" sphere at all. One could say that the accountant will be liable for aiding a person to submit an incorrect tax return, therefore he is merely protecting his own interests against a deceitful client.

Present discrepancies

Should his client withhold relevent information or the accounts he is preparing show discrepancies, the accountant has the duty to state the qualifications necessary to make his report a true one. It is important to remember that the professional independence of the accountant is ever-present. M. Barradell states:[43]

> An accountant offers no tangible merchandise for sale, and his clients seek his professional skill to resolve problems which they have not themselves the knowledge or time to tackle, or to assist them in meeting responsibilities laid upon them by law. In such circumstances they must be able unhesitatingly to assume, not only that he has the necessary skill to undertake their instructions, but also that after a careful appraisal of all material factors he will give them the benefit of an honest and impartial opinion. Remembering that the accountant has a duty towards the community and towards his profession as well as to his client, that opinion may not in all cases be that which the client is most willing to hear; but this of itself will not excuse the accountant for varying or suppressing it. To attempt to 'trim the sails to the wind' of a difficult or self-opinionated client is a short-sighted policy which can have serious consequences. First, it will not earn the respect of the client; secondly,

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43. Supra, footnote 1, at p. 15.

> it differs only by a step from seeking to influence professional business by improper means; thirdly, 'signing to order' involves a considerable risk of conflict with the professional disciplinary tribunals and the Courts of law.

No duty rests on an accountant who is dismissed before he has completed his work on the accounts. It would normally be improper for him to communicate with the tax authorities about those accounts. Similarly, any accountant not engaged in tax work should refer any inquiries concerning this to his client.

Past accounts of a new client.

The accountant has no responsibility for accounts submitted before his employment. He should therefore not report any discrepancies he may subsequently discover. However, this may lead him to terminate the relationship with the client if the latter refuses to follow his advice and contact the tax authorities in such a case.

(ii) Companies[44]

In this section, it is proposed to deal mainly with the auditing functions of the accountant. The auditor has a responsibility to check the accounts of a business or company, and although he is employed by his client, his duties lie towards the shareholders in that company as well as to the public generally.

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44. See supra, footnote 5, at pp. 16-17, paras. 49-52.

M. Barradell states:[45]

> The position of joint-stock enterprise in the community has developed considerably since the first introduction of compulsory audit clauses; and the appearance of internationally influential multi-million complexes and of the institutional investor suggests with some force that the auditor has duties to creditors and to the public at large which equal or transcend those to the shareholders by whom he is appointed.

The auditor must ascertain and state the true financial position of the company and exercise reasonable care and skill in making enquiries and investigations. Yet it has been stated that "he is a watchdog, but not a bloodhound" and that he is justified in believing tried servants of the company, in whom confidence is placed by the company.[46]

Past accounts

The auditor may discover that past accounts on which he worked were defective. What is his position? If the accounts are of relevance to tax matters, his course of action should be in accordance with the earlier section on taxation. It may, however, be necessary to inform the shareholders of discrepancies in the affairs of the company. He should exercise his right to speak at the next general meeting, yet if the matter is urgent the auditor should request that the directors submit a report to the shareholders. If they refuse, the auditor should inform the shareholders himself, but often the

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45. Supra, footnote 1, at p. 17.

46. In re Kingston Cotton Mill Company (No.2), [1896] 2 Ch. 279, at p. 288 (C.A.).

threat of this would hasten the directors to act themselves.

It might be necessary also to inform third parties of the inaccuracies in the accounts, since an auditor by allowing persons to act relying on accounts he knows to be false, would likely leave himself open to an action for negligent misstatement. Since the company is the wrongful party in such a case, the auditor is permitted to save himself at his client's expense.

Should the auditor be removed from office before the completion of his audit he has no duties to inform anyone of any discrepancies he might have come across whilst engaged by his former client. Should he be asked for information by tax authorities or anyone else, he should refer the inquirer to his former client.

Liquidation

On the liquidation of a company, the auditor may be approached by the police for assistance in bringing to justice a director of the company or one of its other officers. The Company's rights, on its liquidation, are exercised by the liquidator, therefore the auditor could approach him for permission to aid the police. However, this would normally not be the correct course of action to pursue, since public confidence in the profession as a whole would not be maintained or augmented. The Statement recommends that the auditor refuse to aid the police, and leave it to the liquidator to decide whether to report anything to the Director of Public Prosecutions. He should

however furnish the liquidator with all information at his disposal:[47]

> The liquidator is the person through whom the company's rights are exercised, enforced or defended and it follows therefore that there can be no breach of confidence on the part of an auditor in giving to the liquidator information to which the company itself is entitled.

THE ACCOUNTANT NOT IN PRIVATE PRACTICE

As was pointed out at the beginning of this chapter, the proportion of accountants engaged in areas other than private practice is large. It will therefore be of value to see how far the duty of confidence extends outside the realm of private practice. The English Statement issued by the Institute of Chartered Accountants, referred to frequently in the earlier parts of this chapter, deals primarily with the private practitioner. It is important to see how far it is relevant to the accountant employed in other areas.

It would seem to be established that the accountant does not leave his conscience behind him when he enters commerce,industry and government. C.W. Anderson said, in the Arthur Capper Moore Memorial Lecture delivered in Adelaide, Australia in 1964:[48]

> Because of the very nature of his fiduciary functions, he is bound to be actuated with the highest degree of integrity.

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47. Supra, footnote 5, at p. 17, paras. 51-52.

48. C.W. Anderson, "The Legal and Ethical Responsibilities of the Accountant Not in Public Practice", The Australian Accountant, Nov. 1964, 607, at p. 614.

M. Barradell said:[49]

> The accountant not in practice places his professional skill but not his professional integrity at the disposal of his employers; and he should not be put in the position of lending or appearing to lend his name and reputation to representations of fact which to his own knowledge are unlikely to be fulfilled.

Mr. Croxton-Smith is reported to have said that a professional man is bound by his code of ethical conduct whether in practice or not, and whether at home or abroad. Such standards could only be forsaken at peril.[50]

It is said frequently that the obligation of the 'internal' accountant is primarily to do the job for which he is paid. Yet Barradell perhaps 'hits the nail on the head' when he says that the salary he receives should not be seen as reward for so many hours labour, but rather as a retainer for the first call upon the whole of his professional abilities.[51] Mr. Davison,in The Accountant,[52] is reported as framing his discussion around the 'triple duty' of members in industry and commerce towards:

(i) their employers

(ii) other members of the profession (whether or not in practice)

(iii) the community at large.

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49. Supra, footnote 1, at pp. 73-74.

50. "Professional Ethics", The Accountant, May 16th, 1964, 620.

51. Supra, footnote 1, at p. 73.

52. Supra, footnote 50.

In support of this, Mr. Croxton-Smith's statement might be quoted:[53]

> It should be regarded as an implied term of any member's contract of employment that he is not required to do anything in violation of either the general law or his professional code...

Thus, it would appear to be the opinion of senior members of, and authorities on,the accounting profession that the duties of an 'internal' accountant are little different to those of the private practitioner. One wonders, however, whether the duty of confidence would not be stronger, in the former's case, because of his connection with a sole 'employer'. Would he be justified in breaching his duty of confidence, given the same situation as his associate in private practice?

C.W. Anderson[54] sees this problem too:

> The real difficulty arises in connection with the professional responsibilities of an accountant entirely subject to direction of a senior officer or the board. What does this accountant do in the event of the senior officer of the company or board doing something unlawful...?

There would seem to be no reason why a higher duty of confidence should extend to accountants employed in industry, commerce or government. If the private practitioner feels he ought to reveal, then in similar circumstances the 'internal' accountant should make disclosure also. The obligation of professional secrecy is a weighty one in both cases. If the public interest requires disclosure, or

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53. Supra, footnote 50, at p. 621.

54. Supra, footnote 48, at p. 615.

"harm" is liable to befall the accountant through acts of his employers, he should disclose the matter to the relevant authorities or persons.

It is not the accountant's place, however, to act as an informer to the auditor. He should give the auditor every assistance, but should leave him to do his job of checking the accounts.

Should the 'internal' accountant be placed in the unfortunate position of having to make disclosure, the repercussions which are likely to befall him, would be more serious than those likely to fall on a private practitioner. He stands to lose his job - not merely a client. Therefore he might be more reluctant to take a stand than would be his associate. This does not mean, however, that he could not reveal the wrongful acts if he wished to do so, or should not if the occasion demands.

C.W. Anderson[55] considers the case of an 'internal' accountant who finds himself connected with irregular records. He points out that by taking a stand on the matter, the accountant can gain respect from senior officers of the company. If this has no effect, however, he would be wise to resign rather than compromise his ethical standards.

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55. Supra, footnote 48, at p. 616.

Government

The accountant plays an important part in both central and local government. As in industry and commerce, his field of operations is increasing in size and he has developed at the higher levels into an adviser to management. This section will view the law relating to local government records in England, and then discuss some of the implications arising from the increasing use of computers in storing data in this field.

Inspection by members and electors

Under section 283(3) of the Local Government Act, 1933,[56] the accounts of a local authority and of its treasurer shall be open to the inspection of any member of the authority, and he may take extracts from them or make copies. Under subsection (4) abstracts of these accounts and the auditor's report on them shall be available for the inspection of any local government elector of that area, and copies must be made available for sale to him.

Under section 224(1), a copy of every account subject to a district audit duly made up and balanced...

> ...and all rate books, account books, deeds, contracts, accounts, vouchers and receipts related to the accounts...

...shall be available for inspection by all persons interested seven days before the audit. In both these sections, it is obviously intended that interested persons should have a right to inspect the

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56. 1933, 23 & 24 Geo. 6, c.51 (U.K.).

accounts of the local authority which is spending the taxpayers' money. The local authority is the agent of the people, and its activities should not be kept secret from them. However, certain information is collected by the authority from private persons, relating to confidential matters. It is implied by the persons submitting this information that only the proper persons employed by the authority, for the particular matter to be dealt with, shall see this information. In such cases the public should not be able to view this material. People applying for welfare assistance or other social services are examples.

A case concerning the ability of persons interested to view confidential matters under section 224(1) occurred in 1935. In Rex v. Monmouthshire County Council, Ex parte Smith[57] two ratepayers and electors of the county instructed an accountant to inspect the accounts of the authority on their behalf. The accountant sought to view application forms for student bursaries, claiming that such were "vouchers" under the section. The application forms contained information concerning the student's parent's income, including his latest tax assessment form or a certificate of earnings. The request was refused on the ground that production of them would disclose confidential information.

The three judges decided that a strict interpretation of the word "vouchers" in the section could not be taken to include the application forms, since they did not show a payment ought to be, or

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57. (1935), 99 J.P. and Local Govt. Rev. Repts., 246 (K.B.D.).

had been, made. Furthermore,under section 225(1) the auditor was given wider powers than an 'interested person' under section 224. The forms might come under the provisions there of "other documents which he (the auditor) may deem necessary for the purpose of the audit," but could not be included under the term "vouchers". Yet, policy reasons might have been the real reason for the decision. Lord Hewart, C.J., said:[58]

> It would be difficult to imagine anything more offensive than the widespread distribution of such information among neighbours and it may be, trade competitors.

Avory, J., stated:[59]

> If any mischief arises from applying a technical meaning to the word "vouchers" in s. 224, and if there is any real ground for supposing that the duties of the local authority in this respect are not being properly performed, I think that under ss. 225 and 226 a remedy may be found, because under s. 226 a local government elector may make any objection to the accounts before the auditor. He may, therefore, make a general objection to the accounts so far as they relate to the granting of all these bursaries, and upon any such documents which he may deem necessary for the purpose of examining into the objection. Therefore, in my opinion, no harm will result from applying strictly the word "vouchers" to such documents as my Lord has described.

It would appear that the strict interpretation of the statute was not the real reason for the decision in the case. Rather, it was thought that confidential documents of this sort should not be open to the inspection of the general public.

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58. Supra, footnote 57, at p. 248.

59. Ibid., at p. 250.

New Developments - Computers

(a) Purpose and characteristics.

Owing to the wide range and large amount of administrative functions performed by local authorities in England, and the vast amount of data stored by them in consequence, the advent of the computer was obviously a significant event in Local Government circles. As was mentioned earlier, the accountant is often concerned with processing data to management specifications. The collection of data in one uniform reference system can be acheived through the computer. Similarly, careful programming of the computer will enable conclusions to be drawn more easily from the data. A more speedy and efficient information system is therefore available - and the accountant is one person who will be able to take advantage of it. Yet the problem immediately apparent is who shall have access to what. Because it is in its early stages of development, it seems that no authoritative guidelines on this question have been issued by any accountancy or computer body. However, members of Coventry Corporation are in the process of establishing an information system employing computers and it is of value to view their approach to the problem.[60] Such a scheme necessarily brings with it problems as well as advantages. Confidentiality is thus considered in some depth.

The objective of the system is stated as being to provide information for decision making and control at all levels of management,

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60. A.Morton, City Treasurer of Coventry, England, "The Management Information System: Interim Report".

and the computer procedures must, for this purpose, be able to retrieve information within a reasonable time. Varying and unknown demands for data storage and processing must be met, so that flexibility in the system is a necessity. The relevant conflict of interests is stated in these words:[61]

> The rationalisation and integration of the system implies the concept that data should become a common commodity throughout the Corporation, subject to confidentiality rules where appropriate.

In addition it is stated:[62]

> Data will be provided by all departments of the Corporation and, subject to the confidentiality rules, will be accessible to officers in all departments.

The data mentioned above would be on population, housing, industry, shops, transportation, personnel, resources, on a local level, and prices and incomes, and Gross National Product and Growth on a national level. Data will be fully cross-referenced; a uniform method of referencing will replace the many different kinds at present employed by various departments. Duplications should thus be avoided and it is hoped that in many cases one department will be able to deal with a matter that previously went through three. It is stated that:[63]

> The output of the system is deliberately termed 'information' rather than 'data' to emphasise the difference between bulky tabulations of unprocessed facts and concise information precisely tailored to management's needs.

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61. Supra, footnote 60, at para. 2:1.

62. Ibid., at para. 2:3.

63. Ibid., at para. 2:5.

One might comment that also emphasised is the danger present should this 'concise information' get into the wrong hands. Consider the possibility of all the application forms for student grants or bursaries, which are handled in thousands by each local authority in England, having their contents revealed to the wrong people.

(b) Implications.

Having briefly described its purpose and some of the system's characteristics one can now turn to its implications. The problem created by the system will be met "by the co-ordinating and technical advice service provided by the City Treasurer". The functions of this service are then described. It is noticable that the first is...

> ...to ensure that the confidentiality rules and security system are maintained.

In a later Review of the system, this problem is dealt with in more depth.

> The general rules assumed previously are set out as follows:
>
> (i) that common data will be freely available;
>
> (ii) that individual data (application enquiries) will only be available to the department supplying that data;
>
> ['application enquiries'are defined at para. 2:5 of the Interim Report as being direct interrogations of a standard and predetermined nature, probably for individual records.]
>
> (iii) that aggregations (control enquiries) will be available as part of an application to specific departments and officers only.

['control enquiries' are defined as necessary for the control of each application, taking the form of overall totals, audit checks etc.]

(iv) that only senior officers will be able to make policy enquiries and all policy enquiries will be made via the computer liaison unit.

['policy enquiries' are ad-hoc enquiries relating to any group of records or files.]

A number of general principles should be borne in mind throughout. Every enquiry should be logged, either manually or by the computer. This should be examined periodically, perhaps by an audit division, certainly by an independent section. No unauthorised staff should have access to the computer rooms, the complete details of enquiry procedures should only be available to the computer liaison. unit, and individuals should only be given sufficient information for their own activities. Apart from these general considerations, the Review proposes special attention to be given to three areas:

(i) Control of terminal facilities

(ii) Control of the computer liaison unit

(iii) Control of computer staff.

(i) Terminal Facilities

The main problem seems to be restricting the use of the terminals to minimise the chances of unauthorised persons using the computer. Thus the siting of them must be carefully considered and, in the event of unauthorised access, the programming of the computer should be such that random or wrongful use of the terminal

can be detected, and it closed down.

Programming should also ensure that only certain types of enquiry are available through each particular terminal. Passwords should be used, of course, and these and the enquiry codes can always be changed quickly and easily if wrongful use of the computer is detected. Similarly some sort of key should be used to switch the terminal on and off (key here means 'door key' type).

(ii) Computer Liaison Unit.

Via the enquiry facilities, the liaison unit would have access to most data in the system in aggregate form. A password system would prevent individual data being obtained.

The purpose of the liaison unit would be to act as a confidentiality screen, and it would act according to the defined confidentiality rules. "Information would only be supplied against a written order and after checking the rules." Members of the unit would not have access to programs or directly to the computer, unless provided by the system.

(iii) Computer Staff.

The purpose here is to prevent any one person having the knowledge and opportunity to make unauthorised enquiries. The staff can be split up into four sections: data preparation staff; operators; programmers; and engineers.

It will be necessary to make the staff aware of the serious importance of the security measures and the serious consequences that

would follow any breach of confidentiality. Operators would have access only to operating instructions, never to programs or enquiry manuals. Programmers would not normally have access to the computer rooms and should not be able to operate the computer. The enquiry log would monitor any trials the programmer may initiate. Engineers should not have access to the file library, and the computer company should be notified of the rules concerning confidentiality with regard to engineers being appointed.

It is to be remembered that the procedures outlined above are intended to preserve confidentiality in internal enquiries. External enquires are to be dealt with at a later date. The precautions suggested seem to be fairly comprehensive. It has been said that:[64]

> ...protection in an entirely 'in-house' installation (and against 'in-house' intrusion in a larger system) is a matter of the integrity and control over the local staff.

This is true, yet the size of a local government authority in terms of the number of people employed by it would suggest stronger measures should be implemented to safeguard confidential material than perhaps are needed in other organisations and businesses.

The report does not devote any space to the idea of cyphering messages to and from the computer. It merely mentions 'enquiry codes'. It will be of value to expand on these. Although all transmissions from the computer are coded in a sense, in that the original input is all transformed into a series of impulses, the computer world

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64. M. Warner and M. Stone, The Data Bank Society (London: Allen & Unwin Ltd., 1970), at p. 201.

has several standard codes, which can be discovered if the potential intruder knows the type of computer involved and the type of terminal used. It is desirable that further protection be granted:[65]

> It is desirable that all data in files should also be ciphered so that it no longer conforms simply to the internal coding structure of the computer. Ideally - and a computer is the ideal tool to handle this - ciphering should be performed according to randomly selected patterns which change from day to day, or from file to file, or even from enquiry to enquiry, so that the cipher is virtually impossible to break. But one cannot, unfortunately, ignore the high cost of implementation nor the 'unproductive' processing time which the maximum protection will involve.

One of the objects of the introduction of computers into local government work is to make common data freely available. Yet it is obvious that confidential material should be stored separately, and be only available to particular persons or departments. The local authorities are concerned very much with health records, social welfare and service records, school and college records, all of which require some sort of confidential information to be filed. In these cases, this information should not be freely available to all departments. Special cyphering might be used in regard to the records. Similarly, care should be taken at all levels that only relevant information be obtained by any department. The writing of records might improve efficiency, but it also leads to problems as will be seen later.

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65. Supra, footnote 64, at p. 203.

It might be of value to mention something about passwords. These detect whether the enquirer has authority to use the computer, or more important, a particular part of it. Unvarying passwords, have the drawback that they can be easily found out, therefore some disposable type of password would seem to be required. It has been suggested that 'apparantly random numbers' be used. Each time a caller establishes contact with the computer, he would be given a number. He would then perform some simple calculation on the number and send the result to the computer, which if the answer was correct would allow him access. The wire-tapper or eavesdropper's task would thus be made more complicated.[66]

Ultimately, however, much depends on the type of people who are using the computer. The Coventry Corporation Report seems to recognise this, in its splitting up of each section of employees connected with the computer. Although, it must be admitted that absolute security is virtually an impossibility, it is vital that the task of the unauthorised user be made as difficult as possible. The security measures may be expensive to employ, but some sort of balance must be attained between the sensitivity of the data held by the computer and the measures taken to safeguard that data.

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66. Supra, footnote 64, at pp. 204-205, referring to L. Hoffman, Paper CGTM 76, Stanford University.

(c) Some Examples of 'Computer' Problems

Warner and Stone[67] give some interesting examples of the problems computers might bring to local government. These, it is hoped, will illustrate why it is important that the measures above be carried out, and show the effect computers might have in this sphere.

Example One

A self-employed builder does some work for the local authority and submits a bill for the work. Bills are paid weekly through the computer, but because of a card-punching error this one is ommitted. The clerk investigating the 'rejects' should prepare a hand-written cheque to clear the account. However, in viewing the man's record in the data bank to find adequate particulars, he sees the man is late with his payment of rates. He, therefore, puts the matter aside, to deal with some other account that is more deserving. This is an abuse of confidentiality. The dangers of all the particulars about a person being set out in one file are shown.

Example Two

Certain properties are designated by the Medical Officer of Health as unfit. Two alternatives are set before the local authority. If houses are built, the need for shops, transport and schools must be considered. If business development is encouraged a road improvement scheme would be needed. Various background information on the property,

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67. Supra, footnote 64, at pp. 177-178.

its occupiers, owners and the businesses at present carried on would be viewed, as well as surveys on town planning, leisure activities etc. A policy decision is necessary, one which should be based on the most desirable prospect for the environment and the community as a whole.

However, the data bank reveals that the occupiers are awkward people, on welfare, and generally non-co-operative to official visitors. Legal costs and time will be wasted in moving them. The owner of one business on the site is very friendly with his labour M.P. Such factors thus might become available more readily through a data bank. These may be not only an infringement on the privacy of individuals but they might lead to a decision being taken which is not in the best interests of the community.

Presumably the computer will only forewarn the authority of the difficulties ahead — it would discover them anyway in the future, perhaps after unnecessary money had already been spent. Yet, the very availability of the data might lead to an unwarrantedly pessimistic view of the situation being taken, and the wrong course of action being implemented.

Conclusion

It would seem to be reasonable to say that the computer is the thing that will have the greatest impact on our lives in the future. Already, its ability to solve complex mathematical problems in the wink of an eye has enabled a man to be landed on the moon. Its

increased use in business is already apparent.

In local government circles, in Canada, its use is similarly increasing. The City of Winnipeg lists the areas presently covered as being assessment control and tax billing; funded debt control; timekeeping, payroll and accounting operations; water works billing; hydro billings; accident and origin destination studies; library control. Such areas might seem to have little confidential material involved in them. However, anticipated areas of computer service include welfare; planning; pollution and environmental control; police department; fire department; maintenance control; purchasing; personnel. The areas of welfare and personnel, in particular, seem to be very sensitive and controls will obviously be necessary regarding user access.

The important fact to remember, however, is that the computer is only as good as the man who programs it. The computer itself does not make the mistakes it is so often blamed for; it is the person who feeds it its material who is at fault.

> The computer is simply more efficient than man in handling its relatively limited memory, and is never clouded by emotion.[68]

It therefore stands to reason that man is responsible for not only putting data into the computer, but also for retrieving it. He must devise, sometimes with the computer's help, adequate safeguards to

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68. Supra, footnote 64, at p. 45.

protect the information when necessary. The vital point is that the computer must be told to apply safeguards. It will not devise them without man's initiative. It follows that the real duty to protect confidential data rests, as it always has done, with people who are in possession of it, whether through the computer or not.

THE QUESTION OF PRIVILEGE

The protection of confidential information in courts of law is now considered. Common Law only grants a privilege to solicitors and, as has been shown earlier, the only way an accountant can keep information secret is to conduct his business through his client's solicitor. In this way the accountant's advice and the information he receives is seen as connected to the solicitor's work and is thus privileged. It is important to realise, however, that the solicitor and not the accountant has the privilege.

The question that arises is whether the accountant is entitled to a privilege in his own right. In 1968, fifteen States and Puerto Rico had granted a privilege to accountants in North America. Five States had a broad privilege; four of these had only one significant limitation, that the information must have been obtained by the accountant in a confidential capacity, while the fifth only required that the information be learnt whilst the accountant was employed by his client.

The majority of the Statutes contained one or more of the

following limitations:

a) did not apply in bankruptcy or criminal proceedings;

b) only applied when the communication was made to the accountant in the course of his professional employment;

c) the privilege could not be invoked if waived by the client.

Two Statutes contained all these limitations, as well as a third party protection clause which prevented clients or accountants asserting a privilege against members of the public injured through reliance on their advice. The courts construe the Statutes strictly.[69]

The arguments favouring a privilege revolve around the widespread participation of accountants in the intricate affairs of modern business and financial concerns, where they learn much about the affairs and secrets of the businesses involved. It has also been contended that the auditor performs a public function, in which he must examine data relevant to a variety of complex financial, tax and management problems. Access to details of his clients' affairs would often be necessary in order that he might perform his job properly. If clients are not willing to let him view these matters or to disclose their existence, the general public will suffer since the audit will not be sufficiently exact. All relevant materials should be viewed; this would often include those materials that the law does not compel the client to disclose to the auditor.

One might argue in reply to this, that a privilege results in a

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69. "Privileged Communications - Accountants and Accounting" (1968), 66 Mich. L. Rev. 1264.

sacrifice of the public's right to enquire into information which the accountant relied on in preparing the audit. When fraud or negligence is suspected the public would be less willing to rely on the financial statement of the auditor. Yet one can counter this response, by pointing to the inbuilt aversion to fraud assured by the independence which the accountant is bound, by his profession's ethical code, to maintain between himself and his client. Also, most Statutes only prohibit enquiry into information disclosed to the accountant during the audit, not into the actual procedures he employed in conducting the audit.

Against this there is the recommendation of the American Bar Association's Committee on the Improvement of the Law of Evidence in 1937-1938. This was to the effect that the demand for privileges by professions was often due in part to a pride in their organisation and a desire to give it some mark of professional status. Accountants were among three professional groups specifically mentioned as examples of this.

The Yale Law Journal stated in 1962[70] that the American Institute of Certified Public Accountants opposed the granting of a privilege to its members. The reasons given were that they derived much income from tax work, and that it was important that good relations be maintained with the tax authorities. A privilege might

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70. "Functional Overlap between the Lawyer and other Professionals; Its implications for the Privileged Communications Doctrine" (1962), 71 Yale L.J. 1226.

well strain the good relationship that otherwise existed. From a research conducted by the writer among many firms of accountants in Winnipeg a poor response was received. However, one questionnaire that was returned was answered very fully. On the question as to whether the arguments in favour of the granting of a privilege were stronger than those against it the answer was as follows:

> I think that privilege would be practically non-existent in terms of tax practice today, whether applied to a lawyer or accountant, and this of course could be one of the more dangerous fields for privilege for those who wish to counsel tax evasion. At the present time I do not think that there is a compelling argument for or against privilege. At least under the present circumstances I know that any information I have is not privileged.

The areas of borrowings, financing and taxation were the areas in which other accountants thought a privilege was most needed, although the accountant quoted above said he had information at present concerning the negligence of one of his clients, which was likely to affect an insurance claim. He thought a privilege would be useful here.

It is generally conceded that a privilege to refuse to supply information when requested in a court of law should be given only in exceptional circumstances. One must consider several factors, one of which is whether the harm caused through the revelation would be greater than that occasioned by non-revelation. The Common Law has resisted the attempts of many professions,including doctors, to claim a privilege, obviously being of the opinion that the community is

generally better served through a thorough disclosure in court, with any exceptional cases being left to the judge's discretion. The United States has, on the other hand, granted privileges to various professions in many States, which has meant that a more rigid approach is taken by the courts in construing the statutory privilege, and the existence of the privilege has sometimes meant that cases have been unfairly decided.

Of course, any professional man would prefer not to have to reveal confidences given to him by his client. However, in some professions the element of confidence is of vital importance, while in others it is merely important. The accounting profession would seem to fall into the latter category, whilst the fact that accountants are not unanimous in calling for a privilege would seem to suggest it is not that badly needed. One must conclude that the scales come down on the side of no privilege being granted.

C H A P T E R V

THE MEDICAL PROFESSION AND PSYCHOTHERAPY

The importance of the patient having confidence in his doctor has long been established. Both the preventive and curative sides of medicine need this confidence: the latter that the patient may disclose all his symptoms and thus enable the doctor to give a true diagnosis of his ailment, and the former so that the patient will approach the doctor for check-ups and periodic examinations. It is not open to question that any society gains from having healthy members. This chapter will view the medical profession generally and then, in detail, will examine the particular importance attached to confidentiality in the realm of psychotherapy.

(i) The Medical Profession

In most continental European countries, breach of the duty of confidence by a physician is made a criminal offence. There is a rarity of cases concerning such a breach in Common Law countries. However, an early Scottish case shows that a remedy might lie for breach of an implied contractual term of secrecy. In A.B. v. C.D.[1]

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1. (1851), 14 Sess. Cases (Dunlop), 177 (Scot.).

the wife of a kirk elder gave birth to a child, six months after their marriage. The doctor told the minister of the kirk, without the elder's permission, that the child was not premature, and as a result the elder was expelled from the session. Lord Fullerton, in giving judgement, said that an obligation of secrecy did exist out of court, and that, although not absolute, it would yield to the demands of justice. The actual decision concerned only whether certain issues should go to trial and the ultimate result of the action is unknown. Yet, it is interesting to view part of the judgement:[2]

> ...but that a medical man consulted in a matter of delicacy, of which the disclosure may be most injurious to the feelings, and possibly the pecuniary interests of the party consulting, can gratuitously and unnecessarily make it the subject of public communication, without incurring any imputation beyond what is called a breach of honour, and without the liability to a claim of redress in a court of law, is a proposition to which, when thus broadly laid down, I think the Court will hardly given their countenance.

In the Canadian case of Halls v. Mitchell,[3] Duff, J., at page 107 said:

> It is perhaps, not easy to exaggerate the value attached by the community as a whole to the existence of a competently trained and honourable medical profession; and it is just as important that patients, in consulting a physician, shall feel that they may disclose the facts touching their bodily health, without the fear that their confidence may be abused to their disadvantage.

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2. Supra, footnote 1, at p. 180.

3. [1928] 2 D.L.R. 97 (S.C.C.).

Qualifications to the Duty

The case of Halls v. Mitchell, quoted above, was relevant also to the question of when the duty is no longer owed to the patient. The case concerned a man, H., who was injured whilst working, by a blow from a door. He suffered loss of sight, for which he sought compensation from the Workmen's Compensation Board. M. was the doctor employed by the Board, as well as being the personal doctor for the injured man, H. He suspected H.'s loss of sight to be caused by a venereal disease, although H. had never admitted having such a disease to him. To simplify the facts of the case, M., informed the Board of his opinion and H.'s claim was refused. H. sued the doctor for defamation, but much was said about a doctor's duty of confidence in the course of the judgements.

Duff, J., said:[4]

> Prima facie the patient has the rights to require that the secret shall not be divulged; and that right is absolute, unless there is some paramount reason which overrides it. Such reasons may arise, no doubt, from the existence of facts which bring into play overpowering considerations connected with public justice; and there may be cases in which reasons connected with the safety of individuals or the public, physical or moral, would be sufficiently cogent to supersede or qualify the obligations prima facie imposed by the confidential relation.

It would seem to be clear that the duty of confidence is not absolute. For simplicity's sake, the qualifications, as in the

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4. Supra, footnote 3, at p. 105.

professions earlier viewed, will be discussed under:

(i) duty imposed by law to reveal;

(ii) duty outweighed by the duty to the community;

(iii) the doctor's interests require disclosure;

(iv) the patient expressly or impliedly consents to disclosure.

(i) Duty imposed by law to reveal.

England

Under the Health Services and Public Health Act 1968, section 48 there is a duty placed on every medical practitioner to report to his local medical officer of health any patients suffering from any notifiable disease or food poisoning. The practitioner is excused from compliance with the section only if he has reasonable grounds to believe some other practitioner has already notified the authorities of the case in hand.

A provision safeguarding confidentiality in relation to this section exists in the Public Health Regulations.[5] The information is not to be divulged except in so far as it is necessary for compliance with the section, or for the purpose of such action as the medical officer of health considers to be reasonably necessary for the prevention of any spreading of the disease. The certificate or document on which the disease is recorded, or any copy of it,

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5. Public Health (Infectious Diseases) Regs., S.I. 1968/1366 (1968 IV, s.11).

must also be sent in such a way that its contents cannot be read in transmission.

Apart from the provisions regarding infectious diseases the State has no right to ask for information from a doctor about his patient. Criminal abortion, venereal diseases, attempted suicides, or concealed births do not have to be disclosed.[6]

Canada

The Manitoba Public Health Act[7] has similar requirements to the English Act considered above. Section 2(1) of the regulations[8] under the Act requires practitioners to report notifiable diseases, or any other disease that may be dangerous to the public's health, to the medical officer of health of the municipality in which the patient resides or to the director under the Act, if the patient resides in an area in which there is no such officer. However, no provisions for secrecy as exist in the English Act, seem to be included in the Manitoba Act or regulations.

Regulations[9] under the same Act, require a duly qualified medical practitioner, on becoming aware of a person suffering from a venereal disease, to report particulars of the case to the director,

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6. Letter from the British Medical Association, quoting its Membership Handbook.

7. R.S.M. 1970, c.P210, s.34.

8. Man. Reg. 51/70.

9. Man. Reg. 120/68 (1968 II, Div.2, s.44(1)).

or the medical officer of health, in the municipality in which the patient resides. If a person, who has been treated for v.d. at an infectious stage, fails to consult or attend a practitioner for fourteen days from the date of previous treatment, this must also be reported, as above.

The same regulations contain provisions for secrecy.[10] Every person employed in administering them should preserve secrecy regarding all matters coming to his knowledge in the course of such employment. He should not communicate any such matters to any person unless performing his duties under the regulations or upon the written instructions of the Minister.

Ontario has similar provisions, regarding venereal diseases.[11] A safeguard for secrecy required by its Act is that the name of any person infected or suspected to be infected with v.d. shall not appear on any account in connection with the treatment of it. Instead a number shall designate each case, and a duty is placed on the local board of health to ensure that secrecy is preserved.[12]

Quebec's Act similarly has a secrecy provision, but attaches to it a clause to the effect that any physician transmitting information as required by the Act, or who, when it is necessary to

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10. Man. Reg. 120/68 (1968 II, Div.2, s.49).

11. V.D. Prevention Act, R.S.O. 1970, c.479, s.3, as amended S.O.1971, c.33, s.2.

12. Ibid., s.18(2).

prevent contagion and it is in the interests of justice, deems it his duty to warn people exposed to the contagion of v.d., is not, and shall not, be bound to preserve professional secrecy.[13] This raises the question of the doctor's duty to his patient, as against his duty to the public, to be discussed below.

An interesting provision concerns Manitoba's Highway Traffic Act, 1971.[14] It is made obligatory for any doctor who discovers that one of his patients is suffering from a condition that would make it dangerous for that person to operate a motor vehicle, to report this fact to the registrar.

This, as the Quebec Act, above, is a case of the public interest being deemed by the legislature to outweigh the individual patient's interests in having his confidences kept secret. One is concerned, however, that such a duty be placed on doctors, regarding matters unconnected to health. It would seem that the Manitoba legislature have fallen into the trap of not weighing up interests of the same type. They have considered the public interest in the safety of other drivers, through the prevention of unfit drivers being allowed to drive, as against the private interest of the individual patient concerned not having his confidences betrayed. What should have been

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13. Venereal Diseases Act, R.S.Q. 1964, c.168, s.12.

14. S.M. 1970, c.70, s.150.1(1), as amended by S.M. 1971, c.71, s.77(a).

considered was the public interest as stated above, as weighed against the similarly public interest in patients having confidence generally in their doctors. The scales seem to be weighted, if one views the matter in this way, against such a statutory provision being invoked. One may point to Pound's statement that:[15]

> When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest, we may decide the question in advance in our very way of putting it...

In contrast, the other statutory regulations, requiring notification, would seem to be justifiable in the public interest. One might also note that several U.S. states required a doctor to report gunshot wounds and suspected cases of child abuse. One must evaluate the justification for these measures by acceding to Pound's criteria. They would seem to fit it and disclosure would seem to be justified. The use of numbers, as used in Ontario, is a welcome addition to the safeguarding of professional secrecy. The safeguard to individual privacy which this provision supplies, seems to show a more whole-hearted attempt to preserve confidentiality, than a mere direction for non-disclosure does.

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15. R. Pound, "Survey of Social Interests" (1943), 57 Harv. L. Rev. 1, at p. 2.

(ii) Duty to the community outweighs duty of confidence.

It is again necessary to reiterate that the professional duty of confidence carries with it a grave obligation. It should only be broken in extreme circumstances: such that usually there is at least a moral duty, as opposed to an ability, to reveal. Thus one could classify the statutes calling for revelation to the authorities of infectious diseases under this heading.

Similarly there is sometimes a duty placed on a doctor to report the fact that he has treated a criminal for injuries. In an American case, a physician was imprisoned for failing to make such disclosure to the police after he had treated Dillinger, the Public Enemy No. 1, for gunshot wounds.[16] A case was recently reported[17] of two American medical journals printing "wanted" notices soliciting doctors' help in catching a suspect, who was afflicted by acne, which was likely to cause her to seek medical treatment. The F.B.I. and American Medical Association both insisted that medical journals have been so used in the past and would be in the future. The secretary of the A.M.A.'s judicial council is reported to have said:[18]

> Doctors have a civic responsibility and it is a decision that the individual doctor has to make as to whether or not he is to call the law.

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16. Z. Chaffee, Jr., "Privileged Communications: Is Justice served or obstructed by closing the Doctor's mouth on the witness stand" (1942-1943), 52 Yale L.J. 607, at p. 615, footnote 39.

17. Time, March 13th, 1972, 85.

18. Ibid.

The question was raised, however, of what would happen if the criminal had a heart condition, and was thus deterred from seeking a doctor's attention.

The justification for a doctor reporting anything to the authorities must lie in the fact that the illness or person he is reporting constitutes a serious present and future menace to the community. The fact that a criminal is involved should not make for disclosure if, for example, the doctor was sure that he would do, or had given up, his bad ways and no longer constituted a threat. It is submitted that when he views the occasion at hand in this light, the individual doctor's problem will be less difficult to solve.

A doctor might be faced with a dilemna which has nothing to do with the law, but is purely a moral one. One might borrow the example of a signalman, who suffers from epilepsy.[19] This ailment might result in him failing to throw a switch and thus cause a train to crash, jeopardizing the lives of many people. The doctor, in such a case should entreat the signalman to inform his employers of his condition. If he refuses, the doctor would be obliged to inform the proper authorities, if revelation was the only means by which the doctor could avert the threatened harm. One might remember here, Denning, L.J.'s, judgement in Initial Services Ltd. v. Putterill,[20]

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19. See D.R. Welles, Jr., "Volare Inviolable - The Ethical Paradox of the Confessional Seal" (1966-1967), 17 Past. Psychol. 22.

20. [1968] 1 Q.B. 396.

where he stressed that disclosure should only be to the proper persons.

Similarly when an innocent third party is threatened by harm to be caused by the patient, the doctor should morally make no revelation unless the situation is sufficiently grave. One might consider the case of a prospective groom who is afflicted with syphilis, of which his bride-to-be is in ignorance. What should the groom's doctor do in such a situation? He should order the groom to postpone the marriage until he can reveal his condition to the girl. If the groom refuses he should threaten to tell her himself. If this produces no effect, then the doctor would morally be obliged to inform the girl. Yet disclosure should be made privately, and suggestions that both parties should undergo a check-up might spare the need for outright disclosure of the groom's condition. Indirect action should always be preferred to outright disclosure. If no results seem forthcoming the girl must be told the actual facts about her prospective husband. However, there would be no justification normally for a disclosure to the girl's parents, unless she was a minor. In cases where the doctor would be allowed to reveal it would be because his patient had forfeited his right to secrecy by becoming an unjust aggressor.

(iii) The doctor's interests require disclosure.

If he were being sued for negligence or breach of contract then a justification would exist for revelation to the proper persons of facts about his patient. The British Medical Association, however, does not seem to consider such an occasion:[21]

> The complications of modern life sometimes create difficulties for the doctor in the application of the principle [of confidentiality], and on certain occasions it may be necessary to acquiesce in some modification. Always, however, the overriding consideration must be the adoption of a line of conduct that will benefit the patient, or protect his interests.

The opinion of doctors,regarding their duty of confidence, is that it is an onerous duty, and they would be reluctant to break it unless circumstances clearly established this to be necessary. Such a view is not open to attack, but one wonders whether it is or should be always acceded to in practice. Justification for disclosure should exist when the doctor sues or is being sued.

(iv) Implied or express consent.

In the area of consent, problems have occurred where minors are concerned. A case in England in 1971 concerned the divulgence, by a General Practitioner in Birmingham, to the father of a sixteen year old girl,of the fact that she was taking contraceptive pills. The

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21. Letter from the B.M.A., quoting its membership handbook.

doctor was brought before the General Medical Council for breaching his duty of confidence. In the circumstances he was absolved, but the case caused much publicity and generally left dark clouds in the air. The B.M.A. considered the matter of consent generally at a meeting later that year. It discussed this case, and whether the disclosure would be justified when it was necessary for the patient's moral and emotional health. They were not in favour of leaving much discretion in the hands of individual doctors and stated that generally consent should first be sought, and if refused, the patient's decision should be respected.[22] It would seem that in a case similar to the one quoted above, where a minor is involved, the doctor could at least advise the girl not to engage in illicit sex. If he has no success, merely refusing to supply contraceptives might mean that the girl has an illegitimate baby in the future. In matters of such a serious nature, it would seem that in the last resort the doctor, for his patient's own good, ought to, indirectly at least, warn the girl's parents of the trouble she might get into.

The Question of Privilege

It is not disputed that at Common Law no privilege exists for the doctor when placed on the witness stand. Perhaps the most famous case

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22. The Times, July 22nd, 1971.

in which professional privileges were discussed was that of the Duchess of Kingston. Lord Mansfield is reported as saying:[23]

> If a surgeon was voluntarily to reveal these facts [i.e. whether the parties to the case were de facto married] he would be guilty of a breach of honour, and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any discretion whatever.

This quotation has been followed in all later cases on the subject in England. In R. v. Gibbons[24] a woman was indicted for the murder of her illegitimate child. She confessed to her doctor. He pleaded privilege when called to testify in court, yet none was seen. However, the seriousness of the charge could not have aided the doctor's claim. The woman, however, was acquitted on other grounds.

In Kitson v. Playfair,[25] the action concerned libel, so cannot be regarded as very strong authority on the matter of privilege. Lord Brampton, then Hawkins, J., said that he was against any duty being placed on a doctor to report anything to the public prosecutor, but he thought it must be left to the judge's discretion in every case as to whether he would punish a doctor who failed to answer questions in court.

The case of Garner v. Garner[26] was more precise in its attitude

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23. (1776), 20 Howell's St. Tr. 355, 11 St. Tr. 243.

24. (1823), 1 C. & P. 97, 171 E.R. 1117 (Assizes).

25. (1896), Times, March 28th.

26. (1920), 36 T.L.R. 196.

towards privilege. By statute all information about any person who was treated under the national scheme for controlling the spread of v.d. was treated as confidential, and absolute secrecy was imposed on any doctors involved. Cruelty was alleged in a divorce action, where it was claimed that v.d. had been communicated by one spouse to the other. The doctor pleaded privilege when asked whether he had treated the "guilty" party. McCardie, J., said that in courts of law even higher considerations prevailed than those to which medical men were normally subjected. Thus the doctor gave evidence.

One might point to the case of Witt v. Witt as establishing a privilege, but when studied, one sees that this case was decided on the misapplication of a rule distinct from those relevant to privilege. It was held that statements in writing to a medical man by his patient, describing symptoms of his illness, were not admissible in evidence. The decision must be wrong since it appears to draw a line between written communications, which the judge thought were privileged, and oral statements which he thought were not. For instance, it seems unfair that a deaf and dumb person communicating to his doctor by signs and writing should gain the benefit of privilege while a similar verbal description would have had to be disclosed in court.[27]

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27. (1862), 3 Sw. & Tr. 143, 164 E.R. 1228 (P.D.A.). See G.D. Nokes, "Professional Privilege" (1950), 66 L.Q.R. 88, at p. 91.

A form of privilege has been granted in that medical records have sometimes been refused production in court under the wider privilege attaching to documents which a Minister has decided ought to remain secret on grounds of public policy. Cases which deal with this area[28] are very much dependant on their own facts and thus decisions are seemingly conflicting. The matter has been recently dealth with by the courts in Conway v. Rimmer,[29] where it was held that the Minister's decision is now subject to review by the court. One cannot regard these cases as relevant to the doctor-patient privilege itself. They are concerned with a different area of privilege.

The United States privilege statutes and some criticisms.

Having seen that no privilege has been recognised in England, and thus none in Canada, apart from Quebec,[30] one turns briefly to view the United States where well over half the states have enacted a privilege for physicians. The first to do so was New York in

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28. Anthony v. Anthony (1919), 35 T.L.R. 559 (P.D.A.).
Lilley v. Pettitt,[1946] K.B. 401.
Andrews v. Cordiner, [1947] K.B. 655.
Gleen v. Gleen (1900), 17 T.L.R. 62 (P.D.A.).
Att. Gen. v. Nottingham (1904), 20 T.L.R. 257 (Ch. D.).

29. [1968] A.C. 910, [1968] 1 All E.R. 874 (H.L.).

30. R.S.Q. 1964, c.249, s.60.

1828.[31] The reason for the statutes is explained by DeWitt as being that if the doctor was forced to reveal confidences in court, the patient would suffer "untold anguish and torment rather than divulge facts inexorably held secret" and would be deterred from visiting his doctor.[32] The fact that physicians wanted a status equal to lawyers also had some bearing on the matter.

The Statutes vary in their scope i.e. whether nurses, assistants, stenographers etc. are covered, whether civil and criminal cases are covered etc., but one might generalise the position by saying that to be privileged the communication must have been:

1) made in confidence;
2) made to a licensed physician or surgeon;
3) necessarily or reasonably believed to have been communicated in order that the doctor might diagnose, advise or treat the patient;
4) in the course of the physician-patient relationship.

Although the statutory privilege is so common in the United States much criticism has been directed at it. Although the Model Code of Evidence still retains the physician-patient privilege, the Uniform Code of Evidence merely includes it in brackets. The significance of this is that its use is not encouraged, but if a

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31. C. DeWitt, Privileged Communications between Physician and Patient (Springfield, Illinois: Thomas, 1958), at p. 15.

32. Ibid., at p. 24.

state wishes to enact such a statute, the model is given.

Z. Chaffee is one of the leading writers on the subject. In one article[33] he questioned the effect privilege had, pointing to the fact that people would still visit the doctor, were there no privilege. Hammelmann, however, was in favour of the privilege.[34] He pointed out that medicine being a science, doctors require many details to be given before a diagnosis can be made. He goes on:[35]

> If it can be taken as axiomatic that unreserved communication is a condition sine qua non of successful medical treatment, complete assurance that there is no danger of unauthorised revelations is not only in the interest of the patient, but also of vital importance to the doctor and a safeguard of public health.

DeWitt, however, gives a comprehensive list of arguments against the privilege.[36] The patient often is ignorant of the existence or non-existence of a privilege when he visits his doctor. Most patients, moreover, like the world to know what is wrong with them, so long as it is not a loathsome disease that is in question. In such a case the patient fears, more than revelation in court, disclosure to his friends, a situation which the statute does not deal with. The public health system in England shows no signs of collapse through lack of a privilege, since people still visit their

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33. Supra, footnote 16.

34. H. Hammelmann, "Professional Privilege - A Comparative Study" (1950), 28 Can. B. Rev. 750.

35. Ibid., at p. 753.

36. Supra, footnote 31, at pp. 31-39.

doctors. However, the main argument against the privilege is probably that it is used so often as a sword when it was intended to be a shield. By far the majority of cases in which it is invoked concern insurance claims based on bodily injuries, ordinary personal injuries cases, or the capacity of a testator whilst making his will. In these instances, relevant and material evidence is excluded because of the privilege. A few states have decreed that in these actions waiver is to be seen, but in the majority the wording of the statutes is strictly construed and the evidence of the doctor is excluded. The wording of many statutes has also led to nurses and assistants being allowed to give evidence, when the doctor could not. The rigidity a statute brings to the law is one argument for the matter being left to the judge's discretion, where some element of flexibility is achieved. The danger here, however, is that the lack of any substantial privilege leads to one rarely being effected. Some form of authority would seem to be needed.

The Representative Body of the British Medical Association stated in 1971:[37]

> That this Meeting deplores the widespread misuse of the subpoena procedure concerning doctors, and requests Council to negotiate with the Bar Council to minimize the use of this procedure whenever the medical profession is involved.

It appears,however, that despite their concern the Association

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37. Letter from B.M.A. to the writer.

does not see the answer as being the granting of a statutory privilege. Indeed it would seem that it is best to leave a discretion in the judge as to when a privilege is justified in being granted. Since the interests of justice must be a prime consideration in any question regarding privilege, the chances of its abuse must be minimised. A discretionary privilege serves this purpose. Although a doctor should always preserve the confidences of his patients, he should not be granted an absolute privilege, since generally patients do not reveal intimate facts about themselves when attending for treatment. There is a strong argument, however, that because confidence are imparted to him on many occasions, this discretion should be supported by some sort of statutory enactment.

(ii) Psychotherapy

Having viewed the medical profession generally, it is now proposed to examine one particular aspect of it in more detail, where confidentiality is more necessary than in most other areas. It is hoped that the previous section has provided a background for this one on psychotherapy.

The Importance of Confidentiality in Psychiatry

The psychiatrist is medically trained, but instead of attending to physical ailments he is concerned with mental illness. The ordinary physician may not always need to have the confidence of his patient in order to treat him, but there is no doubt that the psychiatrist does. His method of diagnosis and treatment is to get the patient to reveal to him verbally what is wrong with him. It is obvious that in order for this to be possible the patient must be able to converse freely, usually about himself. In order for anything to be achieved the patient must see the psychiatrist as a friend, a helper and, above all, as a person that he can trust.

The prime difficulty in achieving such a relationship is the fact that the mentally ill or disturbed often feel that their lives are scored by betrayals. It would be grave, indeed, if the psychiatrist turned out to be a traitor. Freud is supposed to have said that the whole undertaking becomes a lost labour if a single concession is made to secrecy. Yet it is no easy task to gain the confidence of a disturbed patient, and even when the psychiatrist might have appeared to be breaking through, the element of distrust is probably still there. An example of a real-life situation will illustrate the point. An indian boy, who had been classified by the police as an habitual car thief, was introduced to a psychiatrist for treatment. At first nothing could be drawn from him. He merely mumbled in answer to questions and seemed totally disinterested.

After several sessions with him, the psychiatrist managed to get some sort of relationship established between the boy and himself. It is only when this is achieved that any sort of treatment can begin. Yet shortly after this the patient arrived for his session drunk, and was sick all over the psychiatrist's waiting-room. This was explained as being a means the boy had devised of testing the psychiatrist to see if he really was a friend. Not satisfied, despite the psychiatrist's persistently understanding attitude, the patient phoned him in the early hours of the morning saying he had nowhere to stay. He was probably surprised at the offer he received of a bed for the night. The boy has seemingly benefited from his treatment since he is now training to be a janitor and has managed to avoid trouble with the police for a year or so. Yet, without getting his confidence the psychiatrist could not have helped him.[38]

The United States case of Taylor v. U.S.[39] also explains the situation:

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotheraphy know that this is what will be expected of them, and that they cannot get help except on that condition...

One might get some idea of the type of relationship which needs to be established from the fact that one woman patient is reported

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38. Interview with Dr. P. Katz, a Winnipeg psychiatrist.

39. 222 F.2d 398, at p. 401 (D.C. Cir. 1955).

to have always greeted her psychiatrist as "my little fat friend" and that a preacher's wife found it helpful to discuss fecal matter with her psychiatrist.[40]

The Psychologist

It is of value to consider the difference between psychiatry and psychology at this point, since most of what has and will be said about the psychiatrist, would apply also to the clinical psychologist. The psychiatrist is a doctor, trained in medicine and able to administer drugs to treat his patients if necessary. The psychologist, however, is not medically trained, but is concerned with the mind in its behavioural aspect.[41] He often uses special tests in his work, getting people to answer sets of questions, re-arrange shapes etc. It takes much experience to know which test is most suitable for which type of client and to be able to read results into the answers given. Some must be ignored, as inconsistent with the main findings, others emphasised. Each psychologist usually has his favourite tests, which he finds the most helpful to him.[42]

He is involved with the measurement, prediction, and control of human behaviour; thus he might be found assisting the personnel officer in a large firm, who has to decide which men are suitable

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40. R.Slovenko, Psychotherapy, Confidentiality, and Privileged Communication (Springfield,Illinois: Thomas,1966), at p. 41.

41. D.Louisell, "The Psychologist in Today's Legal World, Part 2" (1957), 41 Minn.L. Rev. 731.

42. Interview with Mr. B. Jacob, Winnipeg psychologist.

to be placed before the Board of a company for a top managerial position. He might be found working with children to see why certain of them are not progressing at school as they should. Indeed, he can be found in many fields but his sphere of activity can be split up into three areas: he performs either as an industrial, an educational, or a clinical psychologist.[43]

Confidence is not as important in some areas in which the psychologist works, as it is in others. When he works in collaboration with psychiatrists and social workers, his function will require that he gain his patient's confidence. When he tries to reason out why people voted a certain way in an election, confidentiality is hardly of major importance. It is when the psychologist is working as a marriage guidance counsellor, a school counsellor, a probation officer, or with psychiatrists and social workers as part of a team, that we are concerned with here. In such situations it is necessary that the psychologist gain his patient's confidence, in order that he can be of any service to him.

Some Complications affecting Confidentiality

The comparative shortage of psychiatrists, the increasing number of people requiring treatment, and the general effectiveness of it as a method of treatment, have meant that group therapy is a

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43. R.G. Fox, "Professional Confidences and the Psychologist" (1968), 3 U. Tasm. L. Rev. 12.

common occurrence today. The psychiatrist is merely one of the group whose members discuss their problems and find their remedies, though, of course, he will direct the way the session goes. Confidence is important here, perhaps more so, in that each patient must have confidence not only in his psychiatrist but also in the other patients with him. Yet, on the other hand, a less complete revelation might be made than on a one-to-one, psychiatrist-patient basis.

A similar problem arises in child therapy, where the co-operation of the patient's parents is usually needed. In such cases there can be no breach of confidence. In some instances, however, the parents might be responsible for the child's predicament. Many U.S. states now make it the doctor's statutory responsibility to report cases of suspected physical abuse of children. Yet mental abuse can be even more harmful, though it would be difficult to convince a judge of the injury, because of its intangible nature. In such a case removal from his home would be the child's best remedy and a social worker might be contacted if this were so. The psychiatrist here would be justified in making the necessary disclosures.

With minors attending school or university, however, a complication arises. They might not wish their parents to know of the fact that they are receiving treatment. In order that any help can be given, the confidence of the 'child' must be maintained. It would seem that if there was a requirement that parents be notified that treatment was being administered the benefit of the service

being given to the child would be lost.[44] Factors such as the age of the child, the seriousness of his disturbance, and the effect home conditions are having on his condition ought to be considered, it would seem, but unless weighty reasons can be put forward, the child in this type of situation would generally benefit more from having his confidences respected. The American Psychiatric Society says:[45]

> Legally and ethically, permission of a parent is required before information about a minor is provided to another interested agency or individual. However, this does not include divulging details about the youth's problems to the parents - a practice that can be detrimental to the young person.

The director of Harvard University Health Services, Dr. Dana L. Farnsworth, is quoted as saying that no information gained in confidence from the student should be divulged without his permission. Psychiatric records should be kept separate from other medical records and should not be used for screening purposes for admissions committees of colleges or graduate schools, nor should they be available to security investigators. The Society adds that information should only be divulged if pertinent to the student's academic and social performance. Personal data, dynamic mechanisms,

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44. Supra, footnote 40, at p. 72.

45. American Psychiatric Association, "Official Actions: Position Statement on Guidelines for Psychiatrists: Problems in Confidentiality" (April, 1970), 1543, at p. 1546.

unconscious strivings, and the content of interpretations should be excluded.[46] It should be emphasised that even for this limited information to be revealed, the patient's consent should be obtained.

Yet another problem is that more and more today importance is being placed on the combined treatment of a patient. His troubles may be psychiatric, but their roots are often to be found in social conditions. Co-operation between psychiatrist, and social worker and psychologist can solve the problem more effectively than if each treated the problem separately. Winnipeg's Child Guidance Clinic is one of the foremost institutions of its kind in North America, and co-operation between the above professionals is a foremost feature. It seems that if there is any vertical standing between these experts, the psychiatrist is at the top, followed by the psychologist and social worker respectively, yet more and more the importance of each worker as related to his associates is being seen on a horizontal plane.[47]

For this form of treatment to work, the members of each group of professionals should obviously be able to converse freely about their patients within the group. The patient would usually consent to anything that was likely to help him, or if he is incapable of doing so, his closest relative could do this. If neither form of

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46. Supra, footnote 45.

47. Supra, footnote 41.

consent is forthcoming, it seems that a breach of confidence would be occasioned, should communications be made with other professionals. However, one might say that by applying for treatment the patient, as he would have to in a hospital, must expect various experts to handle the different facets of his case. In all cases though, unnecessary disclosure should be avoided, and in no cases should confidential material be revealed outside the members of the group engaged on the case. The only exception to this would be if a superior's advice was needed, and even then names and irrelevant facts could be omitted from the discussion.

A problem that is increasing in stature in North America especially, but also to some extent in England, concerns business firms and labour unions showing increased concern in the mental health of their employees and members. Psychiatric benefits are included in health insurance policies set up by these groups. Management will sometimes advise that an employee's position "be he craftsman or vice-president"[48] is contingent on his seeking psychiatric treatment. Numbers of individuals might be aware of the patient's receiving treatment, such as superiors, the personnel department, the health department, union administrators. The psychiatrist should be careful to protect the confidentiality of his patient despite the probably good intentions of these people.

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48. Supra, footnote 45.

Any information that must be disclosed to the organization should be told to the patient beforehand, and its confidential nature should be emphasised to the recipient.

In conclusion, it must be noted that where disclosure is justifiable, it is the patient's best interests that always demand this. His consent should be gained before revelation is made, unless this is, for some reason, impossible.

Possible Results Attaching to Revelation

The psychiatrist, once he establishes a relationship of confidence, with his patient, is told many things, that if revealed might have disastrous consequences for the patient.

As Slovenko says, there are hidden skeletons in most homes and they often take on scandalous proportions when revealed publicly. Fault liability still exists, to some extent at least, in divorce despite the Divorce Reform Act of 1969, in England. Yet the psychiatrist's function is not to attribute blame. The law and the public generally give no consideration to the "neurotic interactions and mutual provocation" that take place and to the fact that changes in a patient invariably produce problems for those nearest to him. Psychiatrists, however, have emphasised the need for both spouses to be involved in the treatment of one of them, so that the other's behaviour can be understood. They want to find out attitudes and

events in order to attribute causes to them.[49] One might say that his prime concern is to save the marriage, while the divorce petitioner wants to break it up. The psychiatrist can only perform and render help by gaining the utmost confidence of his patient. The petitioner for divorce should not be able to take advantage of him and his profession and be able to subpoena him to give evidence in court. His function in society is opposite to that at present being carried out by the court: his position demands that confidence be maintained. However, if it is not, his value in such proceedings is obvious.

The psychiatrist would also have vital evidence to give in many child custody cases regarding the fitness or otherwise of a parent to have a child. In such a case there is an argument, at least, that it is in the public interest that the child be given the best possible circumstances in which to grow up and therefore relevation should be justified.

In cases where wills were contested, the psychiatrist would often be able to give his impression about the capacity of a testator . It should be noted however that the duty of confidence, and especially that relating to professional confidences, exceeds the lifespan of the person making the original disclosure.

Again, in life, accident, or other types of insurance policies

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49. Supra, footnote 40, at p. 102.

the truthfulness of any representations made would be open to verification or otherwise through a psychiatrist breaching his duty of confidence.

These instances mentioned above are merely examples of cases in which the psychiatrist's revealing of confidential information might have a detrimental effect on his patient or his patient's wishes. It should be remembered, though, that in psychotherapy the material revealed often has no relation to the outer world of reality. Slovenko gives, as an example, Freud's case of the boy who imagined being beaten, but in fact, never had been.[50] One thing is certain to result from any breach of confidence - the psychiatrist involved will lose the trust of the patient concerned and the reputation of psychiatry in his eyes, and in those of the people he relates his misfortune to, will sink to great depths. It only takes a few such instances before public mistrust sets in. When this happens psychiatrists will cease to be able to function effectively. If one is of the opinion that medicine generally is an asset to society, one cannot but conclude that society will suffer as a result.

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50. Supra, footnote 40, at p. 51, footnote 10.

The Main Problem Today

The American Psychiatric Association in a paper on confidentiality[51] states that:[52]

> It is offered at this time because threats to the confidentiality of the physician-patient relationship in modern society are not abating; they are increasing and must be thwarted.

In the United States, at least, government agencies have been encroaching upon the individual's right to confidentiality in the past few years. The F.B.I., C.I.A., intelligence divisions of the armed services, legislative committees, state and local police are given as some examples in the above-mentioned paper.[53] The patient of the psychiatrist might be seeking a permit or license (from pilot to pistol), or he might be a candidate for a position of a sensitive nature. Security measures might demand that he be checked on. The paper states:

> The contents of psychiatric records may not be divulged to the mental health department of another state without the written permission of the patient. It is unethical to provide any information about a patient to a state department of motor vehicles unless required by statute. Under the latter circumstances the patient should be so informed.

It is noticable that the Manitoba Highways Traffic Act, 1971, section 150(1) makes it obligatory on a doctor to do this otherwise

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51. Supra, footnote 45.

52. Ibid., at p. 1543.

53. Ibid., at p. 1545.

"unethical" thing.

It seems to be stretching the "protecting the welfare of the community" argument to include every such inquiry mentioned above within it.

The American Psychiatric Association paper paints a rosy picture of the precautions that will be taken to protect confidential records in the data bank society. It says that only authorised personnel from the state feeding data into the bank will be able to withdraw information on individual patients. Other states will only be able to retrieve statistics and characteristics of patients, without any identification. Coded devices will be used, which will mean that machines will 'blow' if there is any illegal attempt to retrieve information.It concludes that...[54]

> ...this is infinitely stronger protection than presently exists where records are typed by personnel and stored in ordinary hospital files (locked, one hopes).

Paul Baran,[55] however, is not so enthusiastic, describing computers as both middlemen and servants. He wonders whether the computer will develop as did the social security number. When introduced over thirty years ago there was an assurance that it would never be used for any purpose other than identifying a person's social security record. People were then worried about being

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54. Supra, footnote 45, at p. 1547.

55. Paul Baran, "Remarks on the Question of Privacy raised by the Automation of Mental Health Records", Address to American Orthopsychiatric Association Workshop on 'The Invasion of Privacy' (Santa Monica, California: The Rand Corp., 1967).

branded with numbers. Today in the United States it is rare, he says, for any personal record form, from a credit bureau's to one of the Inland Revenue, that does not ask for one's social security number. He concludes that...

> ...as time moves on, original intent becomes modified for new needs in the name of efficiency.

He wonders whether the safeguards now promised to protect privacy in the computer field, will suffer a like fate. His ideas are supported by a report in the Times recently[56] which said that modern computer systems are so bad that"it was a truism that at least 70 per cent of computer installations were not successful". The president of the British Computer Society was reported as saying that we do not yet have the programming ability to ensure reliability as good as that of the telephone system. It was admitted that most faults were attributable to human error in programming, but it was said that no commonly accepted safeguards to protect the public welfare existed at present, and there was no independent audit of the system.

Baran summarises the expected major changes in the next ten or twenty years, to exemplify the problems facing society. First, there will be a rapid expansion in time-shared computer file systems. Central computers will feed many remotely connected typewriter consoles. Information stored in the computer would be retrievable in

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56. The Times, Friday November 20th, 1970.

any manner wished and able to be combined with other data. Better access and lower costs than present manual work results in will be achieved. Secondly, computation and storage services will be supplied as a utility like electricity is at present. He says that there are no adequate safeguards at present for protecting highly sensitive information. Thirdly, the utility principle, based on buying computer time, will mean economic pressures will call for centralised information systems - not separate ones as are needed for psychiatric records. Fourthly, communications with the computer will often be by telephone. The dangers of wiretapping are obvious.

Apart from the above, changes can also be expected in medical circles, generally. The increased mobility of people; the growth of pre-paid medical insurance schemes in North America; the involvement of firms in this area, insuring their employees as fringe benefits; the government entering into the medical field (as it already has in England); and the use of records for research purposes, will mean that computers make things much easier than manual records would. Insurance schemes, moreover, mean that details of illness, treatment etc. must be sent to the insurance company. Where a firm is involved (Baran's example is of his own firm, Rand Corporation) these records are kept by the firm, not the insurance company. The individual often has no choice but to accept the free medical service when it is offered. Baran addresses the Association thus:

Your records are merely some of the vast sets of

> records which could describe an individual to his possible disadvantage - a form of unwritten self-incrimination.

One can see the benefits that computerisation of medical records will bring in cost and efficiency, and the great help it will bring to research. However, the American Psychiatric Association's view, quoted earlier, does seem to ignore the fact that dangers do exist in such a system. The perils of computers may be somewhat open to exaggeration in this field, however. It seems that most psychiatrists keep their records very much to themselves as far as confidential matters divulged by the patient are concerned. The type of record that will be stored by the computer would usually consist of factual information like name, age, and address as well as a brief account of what the diagnosis of the patient's condition would be and the type of treatment advised. Personal facts which led the psychiatrist to his conclusion are at present either kept in code, so that only he, not even his secretary, can read them,[57] or kept locked up in his office for his own personal use only (again not even his secretary sees them),[58] or hardly kept at all, only in his head.[59] If one is looking for a classification of confidential information one might say that facts divulged by the patient about himself, his personal habits etc. are 'extra-confidential'. The computer will have little to do with this type of data, it seems. The psychiatrist's diagnosis and advised

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57. Dr. P. Katz (Psychiatrist), in an interview with the writer.

58. Dr. M. Prosen (Psychiatrist), in an interview with the writer.

59. Mr. B. Jacob (Psychologist), in an interview with the writer.

treatment would be liable to be stored in the computer and should be classified as 'confidential'. Obviously it is important that this information be kept secret, since the mere fact that a person is receiving psychiatric treatment is a confidential matter. The writer here is merely attempting to paint a true picture of what type of information is likely to be endangered in the future - not to say that any less stringent protection should be given to the latter type of data than is given to the former by the practitioners themselves.

When the Duty is Outweighed by Another Interest

The reader is referred to the corresponding section in the general medical part of this chapter.[60] Examples and additional points relevant only to psychiatry, will be mentioned here. Thus, the duty imposed by statute to reveal, will not be considered.

The American Psychiatric Association paper on confidentiality states:[61]

> ...it is desirable where possible to obtain the authorisation of the appropriate person such as the next of kin, legal guardian, legal counsel, or by order of the court. It may be necessary, and is ethically correct, for the psychiatrist to take action without such authorisation in order to protect the patient and others by preventing the patient from carrying out a criminal act. An example of

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60. Supra, at pp. 167-177.

61. Supra, footnote 45, at p. 1545.

> such action is emergency detention of the patient in a hospital under proper statutory authorisation such as an "emergency" or a "temporary" certificate.

It is noticable that the obligation to inform the police is not mentioned. This would seem to be because such action should only be used in extreme cases, or where statute imposes an obligation to do this, which will only occur where a crime has already heen committed. Generally the law imposes no obligation on anyone to inform on a criminal, and so long as one does not actively assist him, one commits no offence.

Thus, the main type of situation to be considered here is the crime which the psychiatrist discovers is about to be committed. The matter perhaps takes on a different light when one considers that therapy demands that a person refrain from his wrongful actions and can only be effective if the patient does this. Its aim is to help the patient, yet the latter must also try to help himself. Slovenko makes the point that generally the patient in therapy is not anti-social or unable to pursue lawful goals. The criminal's conscience sets few limits on his behaviour, whereas the patient in therapy usually has a strict conscience. Yet should a criminal be seeking help, Karl Menninger is quoted as only being willing to treat a man while he ceased his wrongful activities. It is not the activity that the psychiatrist is trying to stop, so much as the temptation to do it.[62] Dr. Katz gave the example of a boy who intended to murder his mother,

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62. Supra, footnote 40, at p. 123.

and told how a psychiatrist should deal with such a case. He has two alternatives: he can either put the boy in a mental institution or he can try to talk the boy out of fulfilling his intention. It is the psychiatrist's decision, and one which he must take by weighing up whether the threat is likely to be carried out in the near future or at a later date. Much heart-searching and thought would be involved. It might seem that the mother's life is unnecessarily being jeopardized, should the psychiatrist adopt the latter course and try to talk the boy out of it. Yet does society benefit more from a boy being placed indefinitely in a mental institution than it does from a potential criminal being shown the unreasonableness of his proposed actions?

Another person interviewed saw the matter from the side of where a crime had already been committed and was likely to recur in the future. He compared the occasional smoking of marijuana to the 'pushing' of it. He would always view the matter from his patient's point of view and would in the former case only be concerned with him getting caught. In the latter case 'directive' therapy would be tried, where the psychiatrist would tell the 'pusher' to cease his activities in this field.

Another view presented was that different measures should be adopted according to whether the crime committed was serious, such as murder, or insignificant, such as shoplifting. Again, the possibility of the crime being repeated would affect the decision taken by the

psychiatrist.[63]

Some Canadian lawyers discussed this problem generally some years ago.[64] Mr. Robinette, Q.C., was of the opinion that in the case of a paranoid (who is likely to commit further violent acts) the practitioner involved should, if possible, get the patient admitted immediately to a mental institution, but if this was not possible, he should inform the police of the situation. The justification for this course of action would be that a danger to the community was present, and was not likely to be avoided by the practitioner talking to the patient. Referring back to Dr. Katz's example, one can distinguish this case as containing an imminent threat as opposed to a latent one.

Where the Psychiatrist's Interests Require Disclosure.

An example of this situation would be where the psychiatrist has not received payment for his services from the patient. He obviously faces a dilemna since his confidential relationship with the latter might well be shattered if he presses for payment. The G.A.P. report[65] recognised this, and wondered whether the bringing of an action would not be a breach of confidence, since the patient has a right to secrecy, even as regards the fact that he has received

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63. Interviews with psychotherapists (identities withheld).

64. "Problems in Litigation", (1953) Can. Bar Rev. 503, at p. 535.

65. Group for Advancement of Psychiatry, Report No.45 (1960), 105.

treatment. A similar point might be made concerning the psychiatrist handing his debt collecting over to an agency set up for this purpose. Sensibly, however, the law would appear to allow a practitioner to sue for his services without breaching a confidence unlawfully. Two United States cases illustrate this. In Patton v. Jacobs[66] a doctor was held to be able to employ a collection agency to obtain his bad debts for him, without infringing his patient's right to privacy. Recently, in Yoder v. Smith[67] it was held that a debtor's right of privacy was not infringed when a creditor informed the debtor's employer of a debt that was owing, requesting the latter to withhold his wages. Communication was not made to the general public so the privacy of the debtor had not been violated.

It would appear that if the communication made is reasonable in the circumstances, as to a collection agency or in court, there should be no action available to the patient for breach of confidence. Ethically, the patient is a fault, through not paying his debt, and has therefore lost his moral right to have his confidences protected. The admirable Connecticut statute, to be considered below, provides that the name, address and fees for psychiatric services may be disclosed to a collection agency without the client's consent; only if there is any dispute may additional information be divulged.[68]

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66. 118 Ind. App. 358, 78 N.E.2d 789 (Ind. App. 1948).

67. 112 N.W.2d 862 (Iowa Sup. Ct. 1962).

68. Public Act 819, State of Connecticut, 1969.

Consent

An Act concerning the confidentiality of communications and records of mental patients for the state of Connecticut[69] sets out with remarkable precision the steps a psychiatrist ought to take in obtaining a patient's release for him to divulge confidential information. The consent must be in writing (section 1) and must specify to what person or agency the information is to be disclosed and to what use it will be put (section 2). The patient must be informed, beforehand, that refusal to give consent will in no way jeopardize his right to present or future treatment, unless such disclosure as the consent would relate to, is necessary for the patient's further treatment. The consent may be withdrawn at any time, by the patient informing, in writing, the person or office where the original consent was filed. The withdrawal of consent, however, would not effect communications or records wiich had been disclosed prior to notice of the withdrawal. The act makes consent necessary for all communications concerning the psychiatrist and his patient in the course of diagnosis or treatment. Five cases are listed of where such consent need not be obtained. These will be considered later in the section on privilege.

The A.P.A. paper[70] and the G.A.P. report[71] both emphasise that the psychiatrist is obligated to describe fully and even repetitiously

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69. Supra, footnote 68.

70. Supra, footnote 45.

71. Supra, footnote 65.

the nature and purpose of the examination and the information to be divulged. In addition the A.P.A. paper warns the psychiatrist that under certain circumstances, such as a divorce action, the patient may wish to reveal sensational information that is not relevant to his defense and may well be damaging to it. All the connotations of his waiving his right to confidentiality should be explained to him. It is encouraging that this subject has been given so much consideration by these bodies. It shows that confidentiality is recognised as being vital to the operation of the profession of psychiatry.

PRIVILEGE

The famous American authority on evidence, J.H. Wigmore laid down four criteria necessary to justify a privilege being granted to any group:[72]

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

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

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

(iv) The injury that would inure to the relation by the disclosure of the communications must be greater than

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72. 8 Wigmore, Evidence, para. 2285 (McNaughton Rev. 1961) (Boston: Little Brown & Co.).

> the benefit thereby gained for the correct disposal of litigation.

It is hoped that by now the reader should realise that the psychotherapist would fit all the above criteria. However, the Common Law grants no privilege to him. A comparatively recent English case, Nuttall v. Nuttall,[73] discussed the question of the claim of a psychiatrist to a privilege. In a divorce suit the husband subpoenaed, as a witness, a psychiatrist who had been consulted by his wife and the co-respondent in the case. He was asked questions concerning communications made by these two persons to him in the course of treatment. He refused to answer on the grounds of professional confidence. Edgedale, J., stated that what a person said to a doctor in a professional consultation was not privileged, and that the witness had the choice of answering the question or being committed to prison for contempt of court. Probably thinking that in such a situation discretion was the better part of valour, the witness give the evidence.

The Law Reform Committee on Privilege in Civil Proceedings in 1967[74] considered this case, and was of the opinion that if the psychiatrist had persisted in his refusal to answer and the question had gone to the Court of Appeal then he would probably have been allowed to maintain silence. He would not have been so permitted,

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73. (1964), 108 Sol. J. 605.

74. "Privilege in Civil Proceedings", Law Reform Committee, 16th Report, Cmnd. 3472, 1967 (U.K.).

however, if the patient's mental condition had been an issue in the case. The Commission recommended no change in the law. One wonders, though, whether it should be necessary for a psychiatrist to have to take his case to the Court of Appeal before any consideration is given to it. While no privilege exists, the matter is supposedly left to the judge's discretion - a discretion he will tend to be reluctant to use.

An Ontario judge at about the same time was, however, more adventurous. In Dembie v. Dembie[75] Stewart, J., was of the opinion that it was in the public interest that in the treatment of mentally disturbed persons communications during consultations should be privileged. He would not compel the witness to testify as to what was said during an examination.

These two cases can be considered along with a United States case of 1952, Binder v. Ruvell.[76] The attorney for a husband sought to question the wife's psychiatrist, concerning information he had received in a consultation with her. Illinois had no medical privilege. Fisher, J., said that a psychiatrist was beginning to gain recognition and understanding in the courts and he thought that this was just one of the cases in which a privilege ought to be seen. He is quoted as saying that:

> ...the social significance of it is probably even greater than that which comes from the protection of the communications between lawyer and client.

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75. Unreported, April 16th, 1963. See A.M. Kirkpatrick, "Privileged Communications in the Correction Services" (1964-1965), 7 Crim. L.Q. 305.

76. Civil Docket 52C2535, Circ. Ct. Cook City, Ill.,June 24th, 1952.

The judge thus allowed a privilege, a realm of law that had long been thought to be part of the legislature's domain, rather than the judiciary's, in the United States.

It is noticable that the three cases above do not appear in any of the recognised law reports. This emphasises the fact that the psychiatrist might in many cases be forced to give evidence against his better judgement, when no statutory privilege exists. Judges in the lower courts are generally reluctant to go as far as the latter two judges did, and use the discretion vested in them to grant a privilege when the circumstances demand, and because lower court cases are not reported very well, we do not realise the true seriousness of the problem. At least the possible seriousness of it is shown above. One writer has said:[77]

> It seems accurate to conclude, therefore, that a patient's right of confidential communication to his psychodiagnostician and psychotherapist is a function of his right to engage in and get help from such services. If he has a right to obtain such services he has a correlative right to the essential confidence of communication.

Does this mean that a privilege should be given to psychiatrists? It will be helpful to view cases from the United States which have discussed statutory privilege. It will also be remembered that a statute is usually strictly construed by the courts.

An important point is that the privilege should be limited to its

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77. Supra, footnote 41, at p. 746.

purposes and not be used for shielding the crimes of third parties by an unrealistic application of it. In the State v. Boehme[78] a woman could not claim the privilege to stop her doctor giving evidence relating to information gained from her while treating her, after her husband had attempted to poison her. The privilege was intended for the benefit of the patient, and no additional humiliation would be caused her by revelation. This seems to be reasonable.

The existence of a privilege statute has been held to show a determination by the legislature that the physician-patient privilege should not be waived unless good reason is shown. Thus a physician can claim the privilege on behalf of his patient if the latter is not a party to, or present at, the trial.[79]

However, it has been held that where a statute required the physician to report gunshot wounds, despite the existence of a privilege statute, the physician could testify as to the name and address of the wounded person and describe his wound and its nature, which knowledge he would have obtained by observation and through his treatment of the patient.[80] This would seem to show that the legislature's intention to protect the patient's privacy is not that strong.

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78. 430 P.2d 527 (Wash. Sup. Ct. 1967).

79. Osterman v. Ehrenworth, 256 A.2d 123 (N.J. Sup. Ct. 1969).

80. State v. Antill, 197 N.E.2d 548 (Ohio Sup. Ct. 1964).

Waiver of the privilege has been seen where a psychiatrist had testified on the patient's behalf as to his mental ability to formulate and harbour larcenous intent. The government thus had a right to explore the underlying basis for this opinion and could thus ask the psychiatrist whether the defendant had informed the psychiatrist that he was under arrest on a charge of falsifying statements.[81]

Similarly, where a woman filed a cross-complaint in an action brought against her to recover hospital costs, it was held that in bringing her action the woman knew she would have to testify to prove her case and thus reveal treatment she had received. She thus waived the privilege.[82] However, it seems now that waiver will only be seen for the immediate issues involved. In Tylitzki v. Triple X Service Inc.[83] a woman claimed for personal injuries suffered in a car crash. The issue was whether she waived her privilege by claiming pain and suffering and thus brought her mental condition into issue. It was stated that the privilege is too important to be brushed aside when the mental condition of the patient may only be a peripheral matter to the case. Also In re Lifschutz[84] it was said that the patient waives his privilege only in so far as he places his condition into testimony. Communications which are not directly relevant to these

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81. Dani v. U.S., 173 A.2d 736 (D.C. Mun. Ct. App. 1961).

82. Randa v. Bear, 50 Wash. 2d 415, 312 P.2d 640 (Wash. Sup. Ct. 1957).

83. 261 N.E.2d 533 (Ill. Ct. App. 1970).

84. 467 P.2d 557 (Cal. Sup. Ct. 1970).

specific conditions remain privileged. Thus it would seem that waiver will not be seen so readily in the future as it has been in the past. The privilege is seen as an important area of the law, not to be passed lightly.

Yet who is covered by the privilege? In 1937, a nurse and an X-ray operator were held to be outside the privilege statute and able to testify in court concerning a patient's communications to his doctor.[85] However, in Ostrowski v. Mockridge[86] and in State v. Bryant[87] both these people were seen to be impliedly protected by the statute. It would seem to be illogical to allow a necessary assistant to the doctor to give evidence, yet to stop the doctor doing so.

Examination by Order of the Court

In United States jurisdictions generally, where psychiatrists have been appointed by the court to examine a person as to his mental capacity there is no privilege. The element of confidence is missing from the outset.[88] However, psychiatrists appointed must not have previously treated the patient.[89]

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85. Prudential Insurance Co. of America v. Kozlowski, 276 N.W. 300 (Wis. Sup. Ct. 1937).

86. 65 N.W.2d 185 (Minn. Sup. Ct. 1954).

87. 167 S.E.2d 841 (N.C. Ct. App. 1969).

88. People v. Lowe, 248 N.E.2d 530 (I11. Ct. App. 1969).
People v. Bol, 178 N.W.2d 516 (Mich. Ct. App. 1970).
Koonce v. State, 456 P.2d 549 (Okla. Crim. App. L969).

89. People v. Wasker, 91 N.W.2d 866 (Mich. Sup. Ct. 1958).

It is settled law, however, that it is the court, and not the psychiatrist, which must decide the guilt or innocence of the party who has been examined. The psychiatrist must merely aid the court in reaching its decision. In Richmond v. Richmond, an early English case it was stated that the court...[90]

> ...can never dispense with its obligation to form an independant opinion so soon as its mind is enlightened with regard to the technical aspects of the case, whatever they may be.

Several Canadian cases have recently established this, correctly it would seem, as being right. In The Queen v. Lupien[91] evidence was tendered by a psychiatrist as to whether the accused was mentally capable of performing the act of gross indecency with which he was charged. It was to the effect that he had a defense mechanism which would make him react violently to any homosexual activity. The court was divided as to whether this decided whether he actually did form the intent or whether he could. The deciding opinion was that the psychiatrist's evidence should have been admitted, though it was very close to what the jury had to decide. The difficulty in such cases is obvious. Following this case, R. v. Dietrich[92] held that the psychiatrist could give evidence as to the basis of the opinion he had reached. Yet perhaps R. v. McAmmond,[93] a recent Manitoba case, puts

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90. (1914), 111 L.T. 273, at p. 274 (Ch. D.).

91. (1969), 9 D.L.R. (3rd) 1 (S.C.C.).

92. [1970] 3 O.R. 725 (Ont. C.A.).

93. (1969), 69 W.W.R. 277, 7 D.L.R. (3rd) 346 (Man. C.A.).

the matter in a nutshell when it says that psychiatrists, as experts, ought not to be asked the very question that the court must itself decide. Nor should they be asked to express an opinion on disputed facts. The psychiatrist should only answer factual questions, not weigh up the evidence. Thus he could be asked whether he thought the accused was likely to commit further sexual offences to that he was charged with.

Some United States cases are relevant here. In State v. Evans[94] it was held that a psychiatrist would not transmit a defendant's incriminating statements to the court. This was fundamentally unfair, even though the psychiatrist had been appointed by the court to examine him. In another case,[95] a psychiatrist similarly appointed, could not divulge details the accused had revealed to him about his participation in a crime.

Who can claim the Privilege and on what Grounds?

Dr. Katz stressed the importance of psychiatrists being granted a privilege, but he was adamant that this must be distinct from the ordinary physician-patient statutes. So far it seems that only six states in the United States have a psychiatric privilege in its own

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94. 454 P.2d 976 (Ariz. Sup. Ct. 1969).

95. Oaks v. People, 371 P.2d 443 (Colo. Sup. Ct. 1962).

right.[96] This latter point was verified in 1970 by the case of In re Lifshutz.[97] Yet no statute, as yet, gives the privilege to the psychiatrist; all give it to the patient. Psychiatrists claim that it may not be in the patient's best interests that revelation be made, and indeed may be harmful to him to know what the psychiatrist has diagnosed his condition to be. Furthermore, he may waive his privilege unintentionally, or out of emotion, or because he wishes 'to get his own back on the psychiatrist' in some way. The above case was one where the psychiatrist refused to give evidence, even after waiver had been seen by the court through the patient's actions in placing his mental and emotional condition into issue. The psychiatrist argued that psychotherapists would not be able to practice if patients were not certain that in every case their confidences would be safe from revelation. The court did not agree, pointing to the fact that psychotherapy had survived well up until now in such a situation.

Another interesting point put forward in this case was that the psychotherapist has a claim to a privilege similar to that of the clergy. This was based on the 14th Amendment of the Constitution which guarantees equal protection of law. This also was rejected, yet merits further consideration. Wigmore favoured a privilege being granted to priests, yet he opposed one being given to doctors, saying only his

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96. See R. Weinberg, Confidential and other Privileged Communication (New York: Oceana Publications, Inc., 1967), at p. 47.

97. Supra, footnote 84, at p. 564.

third classification applied to them i.e. that the relationship should be fostered. It has been claimed that the psychotherapist's claim to a privilege is more akin to the priest's than it is to the physician's,[98] in that the essential confidence for the relationship to be achieved at all is present in both the former cases, though not necessarily in the latter one. This point is certainly arguable.

Since about one third of U.S. states have given the psychologist a privilege and many states the physician one, it is surprising that only six states, by 1970, had granted one to the psychiatrist. The latter can usually find coverage in the physician statutes, but owing to the uniquely confidential nature of his work, he feels that he deserves a privilege in his own right.

The disadvantages of a statutory privilege lie in the fact that it tends to lack flexibility and this requires that its draftsmen show care and imagination so that all situations are covered. Some inevitably will be missed.

The privilege statute which was praised the most by writers on this subject was that of Connecticut. It seemed to contain most of the attributes and avoid most of the discrepancies one could think of. However, in 1969 the legislature found fit to repeal it and replace it with a statute entitled "An Act Concerning the Confidentiality of Communications and Records of Mental Patients".[99] The absence of the

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99. 1969, P.A. 819.

word "privilege" from its title would seem to show that its emphasis lies elsewhere. The statute defines the patient and psychotherapist in terms similar to the old act, taking care to include the patient's family and guardian or conservator, and the psychotherapist's assistants in the statute if they are involved in confidential matters. The whole statute is based on the idea that the patient's consent must be given in writing[100] before any confidential communications or records can be released. In section 4 it lists five occasions on which consent need not be obtained:

(i) when the patient is transmitted to another mental health facility (defined in detail earlier) for treatment or diagnosis when the psychiatrist thinks communications or records should be divulged to accomplish the objectives of it. The patient must be informed.

(ii) when the psychiatrist determines that there is a substantial risk of imminent physical injury by the patient to himself or others, or when it is necessary in order to put the patient in a mental health facility.

(iii) the name, address and fees for psychiatric services may be disclosed to the individuals or agencies involved in the collection of these fees. Additional information sufficient to substantiate the fees may be given in the case of a dispute.

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100. For further details on this point, see supra, p. 206.

(iv) generally, where the court orders an examination for good cause. The patient must be informed beforehand and this part only applies where the issue concerns the patient's mental health. (As amended).

(v) if, in a civil proceeding, the patient introduces his mental health as an element of the claim or the defense, or after his death, such condition is introduced by a person claiming or defending through or as a beneficiary of the patient and the court finds it more important to the interests of justice that communications be disclosed than that the relationship between the patient and psychiatrist be protected.

This statute paints a very impressive picture of how the law should view confidential communications between psychiatrist and patient. The emphasis is placed on the confidential aspect of it and the court is given a discretion in the area of privilege, though not so much in the applying of the privilege as in the waiving of it, since prima facie it is acknowledged that communications between psychiatrist and patient should be privileged. One flaw in the statute is that the psychiatrist is not given the right to claim the privilege against the patient's waiver of it.

The Common Law has much to be said for it, in so far as it appears to allow the judge a discretion to grant a privilege if the circumstances warrant one. However, prima facie, a privilege does not exist, and here

lies the danger to a profession such as psychiatry, with its requirement that confidentiality be maintained. Without a privilege the psychiatrist can admittedly refuse to keep records and thus not be able to produce them when subpoenaed. He can then suffer from an acute loss of memory. He can refuse to give the solicitor or barrister who wants him to testify, any idea of what sort of evidence he will eventually give. The lawyer might be somewhat reluctant to call a witness who might not support his case. When asked to testify he can refuse, hoping that the questions asked were irrelevant to the case at hand, or rely on the judge's discretion after explaining his predicament. Failing this he could suffer jail as punishment for contempt. Is such a haphazard means of preserving confidentiality necessary and is it just? A discretion should remain vested in the judge as to whether he grants a privilege in the circumstances of the case, yet so rarely should the psychiatrist be required to break his patient's confidence that prima facie a privilege should exist.

That psychotherapy itself is important to society may be witnessed by part of the judgement of Tobriner, J., in the case of In re Lifschutz:[101]

> We recognise the growing importance of the psychiatric profession in our modern ultra-complex society. The swiftness of change - economic, cultural, and moral - produces accelerated tensions in our society, and the potential for relief of such emotional disturbances offered by psychotherapy undoubtedly establishes it as a profession essential to the

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101. Supra, footnote 84, at p. 560.

preservation of societal health and well-being.

There should be a remedy to the aggrieved patient who suffers as a result of a breach of confidence, in the rare instances when this might happen, not only for the patient's good but that the profession may maintain its high standards, and thus serve the community effectively. Furthermore, the courts in applying justice for the common good of society should recognise that it is rarely in society's best interests that a psychiatrist be compelled to testify on confidential matters. Confidentiality is vital in psychiatry: the law must give recognition to this fact.

CHAPTER VI

SOCIAL WORK

What is Social Work?

> ...a great deal of their [social workers'] work is concerned with the type of communication which in more favourable circumstances or in less complex societies is dealt with on the level of kinsfolk and friends. There is a sense in which the social work profession is society's answer in conscience to the problems created by the dispersion of the extended family and the mobility of an urban population in a technological age. Individuals and families at times of stress or crisis find themselves without the known and knowing friend or neighbour at hand to offer support and practical help and who can, above all, be trusted; the necessary support and counsel must be sought in a social work agency.[1]

Social workers necessarily work for, through, and with people. They have been compared to the parish priest of former centuries[2] who acted as advisor to his parishioners in difficult life situations, offered comfort to the suffering, moral support whenever necessary, and the relief of any guilt-feelings to all. His supernatural authority, as the messenger of God, gave him a superior standing in the community to that which the modern-day social worker has.

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1. British Association of Social Workers, Discussion Paper No. 1: Confidentiality and Social Work (London: B.A.S.W., 1971), at p. 3.

2. C.Kasius, ed., Principles and Techniques in Social Casework (New York: Family Service Assoc., 1950), at p. 25.

The different aspects of social work may be split up into six areas: casework, group work, community organisation, welfare research, welfare administration and social action.[3] Although confidentiality might feature in any of these areas, it is most prominent in casework. This is where the worker deals with a client's particular problem, on a one-to-one basis usually, thus needing to establish a relationship of trust and confidence with the client. Casework is conducted through social work agencies, both government-run and independent, which form the administrative centres through which the client's problem is assigned to a particular worker or workers. The latter will then interview the client, discover the facts which constitute the problem, investigate the causes, which are usually a combination of psychological and environmental factors, and attempt to work out a solution. Usually he will not tell the client what to do, but will use a non-directive approach, to enable the client to find the remedy himself, while being prompted by the worker.

In earlier years there was a marked difference in the concept of social workers' training in England and North America. The former favoured specialisation, whereas the latter pursued a system of broad, general education, teaching social work methods in casework, groupwork, or community organisation, rather than the special functions of the medical social worker, probation officer

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3. "Social Worker-Client Relationship and Privileged Communications" (1965), Wash. U.L.Q. 362.

etc. Both systems appear to have been considerably influenced by each other. The English approach is now orientated towards teaching the common factors of each facet of social work.[4] This is likely to be borne out by social work practice since the Seebohm Report states:[5]

> (134) The present pattern of specialisation in employment should be radically altered.
>
> (135) As a general rule, and as far as possible, a family or individual in need of social care should be served by a single social worker.

A move in a similar direction concerns the common occurrence today of the client's problem being seen from various angles, and its causes to be seen as stemming from various sources. In Winnipeg's Child Guidance Clinic, for example, the psychiatrist, the psychologist and the social worker work together as a team. Various specialists treat the problem but it is seen as a unified single problem, rather than as a series of individual ones. In such instances the exchange of information can constitute no breach of confidence. Yet it should always be necessary to inform the client or patient that there will be free interchange of data for his own good. It is when the patient or client finds out in a round-about way that information is being passed on (even though it may be for his own good) that the necessary relationship of

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4. R. Bessell, Introduction to Social Work (London: B.T. Batsford Ltd., 1970), at p. 128.

5. "Report of The Committee on Local Authority and Allied Personal Social Services" (The Seebohm Report), Cmnd. 3703, 1968, at append F.

confidence starts to break down.

Social workers are to be found in many areas. It will be useful to view some examples. In the hospital,the medical social worker can make a substantive contribution in the recovery of a patient from his illness. Social problems can directly induce susceptibility to ill-health, or impede recovery from it.[6] The patient's family might be without sufficient income while he is in hospital; a patient might find difficulty in adapting himself to the use of an appliance; or frequent changes of doctors or nurses might make him feel that he is not receiving the attention he deserves. An interesting case concerned a Jewish rabbi, who refused to eat anything unless it was prepared according to his religious tenets. He was in hospital for treatment of his ulcer, and refused to eat hospital food, despite the fact that he needed to eat to prevent his condition deteriorating. A social worker solved the problem by taking food, after it had been prepared in the way the rabbi wished, to the hospital.[7]

An increase in the high discharge rate of mental patients, together with the fact that a survey conducted in 1959-1960 showed that one man in fourteen, and one woman in nine, are admitted to a mental hospital at least once in their lives, has meant an increase

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6. H.M. Bartlett, Social Work Practice in the Health Field (New York: N.A.S.W., 1961), at p. 33.

7. Ibid., at pp. 165-166.

in the importance of psychiatric social work.[8] Often, it is not the 'sick' person who breaks down first, but the weakest member of a family, since the human being is a constant interaction of mind, body and environment. Thus, often while a child is in need of psychiatric treatment, the mother is helped by the social worker, in order that the origin of the problem may be found.

In probation work the worker deals increasingly with care of prisoners after their release and ensures that their families are looked after while they are in prison. A person's social environment is being increasingly seen today as one reason for his turning to crime.

Social workers are to be found in many areas of counselling, and on an increasing scale in that of school counselling. Today, the drug problem, violence, juvenile delinquency, and an increase in venereal disease among young people emphasises the fact that guidance is not being supplied by the home. The counsellor can be a necessary substitute. Between 1958 and 1965, the number of full-time counsellors employed in secondary schools in the United States rose from 12,000 to 30,000. 86 per cent. of students are said to see their counsellor at least once a year and 74 per cent. between once and five times a year. Counsellors should be independant of the school authorities since otherwise connection with discipline can

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8. E. Heimler, Mental Illness and Social Work (Harmondsworth, England: Penguin Books Ltd., 1969), at pp. 11-12.

undermine the trust upon which the influence relationship rests.[9] Thus a social worker can perform the job better than could a teacher.

Confidentiality in Social Work

Man is not an independent being since he lives with, and depends upon others for his existence:[10]

> This relation demands that he act toward them as individuals having the same intrinsic dignity, the same nature and the same rights. This means that they can never be looked upon as mere material things, mere machines, or on the other hand as divine beings deserving of adoration.

When a man is in need of aid his fellow beings must, therefore, attempt to help him. Each unhappy misfit is a threat to the stability of any society. The social worker is society's tool when a man's problems derive from his environment. Yet, in order that help can be given,the roots of the problem rather than its symptoms must be discovered. The chief means at the disposal of the worker is the interview. The interviewing process is one requiring skill and experience in order that it may be effective, yet unless the client feels he is being treated as a person by one who is

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9. See D.J. Armor, The American School Counselor (New York: Russell Sage Foundation, 1969); "Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools" (1971), Iowa L. Rev. 1323.

10. J.T. Alves,"Confidentiality in Social Work" (Dissertation) (Wash. D.C.: Cath. Univ. of America, 1959), at p. 10.

genuinely concerned with his plight, little will be achieved. If the client cannot feel that he can trust the worker, he will be reluctant to reveal anything of a personal nature - yet this is what his problems usually are: personal.[11]

> In the process of eliciting information from a client...the social worker enters into a relationship and may acquire knowledge, pertinent to the situation but painful to the teller, which in different circumstances would already be known to a trusted friend and would therefore not have to be talked about and certainly not 'recorded'.

The worker must make the client feel at ease, show interest in him, and show himself or herself as a person of integrity in whom the client can trust and speak to confidentially if he so wishes. He must understand the client's manner of expressing himself, communicate to him in terms he can understand, while being alive to hints as to the cause of the problem. However, most important, the client must be made to feel secure so that he can explain what he wants to the worker.[12] Thus, embarrassing or sensitive information, which the worker needs to know, will be revealed.

An example of this in practice was where a woman appeared calm and relatively undisturbed when referring to here husband's recent imprisonment for theft. She was, however, manifestly relieved when

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11. Supra, footnote 1, at pp. 3-4.

12. Cherry Morris, ed., Social Casework in Great Britain (London: Faber and Faber Ltd., 1955), at p. 39.
See also C. Kasius, op. cit. footnote 2, at p. 385.

the social worker brought this point into the open, remarking how painful and distressing it must have been for the woman, despite her apparent courage in facing the situation. The woman was glad the worker had referred to her "trouble" because somehow she now felt it was not so disgraceful as she had earlier thought it to be. She admitted to having been afraid to mention it, lest the social worker think less of her in consequence. Her "trouble" might well have been unnecessarily making her other, more direct problems worse.[13]

Therefore, it is evident that confidentiality is essential in a relationship with any troubled person. This is even more the case where the worker is dealing with persons who have been brought up in a world where they feel they can trust no-one. The social worker must prove to be the exception to the rule for these people. A 17 year old boy, apprehended for his part in a theft, was reluctant to talk to a probation officer, and seemingly off-handish and unconcerned about his plight. His attitude turned out to be a result of his idea that interviews were not completely confidential, and reassurances by the probation officer did not seem to have much effect. It took time for him to realise that what he said would not be relayed, even to his parents, without his express permission, and that his confidence would be respected. He then felt able to

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13. M.L. Ferard & N.K. Hunnybun, The Caseworker's Use of Relationships (England: Tavistock Publications, 1962), at p. 40.

talk more freely about himself.[14]

Once the confidential relationship has been achieved, the worker must take care that any of his actions do not destroy it. Thus, a psychiatric social worker, involved in child guidance work, might visit the child's home but does not do so in every case. A boy might be smart and clean, while his home is a mess. The mother might feel so let down at the worker seeing it that she would feel unable to co-operate with the worker any more. As a result the child would suffer. In such a case, it would be far better for the worker to learn of the home situation through her interviews with the mother.[15]

The vital point to remember is that social casework does not deal with attitudes, difficulties or relationships, but with people who have attitudes, difficulties and relationships, and that:[16]

> The skill in good casework is in keeping the confidence of the client and enabling him to have sufficient trust and security so that he can push off time and again experimentally, knowing that he can come back, until eventually he can swim alone.

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14. Ferard & Hunnybun, op. cit. footnote 13, at pp. 113-117.

15. Morris, op. cit. footnote 12, at p. 53.

16. Ibid., at p. 52.

The Agencies and Confidentiality.

Although the recently formed British Association of Social Workers does not have a code of ethics drawn up yet, the Canadian Association and the National Association of the United States both do. Confidentiality is mentioned, albeit in wide terms:[17]

> To fail to respect the privacy and dignity of a client through divulging confidential information without consent, except when required by professional or legal obligations...

is behaviour deemed by the Canadians to be unprofessional conduct and a breach of ethics.

The National Association Code is briefer:[18]

> I respect the privacy of the people I serve. I use in a responsible manner information gained in professional relationships.

These broad statements of professional ethics can but guide the social worker, and should be obvious to him anyway. The difficulty for him is to know when confidentiality can be overlooked. Is he allowed to give information to other agencies' workers, or must he always consult the client first? What if the client tells him something that he feels should not be kept secret? How confidential is confidential? Often the answers to these questions will depend on the type of work his agency is involved in. It is thus necessary to view the policies of various agencies in this field.

J. T. Alves in a dissertation written in 1959,[19] viewed the code

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17. Canadian Association of Social Workers, Code of Ethics,1970.
18. National Association of Social Workers, Code of Ethics,1967.
19. Supra, footnote 10, at p. 109.

of the Charity Organization Society of the Russell Sage Foundation as enunciated by its National Conference in 1923. He set down some significant points he derived from it including:

(i) the reporting of information received as a result of a professional relationship was not questioned as possibly violating any rights of the client;

(ii) there was much sharing of information between agencies, without client consent being considered;

(iii) the rights of, and loyalties to, other social agencies were considered equal to, and more frequently, than clients' rights.

Later codes stressed the client's rights more strongly. The 1951 Delegate Assembly of the American Association of Social Workers is reported, by Alves, as recognising the individual's rights to make his own decisions, and to give his consent to inter-agency communications. Within agencies information was to be revealed only to persons who could be of service to the client.

Alves tries to reason why the change occurred. Early in the twentieth century the emphasis was on finding out everything possible about a client, from all kinds of sources. Later, however, as psychiatry became more prominent, the importance of the individual as the source of information about himself was seen, and the use of the relationship between worker and client was recognised as being the best means of conducting social work. Thus confidence came to be seen

as an essential means to the establishment of an effective therapeutic relationship.[20]

The vast amount of information that had previously been collected on clients, was now seen as useless, time-consuming, and as having an adverse effect on the client-caseworker relationship. So the principle of confidentiality came to be adopted on practical, rather than ethical grounds.

The Position Today

A survey was conducted by the writer among various agencies in Canada and England. The agencies contacted all felt that confidentiality was important enough to merit some sort of written or unwritten statement about it being established. Some merely applied the vague terms of the C.A.S.W. Code of Ethics. It seems to depend, as it must do, on the kind of confidential matters which pass through the respective agencies' hands. Although there might in some cases be no problems in practice at the moment, the following statement of the John Howard & Elizabeth Fry Society of Manitoba shows that cause for concern exists:

> Professional organization presently has no licensing powers and consequently no means to discipline offending members.

Similarly, the Family Bureau of Winnipeg stated that

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20. Supra, footnote 10, at p. 129.

confidentiality is "largely a staff tradition" and that "it varies from person to person" among the staff. Present problems were listed as being:

> Inconsistent or irregular application of the policy (at present unwritten). We really have no way of perceiving, other than trust in staff, what violations occur.

It was stated that improvements needed were to...

> ...write a policy and have board and staff study the issue. This would likely serve to sharpen our own awareness of the irregularities of our current practice. Basically our staff are in agreement with the policy but likely get sloppy on occasion.

The National Association of the United States stated that its members were in the process of developing guidelines and educational tools to help practitioners, a sign that the measures already taken to preserve confidentiality are still seen as insufficient in that country also.

The main problems mentioned by individual agencies concerned the transfer of information; referrals; the sensitivity of the type of help sought; exposure through the media; and the general lack of respect by outsiders for confidentiality.

The transfer of information between agencies is a desirable end when considered from an efficiency viewpoint. Yet it is vital that the client is not made to feel that his confidences have been betrayed. One hopes that the agencies fully realise this fact, and more important, give effect to it in practice. Perhaps they do, but in letters received by the writer there was little positive evidence of safeguards in this

area. For instance, the English National Council for the Unmarried Mother and her Child, in practice, discusses cases with other agencies or professional helping bodies. No mention of safeguards was mentioned.

The Catholic Marriage Advisory Council in England, stressed that information given by an applicant, with the explicit request that it be kept personally confidential, is so treated. Yet, generally, it is said, confidence should not be so narrowly construed as to prevent necessary information being acquired from other persons by the workers. One feels, however, that it would always be advisable to obtain the client's consent first, if it were possible to do this.

The Board for Social Responsibility, a Church of England organisation, stated however, that information is shared with other agencies with proper discretion and with the consent of the client. Such sentiments are admirable and it is encouraging that consent is mentioned, but one wonders what would happen if consent was not able to be obtained for some reason. If a sufficient degree of harm was threatened to the social worker, an innocent third person, or to the community, it would seem that disclosure would be justified despite the client's lack of consent. Such occasions, one feels, must occur in practice.

The National Society for the Prevention of Cruelty to Children would, for example, often be required to divulge information in court in child custody cases. This is appreciated as being necessary in the

child's interests, but one wonders what sort of information is exchanged in meetings with other agencies where data of "general interest" is shared. In "Case Conferences" also, comprising the Local Authority Social Services, Police and other agencies, information,not for use outside the agencies,is exchanged. Co-operation between agencies might be essential, but would the client consent to disclosure in every case?

Greater problems arise concerning the transfer of information by Local Government departments. The Manitoba Department of Health and Social Welfare stated that information is shared by them with other social agencies "as we consider these agencies provide a delegated service to our clients" but "our general practice is to ascertain if the client is willing that we provide information to the other agency". Generally, whether transfer without the client's consent is permissible ought to depend on the circumstances in which it is called for and the type of information to be divulged. One feels that the scales ought to be heavily weighted before any disclosure of information which is unauthorised by the client, is made. The most encouraging view of this problem was that taken by the University of Manitoba Counselling Service for Students. This body has adopted rules laid down by the American Personnel and Guidance Association. It states that consultation with other "professionally competent" persons is permitted so long as the client's interests are assured of receiving prime regard. Other occasions when disclosure would be justified without the client's

consent are:

> When the member learns from counseling relationships of conditions which are likely to harm others over whom his institution or agency has responsibility, he is expected to report the condition to the appropriate responsible authority, but in such a manner as not to reveal the identity of his counselee or clients.
>
> In the event that the counselee or client's condition is such as to require others to assume responsibility for him, or when there is clear and imminent danger to the counselee or client or to others, the member is expected to report this fact to an appropriate authority, and/or to take such other emergency measures as the situation demands.

An important factor mentioned, is that the client's consent should be obtained whenever possible. One wishes that other agencies and bodies would be more explicit in assessing the importance of this point, despite the fact that it may seem obvious to one viewing the matter, devoid of other considerations.

Another area where confidentiality is threatened concerns referrals to other agencies and bodies. The only agency to see this as a potential problem was the National Council for the Unmarried Mother and her Child of England. It outlined its policy as follows. The mother is given a letter of introduction to another agency, with a slip attached to it, on which is written a number. The slip is returned to the N.C.U.M.C. by the other agency's worker when the client has been seen. In this way it is possible to be sure whether or not the client has been dealt with. The important fact to notice is that the client knows, and is involved in, the referral process.

Should an urgent referral to another agency be necessary, as when confinement is likely to take place within a matter of days and the mother has failed to make any preparations, the initials of the client are given to the referral agency and it is asked to telephone the N.C.U.M.C. when contacted by the client. Such measures are deserving of praise. The client is recognised as a person whose trust must be maintained - and this is borne out in practice.

A third problem concerns the confidentiality surrounding the actual fact that the client is receiving help. The N.C.U.M.C. stated that the nature of its work demands strict confidentiality in every respect and therefore...

> ...it is understood by the police that if, for example, they are looking for a missing girl and believe her to be pregnant we do not reveal her whereabouts to them (always provided that we know it) but undertake to try to persuade her to get in touch with the police as soon as possible.

Requests from worried parents are dealt with in a similar manner.

An encouraging fact, is that agency writing paper is not used when communicating with clients, and envelopes are hand-addressed so that landladies or parents are not likely to open them because they know of their origin or think them to be official communications of no importance. To this end also, envelopes are stamped, not franked.

The Counselling Service of the University of Manitoba said that secretaries employed by that body are instructed to deal with inquiries regarding the fact of whether a student is receiving help with the words "we are not allowed to give out that information".

Generally, written consent of the student concerned must first be obtained, although if he has been referred to the service by a faculty member or administrator for evaluative as well as counselling purposes, the student is advised that some feedback to the referral source is essential.

The Catholic Marriage Advisory Council of England, states in its written policy:

> No visit may be made to a client's house or arrangements made to meet a client outside the Centre, without the approval of the priest chairman, which will only be given in exceptional circumstances.

Marriage guidance work is obviously a delicate area. Mr. Clark Brownlee revealed that in the Family Bureau of Winnipeg, for which he works, many clients are worried about the fact that friends or neighbours might see them entering that agency. Safeguards as mentioned above should be laid down for the guidance of workers, in all agencies employed in this type of work.

Exposure through the mass media is a further problem and was mentioned by the N.C.U.M.C. That agency's policy was that a mother's identity would never be revealed without her consent. If approached by the media,the Council would co-operate and attempt to find clients who would be willing to be interviewed, but the approach and the making of arrangements would sensibly be left up to the mother involved. Any feelings of obligation would thus be avoided.

The Board for Social Responsibility in England was worried

that...

> ...if staff or clients are prepared to participate in T.V. programmes to aid social education they face distortion of contribution in the name of successful programming...

Perhaps this was what concerned an agency in the United States which needed foster homes for 59 children. An N.B.C. television programme offered to show the children in order to find them homes, but the agency refused, preferring to have no homes rather than to allow the children to appear.[21] One can appreciate the good motives of the agency in this case, not wishing to humiliate the children or sensationalise the issue at their expense, yet the result of such action seems rather illogical. Publicity is needed in social work, as it is in most fields. People in need are the responsibility of the community, and the community should be told of such situations. The vital point is that the client should consent to having his plight exposed or, in the case of children, the agency should act responsibly on their behalf. Sensationalism should be avoided, but truthful revelation is justified.

A final problem concerns the disrespect by people outside the social work profession for the latter's need for confidentiality. The Children's Aid Society for Eastern Manitoba stated that other professionals, especially lawyers, seem to think that they have automatic access to all kinds of information and that much discussion

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21. Supra, footnote 10, at p. 175.

between professionals takes place. It seems that the problem exists in England also, since the Catholic Marriage Advisory Council stated that before any letters from solicitors are answered the priest chairman must be consulted. A lack of respect of confidentiality by outsiders may make the social worker's task in preserving his confidences more difficult but it is vital that he take a firm stand. Social work needs a respect for confidentiality in order to function. A small lapse at present can lead to greater, more harmful lapses at a later date.

In conclusion it must be stated that all the agencies who replied to the writer's questionnaire admitted to having some sort of policy regarding confidentiality. The disturbing fact is that generally the policies are unwritten. This, it is submitted, can easily lead to slack methods in practice. It is hoped that other agencies will follow the example of the Family Bureau of Winnipeg, which realises this fact and is setting up a joint staff-board committee this summer to view confidentiality and to review their unwritten policy. As the Catholic Marriage Advisory Council states in its written policy:

> The good name and therefore the availability of the services of the C.M.A.C. would be seriously imperilled if its counsellors were not known to maintain the highest standards of confidence.

This statement indeed can be taken to apply to social work generally.

Government Involvement in Social Work

It will be apparent from the previous section that there are improvements that could be made to the safeguards for confidentiality at present supplied by the individual agencies. Yet, whatever may be done, a further potential danger lies in the increasing participation of Government in the Social Services.

Social work had its origins in voluntary organisations, and today these still play a prominent part in it. However, Great Britain has seen increasing direct participation by Government in social work and Canada and the United States have seen similar Government involvement, though on a more indirect line. In Canada, the Government seems to supply the necessary financial support for voluntary agencies, while in England, local authorities provide more of the actual services themselves.

The English Seebohm Report in 1968[22] recommended a more co-ordinated and comprehensive approach to problems of individuals, families, and communities so that need can be detected, and people encouraged to seek help, while resources can be more effectively attracted and used than so far has been possible. The Local Authorities Social Services Act, 1970 followed most of the Report's recommendations.

A report was presented to the Manitoba Government in 1969, on

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22. Supra, footnote 5.

the social services in Winnipeg,[23] which recommended the unification of various Governmental social service departments. The aim is to overcome the present lack of planning among social agencies, and to avoid duplication of functions, and the fragmentation which results from agencies only serving certain needs. In short, the trend in both countries seems to be towards greater efficiency and unification.

The greatest problems that are likely to occur involve the keeping of records. It would seem that records are kept for four major purposes: planning, research, administrative control, and for the personal use of the worker involved with a particular case. The important fact seems to be that for the first three purposes, it is administrators, usually removed from contact with individual clients, who deal with the records. Administrators, by their very function, demand smooth and efficient operation, the avoidance of duplicity and the encouragement of simplicity and uniformity. Such aims are admirable when facts and figures are being recorded and filed away. However, when impressions are being dealt with, simple classifications are rarely adequate. Bearing in mind that part of a social work record is "an account of what a particular social worker understands at a given moment in time about a particular client" it would be wrong to say that a different worker at a different time could not have a different impression about the same client.

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23. Social Service Audit Committee Report, Winnipeg, 1969.

Furthermore, the record is to help the worker in his future approach to the problem, as well as to aid other workers. People not versed in the intricacies of the social work profession's practical side might well misinterpret certain data recorded.

There is also the matter of the client's consent being obtained. The tragedy is that often he has no choice but to 'approve' of records being compiled of what he says to a social worker, since his alternative would be the lack of any help being able to be given him. He would rarely consent freely to administrators viewing the records that are compiled about him.

The information actually recorded about the client can be classified along two dimensions. The first dimension describes the sources:[24]

1. Information obtained by the worker from the individual.

2. Information obtained by the worker from others about the individual.

3. Information obtained from the worker's judgment or assessment of the individual.

The second dimension describes the nature of the information itself and might be categorized as follows:

a. Identifying information. This category would include name, social security number, case number, fingerprints, photographs.

b. Factual information, verifiable from public

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24. G.S. Hill, "Ethical Practices in the Computerization of Client Data: Implications for Social Work Practice and Record Keeping" (1971), N.A.S.W., at p. 9.

records. This category would include birthdate, birthplace, residence, nationality, parentage, present and past marital status, property holdings, criminal records, court records, military records, published authorship.

c. Factual information verifiable from closed public or private agency records. This category would include education, employment, income, credit records, medical records, juvenile records, other social agency records, association memberships.

d. Factual information verifiable only by the individual himself as inner states and private behavior.

e. Judgmental or descriptive information made about the individual. This category would include all evaluations, diagnoses or other opinions.

The information above may be put to several uses:[25]

(i) It establishes that the agency is fulfilling its function.

(ii) It enables the social worker to have available necessary information gathered in the course of his work with that client.

(iii) It helps colleagues fulfill their own helping or treating function.

(iv) It enables a colleague to offer effective help in the absence, temporary or permanent of the maker of the record.

(v) A supervisor of junior staff or of social work students may ensure that a client is being properly looked after.

(vi) It offers material for teaching and research.

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25. See supra, footnote 1, at pp. 7-8.

It would seem that information needs to be classified according to whether it is the sort that other agencies or departments should rightly be able to view and that which should be kept secret by the agency worker who obtained it. It must be remembered that the bigger the organisation, the bigger its administrative facilities will be. However careful one is in selecting staff, or in educating them as to the importance of confidentiality, they tend not to appreciate this because they are not actually involved in the work with the client. Furthermore, administration tends to be coloured in its demands by those in power, and the danger unhappily does exist of political and administrative philosophies taking precedence over the work being administered. In such cases the social work profession tends to lose control of what information is released and to whom. Adequate safeguards must be set up to stop this happening.

As always, the computer has the potential to be the instrument for the breaching of confidentiality. To talk of amalgamation of agencies and departments is one thing; amalgamation of their records was a different kettle of fish - before computers came on the scene. As Government becomes involved in the social services field it increasingly assumes the right to know more about individuals - and computers can help satisfy its desires.

In North America, the social security number is the identification means for data stored in computers by agencies, usually for administrative purposes. The dangers of administration becoming too involved in

social work have already been explained. The computer specialist, similarly, tends to focus upon the data stored in terms of categories, consistency and purity. The individual, as such, becomes a piece of data, rather than a person.[26]

> Furthermore, science, in the interest of knowledge and the greater good, pulls at the profession to take its categories of judgment ever more seriously and to commit itself to them. But in the flux of an evolving practice technology, categories are probably useful only until they are taken for granted. It is then that categories of judgment freeze the profession and its clients at a particular level of development. And it is then that they are given the status of facts of the same order as name and birthdate. At such time, the profession is apt to make them a part of a computerised record attached to identifying information.

Another danger lies in the fact that until now agencies have tended to keep all categories of information together in composite case records.[27] There would be a temptation to simply transfer these, wholesale, to the computer. It seems that a categorisation of agency records is vital. The computer could be programmed so as to store extra-confidential information apart from confidential information, which in turn could be separated from readily available factual data. The latter[28] could be available freely to those entitled to use the relevant section of the computer (e.g. other departments). Confidential

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26. Supra, footnote 24, at p. 8.

27. Ibid., at p. 11.

28. See classifications (a), (b), (c), supra, at p. 245.

information[29] (e.g. information verifiable only by the client) should need special authorisation before it could be seen by anyone from outside the agency. Extra-confidential information[30] (e.g. judgments made by the worker about the client) should generally only be available to the worker who attended the client, or the agency head, or workers in the agency, on the approval of the agency head.

It must be remembered that although computer firms might be able to supply elaborate safeguards for preserving confidentiality, these will only be as good as the people using them, and the responsibility for deciding to what information such safeguards should apply, ultimately rests with social workers and their representative bodies and agencies. A statement by the B.A.S.W. is relevant here:[31]

> If agencies, for administrative convenience, and also thinking they know "what is good for the client" act without reference to him, they will destroy the confidential basis of casework and the service itself will be destroyed.

When is Confidentiality Outweighed?

The duty of confidence will be outweighed where:

(i) there is express or implied consent of the client;

(ii) there is a legal obligation to disclose;

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29. See classification (d), supra, at p. 245.

30. See classification (e), supra, at p. 245.

31. Supra, footnote 1, at p. 11.

(iii) the social worker's interests require disclosure;

(iv) there is a public duty to disclose.

It is not intended to discuss each of these in detail here, since in most cases an analogy can be drawn between the social worker and the psychiatrist in this sphere. The reader is thus referred to the previous chapter. However, it is of value to say a few words about implied consent with reference to social work, and also about occasions where the worker's interests are involved.

Implied Consent.

It is admitted that client consent cannot be obtained in every case when information needs to be transferred between agencies, but it is emphasised, practice in this area can become so loose...[32]

> ...as to belie existence of the principle that the client's consent either stated or implied is necessary when information about him is obtained or given.

Factors to be taken into consideration before implying consent should be whether the client requested help from the agency, the nature of the request, the kind of information he has given, the purposes it was given for, and the next steps planned by worker and client. A client's consent may be implied in situations such as occur within the agency, with personnel directly involved in serving the client; or outside the agency information may be shared with other agencies' personnel or members of other helping professions when the

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32. Ad hoc Committee of National Social Welfare Assembly, "Confidentiality in Social Services to Individuals" (1958),(U.S.). See supra, at pp. 234-241.

client has knowledge of this, or where there is a kindred interest in giving service to the client.

It seems reasonable that verification of a client's statements should need his explicit consent, even when this is in his interests. Furthermore, when information must be transferred to persons who are not members of professional bodies bound by ethics, consent should only be implied if, by frequent reference to the fact, it may truly be implied that consent would be given. Thus since it is unlikely to have any significant meaning to the client, 'blanket consent' should be avoided. It should be remembered that:[33]

> Certainly conscious and frequent consideration of client consent will strengthen the position of the client, the worker and the agency in the confidential relationship.

The Social Worker's Interests require disclosure.

The worker ought generally to be allowed to protect his own interests where the client is the cause of any 'harm' threatened to him. For example, if he was being sued by a client for some reason, the client would have forfeited any rights to confidentiality he would otherwise have been entitled to. The'harm', however, should in all cases be of a sufficiently serious nature.

Where the client is merely the occasion of the 'harm' being threatened, a distinction to the above must be drawn. Justification

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33. Supra, footnote 32, at p. 39.

for disclosure in such a case would not exist. A professional relationship is involved, and confidence is essential to the existence of this relationship. The public interest in preserving the latter would outweigh the worker's personal interests in disclosure.

THE QUESTION OF PRIVILEGE

Marriage Guidance Work

Although no privilege exists for the social worker in Common Law, one would seem to have been effected for persons involved in the area of marriage guidance counselling. Although not all judges support such a move, it has received the favour of the Probate, Divorce and Admiralty Division of the High Court in England, since it works well in practice.[34]

The origin of the privilege lies in the case of La Roche v. Armstrong.[35] Regarding an action concerning the recovery of certain monies, negotiations for a settlement had been instituted by the solicitor of one of the parties, through the writing of letters marked 'without prejudice', and certain discussions between the parties had occurred. The solicitor claimed a privilege for the letters and the

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34. "Privilege in Civil Proceedings", Law Reform Committee, 16th Report, Cmnd. 3472, 1967 (U.K.), at p. 16.

35. [1922] 1 K.B. 485.

discussions. It was held that both were inadmissible in evidence since otherwise negotiations for a settlement in litigation would be impossible in the future.

In MacTaggart v. MacTaggart[36] a probation officer had acted as counsellor to a husband and wife having marriage problems. He objected to having to give evidence of what occurred at their sessions together, but both parties had waived any rights to a privilege which they might have had. Denning and Cohen, L.J.J., felt, however, that but for this a privilege would have been effected. Cohen, L.J., felt that La Roche v. Armstrong was applicable, and that it applied a fortiori to negotiations between the parties themselves. Denning, L.J., stated that although the probation officer has no privilege of his own:[37]

> The law favours reconciliation, and the court will not take on itself a course which would be so prejudicial to its success.

Lack of a privilege, it was said, would mean that the reconciliation process would be hampered since the parties would be reluctant to tell the whole truth. Frankness in such circumstances is essential, and not possible if revelation is likely at a later date in court.

In Bostock v. Bostock[38] the parties' solicitors were the

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36. [1949], P. 94 (C.A.), [1948] 2 All E.R. 754 (C.A.).

37. Ibid., at pp. 97, 756.

38. [1950], P. 154, [1950] 1 All E.R. 25.

reconciliators. It was held that no privilege attached because the circumstances were not such as to compel the inference that the negotiations were undertaken 'without prejudice'. Generally. they should be specifically stated so to be, it was said.

However, in Mole v. Mole[39] Denning, L.J., said it did not matter who were the reconciliators so long as there were a tacit understanding that the meeting was 'without prejudice'. Certainly, he said, there was no need for a specific statement referring to the fact that the discussion was such. Furthermore, only one party need accept the reconciliator as such before such an inference would be drawn. In Pool v. Pool[40] the wife's leading counsel was seen as the reconciliator.

In Henley v. Henley[41] it was held to make no difference whether the counsellor approached the parties or they him. A vicar had initiated the reconciliation attempt and was accepted as conciliator by the husband.

In Theodoropoulas v. Theodoropoulas[42] it was held that the privilege would apply even to communications between the parties themselves, when no intermediary was present.

The most recent judgement on the subject occurred in 1970, in

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39. [1951] P. 21, [1950] 2 All E.R. 328 (C.A.).

40. [1951] P. 470, [1951] 2 All E.R. 563.

41. [1955] P. 202, [1955] 1 All E.R. 590.

42. [1964] P. 311, [1963] 2 All E.R. 772.

Pais v. Pais.[43] Here a priest had acted as conciliator. Baker, J., held that the privilege attached to the spouses, not to the guidance counsellor. He compared the privilege to that pertaining between lawyer and client. If one spouse has seen a marriage guidance counsellor alone and later reveals what was said at the meeting to the other spouse, no waiver should be seen. Yet if the rules applicable to the solicitor-client privilege applied, waiver would be seen. He concluded that that would defeat the whole object of marriage guidance counselling and said:[44]

> In my judgement there can be no waiver of the privilege in marriage guidance cases until the spouse, or counsel or solicitor on behalf of the spouse, says in unmistakable and unequivocal terms 'I want the evidence to be given to the court of all that happened before the marriage guidance counsellor and therefore I am waiving the privilege'.

A privilege seems to exist in law, but it belongs to the spouses and not to the counsellor. As with the psychiatrist, there is an argument that the counsellor should be able to refuse to give evidence even when the spouses waive their rights to the privilege. The Morton Report of 1956 stated that the evidence of counsellors should not be admissible in matrimonial cases.[45] This has been the law in Australia since 1959, and Leo Abse tried to introduce such a

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43. [1971] P. 119, [1970] 3 All E.R. 491.

44. Ibid., at pp. 123, 495.

45. Royal Commission on Marriage and Divorce, 1956, cmnd. 9678, at para. 358.

provision through his Matrimonial Causes and Reconciliation Bill in 1963. The Catholic Marriage Advisory Council, who were involved in the Pais case stated:[46]

> As the work of this Council and other comparable bodies is almost entirely in the hands of volunteers and their ability to function and give a service is wholly dependent upon the preservation of a confidence reposed in them by the parties who use their services, it must be self evident that incalculable damage would result if a case or a series of matrimonial cases were to be decided in open Court and it became all too apparent that the Marriage Counsellor had played a decisive part to the detriment of one or other of the parties, changing his status from that of an impartial conciliator to 'witness for the defence' or 'witness for the prosecution', even in those cases where this could only come about on the basis of a mutual waiver.

The same body states:[47]

> Many people would be unwilling to seek the help of a marriage counsellor unless they were sure that this help was always completely private and confidential. Any qualification would excite natural suspicion and inhibit husbands and wives from being completely frank.

Against this, the Law Reform Committee[48] argued that to give a privilege to the marriage guidance counsellor as well as to his clients, would not be 'practicable or justifiable'. If the spouses both give evidence, it is said, and this conflicts, the conciliator's evidence is the best means the court has of ascertaining the truth.

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46. Material relating to a press conference following Pais v. Pais.

47. In a letter to the writer.

48. Supra, footnote 34, at p. 17.

The conciliator is always likely to insist on his privilege. One agrees that this may be so, but evidence might be obtainable elsewhere, and if people were deterred from seeking the conciliator's help, he would not be able to give evidence anyway.

A stronger argument is that the welfare of children of the marriage might be in question, and waiver would in such a case, it would seem, be justified. It appears that the question really revolves around whether the conciliator could be trusted to waive his privilege.

The question is a difficult one to decide. However, in order that the counsellor be given a privilege himself, it would have to be shown that people are deterred, at present, from approaching marriage guidance agencies, owing to the possible revelation of confidential material in court, after they have themselves waived the privilege. This can be the only justification for such a form of privilege. Merely making the individual worker feel that he has betrayed a trust is not enough. For it to attach to the conciliator some adverse effect on the ability of the agencies to do their work must be shown from the lack of a privilege at present.

Canada

In Canada there have been two seemingly conflicting cases on the question of marriage guidance counsellors giving evidence in court. In re Kryschuk & Zulynik[49] a social worker had negotiated with an unmarried

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49. (1958), 14 D.L.R.(2d)676 (Sask. Mag. Ct.).

mother and the alleged father of her child, when affiliation proceedings were imminent. The worker was called to testify and objected. It was claimed, however, that these discussions were between unmarried persons, and that the English cases following MacTaggart[50] were all concerned with attempted reconciliations between husband and wife. The Department of Social Welfare and Rehabilitation, by which the worker was employed, pointed out that its work would be very much handicapped if the people using its services could not depend upon strict confidentiality. Wakeling,P.M., said the principles in the English cases would apply equally to the case of a mother who is a single woman and the father of her child, as they would to a husband and wife.

In the case of Brysh v. Davidson[51] in 1963, involving an unmarried mother and an alleged putative father, it was held that a welfare worker's testimony should be allowed. The father had said that he thought he should assume some responsibility for the child. The case was distinguished from the English cases, on the ground that although the possibility of marriage was discussed, the real object of the discussions was to obtain some financial provision for the child. It was a provision of the Child Welfare Act, section 106(1), that the mother's evidence had to be corroborated by other evidence

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50. Supra, footnote 36.

51. (1963), 44 W.W.R. 654 (Alta. Dist. C.).

implicating the putative father, before an affiliation order could be made. The only such evidence available was that of the social worker, a fact which no doubt influenced the court in its decision. The judge said that he considered the principles of the English cases sound, but considered that the 'public interest' in this case, if there was any, was to prevent a male, fathering a child, from avoiding responsibility for his actions. It is relevant to notice that the public interest in giving the social worker a privilege was felt to be outweighed by another interest of the same order, and as far as the immediate result of this case goes, one can hardly criticise it.

The Social Worker generally - does he deserve a Privilege?

The B.A.S.W. paper on Confidentiality states:[52]

> If the legal position of confidential communication to social workers were clarified and some privilege extended it would do much to establish the confidence of the public, and to encourage the general use of the new comprehensive statutory departments by guaranteeing a recognisably confidential setting.

This century has seen the development of helping professions such as psychiatry and social work in general. These need a relationship of trust to be established before their therapeutic quality becomes effective. It has been said that the development of these relationships can only be justified if they are used solely

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52. Supra, footnote 1, at p. 12.

for their intended purpose.[53] To use information gained through these relationships as evidence in court, possibly against the interests of the client, does not seem to be using them for their proper purpose.

Furthermore, one might say that to use the relationship in such a manner is fundamentally contrary to the principles of justice, since it is a form of self-incrimination. The client is being lulled into a false sense of security in entering into the therapeutic relationship with the social worker, and thus revealing facts that he would not normally.

Another argument in favour of a privilege is that a social worker's records are merely working aids, and things contained in them are often his impressions, and his tentative conclusions, at a particular time.[54] A jury or a judge might well be misled by them. When one adds to this the fact that a client's answers might be truthful, yet only applicable to his state of mind at a particular time, the unreliability of such records of the worker, becomes obvious.

One can view the social worker's claim to privilege in the light of Wigmore's criteria.[55] Many clients would not apply for help if they did not believe that what they said would be strictly confidential.

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53. A.M. Kirkpatrick, "The use and protection of Information acquired through the Confidential Relationship"(1970), 12 Can. J. Corr. 236.

54. "Social Worker-Client Relationship and Privileged Communications" (1965), Wash. U.L.Q. 362.

55. 8 Wigmore, Evidence, para. 2286 (McNaughton Rev. 1961) (Boston: Little, Brown & Co.).

Thus, Wigmore's first criterion appears to have been met. Secondly, the element of confidence appears to be essential to the relationship. The social worker has been compared to other professionals:[56]

> The writer as a priest of nearly twenty years experience, and as a member of the bar, easily and honestly attests to the fact that outside of the realm of the confessional - which is a totally different category of itself and sui generis - the priest or lawyer is not in a more confidential relationship with clients or parishioners than the social worker.

A look at some of the functions of the social worker should convince one that the relationship ought to be sedulously fostered: marriage reconciliation; parents helped; adoption services; unmarried mothers helped; unemployed, handicapped and disabled persons helped.

Wigmore's fourth criterion, that the injury to the relationship that would be caused through disclosure would be greater than the benefit to be gained through the correct disposal of litigation, necessitates a value judgement. The Common Law has granted only one privilege outright, that to the lawyer. It has, however, been seen that the courts have, by reference to the 'without prejudice' rule effected a privilege for marriage guidance counsellors. One might consider why such a privilege was felt necessary. There are two possibilities. The first is that where litigation can be avoided by a settlement it should be, in any area of the law. The second is that public policy demanded a privilege for marriage counsellors by

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56. Rev. A.L. LoGatto, "Privileged Communications and the Social Worker" (1962), 8 Cath. Law 5, at p. 17.

the very nature of their work, and the likelihood that they could be subpoenaed to testify in many divorce cases would have meant that this area of social work might not be able to function efficiently without one. According to the viewpoint one adopts, one will decide whether Wigmore's fourth criterion is met for social work, generally.

One wonders, however, whether the Common Law privilege for marriage counsellors protects social workers to a sufficient degree. It seems that the courts are still reluctant to grant even this limited privilege. The Catholic Marriage Advisory Council said that it had to argue strongly for two days in the High Court before a privilege was effected.[57] The argument for a privilege prima facie existing, yet a discretion being left to the judge to overrule it if the circumstances demand, raises itself again in the field of social work. If this were the case, there would be no need to worry on what basis a possible privilege should be given. Since many social workers are unqualified and act on a voluntary basis, any criterion which demands minimum qualifications in workers is unsatisfactory. If the agency is given the privilege, one has to decide whether certain of these deserve it e.g. agencies handling job retraining applications. It would also be difficult to base the privilege on the worker's therapeutic function since there is still doubt as to whether social workers are accepted as members of this field by other helping

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57. Revealed in a letter to the writer.

professions.

A recent English case suggested that judicial opinion might indeed be in favour of a privilege of some sort for social workers. In Re D.[58] a county council objected to producing notes and reports compiled by child care officers in an adoption case. Records were required to be kept by statute and the mother sought to inspect these in her efforts to take her children from their foster parents. It was held that it would be wrong for a child care officer to have to make reports with the possibility looming that these be read in court at a later date. This fact might hamper him in making a frank report, and would be against public policy. This case would seem to allow scope for a privilege to be effected for all social work records.

Conclusion

It is hoped that the reader will appreciate the vital part that confidentiality plays in many areas of social work. It is certain that trust and confidence are needed for it to function effectively, and that confidentiality needs to be maintained at the strictest level. This can best be achieved by the individual agencies through their policies. However, government is intruding into the field of social work on an ever-increasing scale. This will

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58. [1970] 1 All E.R. 1088 (C.A.).

undoubtedly produce benefits but at the same time administration is becoming involved to a greater degree. It is the duty of the community, through its courts and its law, to construct the final safeguard to confidentiality by providing a remedy to any individual who is injured through its lapse, as well as deterring future breaches. A form of privilege would also help to prevent unnecessary revelations in court, when the circumstances do not warrant disclosure. The vital point is that the purpose of these measures be clear to everyone - the profession, lawyers and individual members of society. Society greatly benefits from, and needs, the services of the social work profession; confidentiality is essential in order that these services may be given to indigent persons; and the law, the servant of society, thus should have as one of its aims, the preservation of clients' confidences.

C H A P T E R V I I

THE PRIEST AND OTHER CLERGY

The priest in former times performed many of the functions that today are generally considered to be within the scope of the psychiatrist, psychologist and social worker. His parishioners were his flock, and when troubles fell upon them, they turned to God's minister for help and consolation. The aid he was able to give might not have matched that administered today by trained professionals, but its results were undoubtedly effective in many cases. In today's society, which is in many respects irreligious, it might justifiably be thought that this role of the priest had diminished. Indeed, in some cases it has, but in others people still turn to him for advice and consolation concerning their problems. A psychiatrist and a psychologist are stated to be of the opinion that the confession is often a more effective form of therapy than psychotherapy itself. Paul Tournier, a Swiss psychiatrist, is quoted as saying that, after confession, sometimes in less than an hour, he would notice the same release from psychological tension which ordinarily would only have been expected after months of therapy. O. Hobart Mowrer, Research Professor of Psychology at the University of Illinois, concluded after much research, that the real cause of much mental illness was

real, rather than imagined, guilt. This shows that the problem is not really one of 'illness', but a moral problem, whose best solution lies through confession and expiation.[1] It would appear that the priest or minister, because he is able, as God's representative, to aid people in these processes, still has a useful function to play in our society, whatever one's views with regard to religion in general might be.

Counselling

It seems to depend on the type of priest as to how much counselling he does. Some priests are very concerned about the administration of church affairs and running a well-organised parish, so that in the eyes of their parishioners they seem to be very busy men: a fact which inhibits people from approaching them with their problems. Other priests and clergy might devote most of their time to counselling, being left with little time for church administration. These might receive some sort of training to aid them in their counselling functions, and since they are probably gifted in this area, which is illustrated by the number of people consulting them, the time is well spent. However, most priests will get requests for counselling from time to time, and will thus sail a middle course between the types of priest mentioned above,according to one

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1. W.H. Tiemann, The Right to Silence (Virginia: John Knox Press, 1964), at pp. 65-66.

Roman Catholic priest who was interviewed by the writer.[2]

Confidentiality plays an important part in counselling of any type.[3] If the person requiring help feels he cannot trust a person he will not approach him. Another important factor connected to this, is that the indigent person must be able to identify with his counsellor, and feel that his problems will be understood. Father Beaudrie, a Roman Catholic priest in Winnipeg, related that when he first started out as a young priest, he received several requests for help from young people, yet none from people older than himself. However, as he now has more experience and is himself somewhat older, requests come from more varied sources. This emphasises the fact that a person in need of assistance will not make the initial approach for help, unless he feels his problem will be given the concern that he himself obviously attaches to it. He must, therefore, have full confidence in his counsellor in every respect. It will be realised that in performing work of this type the priest is fulfilling a function very similar to that of the social worker in the previous chapter.[4] It is thus not intended to repeat what has already been said about the importance of confidentiality in this work, and indeed throughout this chapter only points not covered in the Social Work chapter will be discussed.

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2. Father Beaudrie, Roman Catholic priest at St. Gerard's Church, Winnipeg.

3. Supra, at pp. 227-230.

4. Supra, at pp. 222-263.

When is the Duty of Secrecy Outweighed?

The Seal of the Confession

Both Roman Catholic priests who were interviewed by the writer, Father Beaudrie and Father Hanshell[5], were adamant that on no occasion would anything told them in the course of the confession be revealed. Father Hanshell explained that the purpose of the confession was to help the penitent. The people who regularly attend confession are not in need of the priest's help. It is the person in trouble, who maybe is a criminal, and who cannot directly pray to God for forgiveness, who needs help. If the seal of the confession (its secrecy) were broken, there would be nothing left to help him - and there would be nothing left of the confession.

Father Beaudrie stated that when he listens to a confession he is acting as God's agent. Afterwards he would try to forget everything he had been told during it. He did confess, however, that it was sometimes difficult when he had to administer confession to members of the same family, not to reveal anything said by one member, when advising another. No hint should ever by given as to what happened during any confession.

Canon 889, section 1, of Canon Law, the law of the Roman Catholic Church, reads:[6]

The sacramental seal is inviolable, and hence the

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5. Roman Catholic Chaplain at the University of Manitoba.

6. Tiemann, op. cit. footnote 1, at p. 19.

> confessor shall be most careful not to betray the penitent by any word or sign or any other way...
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> Canon 2369 states that a confessor...[7]
>
> ...who dares to break the seal of confession directly, remains under excommunication reserved modo specialissimo to the Apostolic See.

For a non-catholic it may be difficult to realise why such secrecy is attached to the confession. Two explanations might help. St. Thomas Aquinas stated that a man could be called to witness only as a man and hence can truthfully declare that he has no knowledge of that which he knows only as God's minister.[8] The New Catholic Encyclopedia explains:[9]

> When Christ instituted the Sacrament of Penance and imposed on His followers the obligation to confess their sins sacramentally, He thereby implicitly granted them the absolute right to have their confessions kept inviolably secret. In other words, the obligation of the seal follows from the very nature of the Sacrament of Penance as instituted by Christ.

Harm to the Community or to Innocent Third Parties.

It is acknowledged that the seal of the confession is inviolable. But are there no occasions on which the priest would be justified in making a revelation? If a prisoner in jail confesses to a priest that he committed a murder for which another man is to be hanged later

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7. Tiemann, op. cit. footnote 1, at p. 19.

8. New Catholic Encyclopedia, vol. 4, at p. 134.

9. Ibid.

that day, it seems both unchristian and unjust that the innocent man should die.

The 113th Canon of the Canons of the Church of England of 1603, affirmed the inviolability of the confessional seal especially in relation to crimes and other offences, but made an exception for the revelation of something heard by the priest which, if he remained inactive, would threaten the priest's life "according to the laws of this realm".[10] There is also some evidence that before the Reformation, English Common Law required revelation in cases of treason.[11] Yet these provisions do not deal with the situation where the priest faces a conflict of values between the seal of the confession and his christian conscience.

An example of such an occasion was where a 17 year old girl was pregnant and bringing affiliation proceedings against her boyfriend. She confessed to her priest that she had been having relations with two boys and that the wrong boy was being sued. The girl, on the priest's advice, was able to phone her lawyer and explain the situation to him. She had needed the priest's moral support before feeling able to do this. (It is of interest to note that she had not told the social worker involved in her case, because of the danger of inter-agency communications and because social workers

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10. D.R. Welles, Jr., "Volare Inviolable - The Ethical Paradox of the Confessional Seal" (1966-1967), 11 Past. Psych. 22. See also Tiemann, op. cit. footnote 1, at p. 44.

11. Tiemann, op. cit. footnote 1, at p. 46.

possessed no privilege in court.) The lawyer, however, with the support of the girl's mother, refused to investigate the case further, because of the fact that the evidence was strongly against the 'innocent' boy and anyway, he was able to afford the payments which would be ordered by the court.

The priest's conscience was now sorely troubled, yet if the girl had not been assured of absolute secrecy before she confessed to him, no revelation would have been made. The priest, from whom this example is taken, concludes:[12]

> But it seems to me that this is a risk of one's own conscience which the clergyman is called to take from time to time in order to open the channels for redemptive love into the hidden places of peoples' lives. In these situations we do not stand apart and commit the sinner to God's judgement and mercy, but stand with him under the same, call him to repentance, and try to open the channels for God's grace in the situation.

The English canonist, Lyndwood, in his book "Provinciale"[13] discusses this question in considering sins about to be committed. He says that generally the "doctors of theology" say that such knowledge must be kept secret, but that Henry de Sugusio, a noted theologian, says that "whatever he can properly...do for the prevention of the sin, he ought to do, but without mention of persons and without betrayal of him who makes the confession". Another view quoted by Lyndwood is that of Rudovicus and Guido of Baysio,

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12. Supra, footnote 10, at p. 26.

13. Lyndwood, Provinciale (Oxford, 1679). See Catholic Encyclopedia, vol. 13, at pp. 650-651.

who say that a confession of a sin about to be committed is not a real confession, and no penance can be given to the person making it. Therefore, it may be revealed "to those who can be beneficial and not detrimental".

Father Hanshell and Father Beaudrie both thought that in such a situation the priest would be justified morally in making indirect disclosures without revealing the identity of the person who has made the confession, but both stressed that if such revelation would lead to any possibility of the penitent's identity being revealed it could not be made.

Welles, in his article quoted above, said that there seem to be ethical grounds on which the seal can be broken when an innocent third party's life is threatened. This is because the penitent has clearly and flagrantly violated the secretum sacramentale by revealing to the priest that he is endangering the lives of third persons - and refusing to do anything about it.

Yet, it is stressed, all other possibilities and ways should be tried first. He earlier quotes the Doctrine of the Church of England as pronounced in 1938, which reaffirmed the inviolability of the seal yet said that in certain cases the priest would be justified in refusing admonition to the penitent unless he disclosed the facts to the proper persons and thus prevented the imminent harm threatened.[14]

The problem is a difficult one and it must be the priest's own

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14. Supra, footnote 10, at p. 24.

decision in every case. It would seem, however, that in most cases disclosure would not be made by a Roman Catholic priest. If indirect means were ineffective the sacramental nature of the seal would prevent outright disclosure.

Disclosure of matters learnt outside the Confession

Where the priest learns of matters outside the confession his conscience would be guided by principles similar to those explained in the previous chapter on Social Workers.[15] Their functions in such cases are very similar. One point, however, demands extra consideration here.

In the case of young people, especially, there might be occasions, when the priest feels it is in their interests that certain things be told to their parents. This might well mean that the young person's confidence in the priest would be shattered and, as in the case of social workers, such disclosures should only be made in extreme circumstances. Two examples will illustrate this point:[16]

(i) A priest told the parents of a teen-age boy of a relatively minor wrongful act he had committed. As a result the boy never spoke to him again, refused to

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15. Supra, at pp. 222-263.

16. Related by Father Beaudrie in an interview with the writer. See supra, footnote 2.

attend church any more, and the priest's relationship with him was totally shattered.

(ii) A 14 year old girl had been taking drugs for some time and was involved with a young man in his twenties. They were intending to leave Winnipeg for Toronto, where apparently the man was intending to set her up as a prostitute and live off her. The priest involved was told these facts by the girl's friends, who begged him to inform the girl's parents of her intentions. They themselves refused to. Since the girl's whereabouts at that time were not known, and since she intended to leave for Toronto within a matter of days, the priest had no alternative but to talk to the parents. He at first tried to hint that she might be on drugs, but when this produced denials from the parents he had to tell them that she definitely was. He then had to divulge the girl's planned trip, of which the parents were in total ignorance. As a result, the girl was prevented from leaving Winnipeg and her attachment to drugs was able to be treated. For some time after this, the girl refused to have anything to do with the priest, but at the present time their relationship is a healthy one, and she has more confidence in him than she had previously, although a good relationship existed between them before the trouble started. Obviously she now realises that he was acting in her own interests, in the only way that was open to him.

Seeking Help from Other Sources

Father Beaudrie was of the opinion that the priest in his function as a counsellor should avoid trying to 'play' the psychiatrist. He might be able to give valuable help to people with a marriage problem, a family problem, or an emotional problem, but should a case arise which he thought he was not qualified to deal with, he felt it necessary to realise his limitations and to refer the person to a psychiatrist or psychologist, or to another person qualified to help him. This seems to be a sensible point of view to take, although the temptation to try to solve the problem oneself must often be present.

A problem of confidentiality might arise where one person seeks advice from two different priests and they accidentally find this out. Such an instance was referred to by the Reverand Watts[17] who said that this had happened to him. He and the other clergyman concerned,conferred about a girl's troubles to see if they could, together, devise some way of helping her. He was not sure whether she knew the extent to which they conferred, but she was aware that they did. It would seem advisable in such a case to inform the person of this fact, in order that she might not discover this from other sources and thus lose confidence in both the persons she has come to trust.

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17. United Church Chaplain at University of Manitoba (in an interview with the writer).

The Question of Privilege

If a privilege is to be granted to the priest because of his work as a counsellor outside of the confession, it must be for the same reasons and on the same terms as one would be given to the social worker,[18] since the priest is acting as a social worker by performing such deeds. Of course, the close connection between the Church and social work is emphasised by the fact that many social work agencies are run by church organisations, as for example, the Catholic Marriage Advisory Council and the Board for Social Responsibility, two agencies operating in England, and the Lutheran Council in Canada.

The area to be considered now, however, is that pertaining to the confession. The Roman Catholic Church insists on strict confidentiality from its priests in connection with this aspect of their work, so that a claim of privilege for priests in this area has been strongly advocated by the Church for many years.

Yet the Roman Catholic Church is not the only one to administer the confession, although it alone considers it to be a sacrament. The Anglican Church in its Canons of 1603 recognised the right of a person to confess his sins to a vicar or parson, though it was no longer imperative after the Reformation, and limitations in Canon 113 were imposed as far as secrecy went.[19] It was reported that the

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18. Supra, at pp. 258-262.

19. Supra, at p. 269.

Archbishop of Canterbury recently requested a statutory privilege regarding the confession in England, since the lack of one was seen as an obstacle to the drawing up of a new Canon concerning the confession, which the Church of England wished to implement.[20]

The Lutheran Church similarly did away with compulsory confession following the Reformation and confined its use for the confessing of sins greatly troubling the conscience of the individual concerned. However, confession did not have to be administered by a priest but could have been so done by any Christian brother. He could grant absolution to the penitent as the priest did, and does today, in the Catholic Church.[21] The Church Council of the American Lutheran Church and the Biennial Convention of The United Lutheran Church in America, both adopted, in 1960, resolutions concerning the confession in their Churches. The latter convention adopted the following:[22]

> In keeping with the historic discipline and practice of the Lutheran Church to be true to a sacred trust inherent in the nature of the pastoral office, no minister of The United Lutheran Church in America shall divulge any confidential disclosure given to him in the course of his care of souls or otherwise in his professional capacity, except with the express permission of the person who has confided in him or in order to prevent the commission of a crime.

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20. "Privilege in Civil Proceedings", Law Reform Committee, 16th Report, Cmnd. 3472, 1967 (U.K.), at p. 20.

21. Tiemann, op. cit. footnote 1, at pp. 49-50.

22. Minutes of the 22nd Biennial Convention of The United Lutheran Church in America (New York: The United Lutheran Church, 1960), at pp. 277, 758, as quoted by Tiemann, op. cit. footnote 1, at p. 52.

The former meeting stated that:[23]

> WHEREAS it has long been recognized that a part of the ministry of pastors of the Lutheran Church is to hear confessions... BE IT RESOLVED (1) That the Church Council recognizes and reaffirms that a part of the ministry of a Lutheran pastor is to counsel with persons, to receive their confessions...

This would seem to show that today confession is still an article of faith in the Lutheran Church and that the importance of secrecy in it is recognised.

Furthermore, Luther himself disliked the confessional of the Roman Church only because of the irreligious way it was administered and the way it was seen as a source of pecuniary gain by the Church. He even drew up a method of private confession for "simple folk" as "we know and feel guilty in our hearts" of certain sins.[24]

The Reformed Churches similarly recognised voluntary private confession. Zwingli believed that confession should be principally to God alone, but added that if anything was "not clear" the counsel of a minister or any brother learned in the law of God should be sought.[25] This would seem to suggest a private confession was acknowledged as having value. This was repeated by Bullinger, Zwingli's successor in the Swiss Reformed Church.[26]

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23. Minutes of the Church Council of The American Lutheran Church (Minneapolis: The American Lutheran Church, 1960), at p. 16, as quoted by Tiemann, op. cit. footnote 1, at p. 52.

24. Encyclopedia Brittanica, vol. 6, at p. 290.

25. J.T. McNeill, A History of the Cure of Souls (New York: Harper & Bros., 1951), at p. 196.

26. Ibid.

The French Reformer, Calvin, again stressed that confession should be made to God alone, but he laid down two types of public confession and two types of private confession that could be resorted to. Public confession was to be used in public worship or when a public calamity had called attention to a common guilt. He pointed to the scriptures for guidance as to when private confession should be available. To one another, confession could provide mutual advice and consolation, and to a neighbour whom we have injured, confession would provide for reconciliation. The former confession, to one another, should normally be to a minister, but Calvin stressed that the latter "must lay no yoke upon the conscience in the matter".[27] He further urged that before communion the minister should interview each prospective communicant. A synod of 1612, moreover, expressly recognised the secrecy which attached to any confession.[28]

There is evidence that voluntary confession was also recognised in other Protestant denominations.[29] The main ones only,have been mentioned as examples. It has been said that the Reformers wished to avail themselves of the custom of going regularly to confession since through this practice they could gain a knowledge of their lives, examine themselves, and gain instruction and be influenced in their lives.[30] Generally private confession was not practiced much after

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27. Supra, footnote 25, at p. 199.

28. Ibid., at p. 209.

29. Ibid., see generally.

30. The New Schaff-Herzog Encyclopedia of Religious Knowledge, vol. 3, at p. 222.

the Reformation, but in the nineteenth century a revival of interest in it occurred, and is continuing.[31] The important facts to remember are that confession can be made to a person who is merely a Christian brother and not necessarily a pastor, and that it is never compulsory as is the case in the Roman Catholic Church.

The differences between the Catholic and Protestant views of confession, however, would seem to be lessening today. Father Beaudrie stressed that confession in the Catholic Church is now seen as being for the benefit of the penitent, rather than a duty imposed upon him, and that only things that need to be confessed should be. Today most priests do not urge penitents to reveal all their foibles, but only their sins. Thus, it is only necessary in practice for Catholics to attend confession when they have something to confess. They need not go mechanically, though they should attend once a year, at least.

Another interesting point is that confession, being seen as primarily to enable the penitent to take a "good look at himself", is often performed in groups rather than solely with the priest. The similarities to group therapy in psychiatric work are apparent. The traditional confession to the priest alone, would normally follow such a session.

The proximity between the Protestant and Catholic confession is not difficult to see. The main difference between them is the element

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31. Supra, footnote 30, and see Tiemann, op. cit. footnote 1, at pp. 60-69.

of obligation, and even this is less apparent today than it has been in the past. It seems unjust that the priest should be granted a privilege merely because he is a Catholic, while a Protestant minister might be refused one. The United States statutes, it will be noticed, cover both and a similar effect would probably be achieved in English and Canadian law, though through the judges' discretion rather than through legislation. The question is whether a privilege should be extended to confessions made sincerely to one's Christian brother in denominations which allow for this. Logically, a privilege should be granted; practically, the problem arises of deciding whether a confession was made in a genuinely religious way.

History of the Privilege in England

The only available statute concerning privilege in the confession in England was enacted in 1315,[32] and stated:

> And the King's Pleasure is that Thieves [or] Appellors whensoever they will, may confess their offences unto Priests; but let the Confessors beware that they do not erroneously inform such appellors.

Coke in the second volume of his Institutes at page 629[33] inferred a privilege from this, but a better view of the construction of the statute would seem to be that its intention was to warn the confessor

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32. 9 Edw. II, St. 1, c.10.

33. Best, Law of Evidence, vol. 2, at pp. 991-992, quoted by Tiemann, op. cit. footnote 1, at pp. 40-41.

not to convey information from outside the prison to the penitent. However, Coke's view of the statute does show his respect for the rule of secrecy in the confession since he was stating what he believed to have been the Common Law of that time, so that it seems that a privilege existed in post-Reformation days. Furthermore, the fact that the origins of much of the early English Common Law was in the customs of the land would seem to suggest strongly that this was so owing to the importance religion held for people in those times.

Assuming that a privilege did exist in the early Common Law, when did it disappear? The famous historian Blackstone in his Commentaries written in those times does not mention the privilege at all, which would seem to indicate that it must have disappeared from the Common Law sometime in the 17th century. It might have been swept aside when the Puritans came to power in 1645 with their defeat of Charles I in the Civil War. Their Directory for Worship contained no provisions for private confession and they despised Catholicism. They would, therefore, have seen the withdrawal of privilege as a positive act against their Papist enemies.

Wigmore, however, feels that the privilege probably disappeared with the return of Charles II to the throne, following the years of the Puritan Commonwealth.[34] The reasoning behind the withdrawal here

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34. 8 Wigmore, Evidence, para. 2394 (McNaughton Rev. 1961) (Boston: Little, Brown & Co.).

would have been that Puritan pastors could be prevented from withholding secrets from Royal Tribunals, even though they had no provision for compulsory confession in their religious doctrine.

It is certain, however, that no privilege exists today in the Common Law, apart from the discretion which rests in the judge in each particular case. The first case in which a priest was seen as a martyr for preserving confidences imparted to him in the confession was that of Father Garnet in 1606.[35] In connection with the famed Gunpowder Plot in which a group of Roman Catholics attempted to blow up King James I and Parliament, Father Garnet had been the confessor of some of the conspirators. He apparently learnt of some details about the plot outside the confession box, but was supposed to have exerted his strongest influence to dissuade the conspirators. He was tried for high treason, the crown contending that he knew added details of the conspiracy through the confession. He refused to answer questions or to discuss the alleged confession and was found guilty of misprison of treason.

The first recorded case, however, in which a privilege was referred to,was in 1693.[36] An attorney was here granted a privilege but it was said to be different for "a gentleman, parson..." etc. Yet the judges have often used their discretion in cases concerning

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35. The Trial of Father Garnet (1606), 2 How. St. Tr. 218. See also E.A. Hogan, Jr., "A Modern Problem on the Privilege of the Confessional" (1951), 6 Loy. L. Rev. 1, at p. 11.

36. Anonymous (1693), Skin. 404, 90 E.R. 179 (K.B.D.).

priests. In 1853, Alderson, B., stated, referring to a priest's proposed testimony:[37]

> I do not lay this down as an absolute rule; but I think that such evidence ought not to be given.

Earlier, in Broad v. Pitt in 1828, Best, C.J., had said:[38]

> The privilege does not apply to clergymen...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.

The Solictors' Journal found the case of Ruthven v. DeBour "perplexing". In this case the judge ruled that a priest did not have to say what questions he was obliged to ask in confession.[39]

The famous case of Normanshaw v. Normanshaw[40] lays down the full position,however. In a case involving the proof of adultery, a clergyman whose denomination is uncertain, was asked what had been said during a conversation he had had with the respondent. When he declined to answer he was told that each case of confidential communications should be dealt with on its own merits, but that there was no reason why he should not give evidence in that particular case, and that it should not be supposed for a single minute that a clergyman had any right to withhold information from a court of law.

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37. Reg. v. Griffin (1853), 6 Cox Crim. Cas. 219.

38. (1828), 3 C. & P. 518, 172 E.R. 528, at pp. 519, 528-529 (C.P.D.).

39. (1901), 45 Sol.J. 272.

40. (1893), 69 L.T. 468 (P.D.).

It was said that no "unrecognised" privilege should be allowed to stand in the way of justice.

Similarly, the well respected judge, Sir George Jessel, M.R., in Wheeler v. Le Marchant[41] stated as obiter dictum:

> There are many communications which, though absolutely necessary because without them the necessary business of life cannot be carried on, still are not privileged... Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune are not protected.

The case of Reg. v. Hay[42] is interesting. It seems to acknowledge that a priest should have a privilege (if only in the judge's discretion), yet because the question asked concerned the identity of a penitent, rather than what he said, the priest was found guilty of contempt for refusing to answer. He refused to say from whom he had received a stolen watch.

It seems that judges were generally reluctant to compel clergymen or priests to give evidence against their will, and although none exists as such, the discretion of the judges has generally effected some sort of privilege.[43]

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41. (1880), 44 L. T. 632, at p. 634 (C.A.).

42. (1860), 2 Fost. & Fin. 4, 175 E.R. 933 (Assizes).

43. See also R. v. Castro (1874), Tich. Cas., 2 Charge of the Chief Justice 648, Reg. v. Kent (1865), Attlay's Famous Trials of this Century, 1899, 113, 221 L.T. 268.
For a recent decision supporting this policy see Cronkwright v. Cronkwright (1970), 14 D.L.R. (3d) 168 (Ont. H.C.).

A Gloss on the Subject

An early Irish case, Butler v. Moore[44] in 1802 was a definite decision against the existence of a privilege. A Roman Catholic priest was asked the religion of a testator at his death, this fact having been communicated to him in confidence by the deceased shortly before his death. He was refused a privilege.

However, in 1945, the case of Cook v. Carroll[45] was decided by Gavan Duffy, J., a case where marriage guidance advice had been given by a priest. Both parties, however, had waived their rights to a privilege, so the 'without prejudice' rule could not be applied. The Common Law in England and Ireland was said to generally coincide, but it was added that they were not necessarily the same. In particular...[46]

> ...it would be intolerable that the common law, as expounded after the Reformation in a Protestant land, should be taken to bind a nation which persistently repudiated the Reformation as heresy.

With regard to the absense of a privilege for priests in England, it was said:[47]

> I think the rule was first adopted in England at a period when religious bias was inevitable and when public opinion would have resented the privilege as being mainly a concession to Popish priests.

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44. Supra, footnote 34, at para. 2394, footnote 4.

45. (1945), 79 I.L.T. 116 (H.C.).

46. Ibid., at p. 118.

47. Ibid., at p. 119.

Later the learned judge states:[48]

> And the patent fact that English law on this topic was warped...

which illustrates his own views on the subject of privilege. He gives his reasons for why a privilege should exist as:[49]

(i) The risk in examination of one witness or the other having the whole of an intimate conversation reported in open court. This would tend to hamper the priest and prevent him from speaking his mind freely, and would diminish the value of his intervention in any case like the present one. (This argument could, and has been put forward as the grounds for the granting of a privilege in both social work and psychiatry, and it is relevant to remember that this case concerned the priest as a marriage guidance counsellor.)

(ii) On no account should such a confrontation by a parish priest be allowed to become a snare as for example it would if a girl waived her privilege, and while the man could object on the grounds that the discussion with the priest was 'without prejudice', he dare not because it would be said that he was afraid to let the truth be heard. (Again this argument is not really so much concerned with the priest as priest, but with the priest

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48. Supra, footnote 45, at p. 120.

49. Ibid.

as a social worker.)

(iii) To protect the priest would only be a half-measure of justice if others could reveal the conversation. No publication at all should be allowed, without the priest's consent.

It was held that the priest was not in contempt of court by refusing to answer the questions put to him.

This case is not concerned solely with Catholic priests, although the judgement is argued on the supposed inapplicability of the English Common Law because of religious differences between the two countries. It is also relevant to the privilege question concerning social work generally, and marriage guidance work in particular. It is noticable that a privilege is favoured as the property of the counsellor rather than of the parties involved in the discussion, and indeed had to be in this case, since the latter persons had waived any privilege they might have had. An opinion that the privilege ought to be a flexible one, has already been given earlier by the writer.[50] The importance of this case as far as the priest-penitent privilege is concerned, is that it suggests that immunity from testifying ought to extend to matters outside the confession. It also, incidentally, gives some opinions on why no privilege exists in England.

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50. Supra, at p. 261.

The Arguments For and Against a Privilege

About three-quarters of the U.S. states have granted a privilege to the priest or minister, and in Canada, Quebec and Newfoundland have taken similar action. The statutes normally stipulate that for a privilege to attach:[51]

(i) the statement must be made to the priest in his professional character; and

(ii) in the course of discipline enjoined by the rules of practice of the denomination to which the priest belongs;

(iii) it must normally be penitential in character or made to a clergyman in obedience to a religious duty;

(iv) to decide whether a privilege should attach, the court may not request disclosure of the confession, but must decide from the facts and circumstances leading up to it.

In Quebec it was held in Gill v. Bouchard[52] that the statute protected communications in the confession both to the priest and from him. However, on many occasions a distinction has been drawn in United States cases between penitential and other communications, the latter being generally afforded no protection. In Christian Smith's Trial it was said that...[53]

> ...there is a grave distinction between auricular confessions made to a priest in the course of discipline, according to the canons of the church,

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51. Tiemann, op. cit. footnote 1, at pp. 80-81.

52. (1896), 5 B.R., Rap. Jud. Quebec, 138, 22 A.L.R. (2d) 1156.

53. 1 Am. St. Tr. 779, at p. 784 (N.Y. Ct. Oyer & Term. 1817).

> and those made to a minister of the gospel in confidence, merely as a friend or advisor...

Thus, statements made in the course of friendly meetings[54] or even admissions to a priest in jail[55] have not been held privileged and an admission of adultery has been held admissible as evidence since it was not made to the minister in his professional capacity.[56]

However, more important for the purposes of this study, the priest when acting as marriage guidance cousellor has been recognised as protected by the privilege. Several cases illustrate this fact. In Kruglikov v. Kruglikov[57] it was held that a husband's and wife's communications to a rabbi in the privacy of his study, with a view to reconciliation, were privileged since the conversation fell within the spirit of the statute, although neither was a member of the rabbi's congregation. In Pardie v. Pardie[58] it was held that it had been wrong to allow a clergyman to testify about statements made to him during a consultation with him about family problems,

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54. Angleton v. Angleton, 370 P.2d 788 (Idaho Sup. Ct. 1962).

55. Johnson v. Commonwealth, 310 Ky. 557, 221 S.W.2d 87 (Ky. Ct. App. 1949).

56. Alford v. Johnson, 146 S.W. 516 (Ark. Sup. Ct. 1912).
Accord, Christensen v. Pestorious, 189 Minn. 548, 250 N.W. 363 (Minn. Sup. Ct. 1933).
Cimijotti v. Paulsen, 219 F. Supp. 621 (N.D. Iowa 1963).
In re Estate of Soeder, 7 Ohio App. 2d 271, 220 N.E.2d 547 (Ohio Ct. App. 1966).

57. 217 N.Y.S.2d 845 (1961).

58. 158 N.W.2d 641 (Iowa Sup. Ct. 1968).

and the testimony was disregarded.

Yet, perhaps the greatest innovation on the privilege statute came in 1971 in the case of In re Verplank[59] where it was claimed that United States army draft counselling services performed by a clergyman were within the privilege statute. It was said that the statute should be considered "in the light of reason and experience" and that since such counselling would involve often very deep and intimate spiritual and moral considerations such communications should be privileged. Moreover, since such a large number of men were applying for counselling, the clergyman had to employ staff to help him. These were also considered to be within the statute and an analogy was made to the attorney privilege which would include the lawyer's assistants.

A more realistic interpretation of a privilege statute occurred in Simrin v. Simrin[60] where a rabbi, conducting marriage guidance counselling, was held not to be covered by the statute, since otherwise its wording would have had to be interpreted unrealistically. However, an agreement between the parties to suppress evidence was held sufficient to effect a privilege, since public policy favoured procedures designed to preserve marriages and "counselling has become a promising means to that end". Yet the records of a County Welfare

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59. 329 F. Supp. 433 (C.D. Cal. 1971).

60. 43 Cal. Reptr. 376 (1965). But see Killingsworth v. Killingsworth, 217 So.2d 57 (Ala. Sup. Ct. 1968).

Department and a Catholic Welfare Association, concerning the aid given to unmarried mothers received no protection under a privilege statute in The State v. Lender.[61] This case shows that the statutes cannot be interpreted to cover all the functions that the priest and other clergy perform, and which require secrecy. In those cases above where protection has been afforded, one feels that the statute provided a useful tool for public policy and that its intentions were not really being considered, since these dealt mainly with the confession or communications necessitated by the rules of practice of a particular religious denomination - not with the priest's social work duties.

The United States statutes have shown other limitations also. Although one case[62] held that Elders of a Presbyterian Church did come within a privilege statute, it must be uncertain whether the privilege will be similarly viewed in the case of confessions to a Christian brother. In Knight v. Lee[63] a church officer was held not to have been acting as a clergyman when he spoke to a church member about the latter's conduct and in Commonwealth v. Drake,[64] penitential communications made to members of the Church were held not privileged. Since some denominations believe in confession to Christian brothers rather than to a priest, there is an argument, at least, that they should be covered by the privilege statutes.

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61. 124 N.W.2d 355 (Minn. Sup. Ct. 1963).

62. Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (Iowa Sup.Ct.1917).

63. (1881), 80 Ind. 201 (Ind. Sup. Ct.).

64. (1818), 15 Mass. 161 (Mass. Sup. Ct.).

It must, however, be clear that penitential communications are usually made to priests and therefore other persons are not usually included within the protection given by statute. Thus a Salvation Army officer had to give evidence,[65] as did a Catholic nun who was told certain facts,following her social studies class, about a fight the 'penitent'had had with his wife. It was held that the priest-penitent privilege could not be claimed by a nun.[66]

As has already been shown, no privilege exists for such communications under English Common Law. The Law Reform Committee[67] was of the opinion that the law should remain unchanged. It pointed out that "the problem appears to be without practical importance" since no English case in civil proceedings has recently occurred where a priest has been asked to give details of a confession made to him in his capacity as such. The Committee said that it was difficult to imagine circumstances when he would be so asked and that it was sufficient to leave the matter to the judge's discretion in each case. They pointed out that it might be thought wrong to restrict any privilege to denominations with a professional priesthood, but at the same time, no privilege could be granted to every inculpatory confidence that was made to a fellow

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65. State v. Morehous, 97 N.J.L. 285, 117 A. 296 (Ct. Err. & App. 1922).

66. In re Murtha, 115 N.J. Super. 380, 279 A.2d 889 (N.J.App. Div. 1971).

67. Supra, footnote 20.

member of a religious sect.[68]

Several esteemed writers, however, have favoured a privilege being granted in this area. Among them, Bentham,[69] said by Wignore to be the greatest opponent of privileges generally, was in favour of one, on the grounds that discrimination in religion was bad and that if no privilege existed it would amount to persecution of Roman Catholics in England. He based his argument on the fact that the confession in the Catholic Church is a sacrament, whereas in Protestant denominations it is not. Tiemann, however, stated:[70]

> There is no essential difference between a confession of sin made to a Roman Catholic priest and a confession made to a Protestant pastor. The required nature of one and the voluntary nature of the other is not definitive. In both, at their best, forgiveness is asked and absolution assured in the name of Jesus Christ, who alone has the power to forgive sins but who has given to men the ministry of reconciliation.

This indicates that the granting of a privilege to Roman Catholic priests and not to Protestants might also be discrimination.

Wigmore, himself, was in favour of a priest-penitent privilege He tested it by his four conditions and decided that a privilege was demanded. He concludes:[71]

> Even assuming that confessions of legal misdeeds

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68. Supra, footnote 67, at p. 20.

69. Wigmore, op. cit. footnote 34, at para. 2395.

70. Tiemann, op. cit. footnote 1, at p. 91.

71. Wigmore, op. cit. footnote 34, at para. 2395.

> continued to be made, the gain would be merely the party's own confession. This species of evidence...ought in no system of law to be relied upon as a chief material object of proof. In criminal cases it would be impolitic to encourage a resort to this too facile of confessions. In civil cases the ordinary process of discovery upon oath would be a sufficient equivalent.

Lord Chief Justice Coleridge is reported to have written a letter to Mr. Gladstone referring to a case (that of Constance Kent) in which the matter of privilege was raised. In it the reasoning of Sir James Willes, the judge in that case, is mentioned. He did not have to decide the question but...[72]

> ...He said that he had satisfied himself that there was a legal privilege in a priest to withhold what passed in confession. Confession he said, is made for the purpose of absolution. Absolution is a judical act. The priest in absolving acts as a Judge, and no Judge is ever obliged to state his reasons for his judicial determination. This, you see, puts it on grounds of general law, and would be as applicable to Manton, Oliver Cromwell's chaplain, who most certainly heard confessions and absolved, as to the Pope himself. Whether the English Judges would have upheld Willes' law I own I doubt, but I thought it might interest you to know the opinion, and the grounds of it, of so great a lawyer and so really considerable a man. Practically, while Barristers and Judges are gentlemen the question can never arise.

Willes' analogy is an interesting one, but the comment following it seems to be also important. Is it sufficient to rely on the personal moral codes of barristers and judges? C. B. Kruse[73] recently

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72. Wigmore, op. cit. footnote 34, at para. 2395.

73. C. B. Kruse, "The Role of the Clergyman in Coerced Confession" (1966-1967), 17 Past. Psych. 9.

pointed out several cases in which clergymen had coerced prisoners to confess to their crimes and then had given evidence on the matter. He says that this is a denial of the due process of law and akin to ordinary coerced confessions. It is unfair to convict a person on a confession obtained by threats, pressure or the denial of the means of grace. He gives several cases as examples. In Mitsunaga v. People[74] a methodist minister visited the accused in jail, after which he made a statement to the police admitting his guilt. It was held that the privilege statute was not applicable to this case since the accused was not a methodist and it had not been shown that the minister was his spiritual advisor.[75] Kruse suggests that where a privilege statute exists such statements should be held privileged, and excluded from evidence.

However, where no privilege exists there are grounds to support the contention that the confession is involuntary. He states:[76]

> The leverage a clergyman holds over persons is excessive; and where religious influence is shown to control an individual to the point where he has no resistance, no alternative but to confess, his confession is the response of a coerced will.

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74. 129 P. 241 (Colo. Sup. Ct. 1913).

75. See also: Rex v. Gillham (1828), 1 Mood 186, 168 E.R. 1237 (Assizes).
Johnson v. State, 65 So. 218 (Miss. Sup. Ct. 1914).
Denmark v. State, 116 So. 757 (Fla. Sup. Ct. 1928).
Macon v. Commonwealth, 46 S.E.2d 396 (Va. Ct. App. 1968).
Downey v. People, 215 P.2d 892 (Colo. Sup. Ct. 1950).

76. Supra, footnote 73.

An example of such a case is State v. Andrews.[77] The accused, after speaking to his Baptist minister, signed a confession to having murdered his mother, father and sister. The defense argued that the minister should have been prevented from testifying about his communications with the defendant, since a privilege statute existed. It was held, however, that the privilege had been waived when the information had been told to the sheriff, at whose office the accused was being held. The evidence was thus admissible.

It seems that Kruse's argument is a strong one, and that he is justified in saying that the standard of fairness in trials is abused when clergymen take on the state's mantle, since the role of the minister, by its very nature, encourages the accused to place confidence in him.

Conclusion

Although some cases above, in particular those regarding marriage counselling, have illustrated that the courts in the United States can take a broad view of the privilege statute, it is apparent that statutes are usually strictly construed. Since the subject of confidentiality in general requires decisions to be based on the facts of every particular case as it arises, a

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77. 357 P.2d 739 (Kan. Sup. Ct. 1960).

discretionary rule of law is best suited to it. In England, at present, the priest or minister when acting in the confessional, can rely on the judge's discretion to excuse him from giving evidence. However, in performing other functions, that are an essential part of the work of all clergymen and priests, in varying degrees, he cannot feel secure. The recent case of Pais v. Pais[78] emphasises this. It is submitted that a privilege similar to that advocated earlier for social workers be granted to clergymen and priests to protect them in this work, and to enable them to carry it out effectively. Although, in practice, no privilege would seem to be needed for the confessional duties of the priest, the absence of one in this area might lead to an assumption being formed, however erroneously, that these duties do not merit protection. Therefore, some form of statutory protection would be required. If general in nature, with discretion being left to the judge to give protection where it is warranted, the difficulties mentioned by the Law Reform Committee,[79] would be avoided. In both instances in seems that discretion cannot be enough in itself.

It would be unrealistic to think of parishioners suing their priest or minister for breach of confidentiality. Generally, people who seek the advice of a minister do so because they see him as vested with special attributes, that would prevent him from

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78. [1970] 3 All E.R. 491 (P.D.A.).

79. Supra, footnote 20.

intentionally acting against their best interests. However, it is as well to remember that confidence should nevertheless be maintained, otherwise this advantage that the priest or minister has, in certain cases, over the social worker or psychiatrist, will crumble into dust. It has been stated that...[80]

> ...in general, the minister's ability and capacity to help his people is dependent upon their willingness and ability to talk freely.

It has also been said, and rightly so, regarding confidentiality that...[81]

> ...[B]ecause of its protective nature it keeps out those that might help the client as well as those who might do him harm.

However, it is hoped that the reader appreciates the importance that confidentiality plays in any of the helping professions and that it will be appreciated that:[82]

> The relatively few unresolvable problems seem to be far counterbalanced by the benefits to the client through the confidential relationship.

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80. A.A. Cramer, "Go Tell the People? The Ethics of Pastoral Confidentiality" (1971), 22 Past. Psych. 31, at p. 32.

81. DeLoss D. Friesen, "Confidentiality and the Pastoral Counsellor" (1971), 22 Past. Psych. 48, at p. 53.

82. Ibid.

CHAPTER VIII

THE NEWS MEDIA

> Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing.[1]

Although most newsmen might not agree, the function of the newsman cannot be equated with that of any of the professions earlier considered. From the outset the protecting of confidences does not seem to be a sine qua non for him to be able to do his work. Confidential sources do not feature in the preparation of every news story. However, it is a fact that many news-stories would be less complete, and perhaps non-existent, were it not for information received from sources wishing to remain anonymous. The public benefits from reading these stories. Unless there is some overriding interest at stake, the public has a right to know about the reasons for dissent in society and the activities or ulterior motives of its politicians, to name but two areas in which confidential sources are used. If one wishes to draw an analogy between the newsman and any one of the professionals earlier discussed, one might

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1. State v. Buchanan, 436 P.2d 729, at p. 731 (Ore. Sup. Ct. 1967).

say that the newsman's client is the general public. The general public has a right to demand that the press remain a "free press" and that the free flow of news remain unrestricted. This necessitates a freedom to collect news being recognised, which in turn means that the confidential source must not be deterred from supplying newsworthy information, the revelation of which will be in the public interest.

The newsman knows that if he does not respect the confidences of his sources these will cease to supply him with information. This applies especially to regular sources, for obvious reasons. Moreover, the source usually has no compelling need to seek out the newsman - certainly not to the same extent as a sick patient needs a doctor and maybe a social worker, or a person engaged in business needs a banker. The general public, in applicable cases, has the greater need for the information to be divulged to it through the news media.

Thus, the protection of the identity of confidential sources has become an issue in the realm of privilege. This is not surprising since the courts are acting in the public interest in enforcing justice generally. Privilege has been discussed in most of the preceeding chapters, since it is a relevant part of confidentiality. The present chapter provides an opportunity for a fuller consideration of this area. It is submitted that the granting of a privilege is, in effect, a recognition by the court or legislature of the need to protect confidentiality in certain areas. Indeed it might be true

that today's privileges are an unconscious desire to create a restricted recognition of "oaths of honour" and not to discard them entirely as is thought.[2]

The Early Grounds for a Privilege being Granted.

John Henry Wigmore[3] suggested that before the famous case of the Trial of the Duchess of Kingston[4] finally dispensed with the notion, a man's honour was seen as sufficient in most cases to require a privilege being granted. He mentioned several cases in support of this contention.[5]

In The Countess of Shrewsbury's Case[6] in 1613, Lady Arabella Stuart had married without gaining the assent of the King. She had fled abroad with the help of the Countess, who had not escaped. The latter was required to declare her knowledge of the escape but refused,one reason being that "she had made a rash vow that she would not declare anything in particular touching the said points". She was judged to be in contempt of court since it was held that "rash

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2. "Compulsory Disclosure of a Newsman's Source: A Compromise Proposal" (1959), 54 Nw. U.L. Rev. 243, at p. 249.

3. 8 Wigmore, Evidence, para. 2286 (McNaughton Rev. 1961) (Boston: Little, Brown & Co.).

4. (1776), 20 How. St. Tr. 355, at p. 586.

5. Wigmore, op. cit. footnote 3.

6. (1613), 12 Coke 94, 77 E.R. 1369.

and illegal vows make not an excuse" when the case involved the "safety of the King, and the quiet of the realm." Wigmore suggests that a different result might have occurred, had the case been a civil rather than a criminal one.

In Bulstrode v.Lechmere[7] the defendant pleaded that he was a "Counsellor with A.B." and that an agreement of secrecy between them had been made. The Bill was to discover an ancient "Deed of Intail" which was supposed to have been in the defendent's hands and it had been alleged that he had acknowledged the deed "in discourse". The Lord Chancellor ordered that the defendent should not be forced to answer what he knew only as a result of being "Counsellor" or under such "Contract of Silence".

It is also to be noted that the solicitor-client privilege in England was originally based on the honour of the solicitor and belonged to him. It was only in later times that it was seen as being the right of the client to plead privilege.[8]

Certain early cases, however, show that the privilege based on a man 's honour was not absolute and bowed to the higher demands of justice when necessary. In Layer's Trial [9] the witness is reported to have said that :

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7. (1676), 2 Freem. Ch. 5, 22 E.R. 1019 (Ch. D.).

8. Wigmore, op.cit. footnote 3,at para. 2290.

9. (1722), 16 How. St. Tr. 93, at p.245.

> It is a little hard for a man of honour to betray conversation, what passed over a bottle of wine in discourse; but since your lordship requires it, I must submit.

It is noticeable that the honour of the witness was put forward as the stumbling block, which troubled his conscience in answering the question. Similarly in Hill's Trial[10] the prisoner rested his defence upon the credit the jury should give to an informer's evidence. It was claimed that ...

> ... a man who was capable of drawing out this evidence from him ought not to receive credit in a court of justice.

Yet the judge in that case said ...

> ... if this point of honour was to be so sacred as that a man who comes by knowledge of this sort from an offender was not to be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and therefore it is that the wisdom of the law knows nothing of that point of honour.[11]

The important point in all these cases, is that it was thought worthwhile to argue that a man's honour should excuse him from answering questions. As Bulstrode v. Lechmere[12] shows, in certain cases a privilege would have been granted on that ground.

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10. (1777), 20 How. St. Tr. 1317, at p. 1362.

11. Ibid., at pp. 1362 - 1363.

12. Supra, footnote 7.

Today, however, it is recognised that:[13]

> In general ... the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege.

In the United States about one third of the states have granted the journalist a statutory privilege. Recently, the use of the subpoena to force journalists to appear in court and give evidence that relates to confidential information and sources has led to a fresh consideration of what constitutes a free press and whether a privilege should be granted to newsmen to preserve it. In other words the balancing of interests as stated in Wigmore's fourth condition (i.e. whether the injury that would inure to the relation by the disclosure of the communications would be greater than the benefit to be gained thereby for the correct disposal of litigation) is currently in progress. The question is, should the court or the legislature weigh the circumstances up and decide whether a privilege should be granted.

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13. Wigmore, op. cit. footnote 3.

Privilege through Practice in Pre-Trial Proceedings in England and Canada.

A limited privilege has been recognised for the proprietors and publishers of newspapers in England. There are a number of early cases on the subject, from which it seems that the granting of a privilege from having to reveal confidential sources in pre-trial discovery proceedings come about not so much on grounds of policy, but rather through some suspect reasoning in the case of Hennessy v. Wright (No. 2).[14]

In this case, in 1888, a newspaper publisher, who was being sued for libel, was asked the names of his informants, among other questions. It was held that he need not answer since the question sought to discover not the facts of the case, but evidence of them. The defendant was pleading fair comment, a defense which could have been destroyed had it been shown that he had acted maliciously in publishing the libellous statements in his newspaper. It seems that it would have been relevant to consider the reliability of the informant in order to determine whether the publisher had acted in good faith in relying on him. Thus it seems it would have been relevant to discover the informant's identity. Lord Esher, however, stated that...[15]

> ...to shew that the persons who informed the defendant were malicious does not carry the case

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14. (1888), (C.A.), noted at Parnell v. Walter, 24 Q.B.D. 441, at p. 445.

15. Ibid., at p. 447

> any further. What must be shown is that the defendant was malicious...

It seems that the decision in Hennessy's Case was at least questionable. It is clear, however, that the decision rested on grounds of relevance. Privilege was not mentioned.

The decision was followed in Gibson v. Evans.[16] There, the plaintiff was held to be not able to question the defendant as to the source, or writer, of a libellous letter that the latter had published in his newspaper.

Again, in Parnell v. Walter, another libel case, similar questions regarding the publisher's sources were asked. It was held that although the questions might appear to be relevant, previous authorities, together with the fact that the interrogatories in that case amounted to cross-examination of the defendants as hostile witnesses, meant that answers should not be required. Denman, J., said, however:[17]

> I am not perfectly confident that if the point had come before me at chambers in the first instance, I might not have been inclined to order an answer to be given.

In Hope v. Brash,[18] the Court of Appeal once more followed Hennessy. It was said that the general practice of the court was not to allow discovery of the name of the person who originally wrote the alleged libel published in a newspaper.

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16. (1889), 23 Q.B.D. 384.

17. (1890), 24 Q.B.D. 441 at p. 451.

18. [1897] 2 Q.B. 188 (C.A.).

The next case, Elliott v. Garrett,[19] was not connected in any way to the press. The question it was wished to ask related to the information the defendant had received and the steps he had taken to ascertain its truth. The case concerned slander, and the defense was one of lack of malice, good faith being pleaded. Vaughan Williams, L.J., held that the question was obviously relevant. The interrogatory was not a 'fishing' one and the plaintiff was merely trying to support his case. The interrogatory was allowed on grounds of relevance. Hennessy was mentioned but there was no attempt made to distinguish it as protecting only newspaper publishers.

Similarly, in White & Co. v. Credit Reform Assoc. & Credit Index[20] the defendant was not a newspaper publisher, but a Trade Protection Society publishing a book. Elliott v. Garrett was followed and the plaintiff was permitted to ask the defendant what inquiries he had made to ascertain the truth of his statements, since it was held to be an important factor in viewing the question of malice. It was similarly held, as regards to whom these inquiries had been addressed (i.e. the information source) but it was decided that in this case such a question would be oppressive. The defendant would be forced to go all through its books. The important fact to be noticed is that the question was thought to be relevant. This

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19. [1902] 1 K.B. 870 (C.A.).

20. [1905] 1 K.B. 653 (C.A.).

case and Elliott seem to show the mistaken reasoning of Lord Esher in Hennessy v. Wright. An interrogatory regarding the source of one's information is relevant when malice is an issue.

Yet in Plymouth Mutual Co-op. & Industrial Soc. v. Traders' Publishing Assoc.[21] the decision, or rather the result of Hennessy, together with that of Hope v. Brash, was seen as having...[22]

> ...laid down a rule from which we are not at liberty to depart, namely that the Court ought not in such a case as this, to compell discovery of the names of persons from whom the information was derived in the absence of special circumstances...

The defendants had published a trade periodical and were being sued for libel. They pleaded fair comment as a defense. It was held that although the periodical was not strictly a newspaper, it should be dealt with on the same footing as if it were one. It was admitted that the questions sought to be asked, as to what information the defendants had to lead them to believe that the words published were true, and from whom the information which was relied on in publishing the opinions was obtained, were relevant but that the second of these was inadmissible according to the general rule of practice in actions against newspapers. This case marks the point where the "privilege" came into being. No longer was the

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21. [1906] 1 K.B. 403 (C.A.).

22. Ibid., at p. 418.

inadmissibility based on grounds of relevance.

Later cases have established the existence of the special privilege in discovery proceedings for newspapers. In Adam v. Fisher,[23] a non-newspaper case, it was stated obiter dictum that newspapers were seen to have a special position as regards disclosure of sources. In Lyle-Samuel v. Odhams Ltd.[24] no special circumstances were seen to exist to allow the general rule of practice as laid down in the Plymouth Mutual case to be displaced. In Lawson & Harrison v. Odhams Press Ltd.[25] Tucker, L.J., held that...[26]

> ...it has now become a matter of practice, and possibly a matter of law, that an interrogatory of this kind will not be allowed to be administered to the proprietor or publisher of a newspaper.

In Hays v. Wieland,[27] an Ontario case, the rule was recognised as applying to newspapers only. It was said by Hodgins, J.A.:[28]

> The exception itself is founded upon considerations of policy - for, if a newspaper proprietor were compelled to give up the name of his informant, the collection of news would be difficult; and, in the

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23. (1914), 30 T.L.R. 228 (C.A.).

24. [1920] 1 K.B. 135 (C.A.).

25. [1949] 1 K.B. 129 (C.A.).

26. Ibid., at p. 134.

27. (1918), 42 O.L.R. 637 (Ont. App. Div.).

28. Ibid., at pp. 642-643.

> second place, if fair comment and ample apology are a defence to a newspaper, it would be difficult to deny them to the real author of the words complained of.

Three other cases suggest that the English rule applies in Canada. The most recent of these is Reid v. Telegram Publishing Co. Ltd. & Drea[29] where the above passage from Hays v. Wieland was quoted. It was said that the rule of practice should be followed expecially if there was no great hardship likely to fall on the plaintiff.

However, other Canadian cases have not followed the English rule. In Culligan v. The Graphic[30] the majority felt that an interrogatory concerning the name of the writer of an article in a newspaper should be answered by the publisher. This question was considered to be relevant to the action. White, J., dissenting, however, felt that the identity of an informer should only be revealed in special circumstances, in cases concerning newspaper publishers. This case concerned whether an improper admission of such evidence was a ground for a new trial being granted. It was held that it was not.

In 1953, the case of Wismer v. Maclean-Hunter Publishing Co.

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29. (1961), 28 D.L.R. (2d) 6 (Ont. H.C.).
Accord, De Shelking v. Gornie, [1918] 3 W.W.R. 1038 (B.C.S.C.).
Kaft v. Star Publishing Co., [1925] 1 W.W.R. 774 (Sask. Dist. C.).

30. (1917), 37 D.L.R. 134 (N.B.S.C. App. Div.).

Ltd.[31] was a more explicit disagreement with the English position. Whittaker, J., stated that the reasons for the exception in England were not clear. He distinguished the Canadian and English rules for interrogatories, stating that the former allowed much greater latitude in what may be asked in pre-trial discovery proceedings and that a question concerning the source of the defendant's information, since it was relevant to malice, could be asked.

In the appeal, the majority agreed with the opinion of Whittaker, J., although O'Halloran, J.A., dissenting, traced the English rule to grounds of public policy and ordinary fairness. It was not confined to newspapers, he said, but any persons who had a duty to communicate matters of public interest would be covered, as for example, Members of Parliament. He saw no substantial, as opposed to mechanical, difference between the Canadian and English rules for interrogatories, which would justify Canadian practice allowing parties an unfair advantage, which the English system was designed to prevent.

Following this decision McConachy v. Times Publishers Ltd.[32] decided that the English practice regarding interrogatories had no application to Canada. The reasoning of the majority in Wismer had left this point open, since they merely decided that Whittaker, J., had exercised his discretion properly. The English decisions of

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31. (1953), 10 W.W.R. 114 (B.C.S.C.), aff'd, (1954), 10 W.W.R. 625 (B.C.C.A.).

32. (1964), 50 W.W.R. 389 (B.C.C.A.).

Att. Gen. v. Clough[33] and Att. Gen. v. Mulholland[34] were quoted as showing that no privilege as such exists for journalists. Since the "privilege" that does exist only refers to discovery proceedings, Canadian practice was distinguishable. Therefore, it was decided, Wismer was a correct decision and Reid was wrong. The latter case was put aside as being merely the decision of a single judge in the Supreme Court of Ontario, and that it was delivered two years before the Clough and Mulholland cases.

It would thus seem that the weight of opinion in the later cases in Canada is against a privilege being seen. Although such opinion may be based officially on the distinction in the rules for interrogatories in England and Canada, one feels that possibly it has been recognised that the English rule is based on unsafe foundations. There is an aversion to following a rule, the purpose of which is uncertain.

Furthermore, it seems strange that it is confined solely to the publisher or proprietor of a newspaper and does not cover journalists or other writers. For instance, in South Suburban Co-op. Soc. Ltd. v. Orum[35] it was held that the writer of a letter to a newspaper could not refuse to answer questions as to his sources of information. Lord Denning, in Georgius v. Vice-Chancellor and Delegates of the

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33. [1963] 1 Q.B. 773.

34. [1963] 2 Q.B. 477 (C.A.).

35. [1937] 2 K.B. 690 (C.A.).

Press of Oxford University[36] stated that in practice there should be no reason for distinguishing newspapers, another limitation in the rule, from monthly, quarterly and annual reviews. He did not disapprove of the rule of practice for newspapers and felt that the judge, in other instances, might still use his discretion to grant a privilege, having regard in so doing, to the rule pertaining to newspapers.

It is certain that journalists themselves, in proceedings other than those relating to discovery, have no privilege. In Att. Gen. v. Clough[37] it was stated by Lord Parker, C.J., that the rule of practice was confined to interlocutory proceedings only. This was the first time that the matter had been raised outside such proceedings but he was of the opinion that:[38]

> The law has not developed and crystalised the confidential relationship ... into one of the classes of privilege known to the law.

Similarly in Att. Gen. v. Mulholland, Lord Denning stated, regarding the rule of practice:[39]

> But that rule is not a rule of law; it is only a rule of practice that applies in those particular cases.

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36. [1949] 1 K.B. 729 (C.A.).

37. Supra, footnote 33.

38. Ibid., at p. 793.

39. Supra, footnote 34, at. p. 490.

In that case, however, Donovan, L.J., reminded one that:[40]

> There may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.

Both the above cases concerned articles written about the offences of the spy, Vassell. It was obviously in the public interest that where the security of the nation was threatened, a journalist should not be privileged from giving evidence in court. Both cases, however, it will be noticed, pointed out that it was open to the court to recognise a journalist's claim to privilege on the grounds of public policy.[41]

The Public's Right to Know versus Individual Privacy

There will always exist a conflict between what the public has a right to know and what each individual should be permitted to keep secret. Both extremes are undesirable. If no right of individual privacy is recognised the individual himself disappears and becomes merely one of a number. The persons to benefit are always the few people who have power over the rest - if you know everything about

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40. Supra, footnote 34, at p. 492.

41. Accord, McGuiness v. Att. Gen. of Victoria (1940), 63 Commw. L.R. 73.

everyone you have the ball in your court. Similarly, if privacy is recognised to such an extent that no freedom of expression is allowed, no-one knows anything about anybody - least of all about the persons in power. Corruption is always the end result. Once again the majority suffer, and the minority benefit.

The press naturally struggles to maintain its freedom to publish what it wishes, while the individuals whose affairs are exposed by the media demand some sort of privacy. However, it is the public figure who stands to gain the most from any extension of individual privacy, the press argue, and the majority of individuals will suffer should the news media lose its rights to report about true facts as they happen.

This whole question has been the subject of discussion in both England and the United States recently. In January 1972 the British Press Council issued a memorandum[42] in which it argued strongly against the need for any new legislation to extend the rights of privacy in Britain, saying that such laws would do more harm than good. The right for individuals to suppress what they do not wish to be made public, it is argued, means that each individual will be deprived of an appreciable part of his right of free speech. It is said:[43]

> Frequently the publication of truth in newspapers has led to the exposure of wrongs which need to be

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42. The Press Council, Privacy, Press and Public (London: Press Council Booklet No.2, 1971).

43. Ibid., at p. 6.

> exposed and to the subsequent prevention of crime or the criminal prosecution of wrongdoers.

Advances in science, it is argued, should not be used as a ground for framing wide legal concepts that will upset the social balance hitherto held for generations between the right to speak the truth, be it palatable or not, and the law of libel which forbids the publication of defamatory untruth.

The Council argues that, in the field of data banks and computers, storage of information itself cannot be wrong, and that...[44]

> ...an offence can occur only in the course of collecting the information or in its subsequent release or distribution.

However obvious this may seem, it emphasises the Council's point that scientific advances in themselves are not bad. It is the use to which they are put that could cause infringements of individual rights. It thus recognises that there may be need for some limitation on the issue of information so collected, to persons not involved in the gathering of it.

The uses of telephoto lenses, tape recorders and bugging devices are also considered.[45] The Council suggests that "no regulation" of the equipment itself can be justified and that consideration should be confined to the contrived misuse of scientific instruments. The London Times says, regarding this,

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44. Supra, footnote 42, at p. 16.

45. Ibid., at pp. 18-20.

that it is likely to be the Council's most controversial argument.[46] Indeed, it seems some regulation is called for to prevent the opportunity for easy access to such devices being available to the wrong sort of people. The injury may arise from the misuse of them but the possibilities of misuse are so enormous, that their output should be limited to control it.

In the United States in 1971 an interim report of a Task Force set up to consider government and the press[47] discussed in some detail the issue of the Pentagon Papers. It was claimed that any degree of secrecy entails social costs:[48]

> Secrecy itself, moreover, involves a price and can have consequences fully as adverse as a breach of secrecy. It has become increasingly apparent that many Americans are losing confidence in governmental institutions at all levels of society. Citizens have become more interested and more critical of the manner in which such elementary matters as zoning laws, tax assessments, the flotation of school board bonds, the actions of city councils, and the activities of state legislatures and governments are handled. To some extent at least, this is because secrecy has become inherent in government operations, making it difficult for the average citizen to satisfy himself that his affairs are under competent and honest management.

The Pentagon Papers showed, it is said, that people had only the faintest inklings of the facts and the decisons that were to determine their futures. The irony of the matter is that they were

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46. The Times, January 14th, 1972.

47. 20th Century Task Force Report on the Government and the Press, Press Freedom Under Pressure (New York: 20th Century Fund, 1971); final report issued May 1972.

48. Ibid., at p. 29.

compiled to assist future policy planners to avoid the mistakes of Viet Nam, while it was highly unlikely that any planner would ever see them. The Task Force concludes that excessive secrecy is inimical to a free society and that a free and responsible press will combat it if it has the right to investigate, interrogate and to publish.

This discussion illustrated the fear of the Task Force of excessive secrecy destroying the rights of individuals to know how vital decisions affecting them and their country were being taken. The individuals had a right to know - many of them were to die as a result of the decisions taken. Yet at the same time it is recognised that certain state matters should be kept secret for the benefit of the nation. In other words,secrecy itself is not being attacked; rather it is the unreasonable use of it that must be regulated. Associate Justice Potter Stewart said in the Supreme Court regarding this that...[49]

> ...when everything is classified, nothing is, and the system is to be disregarded by the cynical and careless and to be manipulated by those intent on self-protection and self-promotion.

The whole problem is perhaps crystalised by the following statement of the Task Force:[50]

> There is a peculiar characteristic to governmental secrecy that stems from the fact that there is no

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49. New York Times Co. v. U.S. (1971), 403 U.S. 713, at p. 729.

50. Supra, footnote 47, at p. 29.

> known method of confining its exercise to limited areas upon which reasonable persons can agree. Because classified security material cannot be examined by the public, the public cannot know whether only material essential to the nation's security is being classified, When people do not know, they tend to become suspicious...[A]t the first setback - and setbacks are inevitable no matter how wise political leaders and their policies may be - the suspicions emerge as a hardened conviction that secrecy has been used to conceal blunders or even fraud and venality... A free society...requires the confidence of the electorate. Without that confidence, a free government becomes ineffective.

Investigative Journalism in Practice

The whole subject of press freedoms finds a lucid illustration in the activities of Jack Anderson, hailed "Supersnoop" by Time magazine, after the I.T.T. affair had brought the issue of the journalist and his confidential sources of information into the spotlight in 1972. Anderson's column, 'The Washington Merry-Go-Round', has been described as a "mishmash of assorted scandals and disclosures",[51] but its biggest scoops concern the exposure of corruption, particularly at government level.[52] Time says:[53]

> Almost by reflex, Anderson seems to smell danger

51.. Time, April 3rd, 1972, at pp. 36.

52. e.g. misuse of campaign funds by Senator Thomas Dodd; Republican George Murphy exposed as being on payroll of Technicolor Inc. while serving in the Senate; top Latin American officials implicated in heroin smuggling scheme. See ibid., at p. 40.

53. Ibid., at p. 37.

> in the contacts between Government officials and private industry.

He has been compared to the consumer-protectionist, Ralph Nader, both being "obsessed", it is said, by the influence of private power and big money on public men and public policy. He insists that the "drinking or leching capers" of public men do not offend him "until they affect the public business". He interprets the Constitution as forbidding Government secrecy that allows officials to mislead the public. (Perhaps the Pentagon Papers might be included in such an idea.) Anderson sees his work as an "invaluable antidote to corruption" and his effect has certainly been felt. He has made Governmental operations more difficult by publishing records of private policy talks and one West German diplomat is quoted as asking:[54]

> How can you run a Government with such people around?

Anderson, however, admits that government does need some degree of secrecy to conduct its work properly but "not to pursue a course in private that is counter to public pronouncements". Thus, he recognises that only excessive secrecy is dangerous. He pledges that he would not print information about weapons technology, or deployment of forces in times of war, and he claims to have withheld material once at the specific request of C.I.A. Director Richard Helms.

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54. Supra, footnote 51, at p. 39.

It seems that investigative journalism is performing a useful function by ferreting out corruption as it arises and, more important, acting as a deterrent to corruption. When such a function is no longer able to be performed we will have a perfect society. The dangers that do exist, however, are those of sensationalism. It is important that the press realises that it is not performing for economic gain alone, but that primarily it is the public's servant. The public has a right that the truth be told, and this must include the reporting of facts proportionally to their importance.

It seems that investigative reporting is a sign of the times. In the United States, discontent with the continuance of the Viet Nam War, racial tensions, student unrest, and the recent inquiries into police malpractices are other symptoms of a discontented and uncertain society. It is interesting to note that in the long period of post World War II prosperity and contentment, the Jack Anderson type of column was in a state of eclipse.[55] Today, however, it is the 'in' thing with more and more newspapers and magazines assigning teams of writers to search for exposes. One feels a sense of unease, however, when a publication, such as the Long Island paper 'Newsday',proudly lists its achievements as 21 indictments, 7 convictions and 30 resignations of public officials and businessmen. Perhaps such papers might not be pleased to see a decline in their figures.

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55. Supra, footnote 51, at p. 37.

Confidential Information

Confidential information does not only result in the exposure of wrongdoing. It also leads to stories being written on underground groups such as the Black Panthers in the United States and the F.L.Q. in Quebec. It is necessary that the public be informed of the ideals of such groups. Furthermore confidential information is not received only by newspapers. The broadcast media are also involved. In-depth writing and comment is the main preserve of the press, however, while 'hot' news is transmitted more easily by the broadcast media. This is a broad generalisation, though, and must be recognised as such. For example, a local radio station in Winnipeg, C.J.O.B., runs a show each day called 'Action Line'. On it, listeners can phone in complaints and various relevant persons are interviewed by the host, Peter Warren. In an interview with the writer, he disclosed that he receives many confidential leads on areas that he might usefully investigate. That particular morning he had received three such phone calls. He stated that he believed that if he did not respect confidences his sources would soon dry up. His words are given weight to by the fact that he risked going to jail for contempt of court for refusing to reveal the identity of sources in a recent case in Manitoba.[56]

The writer conducted a survey among newspapers in the United States to see how much they relied on confidential information and

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56. See Winnipeg Free Press, May 26th, 1971.

whether this was connected in any way to whether they had a privilege or not. One paper reported that its reporters are encouraged not to take anything "in confidence". Unnamed sources are explored through necessity, but this happens only weekly or even monthly. Generally, it was seen from the survey that confidential information played only a small part in the newspapers' coverage of events.

More extensive surveys by other writers, however, have produced different responses. For instance, one article quoted several newspapers as saying that confidential sources are constantly received and used.[57] One newspaper was quoted as saying:[58]

> Many, many news stories are based, at least in part, on information obtained from confidential sources - sources which do not wish to be identified, but in which the newspaper has confidence in their integrity.

Another survey estimated that 22.2 per cent. of stories resulted from newsmen relying in some way on regular confidential sources of information and that in a further 12.2 per cent. of stories new confidential sources were relied on. Overall, it was estimated that they were used in 34.4 per cent. of all news stories.[59] Such figures must be artificial to some extent but they do show a general trend towards the significant use of confidential sources.

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57. J.A. Guest, A.L. Stanzler, "The Constitutional Argument for Newsmen concealing their sources" (1969-1970), 64 Nw. U.L. Rev. 18.

58. Managing Editor, Manchester Union Leader, circul. 53, 775, ibid., at p. 59.

59. V. Blasi, "The Newsman's Privilege: An Empirical Study" (1971), 70 Mich. L. Rev. 229, at p. 246.

More important, the above figures are very probably representative of the press as a whole. In Application of Caldwell,[60] eighteen reporters submitted affidavits to the effect that confidential sources are essential in newsreporting. Furthermore, Mr. Les Rutherford, a reporter with the Winnipeg Tribune said that information is given to journalists in confidence all the time - although he added the qualification that it was a different question as to how much of it was published. He stressed that its main advantage was that it gave the writer a lead on future stories rather than present ones actually being written.[61]

The information imparted in confidence is said to come from varied sources. Jack Anderson is said to...[62]

> ...get tips from disgruntled secretaries and clerks, as well as from newspaper reporters whom he sometimes pays. He also has a network of regular informants among Senate aides, sub-Cabinet officials and Civil Service careerists in every important branch of Government. He has received documents from the White House, C.I.A., Pentagon, State Department...

Such a set-up reminds one of the diplomatic tactics of European ambassadors in England at the time of Elizabeth 1. The fact that so many people are willing to breach their duty of confidence (since they must all owe such a duty, usually through the nature of the office they hold) is somewhat disconcerting, especially if one is sceptical about their motives for breaking their duty.

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60. 311 F. Supp. 358 (N.D. Cal. 1970).

61. In an interview with the writer.

62. Time, April 3rd, 1972, at p. 36.

Not all information is received in such ways, however. One other form is 'background briefing' where officials in Washington have for many years been able to be more candid with reporters in return for their identities being withheld. The Administration can use such a procedure for its own ends by sending vague hints to other capitals, while still being able to deny the whole thing later on. In December, 1971, the Washington Post deliberately broke the confidence in which 'background' information is revealed, and revealed that Henry Kissinger had disclosed that President Nixon might call off his Spring trip to Moscow. Reporters had received the information as 'deep background' material, meaning that only their own authority might be used in reporting it: not even the term "Administration officials" was supposed to be used. The Post's editor justified his action as putting an end to "deception" and "disservice" to the reader. It was reported that most journalists were angry at the disclosure, and Nixon threatened to end the 'backgrounder'. The press obviously value receiving such information as is revealed in the sessions. Moreover, it is apparent that the material would not be disclosed at all, if identities of sources were revealed in news-stories. When the Washington Star's James Doyle started a new group called the 'frontgrounders', which conducted only "on-the-record" interviews, he soon had to abandon it, because few officials would agree to say anything useful.[63] Such confidential sources of

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63. Time, December 27th, 1971.

information must therefore be respected, otherwise they will dry up.

Another area, which has already been mentioned, where confidence is essential is in the reporting of the activities of underground or radical groups within the community. It is reported that it is fairly easy to obtain an interview with the leaders or members of a radical group.[64] The difficulty is in obtaining any sort of useful information from them. The reporter must be able to inspire a feeling of confidence that he will understand the information or views imparted to him and that he will report fairly on them. It is sometimes necessary to convince radical or minority groups that he is on their side, but most reporters stress that they wish to retain their role of reporter, rather than become supporter. Their primary duty is recognised as being to the reader. Most of the people interviewed are, it is said, more interested in any information divulged by them being reported in its proper context and in enough detail so that a distorted picture is not presented to the reader, rather than in any sensitive material being kept out of stories. This, apparently, contrasts to the desires of bureaucrats and politicians who are more explicit in what should be reported and what should not. With radical groups, therefore, it is obvious that if the group becomes disillusioned with the writer for something he has done, or on account of his writing, the source of information will be likely to dry up. The importance of confidence being

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64. Supra, footnote 59, at pp. 240-243.

maintained is vital.

Developments in the United States - Interference with the News Media

Recently the news media in the United States have become disillusioned with the Government and the co-operation that formerly existed between these two institutions has markedly declined. Several reasons have been suggested. There is disillusionment within the community with the Government over the war effort in Viet Nam, over the seeming collapse of the civil rights movement, and of the relief of poverty effort. The Government has attempted to suppress dissent and, of course, since the news media is the best way of attracting the public's attention to one's cause the Government has tried either to suppress the news media, or to manipulate it. This has been apparent for the past three Presidential administrations, but seems to have reached a head in the present Nixon administration.

The importance of confidential sources remaining available was recognised as long ago as 1949. It was said that because news is made up of facts, when it fails to contain all the facts available, it is no longer news. When confidential news sources are shut off, news becomes subject to censorship and control.[65]

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65. Per District Attorney for Richmond County, New York Law Revision Commission: Legal Document No. 65(A), at pp. 109-110 (1949).

In 1971 Senator James Pearson said:[66]

> The dissemination of news is the primary obligation of newsmen. But newsmen cannot meet this obligation without full opportunity to gather newsworthy information from confidential sources. The gathering of pertinent information prior to publication constitutes an inseperable and indispensable phase of the overall news effort. It is axiomatic that there can be no dissemination of information without collection of information. Therefore, unreasonable governmental interference with the collection of newsworthy information is inimical to a free press.

Yet, in the past few years the press have been beaten up at the hands of the Chicago Police at the 1968 Democratic National Convention; the police have posed as reporters in order to gain contact with dissident groups; it has even been suggested that it is the aim of the police to drive a wedge between reporters and their confidential sources.[67] Perhaps the activity that has hurt the news media the most is the increased use of subpoenas to force newsmen to give evidence in court about their confidential sources. Of course, the result has not always been the one the Government hoped for - many newsmen refuse to talk even when threatened with jail for contempt of court. The point is not so much that subpoenas are being issued, as that they are being issued indiscriminately. This must be the conclusion when one sees that the Cleveland Plain Dealer, for example, at one time received seven subpoenas in one week. The general counsel for the Chicago Sun Times and Daily News

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66. Sen. J.B.Pearson (R-Kansas), Statement on The Condition of Freedom of the Press in America before the Senate Subcommittee on Constitutional Rights, (September 28th, 1971), at p. 6.

67. Supra, footnote 59, at pp. 254, 262. Supra, footnote 47,at pp.18-20.

estimated that these papers were expending several hundred man-hours in co-operation and negotiations with litigants in the course of a few months.[68]

The use of subpoenas has effected the news media in two ways. Firstly, a process of self-censorship has taken place. Both editors and reporters are apprehensive about reporting anything that is likely to attract the Government's attention and have repercussions on them:[69]

> Investigative reporters, who often depend on confidential sources, suffer the most. As soon as they even suspect they may be subpoenaed in a difficult story situation, they tend to hedge on what they report in order to protect their sources in advance. A process of self-censorship sets in, reducing the validity of the news which is reported. The irony of all this is that under threat of subpoena newsmen become no good either as newsmen or as an aid to law enforcement. The public is the real loser.

Where subpoenas have been issued the sources, have reacted unfavourably to newsmen. In some cases they have just ceased to supply information. New York Times reporter Anthony Ripley testified before the House Internal Security Committee concerning news stories about the S.D.S. National Convention in 1968. As a result of his forced revelations, not only his own sources but other Times reporters' sources dried up, and at the 1969 S.D.S. Convention the entire

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68. J.D. Henderson, "The Protection of Confidences: A Qualified Privilege for Newsmen" (1971), Law & Soc. Order 385, at p. 391.

69. Address by J.E. Murray, Vice President of the American Society of Newspaper Editors, University of Arizona Law School, Tucson, Arizona, Feb. 24th, 1971, quoted ibid., at p. 391, footnote 18.

'establishment press' was excluded.[70] Similarly, Earl Caldwell's case resulted in Black Panther sources not only in California, where he worked, but also in New York and Boston, becoming unavailable.[71]

However, worse reactions have on occasions resulted. Min S. Yee, a reporter for Newsweek magazine, who specialised in reports on protest movements, was subpoenaed, and testified, at the trial of Dr. Benjamin Spock, concerning anti-draft activities. As a result he stated that...[72]

> ...the very fact that I had been interrogated caused many sources, with whom I had previously developed a relationship of trust, to refuse to talk to me concerning these important events.

He was assigned to write a story on the 'Red Guards' in Chinatown, San Francisco. He was refused interviews and stopped from taking pictures, because of fears that these would in some way fall into the hands of the F.B.I. Concerning the same 'Red Guards' he flew to Cuba where...[73]

> ...As a direct result of the fact that members of the Brigade were aware that my film and notes could be subpoenaed, the following events inhibited my ability to research this story:
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> (i) An attempt was made to break my camera lens which resulted in a broken lens filter;
> (ii) I received threats of bodily harm and violent retribution against my employer, Newsweek Magazine;

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70. Affidavits of Anthony Ripley, John Kifner, and Martin Arnold, accompanying Petitioner's Brief, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), as quoted supra, footnote 68, at p.388.

71. Affidavits Of T.C.Knight, G.E.Noble, N.C.Profitt, D.Burnham, accompanying Petitioner's Brief, Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970), as quoted supra, footnote 68, at p.389.

72. Affidavit of Min S. Yee, ibid. 73. Ibid.

> (iii) I was ordered to stop photographing and interviewing by members of the Brigade;
> (iv) I was forced to leave Cuba and I was prevented from taking with me any of my film, notebooks or notes. I was also subjected to abusive and threatening language at the Bridade Camp in Cuba, of which the following remarks are typical: "You take my picture and you're dead." "What if pig Mitchell sticks a gun in your stomach and says 'Give me the film', you're going to hand it over, right?" "You're only here shooting for the F.B.I. But we're not worried, [obscenity]. We know where to find you."

Newsmen have claimed that subpoenas have had the effect of making them Government agents. This is even more the case when the notes, records, tapes, television films and photographs concerned are unpublished. Time, Life, Newsweek, the C.B.S. and the N.B.C. are just examples in the news media that have been effected.[74] It seems clear that the press cannot work as an investigation organization for two masters: the Government and the public. The point has been stated thus:[75]

> Government has the means to hire its own investigators and informers. The public in the final analysis, must depend on the press.

Reaction of the Courts in the United States

Newsmen have sought protection in the courts by pleading that forced disclosure of confidential sources is contrary to the first amendment of the United States Constitution which guarantees the

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74. H.L. Nelson, "The Newsmen's Privilege against Disclosure of Confidential Sources of Information" (1971), 24 Vand. L. Rev. 667.

75. Supra, footnote 66, at p. 11.

freedom of the press. Until recently, however, this argument has not been accepted. In Garland v. Torre[76] a newspaper columnist had written defamatory statements about the singer Judy Garland. Her source was said to be a "network executive" but she refused to reveal any more. The court held that the duty of testifying was paramount to the freedom of the press, which must give way under the Constitution to the public interest in the fair administration of justice. In State v. Buchanan[77] an editor of a student newspaper refused to reveal the identities of people she had interviewed whilst writing an article on the use of marijuana on University campus. It was held that recognition of a reporters' privilege would offend the equal protection clause of the Constitution. It has been pointed out that this argument ignores the fact that the Constitution itself gives preferential treatment to the press.[78] Also, one might ask how other privileges that already exist are to be justified.

In Caldwell v. U.S.,[79] however, recognition was given to the constitutional argument's validity. Caldwell had established a relationship with Black Panther leaders in San Francisco, over a period of time, based on their reliance on his judgement, and a

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76. 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958).

77. 250 Ore. 244, 436 P.2d 729 (Ore. Sup. Ct. 1967), cert. denied, 392 U.S. 905 (1968).

78. Supra, footnote 68, at p. 397, footnote 51.

79. 434 F.2d 1081 (9th Cir. 1970).

mutual understanding of what he was free to publish. White reporters, resident in San Francisco, had failed to achieve any success in their attempts to report on the Panthers' activities. In Federal District Court[80] it had been held that Caldwell should appear before the grand jury in answer to the subpoena but that he need not answer questions as to his confidential sources or information "until such time as a compelling and overriding national interest which cannot be alternatively served has been established to the satisfaction of the court".[81]

Caldwell, however, was not satisfied. His very appearance before the grand jury, behind closed doors, would give no assurance to his Panther sources that he had preserved their confidences. The Ninth Circuit Court of Appeals agreed:[82]

> [W]here it has been shown that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance.

The "uniquely sensitive" source in this case had justified a limited privilege being granted to newsmen. This case has been distinguished from those that had occurred previously to it. It

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80. Application of Caldwell, 311 F. Supp. 358 (N.D. Cal. 1970).

81. Ibid., at p. 360.

82. Supra, footnote 79, at p. 1089.

has been said:[83]

> The primary reason for the divergence from past results can be attributed to the circumstances of the cases involved rather than to any radical transition in the law.

It has been said that in Garland v. Torre[84] and in Caldwell's Case, the information sought was relevant to the case at hand. However, in Garland an entertainment personality was involved and the public's right to know was placed, in such circumstances, below the cause of justice. In Caldwell, the social importance of what was being reported was seen as elevating the public's right to know,above the administration of justice.[85] Each of the previous cases had seen the need for a balancing process, but the newsman's position with relation to his sources had not weighted the scales in his favour. Caldwell was different. One might also comment that the scattergun issuing of subpoenas in the few years previous to this case was evidence that the administration of justice might not need the newsman's evidence in every case. Caldwell might have been seen as such an instance. Again, in Caldwell, the grand jury were merely investigating and no charges had been laid. This was a clear case of the using of journalists as governmental agents.

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83. R.O. Sharpe, "The Newsman's Qualified Privilege under the First Amendment" (1971), 16 S.D.L. Rev. 328, at p. 338.

84. Supra, footnote 76.

85. "Caldwell v. U.S. (434 F.2d 1081) - journalistic privilege: a new dimension to freedom of the press" (1971), 37 Brooklyn L. Rev. 502.

Later cases have not always followed Caldwell. In re Pappas[86] stated:

> Were we to adopt the broad conclusions of that decision, that a newsman's privilege exists because of the First Amendment, we would be engaging in judicial amendment of the Constitution or judicial legislation. Requiring a newsman to testify about facts of his knowledge does not prevent their publication or the circulation of information. Any effect on the free dissemination of news is indirect, theoretical and uncertain and relates at most to the future gathering of news. The opinion in the Caldwell case largely disregards important interests of the Federal government and the several States in enforcement of the criminal law for the benefit of the general public.

In this case the reporter had no long connections with his sources, the Black Panthers, and he had merely been allowed into their headquarters on an isolated occasion. Thus, despite his pledge of secrecy, it could be argued that the public would not suffer to the same degree through the drying up of sources as it would have, had Caldwell been forced to testify. Nevertheless, the above quotation shows that the court did not agree even with the basis of the decision in Caldwell's case.

In Branzburg v. Pound[87] a case originally concerning the scope of a newsmen's privilege statute, the court ruled that this did not authorise the non-disclosure of the information itself. A reporter had watched two men convert marijuana into hashish and wrote a story

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86. 266 N.E.2d 297, at p. 302 (Mass. Sup. Ct. 1971).

87. 461 S.W.2d 345 (Ky. Ct. App. 1971).

about it. He refused to reveal the identity of the men to the grand jury, but it was held that the shield statute protected his sources alone and that their identities were the reporter's personal observations only - not part of the meaning of "sources" in the statute. This case has been taken to the Supreme Court to decide if the First Amendment affords him protection.[88] The distinction made regarding the statute's wording, however, would seem to show a reluctance to grant any sort of privilege to newsmen.

Another case did follow Caldwell but at the same time illustrated the limitations inherent in that decision. In State v. Knops[89] a reporter was subpoenaed to reveal his sources for an article concerning a bombing on the campus of Wisconsin State University. Five narrow and specific questions were asked of the reporter, different to the meandering questions asked in Caldwell. The majority in Knops turned the argument of the public's right to know against the journalist. It was said that he may not keep secret his knowledge about major, specific crimes. The point was explained thus:[90]

> However, in a disorderly society such as we are currently experiencing, it may well be appropriate to curtail in a very minor way the free flow of information, if such curtailment will serve the purpose of restoring an atmosphere in which all of our fundamental freedoms can flourish. One exceedingly fundamental freedom which the public

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88. Branzburg v. Hayes, cert. granted, 402 U.S. 942 (1971).

89. 49 Wis.2d 647, 183 N.W.2d 93 (Wis. Sup. Ct. 1971).

90. 183 N.W.2d 93, at p. 98 (Wis. Sup. Ct. 1971).

> is currently doing without is the freedom to walk into public buildings without having to fear for one's life.

It is relevant to note, however, that in this case the identity of the bombers had already been determined by other means. This would seem to have destroyed any compelling state interest in the testimony.[91]

Is a Privilege Necessary?

Many arguments have been propounded against a privilege being granted to newsmen. It has been said that the newsmen, and not the public, would be the true beneficiaries of any privilege being given them. Newsmen, it is said, are not motivated by altruism, but by the need for the economic survival of the newspaper or broadcasting station for which they work.[92] It is hoped that the reader will be convinced by now, that the newsman, although obviously acting in his own interests in exposing newsworthy material is primarily serving the public.

It has also been argued that the effect of a privilege would merely be to grant the newsman an immunity from having to go to jail for contempt, should he refuse to divulge his sources. If he does refuse to talk, then the purpose of a proposed privilege is accomplished without its being granted. It is claimed that newsmen

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91. Supra, footnote 90, at p. 100.

92. "The Right of a Newsman to Refrain from Divulging the Sources of his Information" (1950), 36 Va. L. Rev. 61, at p. 82.

still publish the same sort of stories where no privilege exists. The public, it is claimed, will not be effected by the granting of a privilege to newsmen.[93] This argument breaks down upon analysis. It assumes that the correct method of testing the effect of contempt powers being exercised is in reading appellate decisions. News-stories are effected by the newsman having to divulge the identity of his sources in other instances than those that the public become aware of through the reading of major court decisions. For instance, vast numbers of subpoenas were issued to reporters in minor cases in the United States in the past few years. In Canada, also, the effect of subpoenas has been felt, but this is perhaps not readily apparent. In Quebec in 1969, John Smith refused to divulge to a Fire Commissioner's Inquiry information concerning a television interview he had had with an avowed terrorist. He was sentenced to seven days in jail for contempt.[94]

In July 1971, Globe and Mail reporter John Zantsky was fined 500 dollars for refusing to tell a Judicial Inquiry how he obtained a copy of a confidential Ontario Government Report on the Niagara Escarpment Land acquisition. The Inquiry Commissioner ruled that disclosure of the source was essential to the inquiry, because, it was said, other individuals might also have obtained the information.[95]

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93. Supra, footnote 92.

94. Winnipeg Free Press, March 20th, 1969.

95. Winnipeg Free Press, July 20th, 1971.

On February 16th, 1972, the C.B.C. television news reported that that television company had strongly objected to disclosing to the court films and tapes of an incident in which Russian Premier Kosygin was attacked and manhandled by a member of the crowd, whilst on his Canadian tour in the fall of 1971. The C.B.C., it was said, objected on grounds of privacy and of being made to act as involuntary government agents.

Another case, this time in which a reporter did not have to disclose his confidential sources, but in which nevertheless these were in issue, concerned newsman Tim Burke. The Chairman of the Quebec Liquor Board upheld his right to remain silent since by reporting the news factually, it was said, newspapermen were keeping the general public informed, doing a public service, and sometimes even helping in the administration of justice.[96]

These are but examples of cases in which the newsman's stand to protect his confidential sources of information received little publicity. There must be many others. One case that did receive a lot of attention in Winnipeg, was that,in 1971, of Peter Warren who was at that time a reporter with the Winnipeg Tribune newspaper. He was called as a voluntary witness to give evidence concerning an alleged directive from the management of the Marlborough Hotel to its staff which was claimed to be discriminatory against Indian people. Warren claimed that to reveal his sources i.e. the persons

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96. Winnipeg Free Press, November 28th, 1970.

who had told him about the document, would have jeopardized his position as a newsman. He was later withdrawn as a witness, after being pressured by the judge to answer the question asked of him and being told that in Canada, the journalist has no privilege.[97] The action by the President of the Manitoba Indian Brotherhood against the hotel was eventually dismissed.

These cases show that one cannot tell, from reading reported decisions whether the reporter was pressured to reveal his sources, did do so, or refused to. It, furthermore, is evident that there is a tacit recognition of the desirability to inform the public of newsworthy events, while making the reporter pay the price, through jail or a fine, for society's benefit. For, in England at least, the journalist is bound by his code of ethics,[98] which requires that he realises his personal responsibility for everything he sends to his paper or agency, that he respect professional secrets and also all necessary confidences regarding sources of information. He must also defend his freedom to collect and publish honestly all news facts. According to the Media Club of Canada, the only code of ethics in existence in Canada is one used by the Toronto Star. The matter is, however, "under review by the Board of Directors of the Media Club".[99] It is reasonable to assume, though, that the newsman

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97. Winnipeg Free Press, May 26th, 1971.

98. National Union of Journalists, Code of Professional Conduct.

99. In a letter to the writer.

in Canada at present still feels a similar obligation to that owed by his associates in England.

It has been said that the newspaper industry is not sufficiently "screened" as are the other professions that might be worthy of a privilege. Abuse is likely by unscrupulous publishers, it is said.[100] A qualified or limited privilege would, it is submitted, overcome this difficulty by allowing a privilege only where it is deemed to be warranted by the court.

It has been argued also, that newspapers in states in the United States which do not possess a privilege are of an equal quality to those operating in states which do possess one.[101] One should, however, be questioning the reporters, not viewing the newspapers' quality, since looking at what is, does not tell what might have been.

It is recognised that one should not argue for a privilege merely for the benefit of the newsman, but there is a feeling that society should pay for its own gains. One does not have to argue this point, however, since there is ample evidence, particularly from the United States, that the revealing of the identity of confidential sources does have the effect of making them become unavailable. In such cases it is the public, more than the newsman, which suffers.

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100. "Privileged Communications - News Media - A 'Shield Statute' for Oregon?" (1966), 46 Ore. L. Rev. 99, at p. 102.

101. Ibid.

One wonders, however, whether the effect of a privilege could be achieved in some other way. In the United States, in 1970, Attorney General Mitchell set forth several guidelines for his department, to counter what he termed "one of the most difficult issues I have faced as Attorney General".[102] The main points of these are:

(i) In determining whether to issue press subpoenas the approach must be to weigh that limiting effect against the public interest to be served in the fair administration of justice. (Note the similarity to Wigmore's fourth condition.[103])

(ii) All reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.

(iii) Negotiations should first be attempted with the press.

(iv) If negotiations fail, express authorization of the Attorney General should be obtained before further steps are taken to arrange a subpoena.

(v) In requesting the Attorney General's authorization the following principles will apply:

(a) There should be sufficient reason to believe that a crime has occurred, from disclosures from non-press sources.

(b) Information sought should be believed to be essential to a successful investigation.

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102. Address to American Bar Assoc. House of Delegates Annual Meeting, St. Louis, Mo., August 10th, 1970.

103. See Chapter V, at pp. 207-208.

(c) The Government should have attempted unsuccessfully to obtain the information from alternative non-press sources.

(d) Requests should normally be limited to the verification of published material and to such surrounding circumstances as relate to the accuracy of the published material.

(e) Great caution should be used in requesting authorization for a subpoena for unpublished information, or where an orthodox First Amendment defense is raised, or where a serious claim of confidentiality is alleged.

(f) The subpoena should be directed at material information regarding a limited subject matter, covering a reasonably limited period of time and should avoid requiring production of a large volume of unpublished material.

The existence of such guidelines is in itself encouraging, but one feels that they came at the end of the long line of subpoenas, some of which have already been discussed, and were caused by a realisation that the courts were beginning to show signs of displeasure at the volume of unnecessary subpoenas being issued. The amount of discretion in the hands of the Attorney General is enormous, and it will be noticed that he leaves himself a fair amount of rope on which to exercise this. (Particularly in (d) above: the word "normally" is used, and "surrounding circumstances" could refer to anything.)

Some effect has obviously been felt, however. In the year following the delivery of the guidelines only three subpoenas are

reported to have been issued to newsmen.[104] Yet are such moves on the part of the Government sufficient? One is suspicious of the Government's motives. The guidelines were released in time to be cited by the Government in oral argument in Caldwell v. U.S.[105] When it lost this case it did not appeal the decision to the Supreme Court, according to Senator Pearson,[106] although a writ of certiorari was granted.[107] Why was this? Was it because the Government felt it might probably lose and the judgement be possibly wider than that of even the Ninth District Court of Appeal?

It seems that it would be better if the court could be depended on to grant the journalist a privilege from having to reveal the identity of his sources, should the circumstances of the case warrant one. In the United States, the case of Caldwell would seem to show the courts would be willing to do this. Later cases, however, make this doubtful. In England and Canada, the position is not so drastic. The Government has not apparently been issuing subpoenas to newsmen to the extent that it has been the case in the United States, though the cases described above do show that the subpoena is being used, at least in Canada. Whatever may be the current situation, there is

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104. See Task Force Report, supra, footnote 47, at p. 10.

105. Supra, footnote 79, at p. 1091, footnote 3.

106. Supra, footnote 66, at p. 11.

107. U.S. v. Caldwell, cert. granted, 402 U.S. 942 (1971). It seems, however, that the Supreme Court will soon decide the issue: In re Pappas, cert. granted, 402 U.S. 942 (1971); Branzburg v. Hayes, cert. granted, 402 U.S. 942 (1971).

always the possibility that a similar situation as arose in the United States will arise in England or Canada. Some sort of privilege should be established.

What Sort of Privilege is Needed?

It would seem logical that since one wishes to give the confidential source the assurance that his identity is being kept secret, he should be aware of the circumstances,if any, in which a journalist will be forced to testify about him.

The Task Force Report stated that a majority of its members believed that no "safety valve" qualifications are needed, for practical reasons. It would be rare for a journalist to be given information about a grave criminal offence, it is stated, but if it were given it would usually be published. If it were believed to be so confidential as to be not publishable and the journalist could not bring himself to volunteer it to the police, then it is doubtful that he would divulge it under any circumstances, it is claimed.

This, however, seems to view the matter solely from the journalist's side. It must be remembered that any sort of privilege is, fundamentally, an exception to the general rule that a witness must answer questions relevant to the case at hand. To give the journalist an absolute privilege is to leave it up to him as to whether he would testify on the occasions, perhaps rare, but nevertheless existent, when the circumstances demand, in the interests

of justice that he testify. So far, the opposite extreme has been the case. Rarely had the journalist been seen as being entitled to a privilege, though perhaps he needed and deserved one. The extreme that an absolute privilege would occasion would be that of the journalist always having a privilege, and although most journalists might be truly honest and abide by their consciences when they thought disclosure was demanded, their consciences would undoubtedly be biased in favour of non-disclosure. The interest of their profession would tend to be placed first. It is better not to have the bias either way, but for the scales to be evenly balanced, and able to tilt as the circumstances demand. Thus it should be left to the judge to decide when this should happen.

However, if the present situation continues and the matter is left entirely to the judge's discretion, deserving professions, among them journalism, will be forced to often make an issue of their claim to privilege and take individual cases to the Court of Appeal. A privilege is needed, but one must consider the necessary qualifications that are demanded in the journalist's case.

The Task Force felt that these should be as narrow as possible in order that the reporter and source should know in advance when their communications would be privileged.[108]

The recent Newsmen's Privilege Bill proposed by Senator Pearson,[109]

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108. Supra, footnote 47, at p. 14.

109. S. 1311, introduced in the Senate of the U.S., March 23rd, 1971.

listed qualifications as summarised below:

(i) The privilege is not to apply when the information has been made public in any way by the person claiming the privilege;

(ii) It should not apply to the source of any allegedly defamatory information in any case where the defendant, in a civil action for defamation,asserts a defense based on the source;

(iii) It should not apply to the source of any information concerning the details of any grand jury or other proceeding required to be secret under the United States law;

(iv) Where, upon application of the person seeking the information, it is determined that there is a threat to human life, or espionage,or foreign aggression needs to be prevented, it shall not apply.

It has also been argued that the privilege should extend to civil and not criminal matters.[110] Indiana State's 'shield statute' limits the privilege to newspapers with a minimum paid circulation of 2 per cent. of the county population, and that have been published for five consecutive years. This seems a somewhat unreasonable qualification. Other statutes have limited the privilege to certain forms of the media, or to certain persons employed by it.

To avoid the difficulties that arise foom reducing a privilege to defined limitations, England and Canada have avoided enacting any

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110. Supra, footnote 57, at pp. 50-51.

privilege statutes. The difficulties and limitations of them can be seen from viewing the United States cases. Thus Mr. Les Rutherford[111] said that he preferred the discretionary privilege that exists at present in Canada and England to a statutory privilege. Similarly the National Union of Journalists stated:[112]

> Our view, broadly, is that legislation, in bestowing rights, also restricts them, and the law, by definition, usually operates more by restriction than by enfranchisement.
>
> Once rights for the Press of any kind are legally codified, the risk is created that they will be delimited, in response to institutional pressures, by amendment of the law.

The English Press Council was adamant that some sort of recognition should exist though:[113]

> You may take it, however, that the Press Council's attitude on this issue is based upon the recognition that it is an age-old tradition among journalists that when they receive information in confidence they do not reveal their sources and that this tradition should receive formal recognition when a court is satisfied that it is being appropriately applied.

The N.U.J. also felt that there should be protection "by law" for a journalist from having to reveal confidential information or sources under pain of contempt...[114]

> ...always providing that he may consult his own

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111. Reporter with the Winnipeg Tribune, in an interview with the writer.

112. Letter to the writer.

113. Letter to the writer.

114. N.U.J. domestic document to assist the Home Office Departmental Committee on contempt of court, February,1972, para. V(a).

> conscience on a matter which he considers to be of over-riding public concern.

Furthermore, it was felt that no unpublished information should have to be produced since the journalist would then be in danger of becoming an unwitting criminal investigator. One feels the N.U.J. has its eye on the United States situation when it says:[115]

> Once this role is adopted or seen to be accepted the credibility of the journalist as acting, in an investigation, objectively in the public interest is endangered.

It seems that some sort of legislation, or at least some form of policy guidelines is necessary. A privilege should cover all forms of news media, including the "underground press", who have as much right to freedom of expression as anyone else. It should cover all persons employed by a news outlet, who are acting in the course of their job when they receive information, since it is well-known that tips are received by all persons concerned with the media. The problem would only concern the qualifications needed to be attached to the privilege. It seems that the judge should be able to grant immunity from testimony,or compell it, as the circumstances arise. It is necessary to elaborate on what these circumstances might be.

Initially, the effect the disclosure would have on the newsgathering ability of the particular journalist involved should be considered. Will it mean that a long-standing relationship, which

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115. Supra, footnote 114, at para. V(b).

took much time, effort and confidence, to establish will be shattered? Will future contacts or relationships be harmed through the disclosure? "Harmed" should mean "made impossible".

Secondly, the seriousness of the litigation at hand should be considered. A crime of a serious nature such as murder or kidnapping would require disclosure, more so than would one of theft. Similarly, in a civil action the scales would weigh less heavily in favour of disclosure. Of course, the "crime" must have been committed, and be certain in its ambit. "Fishing questions" should be given the treatment they deserve. An exception to this might be where the national security was endangered to a sufficient degree and the newsman was the only means of discovering the elements of the espionage and those involved in it. Public policy would demand disclosure in such a case.

Finally, all other sources of information should have been exhausted. There can be no excuse for unnecessarily using the newsman to support one's evidence.

If the judge follows these guidelines in deciding whether a newsman will be compelled to reveal confidential information or sources, one feels that unnecessary disclosures will be avoided. One feels also that Camus' warning will be more likely to be taken heed of:[116]

> Freedom of the press is perhaps the freedom that has suffered the most from the gradual degradation

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116. Albert Camus, Resistance, Rebellion and Death, at p. 75 (Modern Library Edition).

> of the idea of liberty. The press has its pimps as it has its policemen. The pimp debases it, the policeman subjugates it, and each uses the other as a way of justifying his own abuses.

We must not subjugate while we strive to preserve our right to be free from subjugation.

C O N C L U S I O N

The number of cases concerning breach of confidence in the professions that have been studied is very small. This might suggest that it is without practical importance whether or not a remedy be granted for breach of confidence in its own right. However, it seems short-sighted to ignore the warning signs that lay ahead. The problems that have arisen so far constitute merely the tip of the iceberg. Technological and scientific advances in the professions themselves, which require greater specialisation among practitioners, and the consequent involvement of more of them and their assistants and clerical staff in single cases will continue. Similarly will the increasing participation of large organisations, particularly Government in some professional fields, and the use and improvement of computer facilities.

It has been said that the professions are important to society for the following reason. Men, in certain difficulties, are forced to turn to others, better qualified than themselves, for assistance. If men do not seek help, through fear of loss of reputation, honour, liberty, or life, or through fear of embarassment, frustration will build up amongst them. This in turn will lead to a sense of hopelessness, despondency and despair, which in turn will bring

about such states of mind and soul as recklessness and dereliction of duty. It is concluded that the evils that would befall society if such conditions existed would be enormous.[1]

Perhaps this is dramatising the issue somewhat, but its basic premise appears to be sound. Particularly today, and it seems, even more so in the future, our complex society will require that advice be sought on many matters that need specialised knowledge for an understanding of them. Men must feel able to approach professional persons for aid, and a necessary pre-condition to this is very often a conviction that the confidences they must divulge to receive the help required, will be respected.

Furthermore, the present century has seen the rapid development of some newer professions, among them psychotherapy and social work. These require that the indigent person have the utmost confidence in the professional person involved in his case, before the latter can be of any assistance to him. In other words, confidentiality is a necessary pre-condition to the very functioning of these professions. If society recognises social work and psychotherapy as beneficial to it, it must create and foster the conditions in which these professions can operate. Through one of its tools, the law, it must ensure that confidentiality is respected.

This point was mentioned, with regard to psychiatry, in G. v. G.

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1. R.E. Regan, Professional Secrecy in the Light of Moral Principles (Washington D.C.: Augustinian Press, 1943), at pp. 17-18.

an Ontario case, in 1964. Landreville, J., said:[2]

> As it is often said, the Common Law to remain a living thing must constantly receive stimuli by reconsidering whether a given rule, hallowed by time, is still adequate under modern conditions. The science of psychiatry in 1881 was but a word created in 1846 (see Shorter Oxford Dictionary, 3rd ed.). It was but a derivative science from psychology (1693). It had little or no medical curative value for the misfunctions of the mind.
>
> Most generally and fundamental to the practice of psychiatry is the fact that the patient seeking medical help must give a detailed picture of his past life. A full statement can only be obtained if the patient knows that what he is to say and hear will be of strict confidential nature.

In Argyll v. Argyll confidences imparted between a husband and wife during their marriage were held to be worthy of protection. Ungoed-Thomas, J., quoted part of the Duchess' affidavit in his judgement:[3]

> During a number of years before our marriage began to deteriorate, my husband and I had a very close and intimate relationship in which we freely discussed with each other many things of an entirely private nature concerning our attitudes, our feelings...our business and private affairs, and many other things which would never have been discussed with anyone else... These things were talked about and done on the implicit understanding that they were our secrets and that we allowed the other to discover them only because of the complete trust and mutual loyalty which obtained between us and created an absolute obligation of confidence.

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2. [1964] 1 O.R. 361, at pp. 365-366 (Ont. H.C.).

3. [1965] 1 All E.R. 611, at p. 616 (Ch. D.).

An analogy can be drawn between this statement pertaining to the relationship of husband and wife, and to the relationship existing between the psychotherapist or social worker, and to a lesser extent between the banker or accountant, and their patients or clients. If confidences of such a nature imparted by a wife to her husband deserve and receive protection in law, they should receive the same when they are imparted by a client or patient to his professional advisor.

To bind the latter alone, however, would hardly solve the problem. Professional services are dispensed today by the most diverse teams of practitioners, and it has recently been stated that, for example...[4]

> ...it is naive to proclaim the physician's secrecy...without also tying down the nurse, the psychologist, the technician or social worker who, called upon to examine all or part of a record, have access to it or even discuss matters with the physician.

All assistants involved in a particular case must be placed under a similar obligation to the practitioner.

This leads to a further point: that of the extent to which the duty of confidence should be supported by the law. Is it necessary or feasible to make any breach of confidence actionable? For example, reference can be made to the confidential informant of the journalist. Should he be able to sue a journalist who discloses his identity?

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4. "The Professions and Society", Report of the Commission of Inquiry on Health and Social Welfare, Quebec, 1970, at p. 55.

The answer would seem to depend on three factors:

(i) the relative necessity of the maintenance of the secret for the common good;

(ii) the relative need for the maintenance of the secret for individual rights to be protected;

(iii) the relative freedom or necessity impelling or accompanying the communication of the secret.

The journalist's confidential source would have his greatest claim to a remedy under the first head, assuming that it was in the public interest that his disclosures be reported. One can draw an analogy by comparing the cases of Caldwell[5] and Garland v. Torre[6] in the United States, concerning the journalist's claim to a privilege. The public interest required protection of Caldwell's political material more than it did of show-business gossip in the latter case.

It would depend on the type of relationship the source had with the journalist as to whether he could argue very strongly about the protection of his individual rights. His claim would hardly match that of a patient being seen by a psychiatrist.

Similarly, generally there would seem to be little compulsion for him to communicate with the journalist. A sick patient,on the other hand, needs to seek a doctor's help.

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5. Caldwell v. U.S., 434 F.2d 1081 (9th Cir. 1970). See supra, at p.333.

6. 259 F.2d 545 (2d Cir. 1958). See supra, at p. 332.

It will be apparent that clients or patients who consult the professionals that have been covered in this study, would usually merit a remedy, should their confidences be breached. Yet, it has been shown that there are occasions when a breach would be justifiable. Some general points can be made.

When the client or patient consents to disclosure being made a confidence can no longer demand protection. It is hoped, however, that the dangers attaching to the implying of consent will be remembered. It is always much easier to imply a client's consent than to actually obtain it, and the client should be consulted whenever possible.

If publication of the confidence has already been made, it would perhaps seem that there can be no breach through further disclosure. Yet, it is necessary to remember that this may lead to confirmation as true of what may have been merely wild rumour or idle gossip and, perhaps more important as regards professional persons, public confidence in the conscientious reserve expected from these people may be diminished.

The duty of confidence would be outweighed were harm of a serious nature threatened to the community. However, the difficulty of evaluating the seriousness of this is illustrated by the Pentagon Papers issue. Daniel Ellsberg thought that disclosure was justified. He said that his actions were undertaken in order to convince other Americans that United States policy in Viet Nam had been morally blind.

He said, regarding the Viet Nam war:[7]

> I think that what might be at stake if this involvement goes on is a change in our society as radical and ominous as could be brought about by our occupation by a foreign power.

Others, however, felt that by disclosing papers marked "top secret" he might have been jeopardizing the security of his country and its citizens.

It must be emphasised that the danger to the community must be a serious one before confidentiality can be justifiably breached. A similar observation might be made concerning cases where harm is threatened to an innocent third party, or to the person who communicated the secret, or indeed where it is likely to befall the recipient of the confidence. In particular, the duty of confidence owed by professional persons is an onerous one and rarely should a breach be justifiable, owing to the social importance of the professions, and the part that confidentiality plays in them.

Throughout this study privilege has been mentioned. It has been stated that this is merely another facet of confidentiality. If it is recognised by the law that confidentiality should not be breached, then disclosure should not be demanded in open court. The dilemma facing the practitioner when such a situation exists has been stated thus:[8]

> On the one hand then, the law imposes secrecy and, on the other, it authorizes the courts to

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7. Time, July 5th, 1971, at p. 14.

8. Supra, footnote 4.

> tear away the veil. The practitioner has a moral obligation which he no longer can respect when a court orders him to testify.

It has been stressed that an absolute privilege ought not to exist, but that where confidences deserve protection, prima facie a privilege should exist. At present, prima facie generally no privilege is seen. A distinction can be drawn here between the professions of psychotherapy, social work, the clergy, and journalism, and those of accountancy and banking. In the former group, the respecting of confidences is vital to the functioning of the professions. Journalism stands out as different from the other three professions, but merits similar consideration to them because of the importance of the freedom of the press being maintained. Banking and accountancy both require that confidentiality be respected, for otherwise they will not be able to operate to their full potential. One feels, however, that the need for a prima facie privilege is not as great as it is in the other areas mentioned.

In camera proceedings might ensure that confidences were not revealed in open court but, it is submitted, this only half solves the problem. Confidentiality must be seen to be protected, and in camera proceedings do not satisfy this point.

Confidences must be protected. It is time that society and the courts recognise this fact. Yet mere tacit recognition is not enough. Positive measures must be taken. The professions must ensure that the standards of their practitioners do not decline, and where necessary

that these are improved. The law must also keep abreast of the changes that are occurring in society. It has been said that...[9]

> ...statutory enactments normally come into existence after fait accompli...

However, the dangers are now apparent. Before their full effect is felt, the law must act. A quotation from a poem by D.H. Lawrence is applicable:[10]

> You, if you were sensible,
> When I tell you the stars flash signals, each one dreadful,
> You would not turn and answer me
> "The night is wonderful."

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9. Supra, footnote 2, at p. 366.

10. "Under the Oak", D.H. Lawrence, Selected Poems (New York: The Viking Press, 1959), at p. 54.

A P P E N D I X

QUESTIONNAIRES SENT OUT BY THE WRITER

1) To Bankers in Winnipeg, Canada and England.

a. Do you take precautions before revealing information about a customer's account?

If so:

b. Do these vary, depending on the type of account in question (savings, deposit, etc.)?

c. Do these vary, depending on the state of the customer's account, e.g. overdraft, large credit balance?

d. Do these vary, depending on the status of the customer, e.g. a business or a private individual?

e. What sort of information do you give to credit bureaux inquiring of you i.e. figures or merely general worded statements?

f. Do you ask the customer for his consent before supplying a credit bureau with information about him and his account?

g. Is the obligation of secrecy placed high on the bank's list of priorities when dealing with customers' affairs?

2) To Accountants in Winnipeg, Canada.

a. Are accountants at present hampered in their work by having to reveal confidential information given to them by their clients in courts of law (i.e. they have no privilege).

b. In what specific areas would the granting of such a privilege facilitate the revealing by clients of confidential information to you.

c. Are the arguments in favour of accountants being granted a privilege, stronger than those against it. It seems some accountants think they are.

3) To Social Workers in Manitoba, Canada and England.

a. Have you a policy re confidentiality, written or unwritten? (Please specify which.)

If so:

b. Did board and staff participate in its formulation?

c. Is it understood and accepted by board and staff?

d. Does your policy provide for the sharing of information with (other) agencies, the other helping professions, news media, etc.?

e. What are your present problems in practice?

f. What needs to be done to strengthen your policy and improve practice?

4) To Journalists in U.S. States that have recently enacted Journalist Privilege Statutes.

a. How much information do you receive in confidence (percentage per day)?

b. How much of this do you use in news stories?

c. Do informants who wish to remain anonymous know about the privilege and how much do they rely on it? Or do they rely on the journalist's personal integrity not to reveal their identity?

d. Has the privilege resulted in an increase in the 'free flow of news' from your paper?

S E L E C T E D

B I B L I O G R A P H Y

BOOKS

1) General

Miller, A.R., The Assault on Privacy: Computers, data banks, and dossiers (Ann Arbor: Univ. of Mich. Press, 1971).

Regan, R.E., Professional Secrecy in the Light of Moral Principles (Washington D.C.: Augustinian Press, 1943).

Warner, M. & Stone, M., The Data Bank Society (London: Allen & Unwin Ltd., 1970).

2) The Legal Profession

Orkin, M.M., Legal Ethics (Toronto: Cartwright & Sons Ltd., 1957).

3) Banking

Lord Chorley, Law of Banking (5th ed.) (London: Pitman & Sons Ltd., 1967).

Holden, M., Banker and Customer (London: Pitman & Sons Ltd., 1970).

Mather, L.C., Banker and Customer Relationship and the Accounts of Personal Customers (3rd rev. ed.) (London: Waterlow & Sons, 1966).

Paget, J., Law of Banking (7th ed.) (London: Butterworths, 1966).

Sharp, J.M., Credit Reporting and Privacy (Toronto: Butterworths, 1970).

4) Accountancy

Barradell, M., Ethics and the Accountant (London: Gee & Co. Ltd., 1969).

Donnelly, A., The Practice of Public Accounting (2nd ed.) (Australia: Butterworths, 1963).

5) The Medical Profession and Psychotherapy

DeWitt, C., Privileged Communications between Physician and Patient (Springfield, Illinois: Thomas, 1958).

Slovenko, R., Psychotherapy, Confidentiality and Privileged Communication (Springfield, Illinois: Thomas, 1966).

Ziskin, J., Coping with Psychiatric and Psychological Testimony (California: Law & Psychol. Press, 1970).

6) Social Work

Armor, D.J., The American School Counselor (New York: Russell Sage Foundation, 1969).

Bartlett, H.M., Social Work Practice in the Health Field (New York: N.A.S.W., 1961).

Bessel, R., Introduction to Social Work (London: B.T. Batsford Ltd., 1970).

Ferard, M.L. & Hunnybun, N.K., The Caseworker's Use of Relationships (England: Tavistock Publications, 1962).

Heimler, E., Mental Illness and Social Work (Harmondsworth, England: Penguin Books Ltd., 1969).

Kasius, C., ed., Principles and Techniques in Social Casework (New York: Family Service Association, 1950).

Morris, C., ed., Social Casework in Great Britain (London: Faber & Faber Ltd., 1955).

Perlman, H.H., So You Want to be a Social Worker (New York: Harper & Bros., 1962).

Ware, M.L., ed., Law of Guidance and Counseling (Cincinnati: W.H. Anderson Co., 1964).

7) The Priest and Other Clergy

McNeill, J.T., A History of the Cure of Souls (New York: Harper & Bros., 1951).

Tiemann, W.H., The Right to Silence (Virginia: John Knox Press, 1964).

PERIODICALS

1) General

Jacob, J. & Jacob, R., "Confidential Communications" (1969), 119 New L.J. 133.

Ladd, M., "Privileges" (1969), 1 Law & Soc. Order 555.

Pound, R., "Survey of Social Interests" (1934), 57 Harv. L. Rev. 1.

Reich, C.A., "The New Property" (1964), 73 Yale L.J. 733.

Warren, S.D. & Brandeis, L.D., "The Right to Privacy" (1890), 4 Harv. L. Rev. 193.

2) Banking

Balmer, D., "Data Banks" (1969), 76 Can. Banker,No. 2.,26.

Conybeare, B.C., "Banking - A Bank Depositor's Right of Sanctity" (1962), 39 U. Det. L.J. 590.

Holden, J.M., "Relationship of Banker and Customer" (1954), 17 M.L.R. 467.

Merritt, R.J., "Banks and Banking: Florida adopts a Duty of Secrecy" (1969-1970), 22 U. Fla. L. Rev. 482.

Niebergall, O.F., "Credit Information" (1966), 73 Can. Banker 85.

"Swiss Banking Secrecy" (1966), 5 Colum. J. of Transnat'l L.128.

3) Accountancy

Anderson, C.W., "The Legal and Ethical Responsibilities of the Accountant not in Public Practice" (Nov. 1964), The Austr. Acctant. 607.

Collie, M.K. & Marinis, T.P., "Ethical Considerations on Discovery of Error in Tax Returns" (1968-1969), 22 Tax Law. 455.

Kasner, J.A., "Confidential Communications between Accountant and Client" (1957), 6 Drake L. Rev. 92.

Katsoris, C.N., "Confidential Communications - the Accountant's Dilemna" (1966-1967), 35 Ford. L. Rev. 51.

Lewis, R., "Income Tax Act, R.S.C. 1952, c.148 as amended s.126, 126A - Solicitor-Client Privilege - Other Professional Advisors of the Taxpayer without Privilege" (1970), 8 Alta. L. Rev. 145.

"Privileged Communications - Accountants and Accounting" (1968), 66 Mich. L. Rev. 1264.

Tigue, J.J., "Accountant-Client Communications" (1968), 12 Tax Couns. Q. 1.

4) The Medical Profession and Psychotherapy

Butler, J.A., "Psychotherapy and Griswold: Is Confidence a Privilege or a Right?" (1971), Conn. L. Rev. 3.

Chaffee, Z., "Privileged Communications: Is Justice served or obstructed by closing the Doctor's Mouth on the Witness Stand" (1942-1943), 52 Yale L. J. 607.

Fox, R.G., "Professional Confidences and the Psychologist" (Dec. 1968), U. Tasm. L. Rev. 12.

Freedman, S., "Medical Privilege" (1954), 32 Can. Bar Rev. 1.

Guttmacher, M.S. & Weihofen, H., "Privileged Communications between Psychiatrist and Patient" (1952), 28 Ind. L.J. 32.

Hammelman, H., "Professional Privilege - A Comparative Study" (1950), 28 Can. Bar Rev. 750.

Kirkpatrick, A.M., "Privileged Communications in the Correction Services" (1964-1965), 7 Crim. L.Q. 305.

Louisell, D., "The Psychologist in Today's Legal World, Part 2" (1957), 41 Minn. L. Rev. 731.

Nokes, G.D., "Professional Privilege" (1950), 66 L.Q.R. 88.

"Problems in Litigation" (1953), 31 Can. Bar Rev. 503.

Usdin, G.L., "The Psychiatrist and Testamentary Capacity" (1957), 32 Tul. L. Rev. 89.

Vaver, D., "Medical Privilege in New Zealand" (1969), Auk. L. Rev. (No. 2) 63.

5) Social Work

LoGatto, Rev. A.L., "Privileged Communications and the Social Worker" (1962), 8 Cath. Law 5.

"Privilege and Attempts at Reconciliation" (1956), 100 Sol. J. 390.

"Social Worker-Client Relationship and Privileged Communications" (1965), Wash. U.L.Q. 362.

"Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools" (1971), Iowa L. Rev. 1323.

6) The Priest and Other Clergy

Cramer, A.A., "Go Tell the People? The Ethics of Pastoral Confidentiality" (1971), 22 Past. Psych. 31.

Friesen, DeLoss D., "Confidentiality and the Pastoral Counsellor" (1971), 22 Past. Psych. 48.

Hogan, E.A., "A Modern Problem on the Privilege of the Confessional" (1951), 6 Loy. L. Rev. 1.

Kruse, C.B., "The Role of the Clergyman in Coerced Confession" (1966-1967), 17 Past. Psych. 9.

Welles, D.R., "Volare Inviolable - The Ethical Paradox of the Confessional Seal" (1966-1967), 11 Past. Psych. 22.

7) The News Media

Blasi, V., "The Newsman's Privilege: An Empirical Study" (1971), 70 Mich. L. Rev. 229.

Bowman, D., "Newspaper Immunity from Disclosure of Sources" (1959), 17 Fac. of Law Rev. (U. of Toronto) 141.

Bryant, K.C., "Newsmen's Immunity needs a Shot in the Arm" (1970), 11 S.C.L. 56.

Buser, P.J., "The Newsman's Privilege: Protection of Confidential Sources of Information against Government Subpoenas" (1970), 15 St. Louis U.L.J. 181.

"Caldwell v. U.S. (434 F.2d 1081) - Journalistic Privilege: A New Dimension to Freedom of the Press" (1971), 37 Brooklyn L. Rev. 502.

Carter, P.B., "The Journalist, his Informant and Testimonial Privilege" (1960), 35 N.Y.U.L. Rev. 1111.

"Compulsory Disclosure of a Newsman's Source: A Compromise Proposal" (1959), 54 Nw. U.L. Rev. 243.

"Freedom of the Press - Reporter has no Constitutional Right to preserve Anonymity of an Informer if Court orders disclosure - State v. Buchanan" (1969), 82 Harv. L. Rev. 1384.

Guest, J.A. & Stanzler, A.L., "The Constitutional Argument for Newsmen concealing their Sources" (1969-1970), 64 Nw. U.L. Rev. 18.

Henderson, J.D., "The Protection of Confidences: A Qualified Privilege for Newsmen" (1971), Law & Soc. Order 385.

Note (1963), 79 L.Q.R. 167.

Nelson, H.L., "The Newsmen's Privilege against Disclosure of Confidential Sources of Information" (1971), 24 Vand. L. Rev. 667.

"Privileged Communications - News Media - A 'Shield Statute'for Oregon?" (1966), 46 Ore. L. Rev. 99.

"The Right of a Newsman to Refrain from Divulging the Sources of his Information" (1950), 36 Va. L. Rev. 61.

Sharpe, R.O., "The Newsman's Qualified Privilege under the First Amendment" (1971), 16 S.D.L. Rev. 328.

REPORTS, STATEMENTS ETC.

1) General

Law Reform Committee, 16th Report, Cmnd. 3472, "Privilege in Civil Proceedings" (U.K., 1967).

Report of the Commission of Inquiry on Health and Social Welfare, vol. VII, part 5, "The Professions and Society" (Quebec, 1970).

Royal Commission of Inquiry into Civil Rights, Report No. 1, vol. 2, c.53, p. 813, "Privileged Communications" (Ontario, 1968).

2) Accountancy

Council of the Institute of Chartered Accountants in England and Wales, "Unlawful Acts or Defaults by Clients of Members: A Statement by the Council for the Guidance of Members" (1957, rev. 1968).

Morton, A., City Treasurer of Coventry, England, "The Management Information System: Interim Report" (Internal document).

3) The Medical Profession and Psychotherapy

American Psychiatric Association, "Official Actions: Position Statement on Guidelines for Psychiatrists: Problems in Confidentiality" (April, 1970) 1543.

Baran, P., "Remarks on the Question of Privacy raised by the Automation of Mental Health Records", Address to American Orthopsychiatric Association Workshop on 'The Invasion of Privacy' (Santa Monica, California: The Rand Corp., 1967).

4) Social Work

Ad hoc Committee on Confidentiality of the National Social Welfare Assembly, "Confidentiality in Social Services to Individuals" (New York, 1958).

Alves, J.T., "Confidentiality in Social Work", Dissertation (Washington D.C.: Catholic Univ. of America, 1959).

British Association of Social Workers, "Discussion Paper No. 1: Confidentiality and Social Work" (London: B.A.S.W., 1971).

Hill, G.S., "Ethical Practices in the Computerization of Client Data: Implications for Social Work Practice and Record Keeping" (New York: N.A.S.W., 1971).

Report of the Committee on Local Authority and Allied Personal Social Services, Cmnd. 3703 (U.K., 1968).

Social Service Audit Committee Report (Winnipeg, 1969).

5) The News Media

National Union of Journalists, "Document to assist the Home Office Departmental Committee on Contempt of Court (domestic document)" (U.K.: N.U.J., 1972).

Pearson, Sen. J.B. (R-Kansas), "Statement on the Condition of Freedom of the Press in America before the Senate Subcommittee on Constitutional Rights" (Sept. 28th, 1971).

The Press Council, "Privacy, Press and Public"(London: Press Council Booklet No. 2, 1971).

Twentieth Century Task Force Report on the Government and the Press, "Press Freedom under Pressure" (New York: 20th Century Fund, 1971).