

**THE POSSIBILITY OF PSYCHOTHERAPEUTIC PRIVILEGE IN  
SOUTH AFRICA**

A thesis submitted in the fulfilment of the requirements for the degree of

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by

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## ABSTRACT

Privilege is an evidential principle which, on the grounds of public policy, excludes evidence relevant and otherwise admissible. This thesis aims to discover whether privilege should be applied to the psychotherapeutic profession in South Africa. At present, the only profession in South Africa afforded privilege is the legal profession. There are two main theoretical justifications for privilege: the utilitarian and the individual/human rights approach. This thesis considers whether the psychotherapeutic profession warrants privilege under either theory, and recommends that the law of privilege integrate both theories rather than adopt one or the other. The impact of the Constitution and the right to privacy receive particular attention. Very little literature or case law on the question of psychotherapeutic privilege was found in South Africa. Consequently, extensive comparative research into the common-law systems of England, Canada and United States of America was done. This research yielded some interesting findings. The first is that case-by-case development of the law of privilege is uncertain and fragmented. The next is that psychotherapeutic privilege exists in almost absolute form in the United States of America, but is littered with *lacunae* causing as much uncertainty as the case-by-case approach to privilege law. The most helpful method of dealing with the problem was found in Canada, where a two-stage approach to protecting personal information, including psychotherapeutic records, has been developed. In light of this research, this thesis reassesses the original viability of psychotherapeutic privilege in South Africa. Privilege, it was found, is not the best solution to protecting psychotherapeutic communications. This thesis recommends legislative adoption of an amended two-stage approach based on the Canadian model for sexual offence trials as the best method of protecting psychotherapeutic communications in both civil and criminal proceedings. The thesis ends by suggesting draft legislative provisions.

*Make your own notes.  
NEVER underline or  
write in a book.*

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## EXPLANATORY NOTES ON FORMATTING

In every chapter, the first reference made to an article or book is given more completely. Subsequent references in the same chapter are abbreviated. Abbreviations are given for the titles of journals, but the full title can be found in the list of abbreviations.

Example:

First reference for a journal:

DT Zeffertt "Confidentiality and the Courts" (1974) 91 *SALJ* 432.

Subsequent reference for a journal: Zeffertt 1974 *SALJ* 432.

First reference for a book:

A Allan *The Law for Psychotherapists and Counsellors* 2 ed (2001) 55.

Allan *Psychotherapists* 55.

Similarly, in every chapter, the first reference made to cases and acts is given fully. Subsequent references to cases in the same chapter are reduced to the case name and page or paragraph citation. Reference to significant case law appears in the main body of the text in italics. If the case name is in the main body of the text for a subsequent time, only the page or paragraph number is cited. Acts are not italicised.

Example:

*Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) 846

*Jansen van Vuuren v Kruger* 846.

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# CHAPTER 1

## INTRODUCTION

### 1.1 Purpose of the Thesis

This study lies within the law of evidence and, more specifically, focuses on the possibility of psychotherapeutic private privilege in South Africa.<sup>1</sup>

In South Africa there are no legal provisions in either common or statute law that protect communications between psychotherapist and their clients. South African courts can order psychotherapists to disclose confidential communications with their clients and, as a rule, the client cannot claim any form of privilege in respect of those communications.<sup>2</sup> There is also remarkably little on the question of psychotherapeutic privilege in South African legal literature. For sexual assault trials, there has been some research and discussion on the disclosure of personal records, including counselling records.<sup>3</sup> Some work has also been done in the area of medical confidentiality and where law impacts on it.<sup>4</sup> Unfortunately, there has not been a similar study into how the law may influence any confidentiality agreement between a psychotherapist and client.<sup>5</sup> Psychotherapists are understandably concerned about this. Some argue for example that it is their duty to advocate publicly for the rights of their clients and bring concerns regarding confidentiality to the media and to the courts.<sup>6</sup>

As a comprehensive study into professional confidentiality *en masse* extends beyond the boundaries of this thesis, this work primarily aims to explore the significance of psychotherapy in South African

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<sup>1</sup> Psychotherapy refers to the practise of diagnosing or treating a client's mental or emotional condition, including alcoholism, sexual abuse or other drug addictions. See Chapter 3 for a full explanation of the psychotherapeutic relationship.

<sup>2</sup> A Allan *The Law for Psychotherapists and Counsellors* 2 ed (2001) 120. The only possible protection is currently that of "just excuse" under s189 of the Criminal Procedure Act 51 of 1977. See Chapter 5 for a further discussion of the defence.

<sup>3</sup> B Pithey *Production of Personal Records in Sexual Assault Trials* (LLM Thesis, UCT, 2005).

<sup>4</sup> L Nell *Aspects of Confidentiality in Medical Law* (LLM Thesis, University of Pretoria, 2006).

<sup>5</sup> There has however been some research into the relationship between law and psychology in recent years. See A Allan *The Law for Psychotherapists and Counsellors* 2 ed (2001), S Kaliski *Psycholegal Assessment in South Africa* (2006).

<sup>6</sup> A Cramers "Psychologist and rape survivor unsupported by the Justice System and HPCSA" [www.psychotherapy.co.za](http://www.psychotherapy.co.za) (accessed 21 February 2007).

society and whether the fiduciary relationship between the psychotherapist and client warrants professional privilege. In order to achieve this, it is necessary to analyse the theoretical foundations for private privilege law in general. Traditionally, the justification for private privilege relied heavily on protecting specific relationships on grounds of public policy against court-ordered disclosure. Only if the relationship outweighed any interests in evidential disclosure could privilege be justified. Any private privilege therefore depended on whether the relationship was essential to the effective functioning of society. The individual interests of the parties to the relationship were considered as inconsequential. Today, however, the law of evidence must develop in accordance with constitutional values.<sup>7</sup> In such a context the impact of the forced disclosure of confidential information on the client's privacy interests cannot be overlooked. As a result, an alternative, less utilitarian, approach to privilege theory – namely the individualised approach – will be examined. This approach regards the privacy interests of the client as a fundamental justification for introducing privilege.<sup>8</sup> This thesis thus aims to consider psychotherapeutic privilege from both the traditional/utilitarian and individual approaches to privilege law.<sup>9</sup>

As indicated above, there is little guidance to be found in South African sources. A comparative analysis of privilege and any other solution to protecting psychotherapeutic communications becomes necessary. Comparative analysis is especially useful in areas of law that have not, as yet, been dealt with adequately. One of the central purposes of this work is to discover whether any valuable insights into the question of psychotherapeutic privilege can be found in the common-law countries England, Canada and the United States of America. The study will then explore the viability of adopting any foreign solutions into South African law and in particular whether there is some possible remedy other than psychotherapeutic privilege for protecting psychotherapeutic communications. Finally, this study

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<sup>7</sup> The Constitution is the supreme law and any law that is inconsistent with it is to be considered as invalid. Section 2 of the Constitution of the Republic of South Africa, 1996. See also P Schwikkard and S Van der Merwe *Principles of Evidence* 2 ed (2002) 25, 31.

<sup>8</sup> It is appropriate at this stage to stress that although a number of constitutional rights are touched upon, most notably privacy, it is by no means the focal point of this work and is only of relevance insofar as it highlights the impact of forced disclosure on the personal interests of the client. This thesis does not propose to provide a comprehensive constitutional argument for non-disclosure.

<sup>9</sup> This work also studies the meaning and purpose of psychotherapy as a method of mental health treatment in South African society. The influence of confidentiality on successful psychotherapeutic treatment is discussed, as well the connection between confidentiality and the client's right to privacy.

considers what, if any, exceptions to any form of potential psychotherapeutic privilege or other should apply.

## 1.2 Scope of the Thesis

This thesis concerns privilege for confidential communications between psychotherapists and their clients. It is beyond the scope of this thesis to consider whether privilege could apply to other professional relationships reliant on confidentiality. That said, reference is made occasionally to priest-penitent and journalist-source confidentiality. This is to provide case-law examples on the possible arguments that arise when considering professional confidentiality. Furthermore, legal professional privilege is studied in some depth in Chapter 2, as it is the only professional privilege in South Africa, and has undergone considerable development since its inception centuries ago. It is not the intention of this thesis to provide a thorough comparison between the legal and psychotherapeutic professions. Although both are reliant on confidentiality, each serves significantly different functions in society. Legal professional privilege provides a useful example of how professional privilege has evolved in our law but it cannot automatically justify the development of any other professional privilege.

Even though psychotherapy has been practised in South Africa for over five decades, there is, at present, no simple definition of a psychotherapist.<sup>10</sup> Psychotherapy is primarily practised by either a registered psychologist or psychiatrist. It is appropriate at this stage to distinguish between psychiatrists and psychologists. A psychiatrist is registered as a medical specialist.<sup>11</sup> When training, the practitioner will work in six-month rotations learning various specialties. These would include *inter alia* neuropsychiatry, child and adolescent psychiatry and psychotherapy. Psychiatrists mainly

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<sup>10</sup> The Mental Health Care Act 17 of 2002 uses the generic term "mental health practitioner" for qualified practitioners involved in the mental health profession. S1 of the Health Professions Act also does not specifically refer to psychiatrists and refers to a *psychologist* as a professional registered under the Act. It is notable that a proposed Amendment Bill to the Health Professions Act now seeks to alter this problem. Section 1 of the Bill recommends that the definition of a health practitioner refer to "*any person*, including a student, registered with the council in a profession registrable in terms of this Act." Health Professions Amendment Bill B -10D, August 2006. <http://www.info.gov.za/view/DownloadFileAction?id=65454>.

<sup>11</sup> An aspiring psychiatrist will have to complete a medical undergraduate degree and then one year internship in a general hospital. After a minimum of two years practise, including community service, the practitioner will have to complete a four-year training programme in any department of psychiatry. Kaliski *Psycholegal Assessment* 377.

assess and treat mental disorders.<sup>12</sup> Owing to their medical training, psychiatrists have acquired the necessary right to prescribe medication for various mental states or psychological conditions. Methods of examination and assessment used in psychiatry are primarily physiological in nature, such as blood tests, brain scans and other types of neuropsychological testing.<sup>13</sup> Although initially trained as a medical doctor, a psychiatrist is much more concerned with the mental state of the patient.<sup>14</sup> Many South African psychiatrists, in addition to their medical function, perform psychotherapy as well<sup>15</sup>

A psychologist can register as either a research, clinical or counselling psychologist.<sup>16</sup> Research psychology does not involve a counsellor/client relationship, and will thus not be discussed further. A psychologist's orientation is determined by the specialty that he or she undertook. For example, the Professional Board of Psychology has defined "clinical psychologists [as professionals who] assess, diagnose and intervene in order to alleviate or contain relatively serious forms of psychological distress and psychopathology, or what is commonly known as 'abnormal' behaviour".<sup>17</sup> Counselling psychologists, however, are described as psychologists who assist relatively well-adjusted people with normal problems concerning all stages and aspects of their life. A counselling psychologist therefore seeks to facilitate a client's desirable psychological adjustment, growth and maturity.<sup>18</sup> Nonetheless, both clinical and counselling psychologists are concerned with emotional and psychological factors that can contribute towards an individual's mental health deterioration, and thus often practise psychotherapy.<sup>19</sup>

The focus of this thesis is on information arising from the psychotherapeutic aspect of the psychology and psychiatry professions. Possible privilege relating to information arising from other aspects of these two professions will not be discussed.

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<sup>12</sup> M Gelder, D Gath, R Mayou and P Cowen *Oxford Textbook of Psychiatry* 3 ed (1996) 1.

<sup>13</sup> Kaliski *Psycholegal Assessment* 378.

<sup>14</sup> Gelder *Oxford Psychiatry* 25.

<sup>15</sup> These would include Cognitive behavioural therapies and Psychoanalysis. For an explanation of these therapies, see Chapter 3.

<sup>16</sup> In order to be a practicing psychologist, the individual must first study psychology more generally before specialising as a clinical, counselling or research psychologist by completing a Masters degree in any of these specialties. HPSCA, Professional Board of Psychology "Education and Training" [www.hpcs.co.za/hpcs/default.aspx?id=302](http://www.hpcs.co.za/hpcs/default.aspx?id=302) (accessed 23/04/2007) and HPCSA, Professional Board of Psychology "The Scope of the Profession" [www.hpcs.co.za/hpcs/default.aspx?id=124](http://www.hpcs.co.za/hpcs/default.aspx?id=124) (accessed 23/04/2007).

<sup>17</sup> HPCSA "The Scope of the Profession" [www.hpcs.co.za/hpcs/default.aspx?id=124](http://www.hpcs.co.za/hpcs/default.aspx?id=124) (accessed 23/04/2007).

<sup>18</sup> *Ibid.*

<sup>19</sup> Kaliski *Psycholegal Assessment* 378.

As discussed in section 1.1, the impact of the Constitution on privilege theory is examined. It is important, however, to stress that although a number of constitutional rights are touched upon, most notably privacy, they are by no means the focal point of this work. Constitutional rights and values are relevant insofar as they highlight the impact of forced disclosure on the personal interests of the client.

### **1.3 Sources and Approach**

Because the problem examined in this thesis has yet to be considered by South African courts or the legislature, extensive use has been made of comparative law and foreign research. Psychotherapeutic privilege has been established at both Federal and State levels in the United States. Canada has introduced a form of qualified privilege that can apply to the psychotherapeutic relationship. The English approach, although rejecting privilege, has attempted to introduce protection for highly confidential communications.

Foreign cases not only provide an indication of the growing need for South Africa to provide better protection for other confidential professions apart from the legal profession. They also give an indication of the arguments raised for and against psychotherapeutic privilege, as well as the difficulties with rejecting or accepting such privilege.

### **1.4 Structure of Thesis**

Chapter 2 sets out the theoretical foundation for any research into private privilege law. It is against this foundation that any argument for psychotherapeutic privilege must be considered. The chapter provides an explanation of the two main theoretical foundations of privilege law as well as discussing the advantages and disadvantages of both theories. The chapter recommends a union between both theories. Finally, this chapter also discusses the origins and conditions of legal professional privilege.

Chapter 3, with reference to the theory discussed in the previous chapter, considers whether psychotherapy and psychotherapeutic communications satisfy the necessary justifications for privilege.

This chapter examines the nature of psychotherapy and the different modes of psychotherapy practised in South Africa. The chapter also considers the ethical principles surrounding confidentiality and the impact that forced disclosure may have on both the profession and the client.

In Chapter 4, a comparative analysis of the approaches to private privilege in England, Canada and United States is undertaken. This includes the question whether psychotherapeutic privilege is established in those countries and, if not, what other solutions to the problem have been developed.

Chapter 5 deals with the question whether psychotherapeutic privilege is a viable option in South Africa in light of the comparative analysis conducted in Chapter 4. The chapter focuses on the solutions and problems that have been encountered in foreign jurisdictions, and any recommendations for South Africa. The chapter also considers what statutory exceptions there should be to privilege or any other possible protection against disclosure. The defence of “just excuse” for non-disclosure is also touched upon.

Finally, Chapter 6 provides recommended statutory provisions for the protection of psychotherapeutic communications in light of the research conducted in this thesis.

## CHAPTER 2

### PRIVATE PRIVILEGE

#### 2.1 Introduction

The only private privilege that protects the functioning of a profession in South Africa is legal professional privilege.<sup>1</sup> Zeffertt suggests, “[W]e should not find it amazing that the common law has singled out law as the most socially desirable of professional activities.”<sup>2</sup> Courts have indeed thus far rejected any claim of private privilege by other professions on the grounds that public policy would not justify that extension.<sup>3</sup> In the case *Botha v Botha*<sup>4</sup>, Leon J states that: “It is in the public interest that justice must be done. The confidential relationship between a doctor and patient must yield to wider considerations of public policy that justice must be done and must be seen to be done.”<sup>5</sup> Nonetheless, Zeffertt suggests that other professional relationships are in need of legal protection.<sup>6</sup> He concludes that the lack of privilege for communications necessary for proper fulfilment of other professions is an “intolerable situation” needing development.<sup>7</sup>

However, a number of areas have to be unpacked before the question of privilege for the psychotherapeutic profession in South Africa is considered. First, what are the theories behind the justification of already accepted private privileges, and can those theories also justify other privileges? Second, what distinguishes the legal profession from other professions when it comes to the justification for privilege? Finally, does the argument that privileges “shut out the light”<sup>8</sup> from the judicial process pass muster? Before these questions are discussed, it is necessary that the general characteristics of private privilege in South Africa are highlighted.

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<sup>1</sup> This privilege is often referred to as attorney-client privilege. Legal professional privilege is preferred because it covers attorneys and advocates, as well as their agents.

<sup>2</sup> DT Zeffertt “Confidentiality and the Courts” (1974) 91 *SALJ* 432 at 433.

<sup>3</sup> *Smit v Van Niekerk* 1976 (4) SA 293 (A); *S v Cornelissen*; *Cornelissen v Zeelie* 1994 (2) SACR 41 (W).

<sup>4</sup> *Botha v Botha* 1972 (2) SA 559 (N).

<sup>5</sup> 560C. See also *Davis v Additional Magistrate, Johannesburg* 1989 (4) SA 299 (W) 303.

<sup>6</sup> Zeffertt 1974 *SALJ* 435.

<sup>7</sup> *Ibid.*

<sup>8</sup> E W Cleary *et al McCormick on Evidence* 3 ed (1984) 171.

## 2.2 General Characteristics of South African Private Privileges

A person can refuse to give possibly relevant and admissible evidence to the court on the ground of private privilege. It is a rule or right that permits the exclusion of evidence during litigation.<sup>9</sup> The holder of the privilege or a person acting on behalf of the holder can claim the privilege.<sup>10</sup> It is the responsibility of the person claiming privilege to satisfy the court that they are indeed entitled to the privilege. This must be done at the proper time: the holder cannot claim it at the outset, but must wait for the issue to arise during testimony.<sup>11</sup> Privilege successfully claimed cannot give rise to any negative inference.<sup>12</sup> Private privilege also extends to documents, but the judge or magistrate has the right to inspect them in order to determine whether they are indeed privileged.<sup>13</sup> Privilege lapses if there is waiver.<sup>14</sup> It can also be defeated if there is a third party who has legitimate knowledge of the privileged information. On the other hand courts will not allow privileged information to be defeated by unlawful tactics.<sup>15</sup>

When private privilege is recognised, it is usually because the protection of some higher value outweighs the advantage of admitting the desired evidence.<sup>16</sup> What constitutes a higher value depends on the privilege itself. Private privileges usually protect relationships and interests that are of sufficient social importance to warrant the sacrifice of potentially relevant evidence. As McCormick explains, these interests and relationships vary.<sup>17</sup> For example, the privilege against self-incrimination<sup>18</sup> protects

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<sup>9</sup> C Tapper *Cross and Tapper On Evidence* 11 ed (2008) 447.

<sup>10</sup> C Schmidt, D Zeffertt and D Van der Merwe "Evidence" in WA Joubert (ed) *LAWSA* Vol 9 (2005) para 751

<sup>11</sup> *S v Govender* 1967 (2) SA 121 (N).

<sup>12</sup> *International Tobacco Co (SA) Ltd v United Tobacco Institute Co (South) Ltd* 1955 (2) SA 1 (W) 10-11.

<sup>13</sup> *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) 567 (T). Schmidt *et al* *LAWSA* Vol 9 para 751 state that this view is supported at common law as the court had a residual right to inspect documents *in camera* where an objection was made that non-disclosure would have a negative effect on public policy: *Van der Linde v Calitz* 1967 (2) SA 239 (A).

<sup>14</sup> There is a significant difference between public and private privileges. Public privilege belongs to state, whilst private belongs to individuals (either natural or juristic persons, though the focus is on natural persons for this thesis). The key differences between public and private privilege are as follows: first, secondary and circumstantial evidence cannot be used to prove the existence of public privilege – this ensures that any documents that are relevant to the state's interests are not disclosed. Second, members of the state may not waive public privilege. Third, the court may hold public privilege *mero motu* and therefore is not dependant on being claimed by the holder of the privilege. See further P J Schwikkard and S E Van der Merwe *Principles of Evidence* 2 ed (2002) 147-148.

<sup>15</sup> Schwikkard *Evidence* 138; Schmidt *et al* *LAWSA* Vol 9 para 751. This is especially if the admission of evidence renders the trial unfair – in such cases, the infringed party may argue that there should be a stay of proceedings.

<sup>16</sup> Zeffertt *Evidence* 517.

<sup>17</sup> Cleary *et al* *McCormick* 171.

both accused and witness because the “accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labours, rather than by the cruel simple expedient of compelling it from his own mouth.”<sup>19</sup> This rule developed from both statute and common law and now enjoys constitutional protection.<sup>20</sup> On the other hand, legal professional privilege and marital privilege protect communications made in the broader context of relationships. Marital privilege protects the personal relationship between spouses, because public policy would not accept that spouses would have to testify against each other.<sup>21</sup> Legal professional privilege protects the professional relationship between client and legal adviser because public policy accepts that the privilege is necessary to ensure the functioning of the adversarial legal system.<sup>22</sup>

## 2.3 The Theories behind Private Privilege Law

### 2.3.1 Introduction

The two main theories that justify or limit private privileges are the traditional/utilitarian and individual/human rights theories. When considering these theories, this study will utilise and critically assess research provided in the comprehensive theoretical analysis of privileged communications written for the *Harvard Law Journal* during 1985,<sup>23</sup> and the reasoning of Wigmore provided in *Evidence in Trials at Common Law* during 1961.<sup>24</sup> Additionally, from a South African perspective the

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<sup>18</sup> Interestingly, *Harvard Law Review* when considering the development of privileged communications in the United States, chose to exclude the privilege against self-incrimination because it does not “expressly” deal with communications. Anonymous Note “Developments in the Law: Privileged Communications” (1985) 98 *Harvard Law Review* 1450 footnote 4 at 1454. However, this opinion is quite possibly incorrect, as information that is communicated to a legal professional, if forced to be disclosed, can be used to self-incriminate the client. As Paizes points out, because of this, “there is a close connection between attorney-client privilege and the privilege against self-incrimination.” Zeffertt *et al Law of Evidence* footnote 298 at 564.

<sup>19</sup> Warren CJ in the well-known case of *Miranda v Arizona* 384 US (1966) 436; see further Schwikkard *Evidence* 117.

<sup>20</sup> Sections 35 (1) (a), (b) and (c); s35(3) (h) and (j) of the Constitution of the Republic of South Africa, 1996.

<sup>21</sup> Schwikkard *Evidence* 142.

<sup>22</sup> This is discussed in more detail in s2.4 of this Chapter.

<sup>23</sup> Anonymous 1985 *HLR* 1450.

<sup>24</sup> J H Wigmore *Evidence in Trials at Common Law* Vol 8 (1961) 527.

possible impact of the Bill of Rights in the South African Constitution on this research will be considered.<sup>25</sup>

### 2.3.2 The Traditional/Utilitarian Approach

In terms of this theory, the introduction of a class of privilege is justified only if the benefit derived from protecting the communications outweighs the resulting restriction on the search for truth.<sup>26</sup> The theory does not concern itself with individual rights but rather considers whether the acceptance or rejection of a privilege is in the greatest good of society. As a result, the theory is primarily utilitarian.<sup>27</sup> When determining what the greatest good of society will be, the courts have thus far been heavily influenced by Wigmore's criteria for privilege.<sup>28</sup> According to Wigmore, the following four criteria should be met in order for a privilege to be justified.<sup>29</sup>

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one that in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Kriegler explains that Wigmore's criteria indicate that the justification of privileges is based primarily on a cost-benefit approach where "it involves a weighing up of the cost to the search for truth, on the one hand, with the benefit derived from protecting confidentiality on the other".<sup>30</sup> Although Kriegler's

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<sup>25</sup> This is especially with regard to the introduction of a constitutional right to privacy. See Chapter 3.

<sup>26</sup> C Boyle, M MacCrimmon and D Martin *The Law of Evidence: Fact Finding, Fairness and Advocacy* (1999) 697; Anonymous 1985 *HLR* 1472

<sup>27</sup> Jeremy Bentham, the 'great utilitarian' argues that the "principle of utility can be no other than the greatest good of the community." J Bentham 'An Introduction into the Principles of Morals and Legislation' in C Morris *The Great Legal Philosophers: Selected Readings in Jurisprudence* (1959) 279.

<sup>28</sup> Anonymous 1985 *Harvard Law Review* 1472; see for example, *R v Gruenke* [1991] 3 SCR 263; *Jaffee v Redmond* 518 US 1. Refer to Chapter 4.

<sup>29</sup> Wigmore *Evidence* para 2285.

<sup>30</sup> M Kriegler "Legal Professional Privilege as a Right: Whence, Where and Whose?" (1991) 108 *SALJ* 613 at 617.

summation is broadly correct, it should be noted that Wigmore's cost-benefit scale does not weigh the benefits of confidentiality itself, but the relations that are based on that confidentiality. Such relations are often professional relationships dependent on confidentiality.<sup>31</sup> Thus, the overall cost-benefit analysis is not the search for truth versus confidentiality in a given situation, but the search for truth versus the general protection of relationships relying on confidentiality that the community believes should be protected.<sup>32</sup>

Authors have argued that Wigmore's test is ambiguous.<sup>33</sup> For example, whose injury and which injury are referred to in the fourth criterion? How does one measure this injury? Does the denial of privilege increase the chances of correct judgments?<sup>34</sup> By what standard is the benefit to be measured and balanced against the injury? Why is there a need to create hierarchical relationships?<sup>35</sup> Whose community decides that the relation should be "sedulously fostered"? How do we determine such a community in a pluralistic and complex society such as South Africa?<sup>36</sup> These questions illustrate how vague these criteria are. It has been suggested that the vagueness of these criteria possibly indicates Wigmore's struggle to balance the justification of current privileges, such as legal professional privilege, with the desire to prevent as much as possible the development of future privileges.<sup>37</sup> Because of this vagueness, these criteria do not provide much guidance in explaining the justification of private privileges. Indeed, this ambiguity could encourage the introduction of new privileges rather than preclude them. If one interprets these criteria in the widest possible way, the introduction of a new privilege could be justified. For example, should the community consist of people who favour the individual right to privacy and the need to foster relations based on trust and confidentiality, the first three criteria could easily be satisfied. The final criterion could then be met if the forced disclosure would result in a betrayal of confidence so damaging to the relations that it irreparably harms them.

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<sup>31</sup> For example, the legal professional relationship. See s2.4 of this Chapter.

<sup>32</sup> This corresponds with Zeffert's opinion that there are other professional relationships that should be sedulously fostered.

<sup>33</sup> Kriegler 1991 *SALJ* 167; Anonymous 1985 *HLR* 1471; Anonymous Note "Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine" (1961) *Yale Law Journal* 1226 at 1230.

<sup>34</sup> Anonymous 1961 *YLJ* 1230.

<sup>35</sup> N Des Rosiers 'Confidentiality, Human Relationships and Law Reform' in C M Koggel, A Furlong, C Levin *Confidential Relationships: Psychoanalytic, Ethical and Legal Contexts* (2003) 241-242.

<sup>36</sup> Des Rosiers recommends that the law should evolve to incorporate how people prioritise and utilise human relationships within a pluralistic and complex society. Koggel et al *Confidential Relationships* 241-242.

<sup>37</sup> Anonymous 1985 *HLR* 1473; Wigmore originally intended that the four criteria be considered for the establishment of new privileges, but later stated that the "four conditions must serve as the foundation of policy for determining all such privileges, whether claimed or established". Wigmore *Evidence* 528 para 2285.

Nonetheless, in practise the criteria have been interpreted narrowly.<sup>38</sup> This follows Wigmore's sentiments toward private privilege. Wigmore was concerned that the courts and legislatures were too quick to develop and introduce new privileges. In order to curb this tendency, he created the criteria to limit the establishment of private privileges.<sup>39</sup> One may apply Wigmore's criteria narrowly by interpreting the criteria from a positivist perspective. According to Theophilopoulos, a positivist-utilitarian approach to evidence will always favour that which will maximise the truth-seeking function of the courts.<sup>40</sup> It is therefore only the interests of the legal community that needs to be considered from this perspective.<sup>41</sup> The moral or personal interests of the individuals involved are irrelevant. It is thus not surprising from the utilitarian-positivist approach that the truth-seeking function of the courts will be favoured over some vague higher value that a profession provides to society.

The traditional approach can be criticised on various grounds. As indicated above, different interpretations of Wigmore's ambiguous criteria can result in different outcomes. If the legislature or the courts were to balance the costs and benefits of the privilege from a utilitarian-natural law perspective, a higher value other than legal rectitude may be favoured. This approach is supported even further by the introduction of a Constitution that is based on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>42</sup> The current South African human rights doctrine could provide the basis for an approach that considers both the needs of individual rights and society. This may outweigh the truth-seeking function of the accusatorial system in certain circumstances.

There are also a number of concerns about whether it is necessary to weigh the privilege against the quest for truth. Supporters for the curtailment of privileges emphasise that people know very little, if anything, of the privileges available to them and that, even if aware, their behaviour would not be affected by this awareness.<sup>43</sup> For example, Wigmore, when discussing physician-patient privilege, opines, "[P]eople would not be deterred from seeking medical help because of the possibility of

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<sup>38</sup> See *Suliman v Hansa* 1971 (4) SA 69 (D) 71-72.

<sup>39</sup> Wigmore *Evidence* 527 para 2285.

<sup>40</sup> C Theophilopoulos "The Jurisprudential Classification, Evaluation and Reform of Evidentiary Principles" (2004) 121 *SALJ* 163 at 166.

<sup>41</sup> The legal professional relationship will maintain its status as privileged as it serves to ensure the functioning of the legal system.

<sup>42</sup> Section 1(a) of the Constitution of South Africa, 1996.

<sup>43</sup> Anonymous 1985 *HLR* 1474.

disclosure in court. If they would, how did they fare in the generations before the privilege came?”<sup>44</sup> In response to this, authors have suggested that the enquiry should be not so much whether the presence of privilege would encourage communication, but whether the absence of privilege would deter it.<sup>45</sup> The relevant question is thus whether, if people were to become aware that their communications are not protected, would they be less willing to disclose the information in the first place? The limited empirical research on this question has yielded inconsistent results.<sup>46</sup> In a Canadian-American study headed by Daniel Shuman, only 17% of the Canadian respondents found that the presence or absence of any privilege influenced their decision to disclose information to their psychotherapists.<sup>47</sup> The study found that, “people do not look to law for guidance in their decision to enter therapy or make disclosures in therapy”.<sup>48</sup> In contrast, in a survey conducted by the *Yale Law Journal*,<sup>49</sup> 108 lay people were asked whether the legal obligation to disclose confidential information given by them to psychiatrists, psychologists or attorneys would affect their willingness to make free and complete disclosure. For relationships with attorneys, 55 people stated they would be less likely to disclose, 37 people said they would not and 16 people were indecisive. For relationships with psychiatrists, 45 people said they would be less likely to disclose, 22 people held they would not be, whilst 41 people did not know. For psychologists, 47 people said they would be less likely to disclose, 18 people said they would not, whilst 43 people did not know.<sup>50</sup> This study does indicate that a significant number of participants were not sure if they would be deterred, but in all instances the overall majority of participants responded that they would be deterred if they knew that their information could be disclosed in court. A more recent study indicates that the presence of the psychotherapeutic privilege encourages full disclosure.<sup>51</sup> In 2003, Marsh conducted a survey on 129

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<sup>44</sup> Wigmore *Evidence* 527 para 2380 at 829.

<sup>45</sup> Anonymous 1985 *HLR* 1475. This argument has also been raised with regard to the knowledge about the limits of attorney client privilege. Wherein it was submitted that it is probable that “a great many clients will be deterred from consulting lawyers” once they become aware that their communications are not privileged. Anonymous 1961 *YLJ* 1236.

<sup>46</sup> See J Marsh “Empirical Support for the United States Supreme Court’s Protection of the Psychotherapist-Patient Privilege” (2003) 13(4) *Ethics & Behaviour* 385 at 387.

<sup>47</sup> D Shuman, M Pinard “The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada” (1986) 9 *Int.J.L&Psychiatry* 393 at 407-417; E Imwinkelreid “The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court’s Instrumental Reasoning in *Jaffee v Redmond*, 518. U.S 1 (1996)” (1997) 49 *Hastings L.J* 969 at 978.

<sup>48</sup> Shuman 1986 *IJLP* 418.

<sup>49</sup> Anonymous 1961 *YLJ* 1261.

<sup>50</sup> *Ibid.* See further Singer “Informed Consent: Consequences for Response Rate and Response Quality in Social Surveys” (1973) 43 *American Social Review* 144 at 150-151.

<sup>51</sup> The study was conducted in the United States where psychotherapeutic privilege exists. See Chapter 4 s4.5.

patients, subdivided into various scenarios.<sup>52</sup> Marsh found that participants were more willing to disclose information during psychotherapy when aware that the information would remain privileged in each scenario.<sup>53</sup> This indicates that the participant's conduct during psychotherapy was influenced by the presence of the privilege and that a lack of privilege does have a deterrent effect on client's willingness to disclose.

Interestingly, according to Imwinkelreid, Wigmore's biggest error was his belief that privilege affects a client's behaviour at all.<sup>54</sup> To explain further, when formulating his criteria, Wigmore overemphasised the importance of evidentiary rules on society as a whole.<sup>55</sup> In practice, he argues, laypeople do not normally concern themselves with the potential disclosure of personal information during litigation. Consequently, people will enter confidential relationships with or without privilege.<sup>56</sup> Thus, Wigmore's "cost-benefit" scale is not the most effective method to determine the advantages or disadvantages of privilege. Imwinkelreid concludes, "privilege must have a firmer footing, that is, a grounding in a normative proposition rather than a dubious behavioural assumption".<sup>57</sup>

Nonetheless, it is notable that even if many people are unaware of the lack of privilege, professionals are not. In fact, many professions dependent on confidentiality oblige professionals to explain the boundaries of confidentiality to their clients before the professional relationship ensues. This is especially in the professions of law and psychology. For example, psychologists and psychiatrists are

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<sup>52</sup> Such as patients who were police officers, suicidal, disabled or physically/sexually abusive.

<sup>53</sup> Marsh 2003 *Ethics & Behaviour* 393.

<sup>54</sup> Imwinkelreid divides the theoretical justification for privilege law into "Instrumental and Humanistic" approaches. Both approaches are equivalent to the traditional/utilitarian and human rights/individualised approaches discussed in this chapter. E Imwinkelreid "The Historical Cycle in the Law of Evidentiary Privilege: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories" (2003) 55 *Ark. L. Rev* 241; E Imwinkelreid "The Rivalry between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in *Jaffee v Redmond*, 518 U.S 1 (1996)" (1997) 49 *Hastings L.J* 969 at 982-984. He criticises the Supreme Court's decision in *Jaffee v Redmond*. This is discussed in further detail in s4.4.3.1 of Chapter 4. He is also author of *The New Wigmore: Evidentiary Privileges* (2002); see also C Meuller "The Federal Psychotherapist-Patient Privilege after *Jaffee*: Truth and Other Values in a Therapeutic Age" (1997) 49 *Hastings L.J* 945 at 950 who uses the same terminology to explain the two theoretical approaches.

<sup>55</sup> Imwinkelreid 2003 *Ark. L. Rev* 255.

<sup>56</sup> Imwinkelreid 2003 *Ark. L. Rev* 255-256.

<sup>57</sup> Imwinkelreid 2003 *Ark. L. Rev* 257.

under a duty to explain the limitations of their confidentiality in order to prevent possible litigation against them in the future.<sup>58</sup>

The claim that privileges keep out truth is also subject to doubt. According to Saltzburg, the argument that attorney-client privilege keeps out the truth “misconstrues a key point about the privilege – privilege is intended to generate information. The privilege creates the zone of privacy which did not exist before and might not exist otherwise.”<sup>59</sup> Thus Saltzburg opines that the protection of the attorney-client relationship allows for the generation of information that might not exist were it not for the protection. This reasoning is supported in the judgment of *Swidler & Berlin and James Hamilton Petitioners v United States*<sup>60</sup> where Rehnquist J stated:

“[I]n related cases we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege the client may not have made such communication in the first place... the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real.”<sup>61</sup>

This reasoning should not only apply to attorney-client relationships. Dubbeday, for instance, states that Saltzburg’s analysis can be applied to the psychotherapeutic relationship.<sup>62</sup> Furthermore, this argument has been accepted by the Supreme Court of the United States, wherein Justice Stevens held that the absence of psychotherapeutic privilege would have a chilling effect on psychotherapy thereby reducing the amount of information generated in the first place.<sup>63</sup>

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<sup>58</sup> Sections 25(1) and 25(2) of Annexure 12 of Ethical Rules of Conduct for Practitioners Registered Under the Health Professions Act, NO R717, *Government Gazette* 29079, 4 August 2006 states the following:

1) A psychologist is *obliged* to discuss with persons and organisations with whom he or she establishes a scientific or professional relationship (including, to the extent feasible, persons who are legally incapable of giving informed consent and their legal representatives) the exceptions to the requirement of confidentiality, including any such exceptions that may apply to group, marital or family therapy or to organisational consulting and the foreseeable uses of the information obtained.

(2) A psychologist *shall*, unless it is contraindicated, discuss confidentiality at the outset of the relationship and thereafter as new circumstances warrant its discussion.

<sup>59</sup> S Saltzburg “Privileges and Professionals: Lawyers and Psychiatrists” (1980) 66 *Vancouver Law Review* 597 at 609-610.

<sup>60</sup> 524 U.S. 399 (1998).

<sup>61</sup> 408.

<sup>62</sup> C Dubbeday “The Psychotherapist-client Testimonial Privilege: Defining the Professional Involved” (1985) 34 *Emory Law Journal* 777 at 800.

<sup>63</sup> *Jaffee v Redmond* 518 U.S (1996) 1 at 12.

There is the potential criticism that this argument could be raised for any relationship that is ethically or morally dependent on confidentiality and privacy, such as friendship, familial or collegial relationships.<sup>64</sup> For this reason it is submitted that privilege should only extend to professional relationships.<sup>65</sup> For example, Dubbelday writes that the psychotherapist's effectiveness would only be hindered if clients are too afraid to disclose their problems in case the information become public knowledge.<sup>66</sup> Consequently, the possibility of the information ever being generated in the first place is only significant if the success of the professional relationship is maintained. Dawson J in *Baker v Campbell*<sup>67</sup> when discussing attorney-client privilege states: "[S]peaking for myself...I should have thought it evident that if communications between legal advisers and their clients were subject to compulsory disclosure in litigation... there would be a restriction, serious in many cases, upon the freedom with which advice or representation could be given or sought."<sup>68</sup>

It follows then that in professional relationships that are subject to forced disclosure during litigation, the absence of privilege could present the professional with a dilemma. In order to fulfil their professional mandate, all information is necessary, yet before he or she can gain such information, the professional is compelled to caution the client that such information could be disclosed in the courts.<sup>69</sup> The professional must thus make a choice between two evils: whether to elicit all the requisite information from the client at the client's possible expense, or request less detail, thereby protecting the client from disclosure but failing to fulfil their professional duty to gather all the information available.<sup>70</sup> Either way, the client's needs are not met.

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<sup>64</sup> Slovenko enquires whether there is any difference between seeking emotional assistance from a psychotherapist and a family friend or even one's pet. "R Slovenko "Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope" (1974) 23 *Catholic U. L. Rev* 649 at 665. Similarly, Justice Scalia in *Jaffee v Redmond* 22 questions why psychotherapeutic communications should be favoured over communications to one's mother or bartender. See Chapter 4, s4.4.2.3.

<sup>65</sup> The argument that the relationship between a husband and wife would be hindered due to lack of confidentiality to the same degree as a professional relationship dependant on confidentiality is unconvincing. As Paizes states, "[I]t is doubtful whether married couples would become more secretive because of the possibility that the other spouse would be compelled to disclose confidences in court." Zeffertt *et al Evidence* 619. Rather, the justification for marital privilege rests on the public's opinion that it would be unacceptable for a spouse to disclose communications made during a personal and private union.

<sup>66</sup> *Ibid.*

<sup>67</sup> (1983) 49 ALR 385.

<sup>68</sup> 444-5. This dicta has been cited with approval by Botha JA in *S v Safatsa* 1988 (1) SA 868 (A) 886E-G.

<sup>69</sup> Common sense would dictate that the more embarrassing, serious and incriminating the information, the more the client would be hesitant to disclose the information to the professional. This would be exacerbated further if the client is aware that their chances of liability increases with disclosure to the professional.

<sup>70</sup> Anonymous 1985 *HLR* 1477.

Lastly, it has also been pointed out that professionals often try to protect potentially privileged relationships by trying to refuse to testify at all.<sup>71</sup> If in such circumstances the privilege is not allowed, the professional's subsequent testimony is likely to be less reliable or candid than would otherwise be the case.<sup>72</sup> The argument is that in the process the truth-seeking function of the courts is in any event hindered.

### 2.3.3 The Individual/Human Rights Approach

The Individual/Human Rights approach is founded on the protection of human rights and values.<sup>73</sup> Imwinkelreid explains that since the utilitarian approach failed to consider other significant factors such as the individuals affected by privilege and relied too much on "some dubious behavioural assumption" of the public, other theoretical justifications for privilege were concurrently developed. The most attractive is based on the concept of privacy.<sup>74</sup>

Human rights doctrines have indeed become the primary mechanism for Western legal reform.<sup>75</sup> South Africa is no different. The introduction of a justiciable Bill of Rights impacts significantly on the feasibility of the utilitarian/traditional approach. The need for protection of individual constitutional rights such as privacy,<sup>76</sup> dignity,<sup>77</sup> and the right not to incriminate oneself, provides the impetus for the introduction of private privilege to a wider range of relationships.<sup>78</sup> The cost-benefit scale adopted in the traditional/utilitarian approach must of necessity adapt to this.<sup>79</sup> The legislature and courts do not have to consider whether the benefit gained by the privilege outweighs the cost to administration of justice in broad terms; instead, the enquiry is whether the individual protection of certain rights warrants protection. Thus, the problem of justifying privilege in this context involves a threefold enquiry: (1) whether the relationship needs confidentiality; (2) whether this need is legally

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<sup>71</sup> Anonymous 1985 *HLR* 1478.

<sup>72</sup> This obviously raises issues as to whether the witness can then be charged as being a recalcitrant witness in terms of s205 of the Criminal Procedure Act 51 of 1977.

<sup>73</sup> Imwinkelreid 2003 *Ark. L. Rev* 257.

<sup>74</sup> *Ibid.*

<sup>75</sup> Theophilopoulos 2004 *SALJ* 168.

<sup>76</sup> Section 14 of the Constitution of the Republic of South Africa, 1996 is relevant here. See further Chapter 4, s4.4.1.

<sup>77</sup> Cleary *McCormick* 697; see also s10 of the Constitution.

<sup>78</sup> Section 35(3)(j) of the Constitution.

<sup>79</sup> Anonymous *HLR* 1480.

recognisable under the Bill of Rights;<sup>80</sup> and (3) whether it outweighs the need for information.<sup>81</sup> Under this enquiry, any relationship that is dependent on confidentiality, such as the psychotherapeutic relationship or legal professional relationship, would satisfy the first aspect. The second aspect would consider whether this need falls under rights such as privacy and human dignity. At first glance, the fact that these are constitutionally entrenched rights would mean that they are legally recognisable. Nevertheless, one would have to consider whether the protection of these rights, as they are applicable to the confidential relationship, is recognised. The question whether the rights of privacy and dignity are justifiably limited in these circumstances will certainly arise, since the rights are influenced by the context in which they are applied. The third part of the enquiry involves weighing the need for the rights against society's interest in ascertaining the truth.<sup>82</sup>

Theophilopoulos argues that the difficulty with the any human rights approach is that it is based solely on the individual's interest and does not consider its effect on the legal system.<sup>83</sup> This is especially significant when discussing possible exclusionary rules or principles in a procedural context. As Theophilopoulos writes:

"The problem with a human rights doctrine... is that it is an individualizing ideal, giving priority to specific basic interests of individuals without concerning itself with its effect on the procedural system as a whole...[i]n contrast a utilitarian-positivist doctrine is a maximising collective principle requiring the state to maximise the total net or balance of happiness of all individuals. It is therefore an abstract ideal which takes into account its effect on the entire procedural system."<sup>84</sup>

According to Theophilopoulos then, the individual rights approach would favour the rights of the individual at the expense of the overall administration of justice. Furthermore, Theophilopoulos concludes that the greatest good of the community is ensured only with the correct administration of justice. Therefore, exclusionary principles based solely on individual human rights are not in the best interests of the community.

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<sup>80</sup> Such as the right to privacy (s14) and dignity (s10) of the Constitution of the Republic of South Africa, 1996.

<sup>81</sup> Anonymous 1985 *HLR* 1481.

<sup>82</sup> Anonymous 1985 *HLR* 1485.

<sup>83</sup> Theophilopoulos 2004 *SALJ* 173.

<sup>84</sup> *Ibid.*

In addition to this overall concern, Imwinkelreid comments on the problem of using the right to privacy as the foundation of privilege. He writes that privacy is a vague and changeable concept because it “can encompass a wide range of rights. Resting privilege doctrine on such a broad, multi-faceted concept would invite years of litigation and uncertainty”.<sup>85</sup> Imwinkelreid, although commenting on the use of privacy for psychotherapeutic privilege in the United States, raises a noteworthy criticism applicable to the South African law of evidence. Founding an evidential rule that is subject to varying interpretations is not advisable.<sup>86</sup> Privacy should not therefore be the sole foundation for psychotherapeutic privilege but rather another significant factor for an argument supporting psychotherapeutic privilege.

Privileges should thus not be justified from the individual/human rights perspective. From this context, it seems that the two approaches to privilege are irreconcilable. The utilitarian approach to privilege downplays the needs of the individuals involved, whereas the individualised approach short-changes the community interest.<sup>87</sup> From what perspective should psychotherapeutic privilege be justified then?

#### 2.3.4 A Combined Approach to Private Privilege

An argument put forth in *Harvard Law Review* states that the two approaches are not as distinct as might seem.<sup>88</sup> The *Review* asks why one should adopt “a one or the other” approach. First, in terms of the utilitarian approach, the concerns of the community are paramount, as the greatest good is that of the good of the community. However, it is arguable that there is no such thing as a clearly identifiable community. Rather, a community consists of collection of individuals with differing ideals.<sup>89</sup> As

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<sup>85</sup> Imwinkelreid 2003 *Ark. L.Rev* 258.

<sup>86</sup> See Chapter 3 s3.5.1 for a discussion of the right to privacy in South Africa. The different explanations enumerated by both theorists and in case law support Imwinkelreid’s argument that privacy, on its own, would be too vague to promote a solid foundation for psychotherapeutic privilege.

<sup>87</sup> R Dworkin “Hard Cases” (1975) 88 *Harvard Law Review* 1057 at 1067-1070; Anonymous 1985 *HLR* 1484.

<sup>88</sup> *Ibid.*

<sup>89</sup> Jeremy Bentham, when enquiring what the good of the community consists of, states “this question could not be answered by a vague declaration or metaphor...but by minute analysis and sober estimation...” J Bentham ‘An Introduction into the Principles of Morals and Legislation’ in C Morris *The Great Legal Philosophers: Selected Readings in Jurisprudence* (1959) 279. This comment is interesting since the very concept of a community is a vague declaration of the *boni mores* of society.

such, the “good of any one such individual is *pro tanto* to the good of the community”.<sup>90</sup> Bentham, a strong utilitarian, states that “a law therefore which the immediate end is no other than the good or benefit of the person whose law it is, does not on that account cease to be such a law as is capable of being warranted by the principle of utility”.<sup>91</sup> It is therefore possible, according to Bentham, that a privilege will protect the individual whilst at the same time considering the good of society as a whole.

Paizes supports this approach to privilege theory by stating that the weighing up between public policy and the truth-seeking function assists in promoting a greater attainment of substantive rights as well as the generation of knowledge and information that is for the broader good of society.<sup>92</sup> Therefore, if we consider that certain privileges create two advantages, first, the protection of certain confidential relationships that maintain society’s well-being and second, the protection of individual rights, the collective benefits of the privilege may well justify the possible impact on the truth-seeking function of the rule for complete disclosure during legal proceedings. As stated, “society, as a collection of individuals, imposes rules on itself precisely so that individuals may enjoy benefits thereof; whether individuals benefit systemically or discretely is irrelevant”.<sup>93</sup> The result is that when deciding whether to apply or create a new privilege, the societal benefit of protecting both the confidentiality of a relationship and the individual rights on the one hand against the possible cost of the privilege to the truth seeking function of the courts on the other should be balanced.<sup>94</sup>

A possible concern of this approach is whether the utilitarian approach has any justification in a Constitutional framework. After all, the Constitution is the supreme law of the Republic and any law or conduct that is inconsistent with it is invalid.<sup>95</sup> It is submitted that there are a two reasons why a union between utilitarian and individualised approaches be preferred over only the individualised-human rights approach. First, constitutional rights, especially those in the Bill of Rights, are abstract and

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<sup>90</sup> Bentham in Morris *Great Philosophers* 279.

<sup>91</sup> *Ibid.*

<sup>92</sup> Paizes is referring to the development of legal professional privilege. It is arguable however that the concerns raised regarding the jurisprudential development of legal professional privilege law can also be raised in most privilege law. A Paizes “Foundations of the Legal Professional Privilege” (1989) 106 *SALJ* 109 at 118; Zeffertt *et al Evidence* 562.

<sup>93</sup> Anonymous 1985 *HLR* 1485.

<sup>94</sup> Anonymous 1985 *HLR* 1486.

<sup>95</sup> Section 2 of the Constitution of South Africa, 1996.

general in nature.<sup>96</sup> When determining the meaning of such rights, the common law will thus continue to guide the courts.<sup>97</sup> The rights in the Bill of Rights are also subject to limitation.<sup>98</sup> Thus, amongst other factors, the courts will consider the importance and purpose of the limitation of the applicable rights.<sup>99</sup> They will assess the overall benefit to society that full disclosure has on the administration of justice. The utilitarian basis will therefore continue to be significant, even though it must yield to the Constitution.<sup>100</sup> The utilitarian approach could thus be described as incomplete rather than defunct.<sup>101</sup> Consideration of autonomy and individual human rights ensures that privilege law maintains credibility within the Constitution framework, but the overall consideration of public interest remains significant. Evaluation of the effect a privilege may have on the administration of justice and thus the overall benefit of society addresses the concern raised by Theophilopoulos regarding the individualised nature of human rights.

Second, this solution to privilege law has been recommended in South Africa already. Paizes, when considering the development of legal professional privilege in South Africa, has proposed this solution. Paizes argues that the two different theories (individual and utilitarian) should appear together when weighed against the possible loss of information. Both theories, opines Paizes, are “capable of reconciling individual rights and the good of society...”<sup>102</sup> Paizes also emphasises that the union between the utilitarian and individual theories is not merely academic. Rather, as privilege can now be viewed as a protector of fundamental human dignity (and it is submitted, privacy) the justification for privilege law thus evolves with the changing reasoning of society. The union between the two theories provides an opportunity for development in a manner that ensures harmony between the old and the new in the Constitutional era.

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<sup>96</sup> I Currie and J De Waal *The Bill of Rights Handbook* 5 ed (2005) 146.

<sup>97</sup> In terms of s39(2) of the Constitution of South Africa, 1996 states that the common law must be developed in manner that promotes the spirit, purport and objects of the Bill of Rights.

<sup>98</sup> Section 36 of the Constitution of South Africa, 1996.

<sup>99</sup> Section 36(b) of the Constitution of South Africa, 1996.

<sup>100</sup> Section 2 of the Constitution states that the Constitution is the Supreme Law of the land and any law that is inconsistent with it is invalid.

<sup>101</sup> Zeffertt *et al Evidence* 567.

<sup>102</sup> Zeffertt *et al Evidence* 566.

Imwinkelreid is also a supporter of fusing the two different approaches.<sup>103</sup> However, he argues that personal autonomy should be used instead of privacy.<sup>104</sup> His argument is as follows: liberal democracies such as the United States (and it is submitted, South Africa) rely on the principle that people are self-autonomous and value the ability to choose their own paths in life.<sup>105</sup> Problems surrounding autonomy occur however when people have to make choices in areas that are they do not understand or do not have the requisite information to do so. They therefore turn to “experts” who can provide the necessary guidance.<sup>106</sup> Here the autonomous person reaches a dilemma: in accepting assistance from third parties, he or she opens himself or herself up to the possible loss of autonomy via coercion or manipulation by the outsider.<sup>107</sup> It is this risk of coercion that privilege should protect against. He argues that this risk can be limited by ensuring that third parties remain as objective as possible – this can occur if both parties know their communications will remain private.<sup>108</sup> As trust in the expert is maintained, both parties can be as frank as possible, ensuring it is only what is in the best interest of the client that is discussed.<sup>109</sup> In summary, he argues that privilege law should protect professional confidentiality from outside interference because securing personal autonomy allows society, as a “liberal democracy”, to develop.

In light of this argument, Imwinkelreid proposes that the courts should not adopt a “one or the other” approach to developing or rejecting a privilege.<sup>110</sup> Rather, the court should use the wealth of theoretical information from both approaches to reach its decision.<sup>111</sup> He writes, “even if the facts of a case do not warrant invoking the instrumental [traditional] theory, the court can grant privilege relief under an alternative humanistic [Individualised] basis.”<sup>112</sup> This is because every modern version of contemporary humanistic theory protects the holder (layperson) on some level. He notes for example,

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<sup>103</sup> Imwinkelreid 2003 *Ark. L.Rev* 261-262.

<sup>104</sup> Note that Imwinkelreid is writing from the perspective of United States jurisprudence. Unlike South Africa, there is no constitutional right to privacy that may encompass personal autonomy. See Chapter 3, s3.5.1 wherein the connection between the right to privacy and personal autonomy is explained.

<sup>105</sup> Imwinkelreid 2003 *Ark. L.Rev* 259-261. If Raz’s theory of democracy is applied, a state should do more than respect a person’s freedom. The state should take steps to promote self-autonomy.

<sup>106</sup> Imwinkelreid 2003 *Ark. L.Rev* 260. This concerns third parties such as lawyers for legal battles or psychotherapists for mental health issues.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> Imwinkelreid 2003 *Ark. L. Rev* 261.

<sup>111</sup> Imwinkelreid 2003 *Ark. L. Rev* 262.

<sup>112</sup> *Ibid.*

waiver is a derivative of individualised theory already accepted by Wigmore.<sup>113</sup> To explain, waiver is an element of individualised reasoning because the privilege can be set aside by the opinion/conduct of one person irrespective of its effect on the community. In addition, the facts of the case may determine whether privilege in that matter is needed – for example, should both the utilitarian and individualised theory be satisfied, a strong form of privilege is recommended.<sup>114</sup>

### 2.3.5 Absolute and Qualified Categories of Private Privilege

At this stage, it is necessary to distinguish between absolute privilege and qualified privilege, as a relationship may be permanently protected against court disclosure, or only protected in an *ad hoc*, qualified manner. Zeffertt, who recognised that South African law does not protect other professional relationships aside from the attorney-client relationship, has identified these two forms of privilege.<sup>115</sup> Zeffertt notes that there is a dichotomy between recognising the protection of professional relationships and the need to gain access to information. Thus Zeffertt raises the same concerns as mentioned previously – how can the law introduce other professional privileges and satisfy the courts' need for truth? Zeffertt proposed a then-controversial compromise,<sup>116</sup> which he couched as follows:

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<sup>113</sup> *Ibid.*

<sup>114</sup> He uses the following example to indicate how both theories can coincide: “[A]ssume the following. After the fatal police shooting of a civilian, the decedent’s family filed suit against both the police officer and her employer, the municipality. The officer found the incident so upsetting that she turned to therapy. Before trial the decedent’s family demand the production of the records of the officer’s therapy sessions. The defendants cited the psychotherapist privilege as a basis for refusing demand. The patient police officer was not only a police officer; she had also received extensive legal training, including some instruction in the law of privileges. Further, suppose that some or most of her psychotherapy sessions occurred after suit was filed. Finally, assume that after suit was filed, an attorney – either her own counsel of the attorney representing the codefendant, the municipality which employed her – expressly cautioned her against making statements that could come back to haunt them at trial. At the very least, given the timing, her training and the attorney’s warning, she might be much more circumspect in her disclosures to her psychotherapist if she knew that no privilege applied to the disclosures. ... [H]ere the facts make out a strong case for invoking the instrumental rationale. In addition, suppose that the officer had found the shooting so troubling that she was on the brink of succumbing to a serious mental illness... [that] could pose a serious threat to her personhood. ... In other words, the facts also make out a powerful case for invoking some version of a modern humanistic theory.” Imwinkelreid 2003 *Ark. L. Rev* 264-265.

<sup>115</sup> Zeffertt 1974 *SALJ* 435.

<sup>116</sup> This was during the late 1980’s.

“[A]n absolute privilege should be retained, with the limitations that have developed in the decisions, for the lawyer-client situation – it has worked in that area with one possible exception<sup>117</sup> ... But the legislature should create what I shall call a qualified privilege to meet the ends of medicine. A patient should be entitled to claim that information is confidential. The court then should be required to hear evidence in camera to determine whether the evidence ought to be disclosed. In determining this issue it should weigh the matter on a social balance, the test being: In the circumstances, would public interest best be served by silence or disclosure?”<sup>118</sup>

The compromise proposed by Zeffertt strongly relies on the scope of the privilege itself – namely whether the privilege is absolute in nature or more limited. As the name indicates, once claimed, absolute privilege is applicable in all circumstances. Thus, absolute privilege applied regardless of competing interests.<sup>119</sup> Consequently, the need to balance the quest for truth with that of individual rights and public policy falls away. As a result, it is not surprising that most legal systems reject this form of privilege.<sup>120</sup>

In South Africa, the closest to an absolute form of privilege is legal professional privilege. However, it is submitted that even this privilege, which is recognised as a right,<sup>121</sup> does not enjoy absolute protection against disclosure. As Zeffertt explains, legal professional privilege is subject to certain conditions or limitations. Such conditions include that legal advisers must be acting in their professional capacity; the communications were in confidence made for the purpose of legal advice;

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<sup>117</sup> The exception is referring to the proposition that the scope of legal professional privilege should not be extended beyond private practice (for example to salaried legal advisors). This proposition has now been firmly rejected by the courts in *Mohamed v President of the Republic of South Africa* 2001 (2) SA 1145 (C). Hoffman AJ citing, with approval, Lord Denning’s reasoning in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 All ER 353 (QB) 376-377; and Swart J’s approval of *Alfred* in *Van der Heever v Die Meester en Andere* 1997 (3) SA 93 (T) at 101J-102E that there is no reason why the courts should limit the scope of legal professional privilege to clients and lawyers in private practice as an employed legal adviser has the same duties as a lawyer in private practice. Hoffmann AJ concludes that “to limit the scope of legal professional privilege to clients and lawyers in private practice is not, in my view, justified in law ... [it] would force governments, statutory bodies and even private corporations with in-house legal advisers to reorganise – at great expense – their *modus operandi* ... [t]here is no warrant for doing this, provided that ... ‘in-house’ legal advisers remain mindful of ... the distinction between communications made in their capacity as legal adviser and other communications which would not be of a privileged nature.” *Mohamed v President of the Republic of South Africa* 1154E-H.

<sup>118</sup> 435.

<sup>119</sup> *Ibid.*

<sup>120</sup> R Brand “Between Privilege and subpoena: Protecting confidential sources”(2006) 27(2) *Equid Novi* 113 at 130

<sup>121</sup> First introduced in *S v Safatsa* 1988 1 SA 868 (A) 886, wherein Botha JA followed the decision of *Baker v Campbell* 1983 49 ALR 385 at 442-445.

and finally that the advice is not associated with pursuing the commission of a criminal offence.<sup>122</sup> Nevertheless, since legal professional privilege in South Africa is now considered a fundamental right, the privilege does not have to be balanced against any other competing interests. This ensures the relationship between the attorney and client is well protected against forced disclosure, provided the essential conditions are met.

Qualified privilege provides a high level of protection, but unlike absolute privilege, balances the rights of both parties involved in the matter.<sup>123</sup> The presence of the privilege is determined by the courts on a case-by-case basis rather than broadly accepted.<sup>124</sup> It is likely that such an approach to introducing new professional privileges will favour this form above absolute protection from disclosure. For example, the main recommendation put forth to the South African National Editors Forum (SANEF) regarding the introduction of journalist privilege argued that a qualified form of privilege should be introduced, rather than an absolute privilege.<sup>125</sup> This is also the approach favoured by the Canadian courts, which have developed what is known as a “qualified case-by-case privilege”.<sup>126</sup>

## 2.4 Legal Professional Privilege

Legal professional privilege is the only privilege that protects a professional relationship in South Africa. Like privilege law as a whole, the grounds for legal professional privilege have also significantly altered over time. Paizes opines that “[T]he history of the privilege has not been characterised by consistency, certainty or predictability.”<sup>127</sup> As any new professional privilege is likely

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<sup>122</sup> These limitations shall be discussed in more detail when discussing legal professional privilege specifically. Zeffertt *Evidence* 579-583; Schwikkard *Principles of Evidence* 135-137.

<sup>123</sup> Boyle *et al The Law of Evidence* 709; Cleary *et al McCormick* 187; Brand 2006 *Equid Novi* 130.

<sup>124</sup> Qualified privilege therefore does not provide blanket privilege, and is similar to the approach taken in Canada when determining privilege for professional relationships not protected by class privilege (absolute or blanket privilege). See Chapter 4, s4.3.

<sup>125</sup> F Haffajee (2005) “Amendments to Section 205 of the Criminal Procedure Act” Report to South African Editors Forum. Unpublished: Grahamstown.

<sup>126</sup> See Chapter 4, s 4.3.

<sup>127</sup> Zeffertt *et al Evidence* 558.

to be compared to legal professional privilege, it is necessary to unpack the history of legal professional privilege, and examine when it is applicable in South Africa.<sup>128</sup>

#### 2.4.1 Development of the Privilege

Legal professional privilege can be traced to the reign of Queen Elizabeth I.<sup>129</sup> The original rationale for the introduction of the privilege was to protect the professional honour of the legal adviser.<sup>130</sup> The privilege thus attached to the lawyer. A good example of this is seen in *Atterbury v Hawkins* (1678).<sup>131</sup> In this matter, the court rejected the claim for privilege on the grounds that the client was not a “civil confessor as a lawyer is, nor to be so treated, but rather a person suspected in law as apt to make unlawful concealments”.<sup>132</sup> This case confirmed that the same level of trust given to a professional could not be given the client.<sup>133</sup> Today however, the position has reversed. The privilege now attaches to the client.<sup>134</sup> Paizes suggests that the shift from the legal adviser to the client is due to the change in society’s ideology, as individual autonomy began to be favoured over the status of the legal profession.<sup>135</sup>

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<sup>128</sup> This was the approach of the Supreme Court of Canada in *R v Gruenke* 1991 (3) SCR 263 and *A (L.L.) v B(A)* 1995 (4) SCR 536. See Chapter 4, s4.3.2.

<sup>129</sup> H Lai “History and Judicial Theories of Legal Professional Privilege” (1995) *SJLS* 558 at 559; Zeffertt *et al Evidence* 558. According to Jones *The Elizabethan Court of Chancery* (1967) 319-320 the earliest record of legal professional privilege can be found in *Lee v Markham* in 1569. Cited from Lai 1995 *SJLS* fn 8 559.

<sup>130</sup> Wigmore *Evidence* para 2290 at 543. Wigmore states that “the theory of its [attorney-client testimonial disclosure] exclusion in those days was very different from that of modern times. It was an objective not a subjective one – a consideration for the *oath and honor* of the attorney rather than for the apprehensions of his client”. Also see Zeffertt 1974 *SALJ* 432.

<sup>131</sup> (1678) 2 ChanCas 242. Taken from Lai 1995 *SJLS* 561 and fn 21.

<sup>132</sup> *Ibid.*

<sup>133</sup> Paizes explains that the writings of John Locke (1632-1704), influenced the transformation of the privilege. See further M Rosenfeld “The Transformation of the Attorney-client privilege: In search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client’s SEC Disclosive Obligations” (1982) 33 *Hastings Law Journal* 497 at 496. Taken from Zeffertt *et al Evidence* 559 fn276.

<sup>134</sup> *S v Safatsa* 1988(1) SA 868 (A) 886E. Notice the development from a rule to right as stated in *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C) 641H.

<sup>135</sup> *Ibid.*

Legal professional privilege is justified on two main grounds: first, it protects the adversarial legal system and hence society; and second, it protects the client's individual rights.<sup>136</sup> The foundation for legal professional privilege is thus both individualist and utilitarian. The evolution of legal professional privilege from an evidentiary rule into a right indicates that both the utilitarian and individualistic perspectives are intertwined, and that legal professional privilege is now primarily non-utilitarian in nature.

From the utilitarian perspective, legal professional privilege is justified because it benefits society by providing the opportunity for people to seek legal counsel without fear of forced disclosure. Friedman J, for example, in *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing*<sup>137</sup> stated: "[T]he foundation of the [privilege] rule is that a litigant should be able to obtain legal advice freely by laying all the facts before his legal adviser without fear that these facts will be disclosed to his opponent."<sup>138</sup> Without such fear the legal professional can give advice based on all the information needed, thus allowing the adversarial legal system to function effectively. This, Wigmore concludes, would outweigh the truth-seeking function of the courts.<sup>139</sup> Wigmore favoured the broad societal justification for the privilege rather than any individual rights.<sup>140</sup> From this perspective, the privilege should only be justified when it does outweigh the societal advantages of full disclosure.<sup>141</sup>

Furthermore, it has been suggested that the privilege asserts a certain confidence in the adversarial system itself as the "privilege demonstrates that our society is self-confident enough to permit those who are charged with violating laws to have their interests represented by a competent counsel, who can not be used as a an instrument against them".<sup>142</sup>

The justification of the privilege has developed from an evidentiary rule into a fundamental right.<sup>143</sup> The development of the rule into a right originated in the need to protect the confidentiality of

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<sup>136</sup> For a thorough explanation of the rationale for legal professional privilege see Zeffertt *et al Evidence* 561- 570.

<sup>137</sup> 1979 (1) SA 637 (C).

<sup>138</sup> 641H.

<sup>139</sup> Wigmore *Evidence* para 2292.

<sup>140</sup> Anonymous 1985 *HLR* 1503.

<sup>141</sup> *Ibid.*

<sup>142</sup> Anonymous 1961 *YLJ* 1237.

<sup>143</sup> *S v Safatsa* 1988 (1) SA 868 (A) 886.

communications between legal advisers and their clients, in order to ensure the proper functioning of the courts.<sup>144</sup> This appears to be utilitarian as society is benefited via the protection of the legal system. For example, in *Mahomed v National Director of Public Prosecutions and Others*<sup>145</sup> Hussein J confirms that “[l]egal professional privilege is a right necessary for the proper functioning of the adversarial system and is not a mere evidentiary principle”.<sup>146</sup> In *Jeeva and Others v Receiver of Revenue, Port Elizabeth*<sup>147</sup> the court explains that the “authority is...overwhelmingly in favour of the view that legal professional privilege has its true basis in a fundamental right to give and take legal advice with complete confidence, without which our adversarial system of litigation cannot function properly.”<sup>148</sup> Both cases emphasise that the right to the privilege is founded upon the benefit to society that the proper functioning of the legal system provides.

There are some interesting aspects to this reasoning. First, in the past the concept of individual *rights* was considered to be distinctly non-utilitarian.<sup>149</sup> Today, however, the privilege is considered as the right of the client. The privilege is therefore no longer based on the needs of society as a whole but on the individual interests of the client. Second, the advent of the Constitution has further shifted the outlook away from the justification of the privilege as primarily utilitarian. For example, in criminal matters it is arguable that forcing the legal adviser to incriminate their client by disclosing communications by the accused to them<sup>150</sup> amounts to an infringement of the accused’s right to a fair trial.<sup>151</sup> This is because the information gathered by the legal adviser is originally facilitated by the candour of the accused, who should be protected against incriminating themselves.<sup>152</sup> It would be unfair if accused persons were incriminated by the same legal protection granted them by the Constitution.<sup>153</sup>

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<sup>144</sup> *Ibid.*

<sup>145</sup> 2006 (1) SACR 495 (W).

<sup>146</sup> 500E-F.

<sup>147</sup> 1995 (2) SA 433 (SE).

<sup>148</sup> 453C-D. Also see *Baker v Campbell* (1983) 49 ALR 385 at 445; *S v Safatsa* 1988 (1) SA 868 (A) 886G-H.

<sup>149</sup> Anonymous 1985 HLR 1504.

<sup>150</sup> Section 35(3)(f) of the Constitution of the Republic of South Africa, 1996 states that the accused has the right to choose and be represented by a legal practitioner.

<sup>151</sup> Also consider s201 of the Criminal Procedure Act 51 of 1977 which states that a legal adviser is not competent to testify or disclose information given by the accused to them in their capacity as legal representative unless the accused consents.

<sup>152</sup> Section 35(3)(j).

<sup>153</sup> Evidence obtained in a manner that infringes a constitutional right “must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice: s35(5) of the Constitution.

## 2.4.2 Conditions for the Privilege

In addition to being the only professional privilege in South Africa, legal professional privilege is also considered almost absolute in nature. Zeffertt concludes that “[I]t is in the public interest to regard the communications between a professional legal adviser and his client as being, in certain circumstances, inviolate”.<sup>154</sup> Nonetheless, there are conditions that have to be met in order for the privilege to exist. According to Wigmore, the inclusion of such conditions prevents possible abuse of the privilege, which could hinder the administration of justice.<sup>155</sup> Wigmore thus wished to ensure that the privilege would be narrowly used. The only condition omitted by Wigmore, which has since been developed by the common law, is that advice must not have been sought to further any criminal offence or fraud, even if the legal adviser was ignorant of the true purpose.<sup>156</sup>

It is notable that these conditions were developed when the privilege was considered an evidentiary rule and not a right bolstered by Constitutional protection. However, Paizes mentions that even though the conditions are likely to become more flexible, the courts will continue to consider and apply these conditions.<sup>157</sup> It is therefore still necessary to study them further.

Condition a): The professional must be acting in his or her capacity as a legal adviser

The client must be seeking advice from a legal adviser who has the requisite capacity to act as the client’s representative. In most cases this is determined by a question of fact, usually provided by the

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<sup>154</sup> Zeffertt 1971 *SALJ* 432.

<sup>155</sup> Briefly these conditions were:

1) Where the legal advice is sought, 2) from a professional legal adviser in his capacity as such, 3) the communications relating to that purpose, 4) in confidence, 5) by the client, 6) are at his instance permanently protected, 7) from disclosure by himself or by the legal adviser, 8) except where the protection be waived. See para 2289.

<sup>156</sup> See for example, *Harksen v Attorney-General of the Province of the Cape of Good Hope & Others* 1999 (1) SA 718 (C) at 729 where Friedman J and Brand J cited with approval the English case of *R v Cox and Railton* (1884) 14 QBD 153 at 165-6 which stated that:

“It is . . . clear that communications in furtherance of a crime are not protected even if the legal adviser was ignorant of the illegal object” Friedman J and Brand J additionally confirm that this reasoning was approved in *Botes v Daly* 1976 (2) SA 215 (N) 222 ; see also *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515(W) 551-522.

<sup>157</sup> Zeffertt *et al Evidence* 579.

legal adviser him- or herself.<sup>158</sup> A useful guideline is whether remuneration was given for the legal advice. This is not always conclusive, as *R v Fouche*<sup>159</sup> indicates. In this matter, Ramsbottom J considered whether certain communications between an attorney and his friend were privileged. The attorney, who wished to disclose certain information from his discussions with the accused, argued that he was not acting in his professional capacity but only out of friendship. Nonetheless, the facts of the case, as Ramsbottom J indicates, proved otherwise. The attorney had been introduced to other professional legal advisers as the accused's attorney; he had done work on the accused's legal matters a number of times and finally, had received remuneration of over £100 from the accused. When considering the significance of the payment, Ramsbottom J held that:

“The question of fees is not unimportant... If Rowan [the attorney] received no fee for his work, that would not show that he had not been employed professionally; an attorney may well act in a professional capacity for a friend without asking a fee. But if, in addition to the facts... Rowan received a fee, that is an important additional fact to show that he was employed in a professional capacity.”<sup>160</sup>

Other factors are also considered in order to determine whether the legal adviser was acting in a professional capacity. First, does privilege extend to advisers who are knowledgeable or claim to be knowledgeable in the field, but are not admitted as legal professionals? At first glance, the answer should be 'no'. However, whether the client believed that his or her adviser is an admitted attorney or advocate and acting in his or her capacity as such, should be significant.<sup>161</sup> If clients reasonably believe that their communications are protected from disclosure, that information should be privileged. This is especially true since the client could incriminate him- or herself with the disclosed information.

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<sup>158</sup> Commentary on the Criminal Procedure Act RS 37, 2007 23-36G; *Danzfuss v Additional Magistrate, Bloemfontein* 1981 (1) SA 115 (O).

<sup>159</sup> 1953 (1) SA 440 (W).

<sup>160</sup> 445A.

<sup>161</sup> This problem is not merely hypothetical – in March 2005 the Cape Times warned about 'fake lawyers' in the Western Cape. According to the report, during March 2005, Judge Desai of the High Court Bench learnt that a fake attorney who did not have the necessary qualifications but was charging a fee to represent her client was handling some divorce matters. The article and the police investigating the matter emphasised that the public should be careful about ensuring their legal representative's credentials are correct. F Schroeder "Public warned about fake lawyers" *Cape Times* 28 March 2007. [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=15&art\\_id=vn20050328080904315C427715](http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=vn20050328080904315C427715) (accessed 2 November 2007).

Wigmore argues that in such circumstances, the information should remain privileged and disclosure by the client to the adviser could be likened to an unlawful confession.<sup>162</sup>

It is submitted that South African courts need not even consider this comparison. For criminal matters, the following argument can be made: If the client enters into a professional relationship with a person he or she believes to be a *bona fide* legal adviser, on a subjective level they have enforced their constitutional right to legal representation. If it transpires that the legal adviser is *mala fide*, the original basis for seeking advice has nonetheless remained unchanged. The subjective belief that the confidant is a legitimate professional and its impact on the client's willingness to disclose potentially incriminating evidence remains the same. To submit the evidence of a *pseudo* legal adviser would amount to an infringement of the client's right to be protected against self-incrimination. This would be a clear violation of s35(5)(j) of the Constitution rendering the trial unfair.<sup>163</sup> For civil matters, the approach of Brand J in *Fedics Group (Pty) Ltd v Matus*<sup>164</sup> provides sufficient protection for the client. The court found that to include improperly obtained evidence is a "retrogressive step in the development of our law".<sup>165</sup> The court should rather be directed by s39(2) of the Constitution which provides that the courts must develop the common law in a manner that promotes the spirit, purport and object of the Bill of Rights.<sup>166</sup> Brand J concludes that if the evidence could not be gathered by any other means, then protection against such disclosure is more likely to succeed.<sup>167</sup> Although in this matter, the evidence was admissible, this *obiter* remark by Brand J is significant. In the client's mind, the information was given to the professional as his legal representative. That the professional had misled the client does not influence the subjective belief that the communications were privileged.<sup>168</sup>

Condition b): The communications must be made in confidence

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<sup>162</sup> Wigmore *Evidence* 584 para 2302 fn 2.

<sup>163</sup> Section 35(5)(j) read with s35(5) of the Constitution of the Republic of South Africa, 1996.

<sup>164</sup> 1998 (2) SA 609 (C). This case is discussed in Schwikkard *et al Evidence* 249-250.

<sup>165</sup> 636D-E.

<sup>166</sup> 638 C-D.

<sup>167</sup> 640C-E.

<sup>168</sup> Since the privilege attaches to the client, common sense would dictate that should the client prove that he or she believed the legal adviser to be qualified, the client would retain the privilege. It would thus be for the client to provide evidence that he or she believed that the "legal adviser" was indeed qualified.

Wigmore observes that, “[T]he privilege assumes, of course, that the communications are made with the intention of confidentiality.”<sup>169</sup> Accordingly, the privilege does not apply if there is any indication that the client was willing to disclose the communication to third parties.<sup>170</sup> Confidentiality is usually inferred when the relationship between the client and the legal adviser is a professional one, as there is an implied agreement between legal advisers and clients that all communications are confidential.<sup>171</sup> Assessment of confidentiality is on a case-by-case basis.<sup>172</sup>

The presence of a third party may have an impact on the confidentiality between the client and legal adviser. According to Wigmore, “the presence of a third person (other than the agent of either) is obviously unnecessary for communications to the attorney...and...communications in the presence of an attorney are not within the privilege”.<sup>173</sup> However, not all disclosures to third parties negate confidentiality. *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing*,<sup>174</sup> distinguished between attorney-client communications in the presence of third parties and attorney-third party communications – without the client – for investigatory purposes. In this matter, the defendant relied on Wigmore’s conclusion that disclosure to *any* third party eliminates confidentiality consequently eliminating any privilege. Friedman AJ however focused on the individual facts of the case and concluded that:

“Should the client elect to communicate with his legal adviser in the presence of a disinterested third person, the communication would not be privileged for the communication would then no longer be confidential. What occurred here, however, is not affected by this principle. This was not a case where the client chose to communicate with his solicitor in the presence of a third person. Plaintiff’s solicitor was investigating the circumstances... [that would have] given rise to a probable claim against plaintiff.... When, under these circumstances, the attorney interviews persons with a view to gathering information on which to advise his

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<sup>169</sup> Wigmore *Evidence* para 2311 at 599.

<sup>170</sup> See *Giovagnoli v Di Meo* 1960 (3) SA 393 (D).

<sup>171</sup> I Hoffman *Lewis and Kyrou’s Handy Hints on Legal Practice* (1997) 22. Hoffman maintains that the confidentiality of the communications is assumed to the extent that the client can alternatively sue the legal adviser should the confidential information be disclosed.

<sup>172</sup> Zeffert *et al Evidence* 580.

<sup>173</sup> Wigmore *On Evidence* 603 para 2311.

<sup>174</sup> 1979 (1) SA 637 (C).

client in regard to contemplated litigation, the notes made by the attorney form part of his brief and are privileged from discovery.”<sup>175</sup>

Thus, when considering whether the presence of a third party negates confidentiality and therefore privilege, the facts surrounding the disclosure should be examined closely. The client will have willingly abandoned confidentiality and the privilege, if he or she chooses to disclose confidential information to the attorney in the presence of a third party. However, the court will have to consider the facts carefully if it appears that the communications were made to a third party by the legal representative for the purposes of assisting the client’s case.

Condition c): For the purpose of obtaining legal advice

Communications made in confidence to a legal adviser will not be privileged if they were not made for the purposes of obtaining legal advice.<sup>176</sup> The privilege will nonetheless remain if the communications are connected to the purpose of obtaining legal advice.<sup>177</sup> A question that has attracted attention is whether the privilege extends to legal advice that is not related to litigation. Originally, the privilege only applied when the advice was sought before or during litigation.<sup>178</sup> Wigmore indicates that this limitation does not consider the possibility that legal advice may well prevent litigation at a later stage.<sup>179</sup> From a utilitarian perspective, Wigmore argues that since the justification of privilege law considers the best interests of the community, it would surely be in the best interests of the community to prevent litigation as well.<sup>180</sup>

As a result, it is now accepted that the privilege can apply even to matters entirely non-litigious. This allows the client to seek legal advice when litigation is not considered without forfeiting privilege.

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<sup>175</sup> 648C-H.

<sup>176</sup> *S v Kearney* 1964 (2) SA 495 (A) at 499-500; *Lane and Another NO v Magistrate, Wynberg* 1997 (2) SA 869 (C). See Schwikkard *et al Evidence* 136 for a discussion on *Kearney’s* case

<sup>177</sup> *Minter v Priest* [1930] AC 558 – taken from *Commentary on the Criminal Procedure Act* RS 33 2004 23-37.

<sup>178</sup> *Wigmore Evidence* 558-559 para 2294.

<sup>179</sup> *Wigmore Evidence* 565 para 2295.

<sup>180</sup> This is especially important considering the time and cost involved in litigation proceedings.

Paizes raises two concerns regarding this. First, he notes that in terms of s201 of the Criminal Procedure Act,<sup>181</sup> a legal practitioner is not precluded from disclosing communications or information that was obtained prior to consultations for litigious purposes.<sup>182</sup> Paizes suggests that this section can be approached in three ways: i) the communications are not privileged if made before the client has been formally charged; ii) the privilege applies only when the client believes that criminal proceedings will be instituted against him or her; iii) the section is incomplete and needs refining.<sup>183</sup> Paizes states that the first interpretation should not be favoured, as this would require a client to wait until arrest before seeking legal advice.<sup>184</sup> This would excessively limit the scope of the privilege. The second interpretation is also in doubt since the accused is allowed to seek legal counsel only once criminal proceedings are foreseen. Thus, any communications not associated with the chance of criminal proceedings are unprotected. Paizes asserts that the final possibility is the most realistic – the section possibly needs constitutional development. This may either be by indirect application of the Bill of Rights by reading down the section in a manner that ensures constitutionality or by direct application of the Bill of Rights whereby s201 is balanced under s36<sup>185</sup> against the right in question and possibly declared invalid.<sup>186</sup> Second, Paizes argues that the scope of South Africa's approach to legal professional privilege may be subject to challenges based on the rights that clash with privilege laws in general. Such rights would include the opposing party's right to a fair trial<sup>187</sup>, and more broadly, the right of access to information.<sup>188</sup>

Condition d): Not in the furtherance of crime or fraud

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<sup>181</sup> Act 51 of 1977.

<sup>182</sup> My emphasis.

<sup>183</sup> Zeffertt *et al Evidence* 582.

<sup>184</sup> *Ibid.*

<sup>185</sup> Constitution of the Republic of South Africa, 1996..

<sup>186</sup> It is submitted that the client could argue for declaration of invalidity on grounds that it unjustifiably infringes the right to a fair trial; the right not to self-incriminate oneself and the right to legal representation: s 35 of the Constitution.

<sup>187</sup> Section 35(3)(j)

<sup>188</sup> Section 32(1)(b) of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to access to any information that is held by another person and that is required for the exercise or protection of any rights.

Legal professional privilege cannot be claimed for advice that assists in the commission of a crime or fraud.<sup>189</sup> Such communications do not promote the purpose for legal representation and it is not in the best interests of the community to foster any relationship that furthers criminal activity. It is irrelevant whether the legal adviser was unaware of the client's *mala fide* intention behind seeking advice.<sup>190</sup>

### 2.4.3 Waiver

There are three types of waiver for legal professional privilege: express, implied and imputed waiver.<sup>191</sup> Express waiver is easy to determine. It occurs when the client, with full knowledge of the consequences of waiver, gives express consent for privileged information to be disclosed. The client thus expressly acknowledges that he or she is abandoning his or her privilege. However, the court in *Harksen v Attorney-General of the Province of the Cape of Good Hope & Others*<sup>192</sup> identified that there is a distinction between implied and imputed waivers.<sup>193</sup> An implied waiver occurs when, objectively, the client behaved in manner that an inference that he or she intended to waive the privilege is drawn.<sup>194</sup> In other words, objectively, the client appears to have intentionally abandoned his or her right to the privilege.<sup>195</sup> An imputed waiver, on the other hand, does not consider the intention of the client. Rather, imputed waiver occurs when the client behaves in a manner that fairness dictates to be the equivalent of abandoning the privilege.<sup>196</sup> In such cases, the court must consider the circumstances surrounding the client's conduct and whether fairness<sup>197</sup> dictates the presence of waiver.<sup>198</sup>

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<sup>189</sup> See for example, *Harksen v Attorney-General of the Province of the Cape of Good Hope & Others* 1999 (1) SA 718 (C) 729 where Friedman JP and Brand J cite with approval the English case of *R v Cox and Railton* (1884) 14 QBD 153 at 165-6 which stated that:

"It is . . . clear that communications in furtherance of a crime are not protected even if the legal adviser was ignorant of the illegal object" Friedman J and Brand J additionally confirm that this reasoning was approved in *Botes v Daly* 1976 (2) SA 215 (N) 222 ; see also *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515(W) 551-522.

<sup>190</sup> Para 45.

<sup>191</sup> *Harksen v Attorney General of the Cape of Good Hope* 1998 (2) SACR 681 (C) para 59.

<sup>192</sup> 1998 (2) SACR 681 (C).

<sup>193</sup> Para 61. See also *Peacock v SA Eagle Insurance Co Ltd* 1991 (1)SA 589 (C) 591-592, followed by Friedman JP and Brand J in *Harksen*. This distinction has been accepted in *Zeffert et al Evidence* 585.

<sup>194</sup> Para 60.

<sup>195</sup> *S v Tandwa* 2008 (1) SACR 613 (SCA).

<sup>196</sup> *Ibid.*

<sup>197</sup> *Harksen v Attorney-General of the Province of the Cape of Good Hope* para 66. *Msimang v Durban City Council and Others* 1972 (4) SA 333 (D) 338D – F confirms that when determining imputed waiver the "question turns on the principle of fairness, which should always be observed by the Court as between the parties. It seems to me to be a

The distinction between imputed and implied waivers has been subject to criticism,<sup>199</sup> but the Supreme Court of Appeal has now firmly accepted the distinction in *S v Tandwa*.<sup>200</sup> The relevant facts are briefly as follows: the court *a quo* had convicted the accused on all counts of armed robbery as he had failed to refute the state's evidence. The conviction had relied heavily on the accused's silence during the trial.<sup>201</sup> On appeal, the accused argued that he had wanted to adduce his own evidence, but had chosen to remain silent on the advice of his legal adviser.<sup>202</sup> In light of this, the accused submitted that his legal representative refused to follow his original wishes to testify and had failed to inform him that the choice to remain silent might lead the court to infer negatively. The accused accordingly argued that his conviction was largely due to his legal representative's incompetence. This led to an infringement of his right to a fair trial.<sup>203</sup> In response to this complaint, the state wanted to lodge an affidavit by the accused's legal representative that affirmed that the accused had been properly advised. In issue was whether the legal adviser's affidavit was admissible since legal professional privilege protects communications made between a client and his legal representative from disclosure.<sup>204</sup> Considering the facts of case, the court had to determine whether the accused had waived his right to legal professional privilege. The court determined that the accused had not expressly consented to waiver and thus the issue rested on whether an implied or imputed waiver was present. The court approved of the distinction between implied and imputed waiver provided in *Harksen's case*<sup>205</sup> and followed Wigmore's canon that "when a client alleges a breach of duty by the attorney, the privilege is

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question of fact to be decided in each case, in the specific circumstances of that case." Also followed in *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C) 646.

<sup>198</sup> The court recognised Wigmore's oft-quoted waiver by implication as imputed waiver. Wigmore asserts, "[clients] cannot be allowed, after disclosing as much as [they] please, to withhold the remainder. [They] may elect to withhold or to disclose." Wigmore *On Evidence* 636 para 2327.

<sup>199</sup> Bilchitz considers *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) where the Supreme Court confirmed that if a client discloses components of privileged statements as evidence, *fairness and consistency* should require that the whole statement be disclosed. According to Bilchitz, Grosskopf JA confirmed Wigmore's waiver by implication but as implied waiver and not imputed waiver. The rationale for this was that it would be increasingly difficult for the courts to distinguish between imputed and implied waiver. D Bilchitz "Law of Evidence – Case Law" 1999 *Annual Survey* 662.

<sup>200</sup> 2008 (1) SACR 613 (SCA).

<sup>201</sup> Para 6.

<sup>202</sup> Para 14.

<sup>203</sup> Para 8-9. See also footnote 7 wherein the accused states in his affidavit that "I didn't elect to remain silent, I did want to speak but was advised not to speak...I submit that, had my counsel told me that I was not compelled to testify [but] further that, if I do not testify, the court is entitled at the end of the case to draw an inference against me, I would have elected to testify... I submit that by reason of the conduct of my own counsel I did not have a fair trial at all."

<sup>204</sup> Para 17.

<sup>205</sup> See also *Peacock v SA Eagle Insurance Co Ltd* 1991 (1) SA 589 (C) 591-592.

waived as to all communications relevant to that issue.”<sup>206</sup> In conclusion, where clients claim failure by their legal representatives, waiver can be imputed to the extent that it allows the legal representatives to refute their accusations. Accordingly, the affidavit was admissible since it directly related to the accused’s claim of incompetence.<sup>207</sup>

#### 2.4.4 Inspection of Documents by the Court

When privilege is claimed, the court has the power to inspect any privileged document.<sup>208</sup> This grants the court’s power to prevent possible abuse of the privilege, as it permits the court to determine whether the privileged documents are indeed justified as privileged. Nonetheless, there must be some doubt regarding the privilege before the court will consider inspecting the documents.<sup>209</sup> Therefore, exercise of such powers by the court takes place only when, in the interests of the administration of justice, the court deems it necessary.

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<sup>206</sup> See paras 19-20; Wigmore’s original quotation from Wigmore *Evidence* 638 para 2327. The reference cited in the judgment as para 2328 is incorrect.

<sup>207</sup> Para 20.

<sup>208</sup> *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) SA 567 (T) 574; *Van der Linde v Calitz* 1967 (2) 239 (A) 257; *South African Rugby Football Union v President of the Republic of South Africa* 1998 (4) SA 296. See Zeffertt *et al Evidence* 583.

<sup>209</sup> *South African Rugby Football Union v President of the Republic of South Africa* 302E-F.

## CHAPTER 3

# POSSIBLE GROUNDS FOR RECOGNISING PSYCHOTHERAPEUTIC PRIVILEGE IN SOUTH AFRICA

### 3.1 Introduction

Chapter 2 proposed that any new privilege should consider a combination of the two main theoretical justifications for privilege. In light of this, it is necessary to discuss the most significant aspects of a combined approach in relation to the psychotherapeutic relationship in South Africa. In terms of the traditional theory, section 3.2 will first consider whether communications with a psychotherapist originate in a confidential framework. Second, section 3.3 will discuss whether confidentiality is essential for the success of the psychotherapeutic relationship. Third, section 3.4 analyses the role of psychotherapy and whether the relationship should be sedulously fostered in South Africa. In terms of the individual/human rights theory, section 3.5 discusses how forced disclosure influences the client's right to privacy and personal autonomy.

### 3.2 Do Psychotherapeutic Communications Originate in Confidence?

#### 3.2.1 Historical Evolution of Professional Confidentiality in Psychotherapy

The concept of professional secrecy is not new. Oosthuizen states that medical professional secrecy has existed since ancient times.<sup>1</sup> The first known written reference to professional secrecy is the Hippocratic Oath established some 2,500 years ago.<sup>2</sup> Hippocrates, a well-known and celebrated Greek

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<sup>1</sup> Oosthuizen writes, "In a work written in Sanskrit presumed to be from about 800 BC Brahmin priests were advised to carry out their medical practices by concentrating only on the treatment of the patient when entering a house and not divulging information about the sick person to anyone else. In Ancient Egypt also the priestly medical men were under strict oaths to retain the secrets given to them in confidence...The name for medicine, *ars meta* (dumb art) is used in Roman poetry by Virgil in *Aeneid XII*." G C Oosthuizen "Professional Secrecy and the Church – A Historical Perspective" in G Oosthuizen, H Shapiro and S Strauss *Professional Secrecy in South Africa: A Symposium* (1983) 98. Harms AJA refers to this in *Jansen Van Vuuren v Kruger* 1993 (4) SA 842 (A) 849G-850B.

<sup>2</sup> H A Shapiro "Medical Secrecy: The Medical Practitioner and his Patients" in Oosthuizen *Professional Secrecy* 3.

physician, expected a high level of professional conduct from his students.<sup>3</sup> This included keeping a patient's information private. The Oath specifically provides that:

“All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal. If I keep this oath faithfully, may I enjoy my life and practice my art, respected by all men and in all times; but if I swerve from it or violate it, may the reverse be my lot.”<sup>4</sup>

The Hippocratic Oath has since been modernized and conceptualised into a number of international and national rules of professional conduct. For example, the World Medical Association in its Declaration of Geneva states that members of the medical profession must pledge to maintain confidentiality.<sup>5</sup>

Confidentiality in the psychological and psychotherapeutic profession developed from medical confidentiality. During the 1950's in the United States a growing number of psychologists, social workers and counsellors began to work in private practice outside the medical profession. The medical profession of psychiatry could no longer regulate the conduct of these professionals.<sup>6</sup> As a result, the American Psychological Association created its own ethical code that provided an ethical obligation on such professionals to maintain confidentiality.<sup>7</sup> In South Africa, too, the medical profession does not govern psychologists and other mental health practitioners. Rather, the relevant Health Boards provide external codes of ethics to govern confidentiality in the psychology profession.<sup>8</sup> Psychiatrists will thus be governed by the relevant ethical code specific to the medical profession.<sup>9</sup>

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<sup>3</sup> Known as *ethos*. See A Cummings “Ethics and the Allocation of Healthcare” in O'Donahue *Handbook* 116; Shapiro *Professional Secrecy* 3.

<sup>4</sup> Shapiro *Professional Secrecy* 3; Nell *Aspects of Confidentiality* 18; N Tribbensee and C Claiborn “Confidentiality in Psychotherapy and Related Concepts” in W O'Donahue and K Ferguson *Handbook of Professional Ethics for Psychologists: Issues, Questions and Controversies* (2003) 287; T Zabow and S Kaliski “Ethical Considerations” in Kaliski *Psycholegal Assessment* 362.

<sup>5</sup> Shapiro *Professional Secrecy* 3; Nell *Aspects of Confidentiality* 18.

<sup>6</sup> Cummings in O'Donahue *Handbook* 117.

<sup>7</sup> *Ibid.*

<sup>8</sup> Professional Boards are established in terms of s15 of the Health Professions Act 56 of 1974.

<sup>9</sup> For a detailed discussion of medical confidentiality in South Africa, see Nell *Aspects of Confidentiality* 18-24.

Confidentiality as an ethical obligation has shifted in its application. The original Hippocratic Oath had demanded the best of a medical professional. Any ethical conundrums regarding confidentiality were to be dealt with via an internal 'code' of ethics:<sup>10</sup> it was the professional who decided whether information should be shared or not. Today, however, external ethical codes of conduct dictate the minimum standard of conduct in health care. The ethical basis of confidentiality is consequently regulated by specific codes of conduct pertaining to the relevant profession.<sup>11</sup>

### 3.2.2 Ethical Rules Governing Confidentiality

The first source of direction regarding client confidentiality for South African psychotherapists can be found in the Rules of Conduct which regulate the psychology profession. More specifically, Rules 24-33 of Annexure 12 of the Ethical Rules of Conduct for Practitioners<sup>12</sup> regulate issues of confidentiality, privacy and record keeping.

Rule 24 deals with client confidentiality. It states that a psychologist must safeguard confidential information obtained during the course of his or her practice, teaching, research or other professional duties, subject only to the limits of confidentiality as may be determined by law or court of law. In situations not covered by specific law or court order, a psychologist can generally only disclose information to other persons with the written, informed consent of the client.

Rule 25 requires a psychologist to discuss with the patient the exceptions to the requirements of confidentiality. This must be discussed at the outset of the relationship and whenever further discussion warrants it.<sup>13</sup> A psychologist must obtain consent to record or transmit information electronically before doing so, and inform the client of the risks that such recording or transmission can have on the client's privacy and confidentiality. A psychologist must ensure that confidentiality and privacy are maintained and measures are taken to protect confidentiality when engaging in

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<sup>10</sup> Cummings *Handbook* 116.

<sup>11</sup> This, it is argued, protects the professional from unnecessary litigation. *Ibid.*

<sup>12</sup> Annexure 12, Ethical Rules of Conduct for Practitioners Registered Under the Health Professions Act, NO R717, *Government Gazette* 29079, 4 August 2006.

<sup>13</sup> The rule specifically refers to any person or organisation that the psychologist has a professional or scientific relationship with, and when feasible, the persons who are legally incapable of giving informed consent and their legal guardian.

electronically transmitted services. Finally, a psychologist in terms of Rule 25(5) “may not withhold information from a client who is entitled to that information, provided it does not violate the right to confidentiality of any other persons and provided the information requested is for the exercise of protection of rights.”

Rule 26 deals with the limits on the invasion of privacy. It states that a psychologist may, in written or oral reports or consultations with third parties, disclose information as is relevant for such communications, and can discuss confidential information obtained during his or her work only for scientific or professional purposes.

Rule 27 lists the situations in which disclosure may be made:

- (1) With the permission of the client;
- (2) When permitted by law for a legitimate purpose;
- (3) When it is strictly for professional purposes and only to appropriate professionals;
- (4) In order to protect a client or other persons from harm or;
- (5) To obtain payment for professional services rendered (but only to the extent necessary to achieve this purpose);
- (6) “When required to do so by law or a court of law, a psychologist shall disclose the confidential information so required.”

Rule 28 concerns instances when there are multiple clients, such as in couple or family therapy. In these circumstances the maintenance of confidentiality must be discussed at the outset.

Rule 29 is concerned with clients subject to one or other form of legal dependency. If the client is a child, the child’s interest is the most important factor when providing psychological services. Special care must also be afforded to children 14 years of age or under. Yet again, the limits of confidentiality must be discussed with the child or a client who has a legal guardian.

Rule 30 deals with the release of confidential information. The rule states that a psychologist must release confidential information if ordered to do so by a court of law; or when required by law; or if the client/legal guardian authorizes the release in writing. Rule 31 states that a psychologist must report

abuse of any child or vulnerable adult when professional responsibility dictates, or in terms of the relevant law.

Rule 32 concerns situations when the psychologist consults or interacts with other professionals about a client. In such circumstances the psychologist may disclose confidential information provided that he or she take all reasonable steps to ensure that the professional(s) who receive such information are both informed and bound by the general rule of confidentiality. Furthermore, the psychologist cannot disclose such information if it could lead to the identification of the client unless he or she has the client's consent or if the disclosure is unavoidable. Obviously, disclosure in such circumstances can only be to the extent that it is necessary to achieve the purpose of the consultation.

Rule 33 deals with disguising confidential information for didactic or other similar purposes. The rule states that:

“A psychologist shall not disclose in his or her writings or lectures or in any other public way confidential information or information that can be linked to an identifiable person which he or she obtained in the course of his or her work with a client, organization, research participant, supervisee, student or other recipient of his or her psychological services, unless (1) he or she has taken all reasonable steps to disguise the identity of such client inter alia; (2) such client, inter alia, has consented to such disclosure in writing; (3) there is other ethical or legal authorization to do so.”

### 3.2.2.1 Analysis of the Rules

Overall, the rules indicate that there is an overriding obligation on psychologists to respect client-psychologist confidentiality. For example, a number of the rules require the client's consent for disclosure.<sup>14</sup> It can thus be accepted that the communications originate in a confidential setting.

Nonetheless, the rules include a number of possible exceptions to client-psychologist confidentiality. Absolute confidentiality is thus not enforced in South Africa.<sup>15</sup> O'Donahue explains that such

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<sup>14</sup> See Rules 24(2); 24(1)(a); 28(2); 30; 32(2)(i) and 33(b). Some of these rules require written consent whilst others require only permission from the client to disclose.

exceptions to confidentiality arise when law or social policy dictates that grounds for disclosure outweigh the grounds for absolute confidentiality.<sup>16</sup> These exceptions include court-ordered disclosure. Privilege would, of course, eliminate the applicability of this exception, but it is important to consider whether the other exceptions listed would provide a useful starting point for developing any exceptions to psychotherapeutic privilege.

### 3.3 Is Confidentiality Essential to the Success of the Psychotherapeutic Relationship?

#### 3.3.1 Introduction

The argument for confidentiality as essential to psychotherapeutic relationships originates from the Freudian model of psychotherapy.<sup>17</sup> In terms of psychoanalytical psychotherapy, it is essential that the client speak freely to the psychotherapist. Shuman and Weiner, with direct reference to Freud's work, provide a useful explanation of the scope of disclosure needed for psychoanalytical psychotherapy:

“We [the psychotherapist] pledge him [the client] to obey the fundamental rule of analysis, which is henceforth to govern his behavior towards us. He is to tell us not only what he can say authentically and willingly, what will give him relief like a confession, but everything else as well that his self observance yields him, everything that comes into his head, even if it is disagreeable for him to say it, even if it seems unimportant or actually nonsensical.”<sup>18</sup>

Two relevant considerations arise from this: (1) There is more than one mode of psychotherapeutic treatment; and (2) This impacts the level of confidentiality needed for the success of both the relationship and treatment. In order to understand the different modes of psychotherapeutic treatment,

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<sup>15</sup> As a result of this, rules 25(1),(2),(4) and 29(3) stipulate that the psychologists must ensure that the client is made well aware of any possible limitations to client- psychologist confidentiality. Rule 25(2) for example, states that psychologists shall discuss confidentiality at the beginning of the professional relationship.

<sup>16</sup> O'Donahue and Ferguson *Handbook* 289.

<sup>17</sup> D Shuman and M Weiner “Part I: The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege” (1982) 60 *North Carolina Law Review* 893 at 896-897.

<sup>18</sup> Shuman and Weiner 1982 *N.C.L Rev* 896 as taken from S Freud *An Outline of Psychoanalysis: The Standard Edition of the Complete Psychological Works of Sigmund Freud* (1964) 141.

however, a general understanding of the psychotherapeutic relationship is needed. Section 3.3.2 provides a brief explanation of psychotherapeutic relationship. Thereafter, section 3.3.3 will discuss what are the primary modes of psychotherapeutic treatment in South Africa and whether confidentiality remains essential irrespective of the modality of treatment.

### **3.3.2 The Psychotherapeutic Relationship**

#### 3.3.2.1. What is Psychotherapy?

Psychotherapy is defined as “the systematic application of defined methods in the treatment of psychic suffering and psychosomatic complaints.”<sup>19</sup> Treatment is dependent on the relationship formed between the psychotherapist and client.<sup>20</sup> Psychotherapy thus seeks to manage people’s psychological problems through utilising different psychotherapeutic methods, all of which requiring a strong relational connection between professional and client.

#### 3.3.2.2 Defining the Psychotherapeutic Relationship

A definition of a psychotherapeutic relationship will always be a working definition that is prone to create some controversy. This is because the construct of the definition is as complex as the psychotherapeutic relationship itself.<sup>21</sup> Nonetheless, Gelso and Hayes state that the “relationship is the feelings and attitudes that the therapist and client have toward one another, and the manner in which these are expressed.”<sup>22</sup> Clarkson expands upon this by stating that the relationship depends on the practitioner and the theoretical orientation adopted by the therapist.<sup>23</sup> Within this, Clarkson identifies five kinds of therapeutic relationships in any therapeutic encounter between client and therapist.

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<sup>19</sup> A Pritz ‘Introduction to Globalized Psychotherapy’ in Pritz (ed) *Globalized Psychotherapy* 13.

<sup>20</sup> *Ibid.*

<sup>21</sup> Gelso *Psychotherapy* 6.

<sup>22</sup> *Ibid.*

<sup>23</sup> P Clarkson *Ethics: Working with Ethical and Moral Dilemmas in Psychotherapy* (2000) 25.

First, there is the aspect of the psychotherapeutic relationship that enables the client and the therapist to work together even when the client experiences strong desires to the contrary.<sup>24</sup> Second, there is the transference relationship wherein the experience of unconscious wishes and fears are transferred onto or into the therapeutic relationship.<sup>25</sup> This is known as the “unrealistic” component of the relationship.<sup>26</sup> Furthermore, it is argued that psychotherapists bring their own meaning and assumptions into the relationships that inform and structure the context of the therapy. Snyman and Fasser explain “[H]ow we hear, how we listen, what we understand, as well as the questions we ask are all informed by our basic belief system.”<sup>27</sup> Snyman and Fasser use the example that psychotherapists who value family over the individual may inadvertently focus on promoting the prolongation of the marriage rather than the specific needs of the individual.<sup>28</sup> Therapists therefore have to take responsibility for the power relations not only directly associated with their clients but also of the power relations and subjugations associated with the group and associated groups that the client may be affiliated to.

Third, there is the reparative relationship where the psychotherapist intentionally seeks to repair or correct actions of previous abusive experiences. Fourth, the person-to-person relationship that is known as the core or “real” relationship. In other words, the relationship that is essentially non-transference and is relatively independent from the other modes of relationships.<sup>29</sup>

In conclusion, these relationships are not singularly identifiable but overlap with one another. They are also not “levels” of relationship but rather five discourses across any given therapeutic encounter.<sup>30</sup> They are all concurrently and constantly operative within the psychotherapeutic relationship. Furthermore, they all come into play in different forms and degrees and provide the essential constituents to the psychotherapeutic relationship.<sup>31</sup>

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Gelder *Oxford Psychiatry* 603.

<sup>27</sup> Snyman 2004 *SAJP* 72-75.

<sup>28</sup> Snyman 2004 *SAJP* 77.

<sup>29</sup> Gelso *Psychotherapy* 13.

<sup>30</sup> Clarkson *Ethics* 25.

<sup>31</sup> Nicholi *Harvard Psychiatry* 417.

### 3.3.2.3 The Legal Definition

#### *(a) The Fiduciary Relationship*

In addition to describing the nature of the helping relationship, one should also consider the legal basis of the psychotherapeutic relationship. Fortunately, one is on firmer ground in terms of legally defining the relationship. It is, simply put, a fiduciary relationship. A fiduciary relationship is one in which one person entrusts his or her welfare to another, who offers in turn a professional service for financial gain.<sup>32</sup> In a psychotherapeutic relationship, the professional psychotherapist is in a position of trust relative to the client.<sup>33</sup> As the psychotherapist is the “senior” person in the relationship, the therapist must uphold the utmost good faith in his or her relations with the client.<sup>34</sup> There is therefore a power imbalance between the therapist and client.<sup>35</sup> Therefore, this relationship depends on privilege, privacy and a certain level of professionalism.<sup>36</sup> As a result, the Ethical Code of Conduct for Psychology states that a psychologist shall develop, maintain, and encourage high standards of professional competence to ensure that the public is protected from professional practise that falls short of international and national standards.<sup>37</sup>

At this stage of discussion, it best to indicate that there are instances where the psychotherapeutic relationship is *not* a fiduciary one. For example, there is a distinction between a psychotherapeutic relationship that is initiated by the client’s need (fiduciary) and an enforced relationship that is formed via the request of either legal counsel or the court (not fiduciary).<sup>38</sup> The latter relationship consists of psycholegal activities that are specialised activities for the benefit of the court. The HPCSA has confirmed that psycholegal reports requested by the court or legal advisers are preferably to be done by

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<sup>32</sup> Kaliski *Psycholegal Assessment* 358.

<sup>33</sup> A Jamieson and T Bond “Confidentiality, Counselling and the Law” (2003) August *British Association for Counselling and Psychotherapy* 1 at 2. The client discloses thoughts that could be frightening, embarrassing or shameful to them, whilst the therapist has the professional competency to understand the implications and meaning of such information disclosed.

<sup>34</sup> A Allan *The Law for Psychotherapists and Counsellors* 2 ed (2001) 7.

<sup>35</sup> Allan *Psychotherapists* 6.

<sup>36</sup> Kaliski *Psycholegal Assessment* 358.

<sup>37</sup> The preamble and s1 of HPCSA “The Professional Board for Psychology Health Professions Council of South Africa: Ethical Code of Professional Conduct Effective from 1 April 2002” <http://web.uct.ac.za/depts/cgc/ethics.htm#3.%20Privacy,%20confidentiality%20and%20records> (accessed 14 February 2007).

<sup>38</sup> For example, this can be in terms of s77, 78 and 79 of the Criminal Procedure Act 51 of 1977

separately appointed mental health professionals whose primary obligation is to the referring authority.<sup>39</sup> Rule 73 of Ethical Rules of Conduct for Practitioners<sup>40</sup> registered under the Health Professions Act<sup>41</sup> states that a psychologist who has had a prior professional relationship with the client is not precluded from testifying as an expert witness. Nonetheless, the psychologist must ensure that there is no conflict of interest between the court and the client and that the prior relationship does not affect his or her objectivity as an expert witness.

The protection of communications between mental health professionals, psychotherapists and clients is therefore crucially dependent on the purpose and nature of the relationship between the client and the professional. For example, psycholegal activities usually involve giving written reports where the appointed mental health practitioner provides a psychological assessment of the client and gives recommendations to the court depending on the purpose of the report.<sup>42</sup> This may include the family of origin, development, occupational, social and psychiatric history. In criminal cases, s79 of the Criminal Procedure Act<sup>43</sup> provides for the referral of an accused for psychiatric observation, where the assessment can consider the accused's competence to stand trial,<sup>44</sup> criminal responsibility<sup>45</sup> or both. Interestingly, in terms of s79(7), any statements made by the accused at the enquiry shall not be admissible in evidence against the accused at the criminal proceedings except to the extent that it is relevant in indicating the mental state of the accused. This is noticeable because the accused is protected by the section from disclosure of self-incriminating evidence that does not signify the mental state of the accused. As such, should the accused give a statement that he or she has suffered from previous sexual violence, if this has no bearing on the mental capacity of the accused, such evidence cannot be disclosed. On the other hand, if there is a fiduciary and independent relationship with the therapist, self-incriminating statements given by the accused would not be protected.

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<sup>39</sup> Rule 7.1 to 7.8 of the HPCSA Ethical Code of Professional Conduct govern assessment and intervention activities within psycho-legal and forensic contexts.

<sup>40</sup> Ethical Rules of Conduct for Practitioners Registered Under the Health Professions Act, NO R717, *Government Gazette* 29079, 4 August 2006.

<sup>41</sup> Under s49 read with s61(2) and s61A (2) of the Health Professions Act.

<sup>42</sup> Rule 69 of the Ethical Rules of Conduct for Practitioners Registered Under the Health Professions Act.

<sup>43</sup> Act 51 of 1977.

<sup>44</sup> Section 77(1) of the Criminal Procedure Act.

<sup>45</sup> Section 78(2) of the Criminal Procedure Act.

In civil matters, psychologists and psychotherapists can be asked to prepare a number of non-criminal reports. These could involve custody cases, disability grants or explanations of absenteeism for an employer.<sup>46</sup> In this instance, the report belongs to the party who requests it. Thus, should the plaintiff's attorney obtain a psycholegal report, the report would be requested for disclosure by the defendant. The defendant's attorney would then send a subpoena demanding disclosure of the relevant information. It has therefore been recommended that the expert first submit a draft report that would be protected in terms of attorney-client privilege before submitting a final report that will be subject to disclosure.<sup>47</sup> This enables the plaintiff's attorney to ensure that all the relevant enquiries have been conducted and any unnecessary breaches of confidentiality are avoided.<sup>48</sup>

*(b) A Contractual Relationship*

Allan has defined the contractual relationship between a therapist and a client as:

“An agreement by which a registered therapist undertakes to render professional services – with the reasonable skill, care and competence of a therapist in the field – to a client who reciprocally undertakes to pay the therapist an agreed amount for such services and to adhere to all conditions the therapist may specify.”<sup>49</sup>

The definition must contain the essential elements of a contract. These are namely: the intention to contract freely and voluntarily by both parties, consensus on the essential terms, capacity to contract, performance, and an adherence to the requisite contractual formalities. In addition to these, there are a number of unique aspects to the psychotherapeutic contract. First, in order for the psychotherapist to be legitimately acting as a professional, he or she must be registered as such.<sup>50</sup> Second, the therapist

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<sup>46</sup> Kaliski *Psycholegal Assessment* 355.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Allan *Psychotherapists* 40.

<sup>50</sup> This should include registered psychologists or psychiatrists practicing psychotherapy. Either professional would have to be registered with the correct governing board after completion of their requisite training. Note that the Mental Health Care Act 17 of 2002 defines a mental health practitioner as “a psychiatrist or registered medical practitioner or a nurse, occupational therapist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services.” Kaliski writes that this does not however explain the different practitioners whose training and expertise can differ significantly. See Kaliski *Psycholegal Assessment* 377-379 for an explanation of the similarities and differences of both professions. .

must act with the reasonable amount of skill required by the profession. Therefore, a psychotherapist must maintain a higher standard of professional competency than a layperson. Third, the fiduciary relationship between the therapist and the client requires the therapist to maintain the utmost good faith when contracting and interacting with the client.<sup>51</sup> A psychologist therefore is accountable for professional actions in all domains of his or her professional life. Failure to maintain the required professional skill and good faith<sup>52</sup> can result in delictual actions against the psychotherapist and possible de-registration by the Professional Board of Psychology.

### 3.3.3 The Main Modes of Psychotherapy Practised in South Africa

Mosher, when discussing psychotherapeutic privilege in the United States, highlights that the traditional/utilitarian justification for psychotherapeutic privilege was reliant on theoretical aspects of psychoanalytical psychotherapy.<sup>53</sup> Since then, however, the practise of psychotherapy has evolved to include a number of different treatments that may not require the same level of disclosure by the client.<sup>54</sup> This may affect the level of confidentiality needed to ensure the success of psychotherapeutic treatment.

As detailed explanations of each mode of psychotherapeutic treatment would be unnecessarily cumbersome for the purpose of this thesis, the different approaches to psychotherapeutic treatment can be categorised into four main theoretical groups.<sup>55</sup> These are namely: Psychoanalytic Therapy; Cognitive-Behavioural Therapy; Humanistic Therapy and Feminist Theory.<sup>56</sup> In South Africa, however, only two modes of psychotherapy are commonly practised. These are psychoanalytical

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<sup>51</sup> Allan *Psychotherapists* 40.

<sup>52</sup> Rule 2(1) of Ethical Rules of Conduct for Practitioners Registered Under the Health Professions Act states that: "Psychologist shall develop, maintain and encourage high standards of professional competence to ensure that clients are protected from professional practices that fall short of international and national best practice standards."

<sup>53</sup> P Mosher 'Psychotherapeutic-Patient Privilege' in C M Koggel, A Furlong, C Levin *Confidential Relationships: Psychoanalytic, Ethical and Legal Contexts* (2003) 177-206 at 197. P Mosher is also responsible for setting up a website devoted to the research and developments of psychotherapeutic privilege after the Supreme Court judgment of *Jaffee v Redmond*. The website is available at [www.jaffee-redmond.org](http://www.jaffee-redmond.org) (accessed 21 May 2007).

<sup>54</sup> Gelso and Hayes state that there could be as many as 36 different systems of therapy. C Gelso and J Hayes *The Psychotherapy Relationship: Theory, Research and Practice* (1998) 16

<sup>55</sup> For the purposes of this study, the categorization of the different theoretical groups into four main clusters by Gelso and Hayes has been followed. Gelso *Psychotherapy* 16; see also W Weiten *Psychology: Themes and Variations* 6 ed (2004) 611-622; Gelder *Oxford Psychiatry* 627-641.

<sup>56</sup> *Ibid.*

psychotherapy and cognitive-behavioural therapy.<sup>57</sup> Focus will accordingly only be on how these two modes of psychotherapy gather information from clients. A clear understanding of these two forms of psychotherapy is necessary for a number of reasons. First, the techniques used to treat clients are significantly different from each other. This affects how and what information is gathered by the psychotherapist. This can and will affect the level of confidentiality required and whether it warrants further protection. Second, the absence of a strict outline on when possible privilege could apply can result in the privilege being unnecessarily broadened. For example, in the American case of *Greet v Zagrocki*<sup>58</sup> the district judge ruled that documents maintained by any in-house alcohol dependency programme were privileged. The court did not consider what form of counselling was practised and whether the counsellor was licensed to practise. To ensure that any argument for privilege is as clearly and narrowly construed as possible,<sup>59</sup> the exact scope of any privilege must be clearly defined with respect to the psychotherapeutic modalities practised.<sup>60</sup>

### 3.3.3.1 Psychoanalytical Psychotherapy

The main methods used in psychoanalytical psychotherapy are the following: First, the client uses free association – where clients spontaneously express their thoughts and feelings *exactly* as they occur, with as little censorship as possible. The unveiling of every inner secret and thought is therefore necessary for the success of the psychotherapeutic process. It clearly has to take place in an atmosphere of *complete trust*.<sup>61</sup> The American Psychoanalytic Association stated in their brief as *amicus* in *Jaffee v Redmond* that:

“The central challenge of psychoanalytically based psychotherapy lies in the fact that it is not easy to bring into conscious awareness that which is unconscious...Individuals develop strong unconscious defenses or resistances...to keep knowledge of these disconcerting thoughts and feelings from becoming conscious. To

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<sup>57</sup> Z Knight ‘South Africa’ in Pritz (ed) *Globalized Psychotherapy* 593.

<sup>58</sup> 1996 WL 724933 as taken from M Nelken ‘The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law’ (2000) 20(1) *The Review of Litigation* 10.

<sup>59</sup> M Archer ‘All Abroad the Bandwagon!: The Uncertain Scope of the Federal Psychotherapist-Client Privilege in the Aftermath of *Jaffee v Redmond*’ *Journal of Urban and Contemporary Law* (1997) 52 355 at 360;

<sup>60</sup> Archer states that there have to be clear boundaries as to what constitutes psychotherapy and *which psychotherapeutic modalities* require privilege. Archer 1997 *Journal of Urban and Contemporary Law* 358; Mosher in Koggel *et al Confidential Relationships* 197.

<sup>61</sup> Mosher in Koggel *et al Confidential Relationships* 185.

further patient's understanding, the psychoanalytic therapist helps them overcome these resistances using techniques whose prerequisite is a safe, confidential treatment situation."<sup>62</sup>

Second, the therapist may use dream analysis in treating the client. Dream analysis is the process whereby the therapist interprets the symbolic meaning of the client's dreams. Here, it is the professional's input and explanation of the dream that is significant. Third, the therapist may interpret and explain the inner significance of the client's thought, feelings, memories and behaviours.<sup>63</sup> Again, it is not the client's disclosure that are significant, but the interpretation of the such disclosures. This indicates that the information disclosed is first, very private and second, not factually relevant. Fourth, psychoanalytic psychotherapy makes use of the concept of transference. Transference is where clients act out or transfer significant aspects or elements of their real-life relationships within the therapeutic setting.<sup>64</sup> Transference arises primarily because the client reveals personal problems that are usually only revealed (if at all) to close relations or friends. The psychotherapist on the other hand does not reveal much of his or her own background.<sup>65</sup> The client therefore knows little about the therapist, and begins to draw on experiences or imaginary experiences to fill in the 'gaps' transferring such feelings onto the therapist. It is not only the client who is prone to transference, however. Psychotherapists, despite training, cannot always maintain the role of both the impartial professional and that of the concerned individual. In such cases, the therapist may displace personal ideas and feelings onto the relationship. This is known as counter-transference.<sup>66</sup> In summary, psychoanalytic psychotherapy is thus primarily symbolic and verbal and the basis of the psychotherapeutic intervention is rooted in language.<sup>67</sup>

Classical Freudian and Lacanian psychoanalysis is not practised as widely today. Rather, a number of modern psychodynamic therapies have developed and expanded from classical psychoanalysis.<sup>68</sup>

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<sup>62</sup> The Supreme Court was clearly persuaded by these arguments when concluding that "effective psychotherapy...depends on an atmosphere of confidence and trust...[where] the patient is willing to make frank and complete disclosure of facts, emotions, memories and fears." *Jaffee v Redmond* 10; Nelken 2000 *Litigation* 7.

<sup>63</sup> Weiten *Psychology* 611-612.

<sup>64</sup> Weiten *Psychology* 613.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Klein 1997 *DePaul Law Review* 715.

<sup>68</sup> Nelken 2000 *Litigation* 7.



These are collectively referred to as psychodynamic psychotherapies that still use free association and deal with problems of the unconscious mind.<sup>69</sup> Psychodynamic psychotherapy requires the same special mode communication that emphasises the significance of the unconscious mind and the complete trust necessary to effectively undergo the psychotherapeutic process as psychoanalysis.<sup>70</sup> Due to these similarities, psychodynamic psychotherapy should warrant the equivalent level of protection as argued for in classical psychoanalysis.

Owing to the standard of disclosure necessary for effective treatment, it can be accepted that the client is very likely to disclose extremely personal and private information to the psychotherapist utilising psychoanalytical or psychodynamic treatments. If there is any danger that the psychotherapist may disclose such information to third parties, the client may hesitate to seek treatment at all, or refuse to disclose his or her thoughts or feelings as openly to the psychotherapist. The result is that, in the absence of an absolute assurance of confidentiality, either no treatment is sought, or effective treatment is inhibited.<sup>71</sup> In addition, it is arguable that evidence obtained from psychoanalytical or psychodynamic therapy is likely to be unreliable. First, the evidence sought has been generated from dream analysis or rooted in the client's unconscious. Second, the power and transference dynamic of the relationship impacts the reliability of information collected.

### 3.3.3.2 Cognitive-Behavioural Psychotherapy

With regard to Cognitive-Behavioural therapy, the focus of the therapeutic intervention is on recognising and changing negative thoughts, maladaptive beliefs and behaviours.<sup>72</sup> This approach focuses on the learning of everyday behaviours. According to this approach, learning of behaviour is usually achieved through conditioning. Conditioning involves making associations between environmental stimuli and behavioural responses,<sup>73</sup> modelling and imitating others' behaviours.<sup>74</sup> Therapy therefore emphasises substituting maladaptive thoughts and behaviours with adaptive ones.

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<sup>69</sup> These are *inter alia*: Ego-analytic theories, Object relations theories, Psychoanalytic self-psychology and Jungian analytic theory. Weiten *Psychology* 644.

<sup>70</sup> *Ibid.*

<sup>71</sup> Anonymous Note "Developments in the Law: Privileged Communications" (1985) 98 *Harvard Law Review* 1543.

<sup>72</sup> Weiten *Psychology* 619.

<sup>73</sup> Weiten *Psychology* 620.

<sup>74</sup> *Ibid.*

Weiten explains that insight therapy views pathological symptoms as signs of an underlying problem, whereas behaviour therapy considers the symptoms as the problem.<sup>75</sup> Cognitive-behavioural therapy is therefore closer to the medical profession in that it treats the physical ailments of the client and does not consider the subconscious as significant in treating mental health concerns.<sup>76</sup>

### 3.3.3.3 Conclusion

It is submitted that not all models of psychotherapy require the same level of disclosure from the client for effective psychotherapy.<sup>77</sup> It is therefore necessary to take into account which model of psychotherapy the psychotherapist is using. The courts or the legislature would have to consider whether the significant differences between the psychoanalytic, psychodynamic therapies and cognitive-behavioural therapies warrant different legal protection. It is likely that more support for absolute confidentiality may be found for psychoanalytically oriented psychotherapy. However, a notable concern is that determining privilege based on the modality of treatment is perhaps unnecessarily cumbersome for practical application. Rather, it is recommended that the overall confidential setting of psychotherapy be considered. This includes acknowledging the sensitive and often embarrassing nature of mental and/or emotional problems.

## **3.4. The Psychotherapeutic Relationship in South Africa**

### **3.4.1 Introduction**

The history and development of psychology and psychotherapy in South Africa cannot be separated from the country's socio-political history. Psychologists have argued that the institutionalised racism promoted by the Apartheid government had a significant impact on the practise of psychology, psychiatry and psychotherapy.<sup>78</sup> As a result, a large number of people involved in the training, teaching and practise of psychology are primarily white and middle class. This problem is being

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<sup>75</sup> *Ibid.*

<sup>76</sup> Koggel *et al Confidential Relationships* 186.

<sup>77</sup> Anonymous 1985 *HLR* 1542; Shuman and Weiner 1982 *N.C.L Rev* 896.

<sup>78</sup> Z Knight 'South Africa' in A Pritz (ed) *Globalized Psychotherapy* (2002) 593.

addressed by affirmative action policies where non-white postgraduates are encouraged to enter psychotherapy and psychology programmes at universities.<sup>79</sup> Nonetheless, transformation has been slow and though there is a commitment to reframing the practise of psychology and psychotherapy in South Africa, there remains much to be done.<sup>80</sup> This has an affect the practice of psychotherapy in South Africa.

### 3.4.2 The Practise of Psychotherapy in South Africa

Most psychotherapists are located in the urban areas and there are not enough psychotherapists available to provide similar services in the rural areas.<sup>81</sup> Pretorius-Heuchert and Ahmed for example, estimate that there are 18 million people in South Africa in need of psychological intervention at some point of their lives, but only a minority receives this help.<sup>82</sup> In order to address this, in 2003 a system of one year of community service for clinical and counselling psychologists was implemented.<sup>83</sup>

Psychotherapy has also been historically practised in South Africa as a Western cultural enterprise.<sup>84</sup> As stated by Seedat, MacKenzie and Stevens, “the endeavour to transform the nature and structure of psychological services arose from the concern that traditional individualised psychotherapeutic modalities were inaccessible, elitist, and culturally inappropriate.”<sup>85</sup> Consequently, the tentative growth of psychotherapy in the rural areas is dependent on the success of psychotherapists gaining and maintaining trust with their clients. As a result of this, an interesting development for South African psychotherapy is the possible integration of Western oriented psychotherapy with African Traditional

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<sup>79</sup> Psychotherapy in particular is also predominantly female. *Ibid.*

<sup>80</sup> Macleod, for example, argues that there is still much that has remained the same in the profession as the majority of “psychologists remain white... and [psychology] has been accused of ignoring feminist issues, being an imperialist project, ignoring issues of class and contributing to the government regulation of citizens... [Therefore] South Africa continues, in the main, to ignore some of the pressing issues facing South Africa today.” C Macleod “South African Psychology and ‘Relevance’: Continuing Challenges” (2004) 34(4) 613 at 614. This article compared broad trends in psychological research during 1999-2004 and found that psychological research is still dominated by quantitative research and traditional subject matter. This indicated that psychology still has a long way to go to decrease the marginalisation of the majority of the South African population.

<sup>81</sup> Macleod 2004 *SAJP* 627.

<sup>82</sup> J Pretorius-Heuchert, & R Ahmed “Community Psychology: Past, Present and Future” in M Seedat, N Duncan and S Lazarus *Community Psychology: Theory, Method and Practice* (2001) 17-36.

<sup>83</sup> A Pillay and B Harvey “The Experiences of the First South African Community Service Clinical Psychologists” (2006) 36(2) *SAJP* 259 at 259.

<sup>84</sup> S Snyman and R Fasser “Thoughts on Ethics, Psychotherapy and Postmodernism” (2004) 34(1) *SAJP* 72-83 at 74.

<sup>85</sup> Seedat 2004 *SAJP* 597.

healing.<sup>86</sup> The World Council of Psychotherapy has initiated co-operation and integration of westernised psychotherapy and African Traditional healing. The Council emphasises that the development of global psychotherapy must involve a dialogue between the two different healing systems.<sup>87</sup> This incorporation ensures that psychotherapy is more accessible to people in the rural areas in South Africa, and also that it becomes more commensurate with their traditional and indigenous knowledge systems.<sup>88</sup> It thereby allows for the development and adoption of psychotherapeutic methods by traditional healers.<sup>89</sup>

Nonetheless, psychotherapy has a much-needed role to play in South African society. First, psychotherapy is often used in HIV counselling.<sup>90</sup> This extends not only to direct treatment to HIV patients but to all those who are affected by the disease. Fouche and Watson, for instance, highlight that the enormous problem of HIV/AIDs in South Africa is resulting in an “altered societal domain of socio-economic instability... [where] counselling psychology will have a role to play.”<sup>91</sup> Second, psychotherapy is often used to treat clients who have suffered a traumatic event.<sup>92</sup> As rape, child abuse and violent crime presently form an unfortunate component of South African society,<sup>93</sup> the need for psychotherapy in addressing the mental health problems caused by such events is likely to increase.<sup>94</sup> Last, the impact of the internet and the increased globalization of psychotherapy mean that more people in the urban areas will be able to access psychotherapeutic treatment.<sup>95</sup>

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<sup>86</sup> S Madu ‘Psychotherapy and African Traditional Healing: Attempts to Cooperate and Integrate’ in Pritz *Globalized Psychotherapy* 793.

<sup>87</sup> Pritz *Globalized Psychotherapy* 797-798.

<sup>88</sup> Pritz *Globalized Psychotherapy* 795.

<sup>89</sup> A primary concern would however be how such healers would be registered.

<sup>90</sup> To the extent that the HPCSA provides specific guidelines for H.I.V counselling. HPCSA “Ethical Guidelines for Good Practice with Regard to HIV” *Booklet 12*. <http://www.hpcsa.co.za/hpcsa/default.aspx?id=152>. (accessed 2 October 2008).

<sup>91</sup> Watson and Fouche 2007 *Applied Psychology* 163.

<sup>92</sup> Weiten *Psychology* 609. Weiten emphasises that psychotherapy can however treat a full of range of concerns, ranging from anxiety to marital conflicts.

<sup>93</sup> So much so that some have argued for the reintroduction of the death penalty as a deterrent. See C Snyman *Criminal Law* 4 ed (2002) 29-31. The death penalty was abolished in *S v Makwanyane* 1995 (3) SA 391(CC). See also J Burchell *Principles of Criminal Law* 3 ed (2005) 39-48.

<sup>94</sup> This argument was successful in Canada. Refer to Chapter 4.

<sup>95</sup> As Pritz explains, “patients are no longer finding their therapists in the telephone directory or by means of personal recommendation, but via the net.” A Pritz ‘Introduction to Globalized Psychotherapy’ in Pritz (ed) *Globalized Psychotherapy* 17. Psychotherapy is also considered to replace a number of previous confessional outlets. Hymer writes “the decline in religious belief and church attendance in Western culture forced people to look elsewhere to confess and discuss their problems. Gone also, are the family doctor and the wise relative, as well as the personal

The increase in endeavours to redress the practise of psychotherapy indicates the growing need for psychotherapeutic treatment and that psychotherapy will progressively become more relevant in the new South Africa. If one considers that the traditional modalities of psychotherapy must and will be transformed into a medium that is also accessible to more than the white middle classes, the number of clients must then also increase.<sup>96</sup> This will increase the need for clear protection of client confidentiality, including whether such communications should be protected from forced disclosure. Indeed, the problem has begun to reach South African courts. In *Henry, Pillay and Nadar v Regional Court Magistrate, Pietermaritzburg*<sup>97</sup> for example, the State had appealed an order granting disclosure of the complainant's entire psychological records. One of the grounds of appeal was that since the records were confidential, they were privileged.<sup>98</sup> Before this was argued further, however, it became apparent that there had been a misunderstanding between both parties and the court *a quo* regarding the testimony of the psychologist.<sup>99</sup> Once the misunderstanding had been cleared, the matter was resolved without delving into the argument for psychotherapeutic privilege.<sup>100</sup> The question of psychotherapeutic privilege therefore remains unanswered.

In addition to the growing popularity of the profession, the profession also uses specialised terminology<sup>101</sup> that is not clearly definable within our legal system. Law operates in the public sphere, and is based on logic and determining the truth. It does not usually concern itself with the practise of psychotherapists. The points of interaction between psychotherapy and law are therefore often obscure and subject to speculation by psychotherapists and lawyers.<sup>102</sup> Psychotherapists are unaware of what is required of them and may then hand over confidential records or be willing to testify if subpoenaed. Legal professionals, seeking to find evidence to assist their clients, may also misunderstand the complexity of the psychotherapeutic relationship and misinterpret the information gathered both before

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servant who was often the repository of the master's secrets. With the traditional avenues of confession, psychotherapy has arisen to provide an outlet for the confessional impulse." S Hymer *Confessions in Psychotherapy* (1988) 2-3.

<sup>96</sup> See further S N Madu 'Psychotherapy and African Traditional Healing' in Pritz (ed) *Globalized Psychotherapy* 797.

<sup>97</sup> *Henry, Pillay and Nadar v Regional Court Magistrate, Pietermaritzburg* unreported case in the Natal Provincial Division noAR57/06 delivered on 30 June 2006. This decision reached the SCA but the appeal quickly dismissed on the finding that there had been no irregularity, misdirection or any other grounds for appeal by the court *a quo*. *Director of Public Prosecutions v Henry* (305/07 [2008] ZASCA 93 (29 May 2008).

<sup>98</sup> Para 8.

<sup>99</sup> Para 9.

<sup>100</sup> Para 7.

<sup>101</sup> P Jenkins *Counselling, Psychotherapy and the Law* 2 ed (2007) 8.

<sup>102</sup> Jenkins *Counselling* 11.

litigation and during litigation. It is therefore important to understand what is meant by psychotherapy before seeking to use it as a source of evidence during litigation.

### 3.5 The Possible Impact of Forced Disclosure on the Client's Individual Interests

If one follows a combined approach to psychotherapeutic privilege, it is not sufficient to argue it on the basis of the protecting the profession alone. The right to privacy and any other interests of the individual that may provide support for the privilege must also be taken into account.<sup>103</sup>

#### 3.5.1 The Right to Privacy

The right to privacy is entrenched in s14 of the Bill of Rights in the Constitution. The section provides that:

“Everyone has the right to privacy, which includes the right not to have —

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.”

Section 14 contains two parts: first, it guarantees a general right to privacy, and second, it protects specific instances such as search and seizures and the infringement of communicational privacy.<sup>104</sup> Both Schwikkard and Zeffertt speculate that the post-constitutional position on other professional privileges may be influenced by the inclusion of the right to communicational privacy.<sup>105</sup> Thus far, however, s14(d) has been confined to the context of intercepting communications and not for the protection of confidential information. For example in the civil case of *Protea Technology v Wainer*<sup>106</sup>, the court considered s14(d) when considering the legitimacy of recording telephone

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<sup>103</sup> Please note that this section does not propose to provide a comprehensive constitutional argument for non-disclosure. An analysis of the right to privacy is considered only insofar as it highlights the impact of forced disclosure on the personal interests of the client.

<sup>104</sup> I Currie and J De Waal *The Bill of Rights Handbook* 5 ed (2005) 315.

<sup>105</sup> Zeffertt *Evidence* 589; Schwikkard *Principles of Evidence* 141.

<sup>106</sup> 1997 (9) BCLR 1225 (W) 1241I.

conversations of employees.<sup>107</sup> Similarly, in *S v Nkabinde*,<sup>108</sup> the court questioned whether telephone tapping amounted to an infringement of communicational privacy.<sup>109</sup>

A better approach may be to consider the impact of forced disclosure on a client's general right to privacy. Unfortunately, there is no concrete definition of privacy.<sup>110</sup> For example, McQuoid-Mason writes that accepted definitions of privacy include the right to be left alone, the right to be left free from intrusion and outside interference, the right to have control over one's personal information and finally the right to be autonomous.<sup>111</sup> The various definitions of privacy indicate that the right can vary according to the context in which it is applied.<sup>112</sup> This section will discuss how a client's right to privacy may be infringed by the forced disclosure of confidential communications.<sup>113</sup>

A constitutional argument on the question of privacy is a two-stage process. First, the client must prove that he or she had a subjective expectation of privacy that was also objectively reasonable.<sup>114</sup>

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<sup>107</sup> Heher J found that there had been no infringement of communicational privacy because the conversations tapped by his employer were related to his employment. The employer is entitled to such information. It would have been a different matter had the conversations between private and not connected to employment. 1240C.

<sup>108</sup> 1998 (8) BCLR 996 (N).

<sup>109</sup> Currie and De Waal state that the Interception and Monitoring Act 127 of 1992 largely gives effect ss14(d). Currie and De Waal *Handbook* 333.

<sup>110</sup> I Currie "The Concept of Privacy in the South African Constitution: Reprise" (2008) 3 TSAR 549. See also A Miller *The Assault on Privacy* (1971) 25 who states "The concept of privacy is difficult to define because it is exasperatingly vague and evanescent, often meaning strikingly different things to different people." Quote taken from J Neethling, J Potgieter and P Visser *Neethling's Law of Personality* 2 ed (2005) 30 fn314. Ackermann J in *Bernstein v Bester* 1996 (2) SA 751 (CC) para 65 notes that "The concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate"; see also South African Law Reform Commission (December 2003) *Privacy and Data Protection* Issue Paper 24, Project 124 at 47 citing Gross who warns that the lack of a single definition or explanation of privacy does not imply that privacy lacks importance. Gross states that a lack of conceptual understanding may result in "Our ability to articulate and apply principles of legal protection diminishes, for we become uncertain what it is that compels us towards protective measures and wherein it [privacy] differs from what has already been recognised or refused recognition under established legal theory." H Gross "The Concept of Privacy" (1967) *NYULR* 34.

<sup>111</sup> D McQuoid-Mason "Invasion of Privacy: Common Law v Constitutional Delict – Does it Make a Difference?" (2000) *Acta Juridica* 227 at 227.

<sup>112</sup> SALRC *Privacy and Data Protection* 47. The SALRC warns that this increases the need to understand the nature of privacy in order to ensure legal certainty.

<sup>113</sup> Currie 2008 *TSAR* 555-557, referring to the reasoning of D Solove "Conceptualising Privacy" (2002) 90 *Cal. L. Rev.* 1087 promotes a "working definition" for privacy. Rather than attempt to delineate the boundaries of privilege by promoting a fixed definition, privacy should be considered from the context that it is raised.

<sup>114</sup> Ackermann J in *Bernstein v Bester* para 75 concluded that "the scope of a person's privacy extends a *fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured." Currie and De Waal *Handbook* 318 summarise this into two components: namely "subjective expectation of privacy...that society has recognised...as objectively reasonable."

Second, if there is an infringement apparently permitted by law, the court is obliged to consider whether such law is justified under s36 of the Constitution.<sup>115</sup>

### 3.5.1.1 Privacy and the Right to be “Left Alone”

Warren and Brandeis in 1890 developed one of the first explanations of the concept of privacy. The authors found that the main function of privacy was to protect an individual’s right to be, as they put it, “left alone”.<sup>116</sup> Privacy has since then been widely accepted as concerning the part of a person’s life that is intentionally kept separate from the outside world.<sup>117</sup> The question of determining those aspects of one’s life that can reasonably be expected to be protected against outside intrusion is a problem that arises from this explanation.<sup>118</sup> In *Bernstein v Bester*<sup>119</sup> Ackermann J held that the right to be left alone decreased the further the intrusion was from an individual’s most intimate or personal details. He writes:

“A very high level of protection is given to the individual’s intimate personal sphere of life and maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual’s activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.”<sup>120</sup>

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<sup>115</sup> The Constitution of the Republic of South Africa, 1996. *Bernstein v Bester* para 71.

<sup>116</sup> S Warren and L Brandeis “The Right to Privacy” (1890) 4 *Harvard Law Review* 193 at 193-197. This phrase was adopted from Judge Thomas Cooley who later cited in *Union Pac. Ray v Botsford* 141 US (1891) 250 251 that: “[t]he right to one’s person may be said to be a right of complete immunity; to be let alone”. See further Solove 2002 *CLR* 1100 fn 47.

<sup>117</sup> See Neethling *Personality* 30 who cites W Joubert *Grondslae van die Persoonlikheidsreg* (1953) 135; H Hubmann *Das Persönlichkeitsrecht* (1961) 270.

<sup>118</sup> Solove explains for example that “[b]eing let alone does not inform us about the matters in which we should be let alone.” Solove 2002 *CLR* 1101. Without further clarity, the boundaries of the right to privacy remain too broad to be applied with any degree of certainty.

<sup>119</sup> 1996 (2) SA 751 (CC). Currie and De Waal write that *Bernstein* provides the richest analysis of constitutional privacy in South Africa so far. Currie and De Waal *Handbook* 317. Note that the case concerned the interpretation of s13 of the Interim Constitution. The section provided that: “Every person shall have the right to his or her *personal* privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the *violation of private* communications.”

<sup>120</sup> Para 77. Footnotes omitted.

Privacy and the corresponding expectation of privacy therefore decrease the further the intrusion moves away from an individual's "inner sanctum." If one applies this interpretation to court-ordered disclosures, it will be seen that information disclosed during psychotherapy is widely accepted as involving aspects of the client's life that are very personal and private.<sup>121</sup> The information also concerns an aspect of one's life that is subject to stigma and outside criticism.<sup>122</sup> As a result, the disclosure of such communications involves exposing information from the client's innermost sanctum that he or she clearly wishes to be left secret. Forced disclosure, clients may argue, is a direct invasion of their private lives.

### 3.5.1.2 Privacy and the Control of Personal Information

Solove explains that the "left alone" concept of privacy developed into a secrecy-based argument where control and concealment of personal information provided the foundation for the right to informational privacy.<sup>123</sup> According to Currie and De Waal, the right to privacy should also be interpreted from the context of protecting a person's individual interest in keeping personal information secret.<sup>124</sup> Currie and De Waal refer to this as "informational self-determination."<sup>125</sup> The interests protected in terms of this interpretation include an individual's personal information that has been given to or collected by third parties.<sup>126</sup>

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<sup>121</sup> See s3.3 above.

<sup>122</sup> Mental health problems can generate public stigma and harm. Refer to section 3.4 above.

<sup>123</sup> Solove 2002 *CLR* 1106.

<sup>124</sup> Currie and De Waal *Handbook* 323.

<sup>125</sup> *Ibid.* In *Ministry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) the Constitutional Court held that in order to determine whether the infringement of the right to informational privacy was unjustified, the court should consider the following factors: the manner in which the information was obtained, whether the information concerned personal aspects of the individual's life, whether it was disclosed for a different reason than its present use and finally whether it was disclosed to the public.

<sup>126</sup> The importance of protecting access and use of personal information has been subject to further study by the South African Law Reform Commission. SALRC 2003 *Privacy and Data Protection*. See also the Protection of Personal Information Draft Bill *South African Law Commission* (2005). The Bill provides a proposed regulatory framework for the protection of personal information and data collection. The definition for personal information is the same as given in s1 of the Promotion of Access to Information Act 2 of 2002. Personal information means information concerning but not limited to sex, pregnancy, physical or mental health, well-being and disability. For a comprehensive study on legislation protecting privacy see Nell *Thesis* 52-67.

It has been accepted that information concerning an individual's mental health is worthy of protection. In terms of the Promotion of Access to Information Act (PAIA)<sup>127</sup> for example, personal information is defined as any information about an identifiable individual including but not limited to sex, pregnancy, physical or mental health, well-being and disability.<sup>128</sup> The Protection of Personal Information Draft Bill also specifically refers to mental health information as "personal information."<sup>129</sup> Both the Act and the Draft Bill govern the access to and release of personal information. The South African Law Reform Commission proposes that the Bill focus on personal information, whereas PAIA deals with access to all other information.<sup>130</sup> These measures provide, however, that all categories of personal information should be disclosed if it is in the public interest.<sup>131</sup> They also only regulate the disclosure of information to third parties and not to the courts. As such, the measures themselves provide little concrete protection against court-ordered disclosure. They do emphasise, however, an argument that mental health information is accepted as private information of the most intimate nature.

### 3.5.1.3 Privacy and the Common Law

Neethling has argued that the common-law approach to privacy is both the starting and finishing point for interpreting s14.<sup>132</sup> It is thus significant to consider whether forced disclosure would amount to an infringement of privacy under the common law. In terms of the common law, privacy constitutes a separate personality right.<sup>133</sup> It is a component of *dignitas*, but separate from the personality right to dignity.<sup>134</sup> Neethling defines privacy as:

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<sup>127</sup> Act 2 of 2002.

<sup>128</sup> Section 1. PAIA regulates the access of information held by the State or private bodies mandated to preserve the information. For a discussion of PAIA and the release of medical records see Nell *Thesis* 54-59.

<sup>129</sup> Nell *Thesis* 62.

<sup>130</sup> South African Law Commission (2005) 198; Nell *Thesis* 59.

<sup>131</sup> Chapter 4 of PAIA deals with mandatory disclosure of information in the public interest. S46 states for example that if the disclosure of the record would reveal evidence that is a substantial contravention of the law or of an imminent and serious public safety risk and the public interest in the disclosure outweighs the harm of non-disclosure. See also Nell *Thesis* 56.

<sup>132</sup> J Neethling "Die Reg op Privaatheid en die Knostitusionele Hof: die Noodsaaklikheid vir Duidelike Begripsvorming" (1997) *THRHR* 137; Currie 2008 *TSAR* 449.

<sup>133</sup> Neethling *Law of Personality* 217.

<sup>134</sup> This was recognised in *O'Keefe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C). In this case, Watermeyer AJ interpreted *dignitas* widely enough to include not only the single personality right of dignity but all "those rights relating to...dignity." 247F-249D. See also *Goschalk v Roussouw* 1966 (2) SA 476 (A) 490-491; *Sage Holdings Ltd v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W) 128-131; *S v Bailey* 1981 (4) SA 187 (N) 189; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) 849 and *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A).  
*Ibid.*

“[A]n individual condition of life characterised by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private.”<sup>135</sup>

According to the explanation provided above, the holder of the right determines what facts are private and how such facts are disclosed.<sup>136</sup> Thus, the holder of the right has the power to decide who to disclose their personal facts to. The holder of the right must also indicate that they want such facts to remain private. If there is no indication that they wish such facts to remain private, there is no legal protection for those facts.<sup>137</sup> It is not sufficient for the holder to believe that such facts are private. They must also be considered private from an objective perspective.<sup>138</sup>

The possible infringement of the client’s right to privacy in terms of Neethling’s delictual interpretation involves consideration of the environment within which the information is generated.<sup>139</sup> For example, the intention of the person disclosing the information and whether the relationship is based on confidentiality become significant.<sup>140</sup> If, however, the relationship itself is reliant on the person disclosing personal facts to the other, a legal duty of confidentiality not to disclose the information has arisen.<sup>141</sup> In these instances, there is a duty on the other person not to disclose the information.<sup>142</sup> Relationships that fall under this head include the doctor-patient relationship, legal adviser-client relationship and the priest-penitent relationship.<sup>143</sup> It is submitted that the

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<sup>135</sup> Neethling *Law of Personality* 32. Harms JA accepted this definition in *National Media Ltd v Jooste* 1996 (3) SA 262 (CC) 271 holding that: “privacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private” This was translated from Afrikaans in SALRC 2003 *Privacy and Data Protection* 48.

<sup>136</sup> Neethling *Law of Personality* 32; I Rautenbach “The Conduct and Interests Protected by the Right to Privacy in Section 14 of the Constitution” 2001 *TSAR* 115 at 118; SALRC 2003 *Privacy and Data Protection* 48.

<sup>137</sup> Neethling *Law of Personality* 35.

<sup>138</sup> *Ibid.* See also SALRC 2003 *Privacy and Data Protection* 48; Rautenbach 2001 *TSAR* 116.

<sup>139</sup> In the case of psychotherapy, disclosure is in a confidential setting.

<sup>140</sup> Neethling *Law of Personality* 227.

<sup>141</sup> Neethling *Law of Personality* 228.

<sup>142</sup> *Ibid.* Also note that even if it is argued that there is no *need* for the client to disclose personal facts to their psychotherapist, once there is an *agreement* between both parties that the information will remain confidentiality, disclosure would amount to both a breach of contract and be considered *contra bonos mores*. Neethling *Law of Personality* 228.

<sup>143</sup> Neethling *Law of Personality* 228. See for example the approach of where *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) where the court confirmed that a medical doctor has both an ethical and legal duty to keep private information confidential.

psychotherapist-client relationship would be considered as such a relationship because in order for psychotherapy to be successful, full and frank disclosure by the client is necessary.<sup>144</sup> The presence of a legal duty on the psychotherapist not to disclose any confidential information bolsters the argument that any disclosure, without the client's consent, amounts to significant infringement of the client's privacy.

Two aspects to Neethling's approach deserve mention. First, in *Bernstein* Ackermann J correctly warns that the courts must be cautious in referring to common law principles when interpreting fundamental rights and their limitation. The common law involves only one enquiry, whilst any infringement of constitutional privacy involves a two-stage analysis.<sup>145</sup> McQuoid-Mason emphasises that there are other differences between a constitutional wrong and a delict.<sup>146</sup> A delict occurs when there has been an infringement of a subjective right or a legal duty.<sup>147</sup> The remedies for a delictual wrong consist primarily of compensation for the person harmed.<sup>148</sup> Constitutional wrongs, on the other hand, are concerned with remedies that reaffirm constitutional values. Furthermore, fault is not a requirement for the infringement of a constitutional right.<sup>149</sup> The second aspect to note is that, according to Rautenbach, Neethling's definition is too narrow to be applied on a constitutional level.<sup>150</sup> The application of constitutional privacy should extend to information that is also protected by other constitutional rights.<sup>151</sup> These could include, for example, the right to property,<sup>152</sup> the right to informational privacy, the right to physical and psychological integrity and it is submitted, the right to dignity. Rautenbach, in incorporating Neethling's definition, therefore proposed the following definition:<sup>153</sup>

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<sup>144</sup> Furthermore, in terms of Ethical rules of conduct, psychotherapists are bound to discuss confidentiality with their clients

<sup>145</sup> See *Bernstein v Bester* para 71 cited above.

<sup>146</sup> McQuoid-Mason asks whether the constitutional right to privacy gives rise to a constitutional delict.

<sup>147</sup> McQuoid-Mason 2000 *Acta Juridica* 244.

<sup>148</sup> He notes however that the constitutional court in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 57 did not rule out the possibility of damages for the infringement of fundamental rights. McQuoid-Mason 2000 *Acta Juridica* 245.

<sup>149</sup> McQuoid-Mason 2000 *Acta Juridica* 245-246.

<sup>150</sup> He also argues that constitutionally protected privacy should not be excluded if it is not considered as part of "inner sanctum of personality privacy protected by private law or because they have moved too far into communal relations and activities such as business and social interaction." Rautenbach 2001 *TSAR* 117

<sup>151</sup> Rautenbach 2001 *TSAR* 117.

<sup>152</sup> *Ibid.*

<sup>153</sup> Currie 2008 *TSAR* 554.

“The right to privacy in section 14 protects one’s actions to control:

- I. access to personal matters, which mainly consist of the ways in which most of the other rights in the bill of rights are exercised;
- II. and the obtaining, dissemination and use of information in respect of these matters.”<sup>154</sup>

It is submitted that Rautenbach’s approach allows for a more comprehensive approach to constitutional privacy. It promotes a multidimensional interpretation of the right interlinking it with other constitutional rights.<sup>155</sup> For example, another fundamental aspect of the right to privacy is founded on the principle of autonomy. The ability to enjoy life autonomously ensures individual freedom and human dignity. It is thus important to consider how disclosure of psychotherapeutic communications during litigation amounts to an infringement of the client’s autonomy and, consequently, the client’s right to human dignity.

#### 3.5.1.4 Privacy and Autonomy

Currie explains that the reason behind limiting privacy to the truly personal realm and not the communal sphere is that “rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one’s own autonomous identity.”<sup>156</sup> The right to privacy allows people to be masters of their own lives – it grants people the right to determine what information should remain secret and what can be disclosed to others, thus providing people the freedom to develop personal identities. This includes the right to control one’s own body, or property<sup>157</sup> and even relationships with others.<sup>158</sup> In *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>159</sup> for example, the Constitutional Court found that the right to privacy encompassed the choice to enter into sexual relationships:

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<sup>154</sup> Rautenbach 2001 *TSAR* 119. Neethling responded to this arguing that this definition was too wide to be applied with certainty. See J Neethling “The Concept of Privacy in South African law” (2005) 122 *SALJ* 18.

<sup>155</sup> Currie for example notes that there “are good reasons to suspect that constitutional privacy is not identical with common-law privacy. The *iniuria* of the breach of privacy is grounded on the common-law concept of *dignitas*. The constitutional right to privacy is grounded instead on a set of foundational values (s1 of the constitution). Currie 2008 *TSAR* 551.

<sup>156</sup> *Bernstein v Bester* para 65.

<sup>157</sup> See *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) para 91.

<sup>158</sup> Currie 2008 *TSAR* 552.

<sup>159</sup> 1999 (1) SA 6 (CC).

“Privacy recognised that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”<sup>160</sup>

By using this approach, it can be argued that disclosure of confidential communications infringes the client’s autonomy on two counts. The first is that the autonomy of the client’s decision to enter into a confidential relationship is damaged. The choice to disclose information is largely influenced by the type of relationship shared between the giver and receiver of information. What a person chooses to disclose to their psychotherapist within a professional context will in all probability be considerably different from what that person would choose to tell an employer. As Bennett and Erin state, by controlling their informational disclosure, people also control their relationship with others.<sup>161</sup> If the information generated in a confidential relationship is considered more important than the relationship itself, then the decision to - and the purpose of - entering such a relationship is undermined. The failure to maintain that distinction would infringe on the client’s original choice to enter the relationship, as well the integrity of the psychotherapeutic process.

The second basis for contending that disclosure of confidential communications infringes autonomy is that disclosure impairs the client’s capacity to exercise control over their own personal information<sup>162</sup> One of the main arguments for confidentiality is that it allows people to be masters of their own well-being. People are able to choose who and who not to disclose information to. This enables people to regulate and determine the level of risk attaching to their disclosure.<sup>163</sup> Confidentiality provides the client with the power to control the disclosure of their personal information.<sup>164</sup> Allan writes for example that in the past it was the professional, as the powerful authority in the relationship, who

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<sup>160</sup> Para 32.

<sup>161</sup> R Bennet and C Erin *HIV and Aids: testing, screening and confidentiality* (1999) 144 taken from Nell *Aspects of Confidentiality* 15.

<sup>162</sup> People should be able control the disclosure of any information that directly concerns them. M Yeo and A Brook “The moral framework of confidentiality and the electronic panopticon” in C M Koggel, A Furlong, C Levin *Confidential Relationships: Psychoanalytic, Ethical and Legal Contexts* (2003) 89.

<sup>163</sup> Nell *Aspects of Confidentiality* 18.

<sup>164</sup> M Yeo and A Brook “The moral framework of confidentiality and the electronic panopticon” in C M Koggel, A Furlong, C Levin *Confidential Relationships: Psychoanalytic, Ethical and Legal Contexts* (2003) 89.

dictated the process of psychotherapeutic treatment.<sup>165</sup> However, with the emergence of the principles of autonomy and self-determination, a psychotherapist had to obtain the client's consent before treatment could commence.<sup>166</sup> Arguably, this change of ideology and the emergence of the importance of consent is also applicable to the emergence of rules ensuring that *the client* controls the disclosure of confidential communications.<sup>167</sup>

The principle of autonomy also interlinks privacy and the right to human dignity.<sup>168</sup> O'Regan J in *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)*<sup>169</sup> explains the connection as follows:

"The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least – that the constitutional conception of being a human being asserts and seeks to foster the possibility of human being choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life."<sup>170</sup>

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<sup>165</sup> A Allan *The Law for Psychotherapists and Counsellors* 2 ed (2001) 24.

<sup>166</sup> *Ibid.* Kaliski and Zabow *Psycholegal Assessment* 370. Psychotherapists must consider two factors regarding informed consent. (1) The client may not have the capacity to make such a decision, especially if psychotherapy is an element of psychiatric treatment for the client. In such circumstances, the psychotherapist has to decide whether the client understands the consequences of disclosure and that he or she still has a choice to refuse disclosure. (2) The client may defer to the perceived authority of the psychotherapist. Psychotherapists must be aware that clients may develop a level of dependence on them. This can cast doubt on the apparent voluntariness of their decision to permit disclosure of their communications. So, for example, if the psychotherapist advises that disclosure to third parties is correct, the client may choose to permit disclosure not because of their own judgment, but because of deference to the perceived superiority of the views of the professional. Kaliski and Zabow *Psycholegal Assessment* 371-372; Yeo and Brook *Confidential Relationships* 90.

<sup>167</sup> It is now widely accepted that disclosure of confidential communications is permissible if the client consents to it. Koocher and Keith-Spiegel *Ethics* 117; Cram and Dobson 1993 *Canadian Psychology* 348; Turkington 1997 *Journal of Law, Medicine and Ethics* 114, Laurie 2002 *Journal of Legal Medicine* 16.

<sup>168</sup> Section 10 of the Constitution of the Republic of South Africa, 1996 provides that "Everyone has the inherent dignity and the right to have their dignity respected and protected."

<sup>169</sup> 2007 (5) SA 250 (CC).

<sup>170</sup> Para 131. See further *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and Others* 2001 (1) SA 545 (CC) para 18 where Langa DP states as follows: "privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. *This understanding of the right flows...from the value placed on human dignity.*" My emphasis. See also *S v Jordan and others (Sex Workers*

The bond between privacy and autonomy provides for an interpretation that serves a fundamental value of the Constitution: the protection and promotion of human dignity.<sup>171</sup> In order to have dignity people must have the power to control their own lives and their information. It is submitted that the disclosure or non-disclosure of such information provides one of the foundations for development of meaningful relationships with others and society.

### 3.5.2 Other Individual Interests Affected by Disclosure

Currie and De Waal point out that the disclosure of secrets can involve immense embarrassment and possible humiliation.<sup>172</sup> It is submitted, however, that the harmful effect of disclosure extends beyond humiliation or embarrassment and may cause substantial harm to the client, for example in business, professional or personal relationships. Under this approach, the focus should not be on the psychotherapeutic relationship itself or on the personal rights of the client.<sup>173</sup> Rather, the main question is: “What interests does a patient have in keeping something secret?”<sup>174</sup> Yeo and Brook provide a useful explanation.<sup>175</sup> Imagine a third party secretly recording and documenting a private psychotherapy session without knowing or recording the client’s identity. Under the argument based on autonomy and dignity discussed above, a breach of confidentiality has still occurred as an unwanted party has acquired information without the client’s consent. However, as anonymity has been preserved, the client has not suffered any direct harm in consequence of the third party’s conduct. The client’s interest in not having such information spread, even anonymously, is apparent. Apart from other considerations, the client may well have a feeling of unease that the so-called anonymous information may, in combination with other information known to one or other person, provide clues to the identification of the subject of the information. If the client is readily identifiable, however, the possibility of social or financial harm to the client provides further justification for protecting the client’s privacy. As there is a stigma attached to mental illness and mental health treatment in

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*Education and Advocacy Task Force and Others* (2002) (6) SA 642 (CC) para 81, where Sachs and O’Regan JJ held that criminalisation of prostitution amounted to an infringement of the prostitutes human dignity and privacy.

<sup>171</sup> Section 10 of the Constitution of the Republic of South Africa, 1996. See also s1 which states that “The Republic of South Africa is one sovereign democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms...”

<sup>172</sup> Currie and De Waal *Handbook* 323.

<sup>173</sup> Yeo and Brook *Confidential Relationships* 93.

<sup>174</sup> *Ibid.*

<sup>175</sup> Yeo and Brook *Confidential Relationships* 94-95.

general,<sup>176</sup> Nell, amongst others, has observed that breaches of confidentiality regarding mental health can result in the loss of a job or promotion, or refusal of insurance.<sup>177</sup> This is regardless of whether the client actually has a psychological disorder: the need for such treatment is itself perceived as a form of weakness.<sup>178</sup>

### 3.6 Conclusion

Confidentiality has been identified as a crucial component of the psychotherapeutic relationship. It ensures that clients feel free and comfortable to disclose information normally kept secret or repressed. Yet the basis for protecting the confidential status of the relationship extends beyond its functional necessity. Confidentiality also protects the privacy interests of clients. Privacy promotes the principle that people should govern their own personal information and by doing so, remain autonomous. The right to be autonomous embraces the freedom to choose which relationships people should enter into. This should include fiduciary relationships such as those with mental health professionals. Such freedom is valuable from both an individual and a communal perspective. It encourages the mental and/or emotional well-being of individuals, and benefits society by improving the mental health status of its members. This ensures that people continue to be functioning components of South African society.

It is insufficient to rely on confidentiality, privacy and professional need as the only interests justifying psychotherapeutic privilege. In order for any privilege to be justified, these interests must outweigh the doctrine of full disclosure. Only then is privilege considered to be in the public interest. The possible impact of privilege on the administration of justice, the right to fair trial and access to information must be given adequate attention. If there is another solution that might effectively balance all interests involved, this must also be considered. It is here that the approaches and solutions developed in foreign jurisdictions may provide assistance. This is because there has been, thus far, very little research or precedent on the protection of confidential psychotherapeutic communications in South Africa. Legal professional privilege, although a useful framework for any professional

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<sup>176</sup> Weiten *Psychology* 609 notes that that the biggest roadblock to seeking psychotherapy is the “stigma surrounding the receipt of mental health treatment.”

<sup>177</sup> Nell *Aspects of Confidentiality* 142; Shuman and Weiner 1982 *N.C.L Rev* 897.

<sup>178</sup> Weiten *Psychology* 609.

privilege, does not provide an effective comparison, as the function of the legal profession remains grounded on the principle of ensuring the proper functioning of the legal system.

## CHAPTER 4

### COMPARATIVE ANALYSIS

#### 4.1 Introduction

South African law of evidence has been classified as belonging to the “Anglo-American” family.<sup>1</sup> For this reason, three countries from the same family were chosen for comparative analysis. This chapter does not purport to provide a wide-ranging comparative study of privilege law but rather focuses, in more depth, on the approaches to confidential communications – such as psychotherapeutic communications – in England, Canada and the United States of America. Section 4.2 focuses on the English approach.<sup>2</sup> It is notable that the English law of evidence, prior to the Interim and Final Constitutions, was considered as the principal source of evidence law for South Africa.<sup>3</sup> Section 4.3 studies the Canadian approach to privilege. As Canada’s human right framework is similar to South Africa’s, their approach provides useful guidelines to developing better protection against the infringement to privacy and human dignity. Finally, section 4.3 focuses on the introduction of psychotherapeutic privilege in the United States of America. The approach to establishing psychotherapeutic privilege on both a federal and state level provides invaluable insight into what arguments were used for adopting the privilege and what problems have been encountered by the courts since its introduction.

Zeffertt warns that legal comparativism is full of dangers. He explains that first, it is impossible to understand the niceties of a legal system foreign to our own.<sup>4</sup> This increases the chances of implementing a thin or incorrect legal principle. Second, assurance that comparative study remains up

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<sup>1</sup> Schwikkard *Principles of Evidence* 25. The South African legal system is however hybrid, consisting of both English and Roman-Dutch law. The application of either English or Roman-Dutch principles depends on the area of law. The two systems are also often intertwined. K Zweigert and H Kötz *An Introduction to Comparative Law* 3 ed (1998) 235. See also Zeffertt *Law of Evidence* 5-12 for a discussion of the history of the law of evidence.

<sup>2</sup> It should be noted that this thesis, for the purposes of clarity, only refers to England and English law. The “English legal system” does however include both England and Wales. For a thorough explanation of the English legal system see further F Cownie and A Bradney *English Legal System in Context* (2000) 1-21.

<sup>3</sup> A O’Dowd *The Law of Evidence in South Africa* (1963) 2; Schwikkard *Principles of Evidence* 25.

<sup>4</sup> Zeffertt *Law of Evidence* 20.

to date is difficult.<sup>5</sup> Third, the context within which laws are created differs from country to country.<sup>6</sup> A legal principle may therefore be well-suited to one legal system but not necessarily ours.<sup>7</sup> There is merit to these concerns. Care should be taken against adopting foreign law uncritically. However, avoiding comparative analysis because of these risks would deprive our legal system of the opportunity to advance its own jurisprudence. For example, O'Regan J when referring to legal comparativism in *K v Minister of Safety and Security*<sup>8</sup> writes:

"It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done."<sup>9</sup>

Zwiegert and Kötz support O'Regan J's approach to comparativism. They write that comparative analysis generates knowledge and solutions to problems that would not have otherwise been considered.<sup>10</sup> This is especially the case in developing legal systems or in areas needing legal reform.<sup>11</sup> Zwiegert and Kötz advise however that two questions should be asked before proposing the adoption of a foreign solution: first, whether the solution developed is successful in the country of origin and

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> Chaskalson P warns of this in *S v Makwanyane* 1995 (3) SA 391 (CC) para 39 before beginning a comparative study on the different constitutional approaches towards the abolition or establishment of the death penalty. He writes "in dealing with comparative law, we must be in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution."

<sup>8</sup> (2005) 9 BCLR 835 (CC).

<sup>9</sup> Para 34-35. For a discussion on the merits of constitutional comparativism see L Ackermann "Constitutional Comparativism in South Africa" (2006) 123 *SALJ* 497. Footnotes omitted.

<sup>10</sup> Zwiegert and Kötz *Comparative Law* 15.

<sup>11</sup> *Ibid.*

second, whether it is suitable for the country seeking to adopt it.<sup>12</sup> Therefore Chapter 5 will critically assess whether any of the solutions provided have been successful and whether they would be well-suited to South African law.

## 4.2 England

### 4.2.1 Introduction

Presently, arguments for the protection for psychotherapeutic communications against forced disclosure in England can be divided into two categories: professional privilege and the law of confidentiality.<sup>13</sup> The development and use of public interest immunity further complicates the matter. It is accepted that, in general, English law wishes to protect any confidential information from being disclosed.<sup>14</sup> The difficulty arises in determining the boundaries of that protection. As confidentiality is not absolute, there are exceptions. These include instances where the professional has information on any form of terrorist activity,<sup>15</sup> when there is suspicion of child abuse<sup>16</sup> and when ordered by the court to break any confidentiality agreement. The focus will be on the final exception. Section 4.2.2 will give a brief outline of private privilege law in England. Following from this, section 4.2.3 will consider any possible arguments for privilege for non-legal professionals such as psychotherapists and

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<sup>12</sup> Zwiagert and Kötz *Comparative Law* 17.

<sup>13</sup> C Tapper *Cross and Tapper On Evidence* 11 ed (2008) 495.

<sup>14</sup> Confidential information can be protected under the common law or legislation. The Data Protection Act 1998, for example, governs all data collected on individuals in a number of contexts. Section 60 of the Act makes it a criminal offence to disclose personal data without the proper justification. This includes data that is in the public interest, data that can help to prevent crime, or if the person to whom the data relates has given consent. As psychotherapists are normally provided with personal information, the Act impacts on how their records should be managed. As records do vary from direct observational data and the therapist's own personal notes to the client's general information, the Act creates some difficulties for English psychotherapists in deciding how the records should be stored and knowing when disclosure is allowed. See further P Jenkins *Counselling, Psychotherapy and the Law* 2 ed (2007) 131-137; R Pattenden *The Law of Professional-Client Confidentiality: Regulating the Disclosure of Confidential Personal Information* (2003) 81-82 and 607-640. In terms of the common law, disclosure should only be granted if it does not constitute a contractual breach or failure to uphold a common law duty of confidentiality. See also A Layton "Setting the Scene II: The Perspective of the Sympathetic Outsider" (2003) 20(2) *British Journal of Psychotherapy* 149 at 149.

<sup>15</sup> Terrorism Act 2000. Failure to report is a criminal offence. Section 19 of the Act.

<sup>16</sup> Section 47 of the Children Act 1989.

whether public interest immunity may be applied. The impact of the Human Rights Act 1998 will also be touched upon in Section 4.2.3.

#### 4.2.2 Introduction to Private Privilege

English law recognises only a few private privileges. These include *inter alia*, legal professional privilege;<sup>17</sup> litigation privilege;<sup>18</sup> the privilege against self-incrimination and “without prejudice” privilege.<sup>19</sup> A limited form of privilege is also afforded to the communications made for the purposes of reconciling marital relationships.<sup>20</sup> Known as “matrimonial reconciliation privilege,”<sup>21</sup> concessions made between parties for the purposes of avoiding litigation cannot be used in litigation should negotiations fail.<sup>22</sup> The rationale is similar to “without prejudice” privilege,<sup>23</sup> and applies to any intermediary. It may also include communications between marital counsellors and their clients as long as it is for the purposes of reconciling the marriage or in assisting the spouses in reaching an amicable separation.<sup>24</sup>

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<sup>17</sup> See Tapper *Cross and Tapper* Chapter 9 (2) for a comprehensive study on legal professional privilege.

<sup>18</sup> Litigation privilege developed from legal professional privilege. It protects communications between a legal adviser/client and third parties. For a thorough discussion on litigation privilege see C Passmore *Privilege* 2 ed (2006) Chapter 3 and Tapper *Cross and Tapper* 438.

<sup>19</sup> C Hollander “Privilege” in M Howard (ed) *Phipson on Evidence* 15 ed (2000) 504-505; Tapper *Cross and Tapper* 447; Pattenden *Professional Confidentiality* 537.

<sup>20</sup> Established by the Court of Appeal in *McTaggart v McTaggart* [1948] 2 All ER 145; *R v Pabani* (1994) 89 CCC (3d) 437. The privilege only applies in civil proceedings.

<sup>21</sup> Passmore *Privilege* 63, Pattenden *Professional Confidentiality* 538.

<sup>22</sup> Passmore *Privilege* 63.

<sup>23</sup> *McTaggart v McTaggart* 145; Passmore *Professional Confidentiality* 64.

<sup>24</sup> Pattenden *Professional Confidentiality* 538. See also Tapper *Cross and Tapper* 507-508.

## 4.2.3 The Position of Non-Legal Professionals

### 4.2.3.1 Private Privilege

In 1963, Lord Denning MR in *Attorney-General v Mulholland and Foster*,<sup>25</sup> explained the position of non-legal professionals as follows:

“The only profession I know which has been given a privilege from disclosing the information to a court of law is the legal profession... Take the clergyman, the banker and the medical man. None of these is entitled to refuse to answer when directed by a judge. Let me not be mistaken. The judge will respect the confidence which each member of these honourable professions receives in the course of it and will not direct him to answer unless not only is it relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered.”<sup>26</sup>

This position is well established in the English Courts. Professionals that have been expressly denied communicational privilege include medical doctors,<sup>27</sup> bankers,<sup>28</sup> spiritual advisers,<sup>29</sup> accountants<sup>30</sup> and

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<sup>25</sup> [1963] 2 QB 477.

<sup>26</sup> 489.

<sup>27</sup> *Nuttal v Nuttal* (1964) 108 SJ 605. The Court rejected doctor-client privilege and held that the psychiatrist must either disclose the confidential information or be imprisoned for contempt of court. See also *Duchess of Kingston's Trial* (1776) 20 How St Tr 355 at 572-573; *Garner v Garner* (1920) 36 TLR 196 at 197.

<sup>28</sup> *Tournier v National Provincial and Union Bank* [1924] 1 KB 461 at 473-486; *Robertson v Canadian Imperial Bank of Commerce* [1995] 1 All ER 824.

<sup>29</sup> *Du Barre v Livette* (1790) 1 Peake 108; *Wheeler v Le Marchant* (1881) 17 Ch D 675 at 681.

<sup>30</sup> *Chantrey Martin (A Firm) v Martin* [1953] 2 All ER 691. This case dealt with a firm of chartered accountants who were suing a former employee. The question was whether all working documents concerning a client company should be disclosed by the plaintiffs. The plaintiffs argued that the company's documents were privileged because they were created under an agreement of professional confidence. The court rejected this argument stating that “outside the area of legal professional privilege, which is not in question here, we do not think this is a sufficient ground for refusing an order for production”.

journalists.<sup>31</sup> The Law Committee and Criminal Law Revision Committee have also both opposed any claim for the statutory development of new privileges in both civil and criminal matters.<sup>32</sup>

The problem does not end here, however. As Lord Denning MR states, the courts will not easily order professionals to break their oaths to keep information confidential. In 1965 for example, Dr Anne Hayman, a practising psychotherapist, publicly explained to both the media and the court why she refused to disclose evidence about one of her clients in court. She had complied with the subpoena to attend a high court trial, but during proceedings refused to answer any questions put to her. Explaining her reasons in an article in the *Lancet*, she stressed that the practise of courts relying on information gathered by psychotherapists is fraught with problems.<sup>33</sup> These ranged from the lack of objectivity by the therapist when gathering any information,<sup>34</sup> to the fact that the information gathered may differ depending on the method of treatment used by the professional,<sup>35</sup> and not least, the overriding professional responsibility of psychotherapists to maintain confidentiality.<sup>36</sup> In conclusion she stated that both “[j]ustice, as well as our [the profession’s] ethic, is likely to be served best by silence”.<sup>37</sup> Her argument persuaded the court not to bring any charges against her for being in contempt of court. This indicates that should a professional provide a coherent argument as to why confidentiality should not be breached, the courts may be disinclined to punish them for being in contempt of court.<sup>38</sup> This is especially if the evidence might not be relevant. Unfortunately, this case provides a rare exception to the general rule that failure to disclose when court ordered to do so will amount to an offence, and does

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<sup>31</sup> Lord Parker CJ in *Attorney-General v Clough* [1964] 1 QB 773 at 792 held that “The law has not developed and crystallised the confidential relationship in which [the press] stand[s] to an informant into one of the classes of privilege known to law. Since then, journalists have been granted limited statutory privilege under the Contempt of Court Act 1981. See further Passmore *Privilege* 61.

<sup>32</sup> 16<sup>th</sup> Report on the Law Reform Committee. See C Tapper “Law Reform Committee: 16<sup>th</sup> Report on Privilege in Civil Proceedings” (1968) 31 *Modern Law Review* 198 for a discussion on the report. 11<sup>th</sup> Report of the Criminal Law Revision Committee. Taken from Tapper *Cross and Tapper Evidence* 497.

<sup>33</sup> A Hayman “Psychoanalyst subpoenaed” *The Lancet* 16 October 1965 in P Jenkins *Legal Issues in Counselling and Psychotherapy* (2002) 22.

<sup>34</sup> Jenkins *Legal Issues* 23.

<sup>35</sup> Jenkins *Legal Issues* 22- 23. See s3.3.3 of this thesis.

<sup>36</sup> She emphasised this responsibility further by confirming that she would maintain confidentiality even if the client gave consent to disclose.

<sup>37</sup> Jenkins *Legal Issues* 23.

<sup>38</sup> This is not always the case. See previously *Nuttal v Nuttal* whereby the judge emphasised that failure to disclose would result in a contempt of court being charged.

not provide any decisive guidelines to psychotherapists as to how to act when faced with such an ethical dilemma.

English courts have nonetheless become aware of the conflict between professional confidentiality and forced disclosure. This is especially evident in cases where claims for public interest immunity have been made.

#### 4.2.3.2 Public Interest Immunity (PII)

Public interest immunity has developed considerably since *Duncan v Cammell Laird*.<sup>39</sup> “Crown privilege”, as it was then known, granted State ministers the power to certify that certain governmental information must remain secret and immune from court disclosure.<sup>40</sup> An application for the privilege would succeed if the court was provided with a certificate indicating the need for secrecy.<sup>41</sup> The court itself could not inspect the validity of the claim once such a certificate was provided.<sup>42</sup> The information was therefore kept secret from the courts as well. The court’s willingness to accept the overarching power of the executive over potentially relevant evidence was influenced by the times. *Duncan* dealt with a damages claim during World War II in connection with the sinking of a British submarine.<sup>43</sup> No survivors of the tragedy could give an account of the event and thus the only way to determine what had caused the accident was by inspecting the submarine’s construction plans.<sup>44</sup> During a time of war, disclosure of these plans would have caused significant harm to the public interest. The House of Lords was therefore willing to uphold a claim for Crown Privilege, provided it was requested in the proper form. Thereafter, Crown Privilege was expressly recognised in the Crown Proceedings Act.<sup>45</sup>

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<sup>39</sup> [1942] AC 624. For a good explanation of the case see Hollander *Phipson* 607.

<sup>40</sup> 642.

<sup>41</sup> *Ibid.*

<sup>42</sup> It should be noted that the even though the Court accepted that it should not inspect documents marked as privileged, the Court emphasised that such executive power should not be used lightly. 638-642.

<sup>43</sup> 625.

<sup>44</sup> Only four of the crew survived the tragedy. 626

<sup>45</sup> Section 28 of Act 1947.

The main problem with *Duncan's* approach was that once information was certified as privileged, the Courts did not have the power to investigate whether the claim was appropriate or not. After World War II ended, this became increasingly unacceptable. Thus, in *Conway v Rimmer*<sup>46</sup> the House of Lords reconsidered the application of Crown Privilege. The House held that the courts had the power to inspect any documents claimed as privileged.<sup>47</sup> Upon inspection, the courts were also allowed to decide whether the public interest would be best served by non-disclosure and whether this outweighed the public interest in accessing all information during litigation.<sup>48</sup> It was held that the power to decide non-disclosure on grounds on public interest would rest with the courts.<sup>49</sup> After *Conway*, Hollander and Crane explain that claims of Crown Privilege fell under even more scrutiny,<sup>50</sup> ultimately developing to what is now more commonly known as Public Interest Immunity (PII).<sup>51</sup>

A leading case that considers confidentiality, privilege and PII is *D v National Society for the Prevention of Cruelty to Children*, decided during the late 1970's.<sup>52</sup> The NSPCC, a well-established society that deals with matters of child abuse, had received information from a caller that the plaintiff and her husband were maltreating their 14-month-old child. Soon after the call, the society sent an inspector to investigate the complaint. The complaint turned out to be unfounded: the child was in good health. The mother on the other hand suffered immense psychological distress as a result of the visit. She was diagnosed with severe clinical depression and other health problems. Consequently, the plaintiff sought restitution for the harm done by the society. In order to pursue the matter, the plaintiff wanted access to all the society's records relating to the complaint. This included access to the records

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<sup>46</sup> [1968] AC 910. For a discussion of the facts see Hollander *Phipson* 608.

<sup>47</sup> 954D; 964D.

<sup>48</sup> *Per* Lord Reid: "[I]t is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done." 940D.

<sup>49</sup> The House also distinguished between "class" and "content" claims. Class claims were defined as dealing with an identifiable class or group of documents such as cabinet minutes or documents relating to policy making. Class claimed immunity provided a fairly broad scope of protection against disclosure: classes of documents relevant for the effective functioning of the public service were protected against disclosure. Contents claims were, as the name suggests, dependent on the content contained in any singular or particular document. 937C.

<sup>50</sup> *Air Canada v Secretary of Trade (No. 2)* [1983] 2 AC 394; Howard *Phipson* 609.

<sup>51</sup> Crown Privilege is now largely considered as a misnomer. *D v NSPCC* [1977] 1 All ER 589 at 609 and *Rogers v Home Secretary* [1973] AC 388 at 400.

<sup>52</sup> The decisions in both the Court of Appeal Civil Division [1976] 2 All ER 993 and House of Lords [1977] 1 All ER 589 will be considered. Take note that National Society for the Prevention of Cruelty to Children is abbreviated to NSPCC.

identifying the caller. The society refused to grant this, as it had promised that the informer's details would remain confidential.<sup>53</sup> The society argued that an agreement of confidentiality encouraged callers to come forward about any child abuse concerns. The society consequently claimed PII on the grounds that it was in the public's interest not to inhibit the willingness of people to report abuse. The original judicial officer rejected this argument and ordered discovery, which was successfully reversed on appeal. The matter then reached the Court of Appeal. The decision of the appeal court was not unanimous. The majority, *per* Scarman LJ and Sir John Pennycuick, held that PII only applied to information kept confidential by central government.<sup>54</sup> The majority held that the society, even though performing a function that was in the public interest, could not claim immunity because it was not connected to the functioning of central government.

In his dissenting opinion, Lord Denning MR held that PII claims should not be restricted to central government secrets. Rather, PII should apply in any instances where confidentiality played a significant role in disclosure. Once confidentiality was established, the court could only order any breach of confidentiality if it was in the best interests of the public to do so.<sup>55</sup> In this case, his Lordship found that the court did not have sufficient reason to breach the confidentiality agreement between the society and the caller. He reasoned that it was in the best interests of the public to secure the willingness of potential child abuse informers to disclose their concerns to the NSPCC. If confidentiality were breached, he opined that this willingness would be significantly curtailed. He further found that the reasons behind the request for the society's records were to identify the caller in order to sue him or her individually. This he considered as an insufficient validation for disclosure.<sup>56</sup>

In an appeal to the highest court, the House of Lords tried to reach a compromise between the two different opinions.<sup>57</sup> First, the House of Lords unanimously held that PII claims were not restricted to central government interests. Rather, claims grounded in public policy should be analogous to

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<sup>53</sup> The society's leaflets contained the sentence "Your name, and the information you give for the purposes of helping children, will be treated as confidential". *D v NSPCC* [1977] 1 All ER 589.

<sup>54</sup> *Per* Scarman LJ "state interest alone can justify the withholding of relevant documents on the ground of public interest from discovery in properly constituted proceedings". 1005.

<sup>55</sup> 999-1000.

<sup>56</sup> 1001.

<sup>57</sup> *C Tapper Cross and Tapper On Evidence* 10 ed (2004) 524.

previously protected communications or information.<sup>58</sup> Lord Diplock explained that PII should not be interpreted as another form of “Crown Privilege”. The House of Lords held that even though public policy arguments had previously been used to protect information essential to the functioning of government, this did not preclude the court from protecting other information in the future.<sup>59</sup> Following from this, the House of Lords held that the principles protecting police informants from detection were analogous to protecting informants or callers of the society.<sup>60</sup>

Second, the House of Lords clearly defined the application of PII. Lord Edmund-Davies, for example writes:

“where (i) a confidential relationship exists...[or] (ii) disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a refusal to disclose relevant evidence providing it considers that, on balance, the public interest would be better served by excluding such evidence.”<sup>61</sup>

In light of this, all the Lordships held records and the caller’s identity should not be disclosed.

Third, even although the House reached the same conclusion as Lord Denning MR in the court *a quo*, the House disagreed with his Lordship’s approach. Confidentiality, it was held, could not be used as sole ground for non-disclosure. Collectively, the House of Lords approved of the dictum of Lord Cross in *Alfred Crompton Amusement Machines v CGE*<sup>62</sup> that “confidentiality is not a separate head of

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<sup>58</sup> The courts should not be bound or limited by precedent.

<sup>59</sup> He states, “I see no reason and I know of no authority for confining public interest as a ground for non-disclosure of documents or information to the effective functioning of departments or organs of central government.” 596-597. See also Lord Hailsham of Marylebone who explains that there should be scope for development. He points out that the courts have developed the doctrine of privilege and public interest. 602.

<sup>60</sup> Lord Simon of Glaisdale compares the two as follows: “[There is a] long-standing and approved authority to the effect that sources of police information are not subject to forensic investigation. This is because liability to general disclosure would cause those sources of information to dry up, so police protection of the community would be affected. Exactly the same argument applies in this instant case, if for ‘police’ you read ‘NSPCC’ and for ‘community’ you read ‘that part of the community which consists of children who may be in peril’. There can be no material distinction between police and/or local authorities on the one hand and the appellants on the other as regards protection of children. It follows that, on the strictest analogical approach and as a matter of legal rule, the appellants are bound to refuse to disclose their sources of information. I would therefore allow the appeal.” 614-615.

<sup>61</sup> 618; see also *R v Higgins* [1996] 1 FLR 137.

<sup>62</sup> [1974] AC 405; [1973] 2 All ER 1169.

privilege, but it may be a very material consideration to bear in mind when privilege is claimed on account of Public Interest”.<sup>63</sup> The House therefore confirmed that when considering claims based on PII, confidentiality remained only one factor that must be balanced against any public policy justifying disclosure.

#### 4.2.3.3 Significant Differences Between PII and Privilege

There are three differences between privilege and PII that warrant further mention. The first concerns waiver. With privilege, a litigant may choose to waive his or her privilege, whilst PII, once established, cannot be waived.<sup>64</sup> The reason for this difference is explained well in *Makanjuola v Commissioner of Police of the Metropolis*,<sup>65</sup> in which the court explained that protecting relationships or information when it is in the public interest to do so is not a right to be enforced by a litigant, but a duty protecting the broader public interest. Consequently, even if PII is detrimental to both parties involved, the overriding duty to protect the public interest will trump any desire to allow disclosure.<sup>66</sup> Therefore, if a PII claim is successful for psychotherapeutic communications, the client would not have any control over *any* communications with their psychotherapist. The court may even uphold PII without mention of the immunity from either party.<sup>67</sup>

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<sup>63</sup> 433. Lord Cross then explains that the court should weigh (a) the public interest in not disclosing against (b) the public interest in ordering disclosure. See Lord Simon of Glaisdale 612 and Lord Hailsham of St Marylebone 605.

<sup>64</sup> Hollander *Phipson* 621; Pattenden *Professional Confidentiality* 540.

<sup>65</sup> [1992] 3 All ER 617.

<sup>66</sup> “Where a litigant asserts that documents as immune from production or disclosure on public interest grounds he is not (if the claim is well-founded) claiming a right but observing a duty. Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties...even where it is to their disadvantage in litigation...public interest immunity cannot in any ordinary sense be waived since, although one can waive rights, one cannot waive duties.” 623

<sup>67</sup> *Duncan v Cammel Laird* 641. It is unlikely that this would occur in reality, however. Hollander, for example, states that should the prosecution or state refuse to claim immunity, the courts are not likely to enforce it. Hollander *Phipson* 614. See *Ex Parte Wiley* [1995] AC 274 at 296 where Lord Woolf MR doubted that immunity should be enforced if the Minister did not claim it. In *Savage v Chief Constable of Hants* [1997] 1 All ER 631, the Court of Appeal held that should the party choose to waive immunity, there is no public interest in enforcing it. Hollander *Phipson* 625 ft 7.

The second difference is that privilege, once established, does not have to be balanced against any competing interests at a later date.<sup>68</sup> Claims for PII on the other hand, are considered on a case-by-case basis. The court is required to balance public interest immunity against the competing interests in granting disclosure for each claim. Therefore, if a claim is successful for one professional, it may not be for another.

The third difference is that the procedure for PII claims differs significantly depending on the nature of the proceedings. This causes some confusion and further complicates the problem of protecting both public interest and professional confidentiality. To explain further, PII was claimed originally during civil matters. This diminished the opportunity for establishing procedural guidelines for criminal matters.<sup>69</sup> However, it was unacceptable to follow the same procedural guidelines developed for civil PII claims for criminal matters – the interests at stake are significantly different between the two.<sup>70</sup> To simplify the process, the courts began to divide PII claims into civil and criminal matters.

#### *(a) PII Claims during Criminal Matters*

One of the first leading cases providing procedural guidance was *R v Ward*,<sup>71</sup> where the court required that if the prosecution wished to claim PII, notice of the claim would have to be given to the defence. Only once both parties were made aware of the claim could the court decide whether the public interest favoured non-disclosure.<sup>72</sup> Following *Ward*, the Court of Appeal a few months later in *R v Davis*<sup>73</sup> further divided PII claims into three different classes.<sup>74</sup> The procedure to be followed differed with the class of PII claim. The first class required the prosecution to give notice to the defence of the intention

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<sup>68</sup> Hollander explains that “[t]here is no balancing act to be performed by the court; the rules which constitute the law of privilege themselves constitute the balancing act between public policy in favour of protecting the professional confidences and the public policy in favour of ensuring that materials relevant to the conduct of litigation are disclosed.” Hollander *Phipson* 503.

<sup>69</sup> *R v H* [2004] UKHL 3 para’s 18 -33.

<sup>70</sup> The impact of non-disclosure of possibly relevant evidence may result in the imprisonment of an innocent individual.

<sup>71</sup> [1993] 1 WLR 619.

<sup>72</sup> *Ibid.*

<sup>73</sup> [1993] 1 WLR 613.

<sup>74</sup> 617.

to claim PII and of what material would be subject to the claim. The defence were allowed to view the information and should thereafter make representations to the court arguing why the claim could be rejected.<sup>75</sup> Only then could the court decide whether the claim was valid or not. If the claim fell under the second class, the prosecution still had to give notice to the defence of the pending PII claim, but no longer had to disclose to the defence what material was intended to be kept secret. Thus, both the defendant and his or her legal counsel were denied access to the material that the prosecution wished to claim PII for. The defence therefore had to make representations to the court that the claim did not warrant such protection, but *ex parte*. The third and final form of class was when even *ex parte* applications could be a danger to the public interest. In these exceptional cases, claims for PII were made without notice to the defence. Should the court find that the claim was not a third class claim, the court could order notice to be given to the defence.<sup>76</sup>

In 2004 the House of Lords in *R v H*<sup>77</sup> held that procedures developed in *Ward* and *Davis* placed undue responsibility on the courts to determine when PII claims were justifiably in the public interest. Their Lordships explained that the procedure unfairly forced courts to decide on too many issues: (1) whether the defence should be allowed to make *ex parte* representations, (2) if non-disclosure would be in the public interest and (3) whether it outweighed full disclosure to the defence. To simplify this burden, the House of Lords unanimously established clear guidelines that courts should follow for PII claims during criminal proceedings.<sup>78</sup>

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<sup>75</sup> *Ibid.*

<sup>76</sup> In 1996, the procedure developed in *Davis* was enacted in the Criminal Procedure and Investigations Act. See s3(6),7(5), 14(2), 15(2), 21(2). See also the Magistrates' Courts (Criminal Procedure and Investigations Act 1996 – disclosure Rules.

<sup>77</sup> [2004] UKHL 3.

<sup>78</sup> Para 36 summarised the guidelines as follows: “When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions :(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail. (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered. (3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered. (4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence? (5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure. (6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make

In terms of these guidelines, the court should grant immunity only if an important public interest is jeopardised – the “golden rule of full disclosure” should be preserved as much as possible.<sup>79</sup> This meant that should the court agree that disclosure would result in a serious threat to the public interest, only the most threatening materials or information could be protected against disclosure. Immunity could not be claimed to the extent that trial fairness is jeopardised.<sup>80</sup> Furthermore, the court established that where necessary, special counsel could be appointed to find a balance between the interests of the accused and the prosecution. Such counsel must be objective, and cannot favour either “side”, but rather ensure that the interests of the accused are met whilst not taking instruction from them.<sup>81</sup> It is interesting to note that the *dictum* does not consider situations where the defence refuses to disclose any information and the interests of the defence are jeopardised.

#### *(b) PII Claims during Civil Matters*

The main consideration during civil matters is whether the information is relevant to the proceedings or not.<sup>82</sup> If the information is found to be irrelevant, a claim of PII becomes redundant.<sup>83</sup> If relevance is established, the court must consider whether the public interest in upholding immunity outweighs the public interest in allowing full disclosure. Pattenden notes that this can include considering whether the information has already been made public, whether the information can be found through another source, whether the information is to be used only for cross-examination and finally, whether the client consents to the disclosure.<sup>84</sup>

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disclosure.(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced? It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review”.<sup>3</sup>

<sup>80</sup> Para 18. Partial non-disclosure is likely to be the most favourable solution.

<sup>81</sup> Para 22; 37. The appointment of special counsel, usually an advocate, should be considered only as a last resort.

<sup>82</sup> Pattenden *Professional Confidentiality* 573.

<sup>83</sup> Pattenden *Professional Confidentiality* 574; *Ex Parte Wiley* [1994] 3 All ER 420 at 423-424. *Air Canada v Secretary of State* 917. It is even recommended that the judge should even inspect the documents if the party successfully establishes that the information is irrelevant to the proceedings. Taken from Pattenden *Professional Confidentiality* 574.

<sup>84</sup> Pattenden *Professional Confidentiality* 574.

#### 4.2.3.4 Public Interest Immunity for Psychotherapists?

Psychotherapists claiming public interest immunity would have to convince the court that protecting their clients' information is in the overall public interest. This may prove difficult as the professional must establish that the public interest in protecting against disclosure is more than simply preserving professional confidentiality.<sup>85</sup> For example, in the case of *R v Morrow*,<sup>86</sup> the court recognised public interest immunity for abortion clinics because women might resort to illegal abortions if not guaranteed a higher level of confidentiality surrounding the procedure.<sup>87</sup> The focus is therefore not on the professional relationship itself or the promise of confidentiality, but on whether services provided by the professional ensure society continues to function effectively. If a higher level of confidentiality ensures the success of that service, then PII may be successful. From this perspective, the main ground for PII for psychotherapists is that, without immunity, people would not seek psychotherapy to treat mental health concerns. This would affect that person's successful functioning and may have a knock-on effect on society as a whole. This argument is even more persuasive if it concerns victims of sexual violence or trauma.<sup>88</sup>

A possible concern with this argument is that issues concerning confidentiality remains dependent on the judge's discretion. Any assurance that information disclosed during psychotherapy will remain confidential during court proceedings thus remains uncertain. Should they be aware of this uncertainty, people might remain deterred from seeking psychotherapeutic treatment. Furthermore, PII, like privilege, does not consider the client's right to personal privacy.<sup>89</sup> The focus is on the purpose and function of on the profession itself and the administration of justice. The client forced to rely on the professional to protect his or her personal information.

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<sup>85</sup> Pattenden *Professional Confidentiality* 573.

<sup>86</sup> [1993] 14 BMLR 54.

<sup>87</sup> 54. See also Pattenden *Professional Confidentiality* 573.

<sup>88</sup> This is one of the main propositions accepted in the Canadian case of *(M)A v Ryan* 1997 (1) SCR 157— see section 4.3.3 of this Chapter.

<sup>89</sup> A Hall "Confidentiality: A Legal View" in C Cordess *Confidentiality and Mental Health* (2001) 147.

#### 4.2.4 Third Party Disclosure in Criminal Matters

Another possible solution for psychotherapists requested to disclose professional information during criminal proceedings is in terms of s2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965.<sup>90</sup> This provision only concerns information that is in the possession of the professional. A psychotherapist who refuses to disclose voluntarily their client's information during criminal proceedings may be forced to do so by the prosecution or defence in terms of s2(1) of the Criminal Procedure (Attendance of Witnesses) Act. The section provides that where a person is likely to be able to give material evidence, or produce any document or thing likely to be material, and will not voluntarily do so, the Crown Court may issue a summons requiring disclosure. Before the court issues a summons, though, the party seeking disclosure must make an application to the Court indicating why the evidence is likely to be material and why the third party (in this case, a psychotherapist) refuses to disclose the information. The third party must also be informed about the application and the date of the hearing, and that they have a right to make representations to the Court against the application. Should the third party wish to make representations, the Court must be informed of that intention within seven days of receiving notice.<sup>91</sup>

Tempkin has indicated that s2(1) has some weaknesses. First, seven days might not provide the professional enough time to give notice as they would have to contact a legal adviser. Second, only the professional, and not the client, is made aware of the application, even though the client does have the right to make any representations surrounding the disclosure. Third, the choice to defend the client's rights depends solely on the professional.<sup>92</sup> Pattenden notes further that the party seeking disclosure would not have had the opportunity to view the information or speak with the professional before making the application.<sup>93</sup> As a result, it is difficult to satisfy the Court that the evidence is material.<sup>94</sup>

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<sup>90</sup> From 1 April 1999 s2 was amended by s66 of the Criminal Procedure and Investigations Act 1996. The Criminal Procedure (Attendance of Witnesses) Act is abbreviated to CPWA.

<sup>91</sup> See also Hollander "Attendance of Witnesses" in *Phipson* 137; J Tempkin "Digging the Dirt: Disclosure of Records in Sexual Assault Trials" (2002) 61 (1) *Cambridge Law Journal* 126-127; Pattenden *Professional Confidentiality* 505.

<sup>92</sup> Tempkin 2002 *CLJ* 128; see also Pithey *Thesis* 39.

<sup>93</sup> Pattenden *Professional Confidentiality* 505.

Similarly, the prosecution or defence can apply to the Magistrates' Court for access to third party information. Section 97 of the Magistrates' Court Act 1980 provides that:

"Where a justice of the peace...is satisfied that any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence...and that person will not attend as a witness or will not produce the document or thing, the justice shall issue a summons ..."<sup>95</sup>

Both applications require that the party seeking disclosure satisfy the court that the evidence is "likely to be material" to the case. An explanation of what is meant by "material" was provided in *R v Derby Magistrate's Court, ex Parte B*.<sup>96</sup> Concerning s97 of MCA, the House of Lords distinguished between evidence in the possession of the Crown and evidence in the possession of third parties.<sup>97</sup> Lord Taylor of Gosforth CJ stated that even though there is a broad duty on the prosecution to disclose material in their possession, the same could not be said for material held by third parties.<sup>98</sup> When the material is held by third parties, the applicant must satisfy the Court that the material is both relevant and admissible as evidence.<sup>99</sup> As such, the court refused to issue a summons for material sought solely for purposes of cross-examination.<sup>100</sup> The same principle has been adopted for the purposes of interpreting s2 of CPWA. In *R v Azmy*,<sup>101</sup> Mitchell J, writing for the Manchester Crown Court, considered whether an application in terms of s2(1) could succeed. Azmy, a medical doctor, was

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<sup>94</sup> Applications in terms of s2 are consequently rare. A Mackie and J Brown "A Study of Requests for Disclosure of Evidence to Third Parties in Contested Trials" (2000) 2 *Home Office Research Findings* 134. Taken from Pattenden *Professional Confidentiality* 505 fn 564.

<sup>95</sup> Abbreviated to MCA.

<sup>96</sup> [1995] 4 All ER 526. The case dealt with the murder and rape of a 16-year-old girl. The applicant (*B*) had gone for a walk with the girl and had originally stated to the police that he was responsible for the murder. Before the trial however, the applicant retracted the statement alleging that although he had gone for the walk with the girl, his stepfather had committed the offence. The applicant was subsequently acquitted and his stepfather charged with the offence.

<sup>97</sup> 535.

<sup>98</sup> *Ibid.*

<sup>99</sup> His Lordships followed the reasoning of Simon Brown LJ in *R v Reading Justices, ex Parte Berkshire CC* (3 May 1995 unreported). Simon Brown LJ said: "The central principles to be derived from those authorities are as follows: (i) to be material evidence documents must be not only relevant to the issues arising in the criminal proceedings, but also documents admissible as such in evidence; (ii) documents which are desired merely for the purpose of possible cross-examination are not admissible in evidence and, thus, are not material for the purposes of s97...". 535.

<sup>100</sup> *Ibid.*

<sup>101</sup> [1996] 34 BMLR 45.

charged with indecent assault by the complainant, a former patient of his.<sup>102</sup> The complainant had sought counselling at a Sexual Assault Centre because of the assault. Dr Azmy thereupon sought access to the counselling records that were in the possession of the Centre.<sup>103</sup> The defence argued that the records were material for the purposes of cross-examination. Mitchell J however, referring to *Derby Magistrate's Court*, held that s2(1) should not be used to gain access to material solely for the purposes of cross-examination.<sup>104</sup> The court rejected the application, holding that:

"I have no doubt at all that Mr Fortune's [defence counsel] principal purpose in seeking the disclosure of the document is to equip himself with the material for cross-examination in the event of the complainant's account in the witness box differing from that contained in the document... Certainly, Mr Fortune cannot advance any reason of substance for supporting that such material is to be found in the document."<sup>105</sup>

This matter indicates that the courts are unlikely to find that information sought solely for the purposes of cross-examination as warranting forced disclosure of confidential communications. This provides some deterrent against utilising psychotherapists as third party witnesses for the purposes of either fishing for personal information or scaring complainants into silence. Materiality however does not consider what possible prejudicial impact forced disclosure may have on the profession or the client.

#### 4.2.5 Human Rights Act 1998

The HRA encourages all English law to be considered through the prism of human rights standards.<sup>106</sup> The HRA was enacted to give effect to a number of rights set out in the European Convention on Human Rights.<sup>107</sup> The HRA does not force Convention rights to become part of English law but rather

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<sup>102</sup> 47.

<sup>103</sup> *Ibid.*

<sup>104</sup> 49-50.

<sup>105</sup> 53.

<sup>106</sup> J Jowell and J Cooper "Introduction: Defining Human Rights Principles" in J Jowell and J Cooper (eds) *Understanding Human Rights Principles* (2001) 3 ; see also Pattenden *Professional Confidentiality* 568.

<sup>107</sup> Courts must try to achieve this irrespective of whether the litigants are private or public. *R v Lampert* [2001] 3 All ER 577 para 28. Application of the HRA is both horizontal and vertical. See s1-3 of the Act; Pattenden *Professional Confidentiality* 55.

encourages laws to be interpreted and applied in a manner that best supports the principles as described in the Convention.<sup>108</sup> For the purposes of this study, the most relevant are Articles 8 and 6 of the Convention, dealing with privacy and the right to a fair hearing respectively.

Article 8(1) states, “everyone has the right to respect for his private and family life, his home and correspondence”, with which public authority cannot interfere unless by law, or unless it is in the interests of society.<sup>109</sup> The right applies very broadly and includes professional confidentiality.<sup>110</sup> The right could potentially be used to emphasise the need for the courts to protect against forced disclosure.<sup>111</sup> However, there are three points that water down the usefulness of art 8(1) for the psychotherapeutic relationship. First, it only encourages the privacy of others to be *respected*. This means that even though the importance of privacy is highlighted, the right to privacy is not as influential as South Africa’s constitutional right to privacy. Second, the right can be interfered with if there are valid aims that justify its infringement. Shorts and de Than note that this list of possible interferences is long indeed.<sup>112</sup> Third, directly concerning the disclosure of personal information during proceedings, the court has to balance the right to privacy with the right to a fair hearing enforced in Article 6.

The scope of article 6 is broad – governing fairness in both civil and criminal proceedings. This is especially so for criminal proceedings.<sup>113</sup> Pattenden notes that the article could demolish professional confidentiality if applied directly,<sup>114</sup> as a professional who has knowledge of personal information relevant to litigation could be forced to disclose the information on grounds of the right to a fair trial.<sup>115</sup> Also, the article guarantees litigants the right to a public hearing.<sup>116</sup> As with the right to privacy, the right to a fair hearing is not absolute. The professional can argue that non-disclosure will not reduce

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<sup>108</sup> S Grosz, J Beatson, P Duffy *Human Rights: The 1998 Act and the European Convention* (2000) 10

<sup>109</sup> Art. 8(2).

<sup>110</sup> The right to respect privacy extends to legislation. (s3(1) of the HRA). Pattenden *Professional Confidentiality* 57.

<sup>111</sup> Section 6(1) states that any public authority, for example the courts, must avoid infringing convention rights.

<sup>112</sup> See further E Shorts and C de Than *Human Rights Law in the UK* (2001) 64.

<sup>113</sup> Section 6(3) enforces a number of minimum rights for those charged with a criminal charge. See Short and De Than 62 and chapter 3 for a thorough discussion.

<sup>114</sup> Pattenden 62.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

the effectiveness of the right. Furthermore, all convention rights are considered to be of equal value. Therefore, when there is a clash between two convention rights, the courts must seek to reach a balance between the two.<sup>117</sup> The Act highlights the significance of the right to privacy, but in view of the broad scope of the HRA, it provides little solace for those seeking to develop a new privilege or PII claim for psychotherapeutic communications.

#### 2.4.6 Conclusion

South African law of evidence can learn some important factors from the English law approach. First, any arguments for privilege or similar should not attempt to follow an “all or nothing” tactic. The English courts have rejected any claims for privilege akin to that of the legal professional, but have nonetheless considered preserving the secrecy of certain specific confidential relations by means of arguing PII or resorting to a number of fragmented legislative “loopholes”. The English position, as a consequence, remains unclear. Second, it is unlikely that if a psychotherapist is ordered to disclose confidential communications by the court, he or she will be able to avoid all disclosure. Rather, a request for partial disclosure under certain agreed conditions could be an acceptable resolution between full evidential disclosure and mental health confidentiality. This is similar to the Canadian position.<sup>118</sup> Third, South African law should avoid the piecemeal approach to professional confidentiality in mental health law. There remains a large amount of uncertainty regarding the position of psychotherapeutic communications in English law. Jamieson and Bond, for example, feel that “the coexistence of different approaches to confidentiality makes for a complicated and fragmented legal approach to confidentiality in which it is sometimes difficult to be certain about how the law would be applied in a case involving a counsellor”.<sup>119</sup>

The lack of a coherent approach is not unique to psychotherapists. In general, both medical and mental health professionals are uncertain of the boundaries of confidentiality.<sup>120</sup> Privilege and public interest

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<sup>117</sup> See *Douglas v Hello! Ltd* [2001] 2 All ER 289 para 136. Pattenden *Professional Confidentiality* 72-73.

<sup>118</sup> See previous section on Canadian position discussed below.

<sup>119</sup> A Jamieson and T Bond “Confidentiality, Counselling and the Law” (2003) August *British Association for Counselling and Psychotherapy* 1 at 2.

<sup>120</sup> Hall *Confidentiality* 147.

immunity claims remain largely unsuccessful or fragmented. This indicates that perhaps the most solid argument for protecting psychotherapeutic information is that any evidence gathered would not be relevant to the proceedings. This responsibility would belong to the psychotherapist.

## 4.3 Canada

### 4.3.1 Introduction

Canadian law traditionally recognised a limited number of communications as deserving privilege.<sup>121</sup> The privilege could only attach to communications made in confidence and within the context of a special class of relationship that the legal community found to have earned additional protection.<sup>122</sup> Commonly termed as “class privilege”, the party claiming this form of privilege had to prove that the communications were under a protected class of relationship. More recently, however, a second category of privilege has been established under the common law, namely case-by-case privilege. This privilege is applied on a case basis rather than under the umbrella of a particular class or relationship.

Section 4.3.2 will discuss what is meant by class privilege and whether an argument for psychotherapeutic class privilege would be successful in Canada. This provides a useful comparative framework for South African jurisprudence, as the law of private privilege in South Africa appears to be analogous to the Canadian class privilege. Following from this, the development of case-by-case privilege will be examined in section 4.3.3.

Parliament has also enacted provisions in the Canadian Criminal Code that provide additional protection of personal records during sexual assault trials.<sup>123</sup> Because psychotherapy records are categorised as personal records, section 4.3.4 will discuss these provisions in more detail.

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<sup>121</sup> Privileges were established by either common law or statute. *A (L.L.) v B(A)* 1995 (4) SCR 536 para 37.

<sup>122</sup> B McLachlin “Confidential Communications and the Law of Privilege” (1977) 11 *U Brit Colum L Rev* 266 at 266.

<sup>123</sup> Bill C – 46 (1996-1997) as amended into the Canadian Criminal Code, sections 278.1 to 278.91.

### 4.3.2 Class Privilege

Class privilege adopts what McLachlin J (as she then was) refers to as an “all or nothing” approach.<sup>124</sup> Once class privilege is established, all communications and records connected to the relationship are considered as *prima facie* inadmissible.<sup>125</sup> Even class privileges are not absolute, though. In *R v Seaboyer*,<sup>126</sup> for example, it was held that informer and solicitor client privilege could be limited in circumstances where the accused’s innocence is jeopardised by non-disclosure.<sup>127</sup>

In order for class privilege to exist, public policy interests must outweigh the public’s interest in the truth-seeking function of the courts.<sup>128</sup> Class privileges established under the common-law include: solicitor-client privilege,<sup>129</sup> the privileges against self-incrimination, public interest immunity, informer privilege and statements made “without prejudice” during negotiations.<sup>130</sup> The only privilege created under statute is marital privilege.<sup>131</sup> As class privileges are developed primarily by the common law, the courts have considered arguments for establishing new class privileges. For the purposes of explanation, two significant judgments of the Supreme Court of Canada will be examined further: *R v Gruenke*,<sup>132</sup> decided in 1991, and *A(L.L) v B(A)*,<sup>133</sup> decided in 1995.

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<sup>124</sup> *M(A) v Ryan* 1997 (1) SCR 157 para 18.

<sup>125</sup> C Boyle *et al The Law of Evidence: Fact Finding, Fairness, and Advocacy* (1999) 698. It is important to note that these privileges are not absolute and can yield to the accused’s right to make full answer and defence, see *M(A) v Ryan* 1997 (1) SCR 157 at 607; *A(L.L) v B. (A.)* para 37.

<sup>126</sup> 1991 (2) SCR 577.

<sup>127</sup> 607. Pattenden explains that this exception is narrowly defined. The accused must prove that there is a “genuine risk of wrongful conviction if the privileged evidence is withheld.” Pattenden *Professional Confidentiality* 552.

<sup>128</sup> Even the Law Reform Commission of Canada recommended that new privileges be subject to limitation. Section 41 states: “A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or who has been rendered such services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship, if in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice.” Section 41 of the *Report on Evidence* (1975). Taken from *A(L.L) v B.(A.)* para 43.

<sup>129</sup> Solicitor-client privilege (as it is known in Canada) is based on the policy that it is necessary for the functioning of the legal system. *Geffen v Goodman Estate* 1991 (2) SCR 353; *Solosky v The Queen* 1980 (1) SCR 821; Boyle *Evidence* (1999) 700.

<sup>130</sup> McLachlin 1977 *U Brit Colum L Rev* 266-267.

<sup>131</sup> Section 4(3) of the *Canada Evidence Act* RSC 1985, c C-5; *A(L.L) v B(A.)* para 38.

<sup>132</sup> 1991 (3) SCR 263.

<sup>133</sup> 1995 (4) SCR 536.

In *R v Gruenke*, the Supreme Court considered whether priest-penitent communications could be protected by class privilege.<sup>134</sup> Lamer CJ held that in order to justify such a class privilege, policy reasons supporting religious communications must be as compelling as the policy reasons behind solicitor-client communications.<sup>135</sup> Referring to the policy justification for solicitor-client privilege, the Court found that such communications were essential to the efficient functioning of the legal system.<sup>136</sup> It was accepted that solicitor-client communications were “inextricably linked with the very system which desires the disclosure of the communication.”<sup>137</sup> This placed solicitor-client communications in a unique position that religious communications could not be equated with.<sup>138</sup> As a result, although the court recognised the value of religious freedom, the court rejected the argument for class privilege.<sup>139</sup>

*A(L.L) v B(A)* specifically dealt with counselling records and is therefore central to this enquiry. The facts are as follows: when the appellant was six years old, the respondent allegedly sexually assaulted her. Ten years later, the appellant went for counselling for the assault at two institutions (the second and third appellants). Following charges of sexual abuse, the respondent issued a subpoena *duces tecum* requesting access to all the counselling records from both institutions. Both institutions refused on two grounds: that respondent must prove that the records would be relevant to the proceedings, and that even if relevant, the records were nonetheless privileged.<sup>140</sup> The court of first instance<sup>141</sup> held that there was no statutory basis for classifying such records as privileged and that traditional classes of privilege created by the common law were not applicable.<sup>142</sup> The court also rejected the argument of relevance, stating, somewhat vaguely, that “there may be information at hand that is relevant to the issue.”<sup>143</sup> The appeal to the Ontario Supreme Court also proved unsuccessful.<sup>144</sup> The matter ultimately reached the Supreme Court of Canada.

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<sup>134</sup> Para 14. The Court also refers to class privilege as *prima facie* privilege.

<sup>135</sup> Para 32. Similarly, L’Heureux-Dubé J, writing for the majority in *A(L.L) v B(A)*, confirms that the common-law approach for establishing class privilege is based on compelling policy reasons. Again, she writes that any policy reason supporting a new class privilege must be equitable with the policy reasons for solicitor-client communications. Para 39.

<sup>136</sup> This is also one of the founding principles of legal professional privilege in South Africa. See Chapter 2, s2.4.1 above.

<sup>137</sup> Para 32.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> Para 10.

<sup>141</sup> The Ontario Court of Justice, General Division.

<sup>142</sup> Para 10.

<sup>143</sup> *Ibid.*

<sup>144</sup> The decision was based on jurisdictional grounds that are irrelevant for the purposes of this study. For further information see *A(L.L) v B(A.)* 1995 37 CR (4<sup>th</sup>) 170.

The Supreme Court held that the justification for class privilege was conventionally founded on utilitarian principles, but new privileges based on individual *Charter* values, such as privacy, should be considered.<sup>145</sup> However, any class privilege must remain grounded on public policy because it remains an evidential rule that impedes the search for truth – a fundamental component of the Canadian adversarial legal system.<sup>146</sup> In conclusion, although the Court recognised that there are strong arguments for protecting the confidentiality of counsellor-sexual assault communications,<sup>147</sup> these did not justify a class privilege. First, because the information could be relevant, complete inadmissibility of such information could prevent an accused from providing a full answer and defence.<sup>148</sup> Second, there were significant problems in composing the boundaries for such a class of relationship. Unlike the legal profession, counsellors dealing with clients who have suffered sexual trauma may be psychologists, psychiatrists, medical doctors, school counsellors and those working in counselling centres.<sup>149</sup>

Consequently, L'Heureux-Dubé J writing for the majority was of the view:

“that recognizing a class privilege in criminal trials for private records relating to sexual assault complainants is not the best way to serve the interests of justice. As argued by the appellants...there are strong public policy considerations which may favour non-production of private records relating to sexual assault complainants in criminal trials, but on balance, I conclude that class privilege is not the avenue which should govern the extent of production of private records held by third parties in criminal trials.”<sup>150</sup>

Both cases suggest that it is difficult to establish a new class privilege. Considering that the argument for class privilege was not successful for sexual trauma or violence counselling, it is probable that any wider claim for class privilege concerning all psychotherapeutic communications is unlikely to be

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<sup>145</sup> Para 34-35.

<sup>146</sup> Para 66.

<sup>147</sup> The arguments raised were: “(1) Sexual assault counselling relationships are based upon and depend on confidentiality; (2) without confidentiality, sexual assault victims will be deterred from seeking counselling; (3) the deterrent effect of disclosure which leads to under-reporting of sexual assault cases undermines the effectiveness of the criminal justice system; (4) records of statements made in the course of sexual assault counselling are both hearsay and inherently unreliable and, (5) the common law principles governing privilege need to be in step with *Charter* values”. Para 54.

<sup>148</sup> Para 66.

<sup>149</sup> Para 70-72.

<sup>150</sup> Para 74.

successful. Should South African courts adopt a similar approach, any confidential relationships apart from those related to the legal profession, would not receive protection against disclosure. Canada, unlike South Africa however, has developed two significant alternatives to class privilege: first, case-by-case privilege and second, the statutory protection of personal records during sexual assault trials. Notably, both the *Gruenke* and *A(L.L) v B(A)* judgments considered whether case-by-case privilege would be better suited for confidential communications. When considering case-by-case privilege, the courts will take into consideration the circumstances of each case to determine whether a claim for privilege should succeed. For example, in *Gruenke*, the argument for case-by-case privilege was unsuccessful because the communications made to the pastor had not been made in confidence.<sup>151</sup> As confidentiality is the *raison d'être* of any privilege, any claim for privilege would not succeed.<sup>152</sup> In reaching their conclusion however the Court emphasised that should circumstances dictate otherwise, a different conclusion could be reached in future matters.<sup>153</sup> In *A(L.L) v B(A)*, L'Heureux-Dubé J discussed whether case-by-case privilege was the appropriate approach for protecting sexual trauma or violence counselling communications. She concluded that, as case-by-case privilege is *ad hoc* in nature, the main policy reason arguing case privilege would not be met. To explain, complainants would remain unsure whether their communications would continue to be confidential even if the matter becomes litigious. Victims/survivors of sexual violence could therefore still be deterred from seeking counselling. Consequently, even case-by-case privilege was rejected.<sup>154</sup> L'Heureux-Dubé J thus favoured the two-stage approach developed in *R v O'Connor*<sup>155</sup> as the best approach to effectively balance the different interests involved.<sup>156</sup>

### 4.3.3 Case-by-Case Privilege

It is evident that the courts routinely rejected all non-lawyer claims of class privilege, including those argued on grounds of professional confidentiality.<sup>157</sup> This resulted in little or no protection for

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<sup>151</sup> Para 33-35.

<sup>152</sup> Para 35. See Chapter 2 of this thesis for a fuller description of the essential elements of private privilege.

<sup>153</sup> See for example *Re Church of Scientology and The Queen (No 6)* 1987 31 CCC (3d) 449 where the Ontario Court of Appeal recognised case-by-case privilege for communications between priests and penitents. Para 33.

<sup>154</sup> Para 76.

<sup>155</sup> 1995 (4) SCR 411.

<sup>156</sup> Para's 75-78. Both *O'Connor* and *A(L.L) v B(A)* were heard concurrently though each decision did not affect the outcome of the other. Para 3.

<sup>157</sup> See also *R v Wray* 1971 SCR 272; *McLachlin* 1977 *U Brit Colum L Rev* 268.

confidential communications outside the solicitor-client relationship. On account of this, concern over the lack of protection for confidential communications between physicians, psychiatrists and psychotherapists and their patients/clients grew. Stewart J in 1976, for example, stated in *Dembie v Dembie*<sup>158</sup> that he found it “shocking that a psychiatrist who sees both spouses for marital counseling could subsequently be called to testify to what was previously though confined to the psychiatrist’s office.”<sup>159</sup> He held that he did not intend to compel the testimony irrespective of any absence of privilege.<sup>160</sup>

During the same year as *Dembie*, the Supreme Court in *Slavutych v Baker*<sup>161</sup> introduced the possibility of a case-by-case privilege. Slavutych, a professor at the University of Alberta, had been dismissed by the University’s arbitration board because of some derogatory comments made by him on a “tenure form sheet” regarding a colleague who was applying for tenure.<sup>162</sup> The issue was that Slavutych had been led to believe that the form was confidential: it was clearly marked as confidential and Slavutych had been assured that the forms, and his opinion, were going to be kept in the strictest confidence until the tenure committee met. After the meeting, the form was meant to be destroyed.<sup>163</sup> Instead, the form was used as evidence by the Board to dismiss Slavutych on grounds of general misconduct. Slavutych appealed the decision to the Supreme Court of Alberta<sup>164</sup> where Sinclair JA held that the question of privilege had not been settled. Accordingly, Sinclair JA accepted an argument for case-by-case privilege for confidential communications.<sup>165</sup> Wigmore’s four criteria were used to determine whether privilege in that particular case had been established.<sup>166</sup>

To recapitulate, these criteria are:

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

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<sup>158</sup> 1976 (21) RFL 46. Unreported decision of the Ontario Supreme Court. Discussed in D Shuman, M Weiner and G Pinard “The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada” (1986) 9 *International Journal of Law and Psychiatry* 393 at 396 and McLachlin 1977 *U Brit Colum L Rev* 270.

<sup>159</sup> Para 49-50.

<sup>160</sup> *Ibid.*

<sup>161</sup> 1976 (1) SCR 254.

<sup>162</sup> 256.

<sup>163</sup> 257.

<sup>164</sup> *Slavutych v Baker* 1973 (5) WWR 723.

<sup>165</sup> 730.

<sup>166</sup> *Ibid.*

- 2) This element of confidentiality *must be essential* to the full and satisfactory maintenance of the relation between the parties.
- 3) The relation must be one that in the *opinion of the community* ought to be sedulously fostered.
- 4) The injury that would inure to the relation by the disclosure of the communications *must be greater than the benefit* thereby gained for the correct disposal of litigation.<sup>167</sup>

Nonetheless, Slavutych lost the appeal, as the comments on the form were made in bad faith.<sup>168</sup> Slavutych appealed to the Supreme Court of Canada. Spencer J, writing for the majority, agreed with the court *a quo* that privilege law was in need of development and consequently accepted that case-by-case privilege, utilising Wigmore's four criteria, was possible.<sup>169</sup> Unfortunately, however, the court did not establish the presence of this new form of privilege, but rather based its decision on breach of confidentiality.<sup>170</sup> Nonetheless, since *Slavutych*, case-by-case privilege has been applied in a number of matters dealing with confidential communications between professionals and their clients.<sup>171</sup>

In 1997 in the civil case of *M(A) v Ryan*<sup>172</sup> for example, the Supreme Court of Canada held that confidential records related to communications between a psychiatrist and client were privileged if the communications were connected to sexual assault counselling. In this matter, the appellant (a 17 year old girl) had received psychiatric treatment from the respondent. The parties then had sexual relations with one another. The appellant alleged that the sexual relations had not been consensual and she was forced to seek psychiatric help from another psychiatrist. The appellant then sought civil damages for the psychological harm caused by the sexual relationship.<sup>173</sup> The matter dealt with the question whether the respondent was entitled to all the communications and records between the appellant and

<sup>167</sup> J H Wigmore *Evidence in Trials at Common Law* Vol 8 (1961) 527 para 2285. These four criteria are often referred to as the "Wigmore test" when used to determine case-by-case privilege.

<sup>168</sup> As a result, the third and fourth criteria were not met.

<sup>169</sup> 1976 (1) SCR 254 at 261.

<sup>170</sup> 262. Thus, case-by-case privilege remained mere *obiter*. McLachlin 1977 *U Brit Colum L Rev* 273; Shuman 1986 *International Journal of Law and Psychiatry* 399. Pattenden erroneously cites *Slavutych* as establishing partial case-by-case privilege. Rather, *Slavutych* opened up the opportunity for case-by-case privilege to be considered in later judgments. Pattenden *Professional Confidentiality* 567.

<sup>171</sup> See *Clements and Wawanese Mutual Insurance Company v Fougère and Marin* 2007 (275) DLR 676; *R v TJ* 2005 CanLII 51120 (on SC); *M(A) v Ryan* 1997 (1) SCR 157; *R v Fehr* 1983 (6) DLR 281.

<sup>172</sup> 1997 (1) SCR 157.

<sup>173</sup> The appellant alleged that the sexual assault and the acts of gross indecency "caused her mental distress and anguish, loss of dignity and self-esteem, humiliation and embarrassment, difficulty in forming and maintaining relationships with other persons, lasting psychological and emotional trauma, continuing fear and anxiety, foregone career and educational opportunities, inability to verbalize emotions and recollections of the events, repeated suicide attempts, severe depression and post-traumatic stress disorder." Para 3.

her second psychiatrist. The psychiatrist agreed to disclose her reports but claimed that her notes taken during the sessions themselves were privileged. The majority, *per* McLachlin J (as she then was), confirmed that the common law now clearly recognised privileges in “new situations where reason, experience and application of the principles that underlie traditional privilege so dictate”.<sup>174</sup> The law of privilege could, as a result of this, be used to protect communications between psychiatrists and their clients.<sup>175</sup>

Applying Wigmore’s four criteria, the court considered whether the psychiatrist’s claim for case-by-case privilege could succeed. The first criterion was met because the communications were made in confidence.<sup>176</sup> Confidentiality was also considered as essential to the relationship – thus meeting the second criterion – because any breach of confidentiality results in a disruption of the therapeutic process.<sup>177</sup> The maintenance of confidentiality was therefore considered as essential to the relationship. The third criterion was satisfied as “the mental health of the citizenry, no less than its physical health, is a public good of great importance”.<sup>178</sup> This was held to be especially true in the context of those suffering from sexual abuse.<sup>179</sup>

The final criterion required further analysis, as the interests for establishing privilege must outweigh the interests involved in ensuring the proper administration of justice. On the one hand, the court had to determine what effect no privilege would have on similar matters relating to sexual trauma. This was considered from two perspectives: the effect on the individual complainant and the effect on society. Concerning the effect on society, the court held that if people, suffering from similar trauma, are deterred from seeking treatment they could fail to become functioning individuals of society. This would have a negative impact on society as a whole.<sup>180</sup> The effect on the individual complainant concerned whether any values enshrined in the *Canadian Charter of Rights and Freedoms*<sup>181</sup> would be

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<sup>174</sup> Para 20.

<sup>175</sup> Para 21.

<sup>176</sup> Para 24.

<sup>177</sup> Para 25.

<sup>178</sup> Para 27.

<sup>179</sup> *Ibid.*

<sup>180</sup> Para 29.

<sup>181</sup> Take note that the application of the *Charter* differs when used in state action or private action. *Charter rights* are applied when any form of government action is challenged. *Charter values* on the other hand, are applied in private

affected by the disclosure. The values considered were the complainant's right to privacy and her entitlement to the equal benefit of the law.<sup>182</sup> The court paid significant attention to equality as it related to privacy because the matter dealt with sexual violence. The court stated that:

"A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong...The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s. 15 of the Charter entitles her."<sup>183</sup>

A victim of sexual assault could therefore be placed at a greater disadvantage than any other litigants.<sup>184</sup>

On the other hand, these factors must outweigh the interests involved in ensuring the proper administration of justice. The court, whilst acknowledging that the appellant's interests warranted protection against arbitrary disclosure, rejected the argument for full case-by-case privilege. Rather, in order to ensure that a balance between the two opposing interests is met, the court introduced "partial" case-by-case privilege. This approach allowed the court to secure some discretion over what communications and information could be protected under Wigmore's case-by-case privilege. Using this approach, the courts would first determine whether Wigmore's case-by-case privilege was successful and then, in order to balance the competing interests, they would determine what communications and records were protected by the privilege in that specific matter.<sup>185</sup> Using this approach, the majority found that the notes were to some extent privileged, but disclosure of the notes would nonetheless be granted on four conditions:

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litigation. As this case is a civil matter, the court must ensure that the common law relating to privilege develops in a manner that is in accordance with *Charter values*. Para 22.

<sup>182</sup> Sections 8 and 15 respectively. Para 30.

<sup>183</sup> Para 30.

<sup>184</sup> Para 31.

<sup>185</sup> The judge must consider "1) The circumstances of the privilege alleged; 2) the documents and; 3) the case." Para 39

- 1) Inspection of the notes would be confined to the respondent's solicitors and expert witnesses;
- 2) The respondent could not view the notes himself;
- 3) Anyone who saw the documents could not disclose the contents to anyone not entitled to inspect them; and
- 4) The documents could only be used for the purposes of litigation.<sup>186</sup>

*Ryan's* case significantly alters the law of privilege to coincide with *Charter* values,<sup>187</sup> and provides more guidance for future matters that do not require class privilege.<sup>188</sup> However, the dissenting opinion of L'Heureux-Dubé J warrants deliberation.

First, L'Heureux-Dubé J contends that the doctrine of case-by-case privilege is distinctly *ad hoc* in nature. The client has no guarantee that their confidential communications will remain secret during litigation. Case-by-case privilege does not therefore induce people to enter into a confidential relationship with psychotherapists. Rather, the privilege grants the courts the discretion to implement conditions surrounding disclosure. L'Heureux-Dubé J writes that "if the result is that all records, and thus all the information they contain, are released to the defence, albeit subject to restrictions, many plaintiffs will be deterred from undertaking civil suits and/or therapy to address the assault's effects on them."<sup>189</sup>

Second, Wigmore's criteria were not designed to be applied on a case-by-case basis.<sup>190</sup> The criteria were developed to determine whether privilege should apply to specific confidential relationships. Privilege, according to Wigmore, were meant to protect a class of individuals. Furthermore, L'Heureux-Dubé J correctly points out that the test is utilitarian and its aim is to "balance the public's interest in fostering particular relationships with its interest in correctly disposing of legal disputes."<sup>191</sup>

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<sup>186</sup> Para 41.

<sup>187</sup> Para 57.

<sup>188</sup> See for example *Clements and Wawanese Mutual Insurance Company v Fougère and Marin* paras 24.

<sup>189</sup> Para 57. This concern was also raised by L'Heureux-Dubé J in *R v Gruenke* para 57.

<sup>190</sup> *Pattenden Evidence* 567 fn 265.

<sup>191</sup> Para 58. Emphasis by L'Heureux-Dubé J.

Thus, the individual's privacy and equality interests are examined only to the extent that they influence the importance of the relationship seeking protection from disclosure.<sup>192</sup> The client's interests are therefore considered under the rubric of the final criterion and only to the degree that public policy dictates. As such, individual rights/values may not receive adequate protection.<sup>193</sup>

Third, following the above conclusion, L'Heureux-Dubé J firmly dissented from the majority view that if the party argues case-by-case privilege, no further arguments based on relevance could be considered.<sup>194</sup> She suggests that if a claim for case-by-case privilege fails, the court should still have the discretion to limit disclosure in order to protect the plaintiff's privacy interests. She explains that the Court should adopt a similar approach to *R v O'Connor*,<sup>195</sup> namely, that the court should adopt a two-stage approach to determine the disclosure of confidential information.<sup>196</sup> She suggests that: (1) the defence must establish the likely relevance of the documents and (2) the production of such documents should then be disclosed to the court to determine whether the record should be produced as evidence. In order to determine this, the court must weigh the effect of production on both the complainant and the accused.<sup>197</sup>

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<sup>192</sup> *Ibid.*

<sup>193</sup> Para 59. L'Heureux-Dubé J also notes that as partial privilege is dependent on the relationship, privacy interests over records that did not arise from the context of a confidential relationship are not protected.

<sup>194</sup> The majority held that as relevance is considered within Wigmore's four criteria, a separate argument solely on relevance would be unnecessary. Para 15-16.

<sup>195</sup> 1995 (4) SCR 411. The case dealt with charges of sexual assault against O'Connor, a school principal and priest. The charges were laid by four Aboriginal women, who alleged that they had been sexually assaulted by O'Connor whilst at his school. Busby shows that the power dynamics of relationship between the complainants and the accused was significantly disproportionate, but this was unfortunately missed by the Court. K Busby "Discriminatory Uses of Personal Records in Sexual Violence Records" (1997) 9 *CJWL* 148 at 152.

<sup>196</sup> Para 87. This two-stage approach had already been introduced by the same court in *R v O'Connor*, a criminal matter. See s4.3.4.1 below.

<sup>197</sup> *Ibid.*

#### 4.3.4 Third Party Production of Personal Records in Criminal Matters

##### 4.3.4.1 Case Law

The approach developed in *O'Connor*<sup>198</sup> had significant impact on the access of private records of third parties by the accused in sexual assault trials.<sup>199</sup> Some critics, most notably Busby, argued that the decision was “utterly disastrous” for women and children who had been sexually violated.<sup>200</sup> Busby complained that the case, whilst attempting to balance the rights of both the complainant and the accused, instead confirmed the myths surrounding sexual complaints. The primary criticism surrounded what the majority defined as “likely relevant” records. The Court in *O'Connor* had held that the defence may successfully argue relevance if: (1) the records may contain information concerning the events underlying the complaint; (2) they indicate that the complainant’s memory has been influenced by the therapy, or (3); records affect the “complainant’s credibility, including testimonial factors such as the quality of their perception of the events at the time of the offence, and their memory since”.<sup>201</sup> Busby claims that this reasoning reinforces myths surrounding both complainants and therapists. First, the majority dismissed the argument that therapy records are not factual in nature and are consequently of little assistance to the defence.<sup>202</sup> Busby explained that it is highly improbable that a complainant would give the same account of the event to their therapist as they would the police or the court.<sup>203</sup> The focus of therapy is the underlying concerns and trauma surrounding the event whereas the focus of the police or court is to gather a factual description of the offence itself. Therapeutic records would accordingly be inaccurate for the purposes of litigation.<sup>204</sup> Second, the court reinforced the “Bad Therapist” myth – that the therapist themselves impart memories

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<sup>198</sup> Note that this matter was heard at the same time as *A(L.L.) v B(A)*.

<sup>199</sup> *R v Mills* 1999 (3) SCR 668 para 17.

<sup>200</sup> K Busby “Responding to Demands for Records” in C Koggel *et al Confidential Relationships: Psychoanalytic, Ethical, and Legal Contexts* (2003) 209; K Busby “Third Party Cases Since *R v O'Connor*” (2000) 27 *Man.L.J* 355 at 356; Busby 1997 *CJWL* 148; B Pithey *Production of Personal Records in Sexual Assault Trials* (LLM Thesis, UCT, 2005) 18; M Denike “Sexual Inequality and the Crisis of Confidentiality: The Myth and the Law on Personal Records” in Koggel *et al Confidential Relationships* 134.

<sup>201</sup> Para 29.

<sup>202</sup> Busby 1997 *CJWL* 158; Pithey *Personal Records* 18.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

of sexual abuse.<sup>205</sup> This rationale presupposes that therapists “fill in the blanks” left out by the client.<sup>206</sup> Busby comments that this is further exacerbated by the notion that female counsellors are especially committed to persuading their clients to believe that they have been abused.<sup>207</sup> As indicated in the Chapter 3 of this thesis, the therapist’s role is multifaceted, utilising a number of therapeutic techniques for treatment. A thorough understanding of memory functioning, of the psychotherapeutic process and of the psychotherapist is needed before assertions of this kind are made. Furthermore, these assertions should be based on some factual indication of such “indoctrination” rather than blind assumption. It is therefore submitted that L’Heureux-Dubé J in *O’Connor* is correct in noting that “any suggestion that a particular treatment, therapy, illness or disability implies unreliability must be informed by cogent evidence, rather than stereotype, myth, or prejudice. For these reasons, it would be inappropriate for judicial notice to be taken of the fact that unreliability may be inferred from a particular course of treatment.”<sup>208</sup>

#### 4.3.4.2 Legislation

Following *O’Connor’s* judgment and the criticisms surrounding the decision in 1999, parliament established legislative principles regulating the disclosure of personal records during sexual assault matters.<sup>209</sup> Section 278 of the Criminal Code (often referred to as Bill C-46) introduced a codified, altered and improved form of *O’Connor’s* two-stage approach. The section provided a broader definition of what constituted protected records,<sup>210</sup> and established further guidance for the Courts than

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<sup>205</sup> Busby 1997 *CJWL* 164.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> Para 143.

<sup>209</sup> *R v Mills* para 17; Denike *Confidential Relationships* 141.

<sup>210</sup> Section 278.1 states that a “ ‘record’ means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, *psychiatric, therapeutic, counselling*, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by person responsible for the investigation or prosecution of the offence.” My emphasis.

*O'Connor* for determining the level of disclosure allowed in order to balance both parties' interests.<sup>211</sup>

The new approach is as follows:

*Stage 1:* The accused must establish that the record sought is both "likely relevant to an issue at trial or to the competence of a witness to testify" and "necessary for the interests of justice".<sup>212</sup> This vastly improves the procedure established in *O'Connor* as the accused has to prove that the production of the confidential records will affect his right to make full answer to the court *and* that the right overrides the complainant's or witness's right to privacy and equality.<sup>213</sup> Furthermore, s278.5 (2) provides a list of factors giving guidance for the judge in reaching a decision. These include considering the probative value of the records, the reasonable expectation of privacy, whether production is based on any discriminatory belief or bias, society's interest in encouraging the reporting of sexual offences and the integrity of the trial process. The inclusion of these guidelines assists in eliminating the myths or stereotypes that may be accorded to sexual offence matters discussed earlier.<sup>214</sup>

*Stage 2:* Should the accused be successful in stage 1, the court then has to consider the record without the presence of either party.<sup>215</sup> Again, the court is required to consider (1) whether the information is likely to be relevant to an issue at trial or to the competence of a witness to testify and (2) if disclosure is necessary in the interests of justice.<sup>216</sup> This ensures that the court considers both sides of the problem: the effect of non-disclosure on the accused's right to fair trial and the effect of disclosure on the complainant's rights to privacy and equality.

In *R v Mills*,<sup>217</sup> the Supreme Court of Canada considered the constitutionality of s278. The main basis of the challenge was that the two stages provided more stringent requirements over access to personal

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<sup>211</sup> Note that *O'Connor* established that any personal records in the possession of Crown prosecutors were not protected against disclosure. *R v O'Connor* para 9. Section 278.2 (2) on the other hand, states that the protection afforded by s278 applies to records in anyone's possession, including the Crown.

<sup>212</sup> Section 278.5(1); see also *R v Mills* para 53.

<sup>213</sup> *R v Mills* para 53.

<sup>214</sup> Koggel *Confidential Relationships* 141.

<sup>215</sup> The court also has the discretion to hold a separate *in camera* hearing: S278.6(2).

<sup>216</sup> Section 278.7.

<sup>217</sup> 1999 (3) SCR 668.

records than provided in *O'Connor*.<sup>218</sup> As a result, the accused's rights, namely s7 and s11 (d) of the *Canadian Charter of Rights and Freedoms*, were infringed.<sup>219</sup>

The Court established that Parliament may introduce legislation that differed from the common law even if *O'Connor* provided the catalyst for further development.<sup>220</sup> The only requirement is that any developments remain constitutional. Considering the constitutionality of the sections, the court confirmed the importance of the accused's right to make full answer and defence but stated that this right "must be defined in a context that includes other principles of fundamental justice...[that] does not include the right to evidence that would distort the search for truth inherent in the trial process."<sup>221</sup> In this case, this meant considering the complainant's competing rights to privacy and equality. Regarding privacy, McLachlin and Iacobucci JJ held that once a reasonable expectation of privacy has been established, s8 of the *Charter* protects individual's privacy by "fostering underlying values of dignity, integrity and autonomy."<sup>222</sup> As the therapeutic relationship is based on trust and confidentiality, s8 could protect both the therapeutic relationship and the complainant's records.<sup>223</sup> The court also stated that in circumstances where the therapeutic relationship is threatened, the complainant's right to security is also infringed as the right to security includes the right to have one's mental integrity protected from State interference.<sup>224</sup>

With regard to equality, the court considered the circumstances surrounding sexual offence matters. Referring to *Ryan's* case,<sup>225</sup> there were various dimensions to considering equality issues during sexual offence trials. These included: the effect of automatic disclosure on victims of sexual assault; that such

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<sup>218</sup> The other challenges included: (1) the definition of what constituted personal records was too broad and (2) records in the possession of the Crown should not be protected.

<sup>219</sup> Section 7 states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." S11(d) states that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

<sup>220</sup> Para 60.

<sup>221</sup> Para 76.

<sup>222</sup> Para 81 citing Sopinka J in *R v Plant* 1993 (9) SCR 281 at 293.

<sup>223</sup> Para 82.

<sup>224</sup> Para 84.

<sup>225</sup> *(M)A v Ryan* para 30.

assaults are usually perpetrated against women, and finally, that myths and stereotypes regarding the complainant's 'motive' can infiltrate proceedings.<sup>226</sup>

In conclusion, the majority held that s278 established a legislative framework that provides a balance between the competing interests involved. The section provided the court with wide discretion in deciding whether personal records should be disclosed and to what extent. Furthermore, the court is provided with a number of factors to guide it in preserving the complainant's privacy and equality rights to the maximum extent possible, while ensuring that the accused has access to records that are needed to make full answer and defence.<sup>227</sup>

#### 4.3.5 Conclusion

The Canadian human rights framework is similar to that of South Africa and provides useful insight into how our Legislature and our courts could approach the matter of protecting counselling or psychotherapeutic communications. In terms of their common law, case-by-case privilege is an alternative to class privilege that South African courts have not yet considered.<sup>228</sup> Case-by-case privilege eliminates any apprehension that psychotherapeutic privilege might cast the net too wide and hinder the administration of justice. Adopting a case-by-case approach would provide the courts with the discretion to decide when to grant privilege and if needed, limit the scope of the privilege accordingly.

Some concerns regarding the privilege deserve mention however. First, as case-by-case privilege is determined in an *ad hoc* manner, absolute certainty surrounding the extent of confidentiality during psychotherapy remains impossible. Second, L'Heureux-Dubé J criticism concerning the suitability of Wigmore's criteria is valid. As the criteria only consider the importance of confidentiality for the

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<sup>226</sup> Para 90-91.

<sup>227</sup> Para 144.

<sup>228</sup> The approach is akin to Zeffertt's recommended qualified privilege. Refer to Chapter 2, section 2.3.5.

relationship and not the individual interests of the parties involved, *Charter* values and/or rights are not given sufficient weight in the balancing process.

Furthermore, the introduction of “partial” case-by-case privilege is also potentially problematic. It is submitted that the protection provided by rules of privilege is significantly altered by the concept of ‘partial’ protection against disclosure. Privilege is defined as excluding possibly relevant information on the grounds of protecting some higher value than the truth-seeking function of the courts.<sup>229</sup> Once privilege is successful, all communications are considered, *whether relevant or not*, are protected against disclosure.<sup>230</sup> Partial privilege however provides the court the discretion to order information to be disclosed to the other party, based on relevancy.

With these concerns in mind, it is understandable why the courts (and later the legislature) formulated another method to protecting to personal information in criminal matters. As the majority of counselling records were sought in criminal sexual assault trials, it is unfortunate that the sections are only applicable in criminal trials and not civil matters as well. Thus psychotherapy involving mental health treatment in other contexts remains open to court inspection.

## 4.4 United States of America

### 4.4.1 Introduction

The United States legal system is divided into federal and state law. Rule 501, the federal rule of evidence governing privileges, is very broad. When enacting the rule, Congress found that rather than legislating specific privileges, all privileges should be reconsidered and reintroduced through the federal courts. As federal psychotherapeutic privilege provides South African courts with unique insight into the advantages and disadvantages of establishing psychotherapeutic privilege, the Rule, and the Supreme Court judgment of *Jaffee v Redmond* which established psychotherapeutic privilege,

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<sup>229</sup> See Chapter 2, section 2.3.2 for an explanation of privilege law, as well s4.3.3 of this Chapter.

<sup>230</sup> *Ibid.*

are discussed in detail in section 4.4.2. Section 4.4.3 then investigates the theoretical framework for introducing the privilege. As with most new legal rules, however, considerable uncertainty regarding the scope of the privilege emerged post-*Jaffee*. The main problems are discussed in section 4.4.4.

Because there is a large quantity of American case law surrounding federal psychotherapeutic privilege, the laws of each individual state governing psychotherapeutic privilege will not be discussed in any considerable depth. Instead, section 4.4.5 will highlight that all 50 states have established some form of legislative psychotherapeutic privilege. In addition, an example of an established legislated psychotherapeutic privilege will be discussed.

#### **4.4.2 Federal Psychotherapeutic Privilege: *Jaffee v Redmond***

The current Federal Rules of Evidence were adopted in 1975.<sup>231</sup> Rule 501 governs testimonial privileges. The Rule states in part:<sup>232</sup>

“Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of *reason and experience*.”

The Rule, rather than confirm or deny any of the testimonial privileges proposed by various advisory committees,<sup>233</sup> left establishing privileges to the Federal courts. This included both the traditional and

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<sup>231</sup> The Rules were designed in a manner that promoted fairness, trial efficacy and the development of the law of evidence in accordance with the ascertainment of truth. Rule 101 states: “These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges to the extent and with the exceptions stated in Rule 1101.” Rule 102 states: “These rules shall be construed to secure fairness in administration, elimination or unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” Taken from J Klein “‘I’m Your Therapist, You Can Tell Me Anything’: The Supreme Court Confirms Psychotherapist-Patient Privilege in *Jaffee v Redmond*” (1997) 47 *DePaul Law Review* 701 at 708 fn61.

<sup>232</sup> Fed R501. My emphasis. Take note that rule continues to state that: “However in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.”

<sup>233</sup> See Klein 1997 *DPLR* 708-712 who discusses the legislative history of Rule 501 in detail. See also R Slovenko “The Psychotherapist-patient Privilege” (1997) 57(1) *The American Journal of Psychoanalysis* 63 at 69.

the more controversial privileges.<sup>234</sup> As the deciding factor for privileges depended on the “reason and experience” of the courts, the so-called traditional privileges were quickly re-established. For example, the Supreme Court confirmed spousal privilege in 1980<sup>235</sup> and attorney-client privilege in 1981.<sup>236</sup> Controversial privileges were not as quickly accepted.<sup>237</sup> It was only in 1996, after a number of conflicting decisions by the Circuit courts, that the Supreme Court considered psychotherapeutic privilege.<sup>238</sup> The Supreme Court, with a 7-2 majority, in *Jaffee v Redmond*<sup>239</sup> held that psychotherapeutic privilege existed on a Federal level.

#### 4.4.2.1 Facts in *Jaffee*

*Jaffee* was a civil case that concerned the possible wrongful death of one Ricky Allen caused by Redmond, a police officer.<sup>240</sup> Redmond had been called to investigate a disturbance in a block of apartments.<sup>241</sup> There she saw the deceased, who was wielding a knife, chasing another man. She commanded him to drop the weapon a number of times, believing him to be a danger to the other man. When he failed to listen to her, she shot and killed the deceased.<sup>242</sup> The complainant, Jaffee, the administrator for Allen’s estate, claimed civil damages for the wrongful death of the deceased on the grounds that Redmond had used excessive force.<sup>243</sup> During pretrial discovery, the complainant learnt that Redmond had attended roughly 50 psychotherapeutic sessions with a licensed social worker since

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<sup>234</sup> There were criticisms surrounding the elimination of traditional privileges. See E Imwinkelreid “An Hegelian Approach to Privileges under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis” (1994) 73 *Nebraska Law Review* 511 at 518.

<sup>235</sup> *Trammel v United States* 445 US (1980) 40 at 51-53.

<sup>236</sup> *Upjohn v United States* 449 US (1981) 383 at 389. The Supreme Court stated that attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”

<sup>237</sup> See for example, *United States v Meager* 531 F.2d (1976) 752 (5<sup>th</sup> Circuit)

and *Patterson v Caterpillar, Inc* 70 F.3d (1995) 503 (7<sup>th</sup> Circuit) where the courts held that there was no physician-patient privilege based on the common-law.

<sup>238</sup> Because of the amount of conflicting decisions regarding the privilege, the Supreme Court granted *certiorari* in *Jaffee v Redmond* 518 US (1996)1 at 8.

<sup>239</sup> *Jaffee v Redmond* 518 US (1996) 1.

<sup>240</sup> 4.

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

<sup>243</sup> 5. The complainant sought damages under Rev. Stat 1979 42 USC 1983 and the Illinois wrongful death statute Ill. Comp. Stat ch 740 180/181 (1994).

the incident.<sup>244</sup> The complainant sought access to the social worker's notes for cross-examination purposes. At this stage, the district judge ordered the disclosure of the notes because there was no legal justification for refusal.<sup>245</sup> However, both Redmond and the social worker refused to hand over the notes.<sup>246</sup> The matter then went to the 7<sup>th</sup> Circuit Court of Appeal, which reversed the decision of the district judge.<sup>247</sup> The Court of Appeal noted that Rule 501 granted Federal courts the power to decide whether to establish privileges based on reason and experience. Using this as the guideline, the Court found that, first, reason "tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment"<sup>248</sup> and second, that experience tells us that all 50 states have adopted some form of psychotherapeutic privilege, including Illinois.<sup>249</sup> The Court of Appeal confirmed the presence of psychotherapeutic privilege. However, the privilege was qualified and could not be applied if "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests".<sup>250</sup> Courts should therefore balance the evidentiary need for the confidential communications versus the patient's privacy rights on a case-by-case basis.<sup>251</sup> In this case, the notes were considered privileged, as a number of other people had witnessed the shooting and Redmond's privacy interests were significant.<sup>252</sup>

The matter then reached the Supreme Court. The main questions were whether psychotherapeutic privilege should: (1) be recognised in terms of Rule 501; (2) extend to licensed social workers; and (3) have its application clearly set out by the Court.<sup>253</sup>

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<sup>244</sup> 5. Ms Redmond had been seeing Karen Beyer, a licensed clinical *social worker* employed by the Village of Hoffman Estates. K Beyer "Jaffee v Redmond: Therapist Speaks" (2000) 34 *The American Psychoanalyst* <http://www.jaffee-redmond.org/articles/beyer.htm> (accessed 12 September 2008).

<sup>245</sup> 5.

<sup>246</sup> The jury thus granted the complainant \$45 000 for the federal claim and \$500 000 for the Illinois state claim.

<sup>247</sup> 51 F.3d (1995)1346.

<sup>248</sup> 1355-1356. Cited in *Jaffee* 6-7.

<sup>249</sup> 1356-1357.

<sup>250</sup> 1357.

<sup>251</sup> 1358.

<sup>252</sup> With regard to Redmond's privacy interests, the court stated that "[h]er ability, through counseling, to work out the pain and anguish undoubtedly caused by Allen's death in all probability depended to a great deal upon her trust and confidence in her counselor Karen Beyer. Officer Redmond, and all those placed in her most unfortunate circumstances, are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of duty. An individual who is troubled as the result of her participation in a violent and tragic event, such as this, displays a most commendable respect for human life and is a person well-suited 'to protect and to serve'." 1358. Cited to in *Jaffee* 7 fn 5.

<sup>253</sup> Formulated by Slovenko 1997 *AJP* 70; R Slovenko *Psychiatry in Law/Law in Psychiatry* (2002) 90.

#### 4.4.2.2 Majority Judgment

On the first issue, the majority *per* Justice Stevens confirmed the court *a quo*'s interpretation of R501: the courts had the power to create or recognise privileges based on "reason and experience".<sup>254</sup> This allowed evidential privileges to evolve with the changing times.<sup>255</sup> The court then turned its attention to determining whether privilege was an appropriate remedy for protecting the psychotherapeutic profession. Regarding the psychotherapeutic profession as a whole, a similarity was found between the psychotherapeutic and legal professional relationships: both needed an atmosphere of confidentiality and trust in order to be effective.<sup>256</sup> The court also found that psychotherapeutic privilege would serve an important public goal that outweighed the need for evidence.<sup>257</sup> It was held that:

"The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."<sup>258</sup>

The court also accepted that the privilege would not hinder the truth-seeking function of the courts because its denial would result in a chilling effect on the use of psychotherapy by society, thereby drying up the source of the information in the first place.<sup>259</sup> This was especially true if the client sought psychotherapy for treatment over traumatic events that could give rise to future litigation.<sup>260</sup> Finally, the court acknowledged that some form of psychotherapeutic privilege was already recognised

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<sup>254</sup> 8-10.

<sup>255</sup> 9.

<sup>256</sup> "Like spousal and attorney-client privilege is "rooted in the imperative need for confidence and trust ... Effective psychotherapy ... depends upon an atmosphere of confidence and trust in which the patient is willing to make frank and complete disclosure of facts, emotions, memories, and fears ... the mere possibility of disclosure may impede development of the confidential relationship needed for effective psychotherapy." 10.

<sup>257</sup> 11.

<sup>258</sup> 11. This is especially for members of the police force who work under extremely stressful circumstances. Fn10.

<sup>259</sup> 12.

<sup>260</sup> *Ibid.*

by all the state legislatures and it would be inadvisable to provide psychotherapeutic privilege in state courts and not in federal courts.<sup>261</sup>

Considering the second issue, namely whether the privilege extends to licensed clinical social workers, the court held that it did.<sup>262</sup> The rationale for recognising communications with clinical social workers was that social workers practised a significant amount of psychotherapeutic counselling for the public.<sup>263</sup> They are also often cheaper and more accessible to most of the population than psychologists and psychiatrists.<sup>264</sup> Therefore it was found that limiting the privilege to psychotherapists would amount to an unfair discrimination against those with less financial means and would limit the scope of the privilege unnecessarily.

With regard to the third issue, the Supreme Court wished to create some form of certainty surrounding the privilege.<sup>265</sup> Consequently, the Court rejected the court *a quo*'s case-by-case approach.<sup>266</sup> The court found that "making the promise of confidentiality contingent upon the trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."<sup>267</sup> The only aspect left open for the courts to develop remained the formulation of any conditions or exceptions to the privilege, as it was impossible to provide solutions for every foreseeable situation.<sup>268</sup>

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<sup>261</sup> 13-15. The court also relies on the fact that prior to Rule 501, the Advisory Committee in 1972 included psychotherapeutic privilege as one of the nine recommended evidentiary privileges. See 56 F.R.D 183 at 234-58 (1972) Proposed Rule 5.04. See also Klein 1997 *DePaul L.Rev* 709 fn64.13-15

<sup>262</sup> 15.

<sup>263</sup> 15-16.

<sup>264</sup> *Ibid.*

<sup>265</sup> 18. The court held in order to ensure that the purpose of the privilege is met, participants in the confidential conversations "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Direct quote from *Upjohn v US* 393.

<sup>266</sup> 17.

<sup>267</sup> *Ibid.*

<sup>268</sup> 18. The court stated in the 18fn19, however, that "although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." .See section 4.4.4.1 below for further discussion of this *obiter* remark.

#### 4.4.2.3 Minority Judgment

Justice Scalia wrote a scathing dissent worthy of discussion.<sup>269</sup> First, he criticised the majority for not paying enough attention to the limiting effect of privileges on the fact-finding process.<sup>270</sup> Citing the principle that “the public ... has a right to every man’s evidence”,<sup>271</sup> he concluded that the majority had failed to consider the significance of such a principle on the administration of justice. The loss of possibly relevant evidence for parties claiming or defending a matter increased the chances of incorrect decisions. He claimed that the courts, by failing to consider this adequately, themselves could become bringers of injustice.<sup>272</sup>

Second, Justice Scalia questioned why the psychotherapeutic profession played such a prominent role in the country’s well-being. He wrote:

“When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry’s mental health? For most of history, men and women have worked out their difficulties by talking to, inter alios, parents, siblings, best friends and bartenders – none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.”<sup>273</sup>

From here, Justice Scalia continues to question why disclosure during psychotherapy warrants such noteworthy protection. He states that a person undergoing psychotherapy should not have both the psychological and emotional benefit of “confessing” to another person and the knowledge that the

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<sup>269</sup> Justice Rehnquist concurred with Part III of Justice Scalia’s opinion.

<sup>270</sup> This was considered incongruous because precedence indicates that the Supreme Court did not easily create barriers to the truth. He cites *Trammel v US* 445 US (1980) 40; *United States v Nixon* 418 US (1974) 683; *University of Pennsylvania v EEOC* 493 US (1990) 182 (denying privilege against disclosure of peer-reviewed research); *US v Gillock* 445 US (1980) 360 (denying privilege against disclosure of “legislative acts” by members of the state legislature); *US v Zolin* 491 US (1989) 554 (limiting the scope of attorney-client privilege).19.

<sup>271</sup> *Trammel v US* 50.

<sup>272</sup> 22

<sup>273</sup> *Ibid.*

person confessed to cannot tell the court.<sup>274</sup> Recognising the privilege simply to “spare patients needless intrusion upon their privacy” is not reasonable when other legal alternatives can be found.<sup>275</sup>

Third, he condemns the ease with which the majority extended the privilege to licensed social workers.<sup>276</sup> The majority, he found, had failed to notice the significant differences between licensed social workers and psychotherapists.<sup>277</sup> These included the different levels of expertise and education needed to be a licensed psychotherapist (most often a psychologist or psychiatrist) and the differing amounts of psychotherapy practised by those in the two professions.<sup>278</sup> As such, the court’s decision to include social workers was decided prematurely.<sup>279</sup>

Fourth, the majority’s use of state legislation as an indication of the need to grant psychotherapeutic privilege was faulty. He opines that even though each state has enacted some form of the privilege, each state’s privilege is different from the other.<sup>280</sup> This signifies an uncertainty about the boundaries and application of the privilege on a state level. This translates into any creation of a federal common law psychotherapeutic privilege as likely to be riddled with unanswered questions only the federal legislature could clarify.<sup>281</sup>

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<sup>274</sup> 23-24.

<sup>275</sup> 24.

<sup>276</sup> Justice Scalia lists a number of examples, indicating the numerous differences between social workers, licensed social workers, psychiatrists and psychologists in each state. 28-35.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

<sup>279</sup> 30.

<sup>280</sup> 26.

<sup>281</sup> *Ibid.* He wrote: “Let us consider both the verb and its object: The fact [1] that all 50 States have *enacted* privilege argues not *for*, but *against*, our adopting the privilege judicially. At best it suggests that the matter has been found not to lend itself to judicial treatment – perhaps because the pros and cons of adopting the privilege, or giving it one or another shape, are not clear; or perhaps because the rapidly evolving uses of psychotherapy demand a flexibility that only legislation can provide.”

### 4.4.3 Analysis of the *Jaffee v Redmond* decision

#### 4.4.3.1 Theoretical Approach of the Majority Judgment

Both Klein and Imwinkelreid<sup>282</sup> write that the majority court applied Wigmore's criteria to determine whether the privilege was justified.<sup>283</sup> By conducting a close reading of the majority opinion, Klein notes the following: (1) The first criterion is met because the majority acknowledged that psychotherapy occurs in a confidential setting.<sup>284</sup> (2) The second criterion is satisfied because the majority recognised that confidentiality is an essential component of successful psychotherapy.<sup>285</sup> (3) The third criterion is met because the majority found that the mental health of individuals, and society as a whole, is in the interests of the American community. Therefore, the community favours the protection of the psychotherapeutic relationship.<sup>286</sup> (4) The fourth criterion is satisfied because the majority confirmed that the cost to the administration of justice and the truth-seeking function did not outweigh the importance of protecting the psychotherapeutic relationship.<sup>287</sup> Klein argues that the fourth criterion was met, since the majority accepted the argument that the possible evidentiary benefit gained from the denial of psychotherapeutic privilege would be modest: without the privilege, the evidence would not be generated in the first place. Klein also suggests that since the court acknowledged that the presence of other witnesses to the incident as significant, further evidence that the injury to the truth-seeking function did not outweigh the harm to the confidential relationship was established.<sup>288</sup>

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<sup>282</sup> Klein 1997 *DePaul L.Rev* 731; E Imwinkelreid "The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in *Jaffee v Redmond*, 518 U.S. 1 (1996)" (1997) 49 *Hastings L.J* 969 at 982.

<sup>283</sup> Klein 1997 *DePaul L.Rev* 731; Imwinkelreid 1997 *Hastings L.J* 972. To recapitulate, these are: (1) The communications must originate in a *confidence* that they will not be disclosed; (2) This element of confidentiality *must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one that in the *opinion of the community* ought to be sedulously fostered; (4) The injury that would inure to the relation by the disclosure of the communications *must be greater than the benefit* thereby gained for the correct disposal of litigation. Refer to Chapter 2 s2.3.2. Klein 1997 *DePaul L.Rev* 731; Imwinkelreid 1997 *Hastings L.J* 972.

<sup>284</sup> 731.

<sup>285</sup> *Ibid.*

<sup>286</sup> 731-732.

<sup>287</sup> 732-733.

<sup>288</sup> *Ibid.*

Klein is correct in finding that the majority court applied a utilitarian approach to privilege law, and inadvertently used Wigmore's criteria.<sup>289</sup> Nonetheless, Klein's analysis is subject to some criticism. First, as discussed in Chapter 2, it is relatively easy to apply Wigmore's criteria successfully. They are ambiguous and open to broad interpretation.<sup>290</sup> Second, the presence of other witnesses to the incident should not be considered as further evidence that the Court found the injury of disclosure as outweighing the injury to the administration of justice. It was the court *a quo* and not the Supreme Court that considered the other witness as an important factor.<sup>291</sup> Third, following from the second criticism, the use of case-by-case factual circumstances is not in accordance with Wigmore's utilitarian approach.<sup>292</sup>

Imwinkelreid argues that the very use of Wigmore's criteria exposes the judgment to criticism. First, he highlights that the behavioural assumption behind Wigmore's criteria is faulty.<sup>293</sup> By reanalysing the studies cited in the *amicus* brief of the American Psychological Association (APA),<sup>294</sup> he argues that the studies used to support the proposition that privilege is essential to the success of psychotherapy are selective and therefore unreliable. He notes that the brief failed to disclose that most of the empirical studies did not differentiate between forced disclosure to third parties and forced disclosure to the court.<sup>295</sup> Thus, the results do not indicate the need for privilege but the need for stringent regulations on the disclosure of confidential communications to third parties outside the court.<sup>296</sup> It therefore remains questionable whether instances of court-ordered disclosure influence the public's behaviour.<sup>297</sup> Furthermore, two of the studies used by the APA asked mental health professionals instead of their clients whether privilege would affect their willingness to engage in

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<sup>289</sup> Klein 1997 *DePaul L.Rev* 731.

<sup>290</sup> See discussion of Wigmore in Chapter 2 section 2.3.2 above.

<sup>291</sup> 51 F.3d 1346 (1995) 1358.

<sup>292</sup> Pattenden *Evidence* 567 fn 265; See also the opinion of L'Heureux-Dubé J discussed section 4.3.3 above.

<sup>293</sup> Imwinkelreid 1997 *Hastings L.J* 982. See Chapter 2 above for a further discussion of Imwinkelreid's argument.

<sup>294</sup> Brief Amicus Curiae of the American Psychological Association, *Jaffee v Redmond*, 518 US 1 (1996) (No. 95-266). The brief relied upon extensively by the majority and therefore correctly do warrant inspection. The primary studies referred in the brief have also been discussed in Chapter 3 above. To view the brief go to [www.jaffee-redmond.org/briefs/ampsychol.htm](http://www.jaffee-redmond.org/briefs/ampsychol.htm). (accessed 7 August 2008).

<sup>295</sup> Imwinkelreid 1997 *H.L.J* 976-980. Citing D Miller and M Thelen "Knowledge and Beliefs About Confidentiality in Psychotherapy" (1986) *J. Prof. Psychol Resand Pract* 15 at 17.

<sup>296</sup> *Ibid.*

<sup>297</sup> Imwinkelreid 1997 *H.L.J* 980.

psychotherapy.<sup>298</sup> This focuses on the incorrect person: it is the behaviour of the client that should influence the decision to implement privilege.<sup>299</sup> He concludes that since the empirical support used to validate the privilege were inconclusive, the decision itself is subject to doubt.

Second, Imwinkelreid writes that by refusing the court *a quo's* qualified approach to the privilege, the majority rejected the individualised/human rights theoretical approach to privilege law.<sup>300</sup> Finding the individualised approach on its own equally unsatisfactory,<sup>301</sup> he found it unfortunate that the Supreme Court did not combine Wigmore's utilitarian approach with the individualised/human rights approach. The Court should rather have considered the effect of disclosure on the client's personal autonomy as well the impact of forced disclosure on society as a whole.<sup>302</sup> A combined approach would indeed have been preferable; however, the Court took an "either/or" approach to the privilege even though Rule 501 allows for a creative development of privilege law.

#### 4.4.4 The Effect and Problems of Federal Psychotherapeutic Privilege

*Jaffee v Redmond* sparked a flood of commentary from both the legal and mental health professions, even resulting in an internet website dedicated to the newly developed privilege.<sup>303</sup> As expected, most mental health professionals welcomed the decision.<sup>304</sup> Psychotherapists lauded the judgment as acknowledging the importance of the profession and its need for absolute confidentiality.<sup>305</sup> A notable

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<sup>298</sup> Imwinkelreid 1997 *H.L.J* 975-976. Citing Note "Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of *Tarasoff*" (1978) 31 *Stan. L. Rev* 165 at 183 and Miller and Thelen 1986 *J.P.PRandP* 17.

<sup>299</sup> Imwinkelreid 1997 *H.L.J* 980-982. Since then however, Marsh has conducted further empirical study into the reaction of the public to psychotherapeutic privilege – see Chapter 2 section 2.3.2.

<sup>300</sup> Imwinkelreid 1997 *H.L.J* 983; E Imwinkelreid "The Historical Cycle in the Law of Evidentiary Principles: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories" (2003) 55 *Ark. L. Rev* 241 at 251. He notes that the Supreme Court also only followed Wigmore's utilitarian approach in *Swindler & Berlin v United States* 524 U.S (1998) 399 at 406. *Swindler's* case held that attorney-client privilege remained after the death of the client.

<sup>301</sup> Refer to Chapter 2 section 2.3.3 above which discusses his argument in further depth.

<sup>302</sup> Imwinkelreid 2003 *Ark.L.Rev* 266.

<sup>303</sup> This website is updated regularly and includes the history and development of federal psychotherapeutic-privilege. The site offers links to newspaper and journal articles, case law and any other information connected to the privilege. <http://jaffee-redmond.org> (accessed 17/02/2007 – 23/10/2008).

<sup>304</sup> Both the American Psychological Association and the American Psychiatric Association acted as *amici curiae* for the Respondent in *Jaffee*. Both briefs are accessible at <http://jaffee-redmond.org>. Social workers also lauded the judgment as recognising the value of both social workers and the psychotherapeutic relationship. V Lens "Protecting the Confidentiality of the Therapeutic Relationship: *Jaffee v Redmond*" (2000) 45(3) *Social Work* 273 at 276. See also L Greenhouse "Justices Uphold Psychotherapy Privacy Rights" *New York Times* June 4, 1996. <http://query.nytimes.com/gst/fullpage.html?res=9907EFD81739F937A25755C0A960958260&sec=health&spon=&&sc p=4&sq=Jaffee%20v%20Redmond&st=cse> (accessed 16 July 2008).

<sup>305</sup> *Ibid.*

critic however has been Ralph Slovenko, author of the treatise *Psychiatry in Law/Law in Psychiatry*.<sup>306</sup> Pre-*Jaffee*, Slovenko found that state-enacted testimonial privileges, especially psychotherapeutic privilege, were little more than a flimsy shield offering only an illusion of protection.<sup>307</sup> He argued that legislated psychotherapeutic privileges were already so full of exceptions and waivers that the scope and application of the privilege had become negligible.<sup>308</sup> Slovenko concluded that in practice, the disclosure of psychotherapeutic communications relied on the relevance or materiality of the communications between the therapist and client and had little or no connection to privilege.<sup>309</sup> Post-*Jaffee*, Slovenko did not reconsider his position. Psychotherapeutic privilege remained, in his opinion, a futile rule of evidence. He indicated that if history provided a good example, the application and success of federal psychotherapeutic privilege would also remain limited in practice. He wrote, “[A] decision against privilege would have punctured the myth of privilege, though in practice, privilege or no privilege, the outcome is the same.”<sup>310</sup> The focus, he maintained, would remain whether the court considers the information relevant or material to the proceedings.<sup>311</sup> There is some merit to his argument. Since *Jaffee*, the courts have indeed battled to determine the scope of the privilege, introducing two significant exceptions: namely, the dangerous-patient exception and the litigant-patient exception.

#### 4.4.4.1 Dangerous-Patient Exception

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<sup>306</sup> R Slovenko *Psychiatry in Law/Law in Psychiatry* (2002) 89-101. He is a Professor of Law and Psychiatry at Wayne State University Law School, Michigan.

<sup>307</sup> R Slovenko “Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope” (1974) 23 *Catholic U. L. Rev* 649 at 656. Note that this paper was originally presented at a conference on Mental Health and the Law at Catholic University School of Law, Washington D.C 19/01/1974.

<sup>308</sup> He refers to the then-Californian Code and a prominent case of the time *In re Lifschutz* 2 Cal. 3d 415, 467 P. 2d 557, wherein the court held that the privilege did not apply in cases where the patient is claiming emotional distress. In such cases, the privilege was held to be waived by the patient. The question of admissibility then turned on whether the psychotherapeutic communications were relevant or material to the proceedings. 656-658.

<sup>309</sup> 659.

<sup>310</sup> Slovenko 1997 *AJP* 73; reproduced in Slovenko *Psychiatry in Law* 91-92.

<sup>311</sup> He writes: “[W]hen push comes to shove, the principle of relevancy or materiality rather than privilege provides the protection of confidentiality. And, as I would emphasize, because these are elastic terms, given to interpretation, the therapist should withhold information until the patient consents or the court orders disclosure. The courts tend to find communications in therapy irrelevant, immaterial, or prejudicial, and do not call for their production.” Slovenko *Psychiatry in Law* 93.

Justice Stevens, in footnote 19, touched upon a possible exception that has since caused considerable controversy. He writes:

“Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”<sup>312</sup>

This footnote sparked what is now known as the “dangerous-patient” exception to privilege and has been closely linked to the *Tarasoff* duty to warn.<sup>313</sup> In 1976, in *Tarasoff v Regents of the University of California*,<sup>314</sup> the Californian Supreme Court found that “the public policy favoring the protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others.”<sup>315</sup> In other words, the privilege ceases when public peril begins.<sup>316</sup> The Supreme Court of California did however emphasise that the discharge of the duty to warn will depend on the circumstances of the case.<sup>317</sup> *Tarasoff* also did not expect psychotherapists to have prophetic knowledge of whether a client is likely to harm others but rather, when harm is readily identifiable to the practitioner, they must take proportional steps to avert it.<sup>318</sup> Yet though *Tarasoff* was decided twenty years earlier, the Supreme Court did not refer to it and left the question surrounding such an exception open to further interpretation. The presence or absence of this exception has resulted in significant interpretational differences between the circuit courts, whereby a clear split between the Tenth and Fifth courts on the one hand and the Sixth and Ninth courts on the other emerged.

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<sup>312</sup> *Ibid.*

<sup>313</sup> *Tarasoff v Regents of the University of California* 551 P2d 334 (Cal 1976)..

<sup>314</sup> The Californian Appeal Court has further extended the duty of care to family reported threats in *Ewing v Goldstein* 120 Cal. Appeal 4<sup>th</sup> 807(Cal 2004) wherein the courts granted a claim against a therapist and the Centre he worked in on the grounds that he had failed to report the harm to the client or his parents. He had been informed of the harm not by the client but by the client’s father

<sup>315</sup> 442.

<sup>316</sup> *Ibid.*

<sup>317</sup> 439.

<sup>318</sup> Mosk J states that “we are not concerned with whether the therapist pursuant to the standards of their profession ‘should have’ predicted potential violence; they allegedly did so in actuality. Under these limited circumstances I agree that a cause of action can be stated.” 451. For a thorough discussion of this case see D Reed “Therapists Duty to Protect 3<sup>rd</sup> Parties, Balancing Public Safety and Patient Confidentiality” (2001) 1(5) *Community Mental Health Report* 1 [www.mg.co.za/articlePage.aspx?articleid=32931&area=breaking\\_news/breaking\\_news\\_business/](http://www.mg.co.za/articlePage.aspx?articleid=32931&area=breaking_news/breaking_news_business/). (accessed 22 February 2008). For further study see also J Beck *Confidentiality versus the Duty to Protect* (1990) 1-23.

The Sixth and Ninth circuits did not recognise the exception. In *United States v Hayes*,<sup>319</sup> the Sixth circuit court refused to admit the testimony of Hayes's psychotherapist because "[o]n the one hand, Hayes should be applauded for seeking professional help for the mental and emotional difficulties he was suffering. Yet, because ...he sought treatment ...Hayes now finds himself facing a felony conviction and incarceration because his professional care givers are prepared to testify against him."<sup>320</sup> The court found that accepting such an exception would result in significant harm to the success of psychotherapeutic treatment.<sup>321</sup> Furthermore, the court found that since the harm warned against had already passed, there was no reason that the exception should extend to criminal or civil proceedings.<sup>322</sup> The only foreseeable application of the footnote nineteen was thus for involuntary admission into a mental health hospital.<sup>323</sup> Similarly, in *United States v Chase*<sup>324</sup> the Ninth circuit found that there was no "dangerous patient" exception to psychotherapeutic privilege. In this matter, Chase was charged with making threats to federal law enforcement agents. He had made such threats during psychotherapy and the state wished to use the psychotherapist's testimony against him.<sup>325</sup> Significantly, the Court distinguished between a dangerous-patient exception to privilege and the psychotherapist's duty to warn third parties.<sup>326</sup> The Court explained that the duty to warn is preventative in nature and is justified only to the extent that it protects others from foreseeable harm.<sup>327</sup> Once such a warning is made, any further disclosure is not warranted. Therefore "a state-law breach of psychotherapist-patient *confidentiality* would not necessarily lead to an abrogation of the federal *testimonial privilege*".<sup>328</sup>

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<sup>319</sup> 227 F.3d 578 (2000). Hayes, a United States postal worker, had made threats about his supervisor to his therapist during psychotherapeutic treatment. The therapist warned him that such threats would not be protected by their confidentiality agreement, as per *Tarasoff*. The psychotherapist then warned his patient's supervisor about the threats. This resulted in the supervisor becoming frightened and informing the postal inspector. The inspector then laid criminal charges against Hayes and wanted the psychotherapist to testify about the threats made during treatment.

<sup>320</sup> 584.

<sup>321</sup> 584-584.

<sup>322</sup> 585.

<sup>323</sup> 585. The court held that footnote 19 only confirmed that the existence of the duty to warn third parties. Namely that "privilege will not operate to impede a psychotherapist's compliance with the professional duty to protect identifiable third parties from serious threats of harm."

<sup>324</sup> 340 F.3d (2003) 978. The court *a quo* had admitted such testimony, which the Appeal court found to be an irreversible error. 993.

<sup>325</sup> 981.

<sup>326</sup> 983-988.

<sup>327</sup> 987.

<sup>328</sup> 985. The Court quoted the Oregon State Supreme Court in *State v Miller* 709 P.2d (1985)225 at 236 finding that "The public interest to be served by notifying the police, in most cases, could be achieved by divulging only that information

The Tenth and Fifth circuits held differently. The Tenth circuit court in *United States v Glass*<sup>329</sup> found that there was a dangerous-patient exception to psychotherapeutic privilege.<sup>330</sup> The court, however, did not easily grant the existence of such an exception.<sup>331</sup> Following the dictum of *Jaffee* closely, the court agreed that such an exception would significantly impact on the scope of the privilege.<sup>332</sup> As such, in order for psychotherapeutic communications to be used against the client, the threat made must have been serious and its disclosure the only method for preventing the harm from occurring.<sup>333</sup> In 2008, the Fifth circuit court in *United States v Auster*<sup>334</sup> rejected the approach adopted in *Chase* and *Hayes* entirely.<sup>335</sup> The court held that patients are informed that threats made to others will not remain confidential: if a patient chooses to continue using psychotherapy as the forum to disclose harmful intent to others, he or she abandons confidentiality.<sup>336</sup> Consequently, one of the main conditions necessary for the privilege is no longer present.<sup>337</sup> The atmosphere of “confidence and trust” is already broken when the psychotherapist warns others about his or her client’s intentions.<sup>338</sup> The harm or

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needed to show why a clear and immediate danger is believed to exist. It would rarely justify the full disclosure to the police, and never justify a full disclosure in open court, long after any possible danger has passed.” 986.

<sup>329</sup> 133 F. 3d (1998)1356

<sup>330</sup> 1358-1360. Briefly, the facts are as follows: Glass, whilst in a mental health care centre, had told his psychotherapist that he wished to shoot Bill Clinton and his wife. He left the mental health centre as an outpatient to live at his father’s home. However, ten days after leaving the centre it was discovered that he had left his father’s home. The centre then chose to inform the US secret service agents and informed them of Glass’s wish to assassinate the president. The agents found Glass and placed charges against him for making threats to kill the President. 1357.

<sup>331</sup> 1359.

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.*

<sup>334</sup> *US v Auster* No. 07-30084 (02/11/2008).The facts influence the approach followed by the court. Auster had made repeated threats to his psychotherapists that he would kill his co-workers should he lose some of his employee benefits. He also told his psychotherapists that he had the means to commit the offence. Significantly, he had been told on numerous occasions that the psychotherapists had a duty to inform potential victims of such threats. He admitted to this knowledge during trial proceedings. It later became evident that this had been Auster’s chosen method of conveying threats to his employers.

<sup>335</sup> The court stated, “We respectfully disagree with those circuits that have extended *Jaffee* by holding that even if a patient knows that a threat is not made in confidence, any statements made to the therapist are privileged in a federal trial.” Part IIC.

<sup>336</sup> Part IIB.

<sup>337</sup> *Ibid.*

<sup>338</sup> Smith J explains “as the *Jaffee* Court implicitly recognized by explicitly requiring confidentiality, this cost-benefit calculation is inapt where the patient already knows the confidence will not be kept. Consider the marginal impact on effective therapy of allowing a statement into evidence that the patient knew would be communicated to third parties when he uttered it. In such a case, the “atmosphere of confidence and trust” has already been severely undermined. ... If the therapist’s professional duty to thwart the patient’s plans has not already chilled the patient’s willingness to speak candidly, it is doubtful that the possibility that the therapist might also testify in a federal court will do so.” Part IIC.

injury caused to the psychotherapeutic relationship and profession has thus already occurred. In other words, the so-called “cat is out of the bag”.<sup>339</sup>

Another important factor influencing *Auster’s* decision is that there is no uniform agreement in state law that the *Tarasoff* duty does not affect the privilege. Since there are different state regulations regarding the scope of privilege in this aspect, the argument raised in *Chase*, namely that federal law should be consistent with state law, does not hold significant weight for rejecting the exception.<sup>340</sup>

Nonetheless, a number of authors have agreed that *Chase* had adopted the correct approach.<sup>341</sup> It has been argued that there is a significant difference between the warning of outside parties and using such knowledge against the client during litigation. In the latter instance, the client’s own psychotherapist is used against him or her even although the harm has already been prevented.<sup>342</sup> In support for the rejection of the exception, Buroker notes for example that footnote 19 can refer only to very specific instances. For example, he argues that the exception cannot be raised during criminal matters as the word *avert*<sup>343</sup> implies the prevention of harm.<sup>344</sup> Accordingly, if the harm has already been prevented, the exception falls away. The result is that the exception is limited to circumstances in which the psychotherapist must testify against his or her patient in order to get the patient involuntarily admitted in a mental health care hospital.<sup>345</sup> In addition, Parsio suggests that it is too much to expect psychotherapists to warn potential victims and to be used as witnesses against their own patients, should the victim then lay criminal charges against the client for making such threats.<sup>346</sup>

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<sup>339</sup> Kleinfeld J for the minority stated eloquently in *Chase* that “[t]he cat being already out of the bag, trial is no occasion for stuffing it back in.” 998.

<sup>340</sup> Part IIC. Citing *Chase* 986 that “Almost all states ... recognize the distinction between confidentiality (which is affected by the *Tarasoff* duty) and testimonial privilege(which is not).”

<sup>341</sup> M Nelkon “The Limits of Privilege : The Developing Scope of Federal Psychotherapist-Patient Privilege Law” (2000) 20 *Rev. Litig* 35; A Parsio “ The Psychotherapist-Patient Privilege: The Perils of Recognizing a “Dangerous Patient” Exception in Criminal Trials” (2007) 41 *New Eng. L. Rev* 623; G Harris “The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: the *Tarasoff* Duty and the Jaffee Footnote (1999) 74 *Washington L.Rev* 33; D Buroker “The Psychotherapist-Patient privilege and Post-Jaffee Confusion” (2004) 89 *Iowa L.Rev* 1373.

<sup>342</sup> The court in *Chase* held that the harm done by to the psychotherapeutic relationship outweighs any possible evidentiary gain from disclosure during criminal trials. 982, 990.

<sup>343</sup> The footnote states that “If a serious threat of harm to the patient or to others can be *averted* only by means of a disclosure by the therapist...”. Buroker 2004 *ILR* 1383-1384.

<sup>344</sup> 1384.

<sup>345</sup> 1385. This interpretation has also been accepted by other theorists: Nelkon 2000 *RL* 36-37; Parsio 2007 *NELR* 655-658. See also *United States v Hayes* 586.

<sup>346</sup> Parsio 2007 *NELR* 656-657. Parsio states that “patients are more likely to understand their therapists’ duty to warn, versus testimony putting the patient behind bars ... a *Tarasoff* duty to warn does not put the therapist in the same peril

The conflict surrounding the dangerous-patient exception raises a number of problems. First, more generally, accepting the presence of such an exception depends largely on the discretion of the court. Second, the arguments used in *Auster's* case supporting the exception indicate a fundamental weakness of Wigmore's utilitarian approach. To explain, *Auster's* case focused solely on whether confidentiality is breached. According to Wigmore, once confidentiality at any level is found to be absent, one of the main criteria for the privilege is no longer present.<sup>347</sup> How confidentiality is breached, and what impact such a breach has on the client, appears to be insignificant. This allows the courts to use a common-law principle (the duty to warn) to eliminate the so-called absolute privilege. It is regrettable that the Supreme Court in *Jaffee* did not include the importance of protecting the client's right to privacy, dignity and personal autonomy when establishing the privilege.<sup>348</sup> As a utilitarian approach to privilege law does not consider these rights, the lower courts could avoid questioning what negative repercussions can occur when forcing psychotherapists to testify against their own clients. In this instance, the individualised/human rights approach to privilege law would provide significant opposition for such an exception.

Third, the presence of the dangerous-patient exception to privilege places an additional and unnecessary burden on the professional to decide when such a threat might result in the event occurring in reality – at what stage should the psychotherapist inform their client about their duty to warn any potential victims? Also, the professional's own interests may be affected – will testifying against one's own client have a negative impact on the professional's success in general? It is thus submitted that the *Tarasoff* warning is understandable, but the utilisation of the *Tarasoff* warning to circumvent privilege is not.

#### 4.4.4.2 Patient-Litigant Exception (Waiver)

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as the 'dangerous patient' exception, because the patient can be assured that the therapist will not be compelled to testify against the patient."

<sup>347</sup> Also note that Wigmore's first criterion, namely that the communications must be confidential is also relevant.

<sup>348</sup> See Chapter 2 above.

Another inconsistency surrounds the possible waiver of psychotherapeutic privilege. It is generally accepted that if a party wishes to use the records or his or her communications with their psychotherapist to prove a claim, he or she has waived their privilege.<sup>349</sup> Nonetheless, what happens in circumstances where the client does not wish to use the psychotherapist as an expert witness, but is still claiming some form of psychological harm? This has caused more problems than expected. The courts, both at federal and state levels, have interpreted waiver of psychotherapeutic privilege in three different ways: broadly, narrowly, and, finally, by finding a middle ground between the two.<sup>350</sup>

A broad approach to waiver holds that once either party claims any form of emotional distress, he or she waives their privilege.<sup>351</sup> The argument for the broad approach relies on the principles of fairness and relevance.<sup>352</sup> For example, in *Sarko v Penn-Del Directory Co.*,<sup>353</sup> a Californian district court held that “allowing a plaintiff to hide...behind a claim of privilege when that condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice”.<sup>354</sup> Similarly, in *Sidor v Reno*,<sup>355</sup> the court found that the client waived privilege when she filed an emotional distress claim. The court held that any/all confidential psychotherapeutic records were no longer privileged as the confidential information would be both relevant and helpful for the defendant’s defence.<sup>356</sup> Thus, a broad approach suggests that the mere mention of *any* emotional distress by a client results in the privilege being waived.

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<sup>349</sup> *Speaker v County of San Bernardino* 82 F.Supp 2d 1105 (C.D Cal 2000); *Adams v Ardcorey* 196 F.R.D 339 (E.D Wis 2000); *Fritsch v City of Chula Vista* 196 F.R.D 562 (S.D Cal 1999); *Van v Lone Star Steakhouse & Saloon* 967 F. Supp 346 (C.D III 1997); *Doolittle v Ruffo* WL 151799 (N.D.N.Y Mar 31 1997). Nelkon writes that the standard formulation of this waiver is based on the rejected Federal Rule of Evidence 504(d)(3). The Rule stated that “There is no privilege as to communications relevant to the mental or emotional condition of the patient in any proceeding in which the patient relies on the condition as an element of the patient’s claim or defense.” Nelkon 2000 *RL1* at 20 fn85.

<sup>350</sup> See generally E McDonnell “Certainty Thwarted: Broad Waiver versus Narrow Waiver of the Psychotherapist-Patient Privilege After *Jaffee v Redmond*” (2001) 52 *Hastings L. J* 1369 at 1375. Nelkon 2000 *RL20-33*; *Fitzgerald v Cassil* 216 F.R.D 632 (N.D Cal 2003).

<sup>351</sup> The party is usually the plaintiff during civil cases. See generally *Sarko v Penn-Del Directory Co* 170 F.R.D 127 (C.E.D Penn 1997); *Fritsch v City of Chula Vista* 196 F.R.D 562 (S.D Cal 1999); *Van v Lone Star Steakhouse & Saloon* 967 F. Supp 346 (C.D III 1997).

<sup>352</sup> *Fitzgerald v Cassil* 636. The case discusses the different approaches to waiver. In addition, the case is significant as it considers waiver from federal and state claims. In such cases, federal law of evidence will apply. 635.

<sup>353</sup> 170 F.R.D 127 (E.D Cal 1999).

<sup>354</sup> 130. For a discussion of the case see further McDonnell 2001 *H.L.J* 1376.

<sup>355</sup> No 95 CIV 9588(KMW), 1998 U.S Dist LEXIS 4593 (S.D.N.Y Apr 7, 1998).

<sup>356</sup> 4-7. Cited in McDonnell 2001 *H.L.J* 1378.

Narrow waiver, on the other hand, holds that privilege is waived only if the client clearly relies on communications with his or her psychotherapist during litigation.<sup>357</sup> The mere mention of emotional distress is not considered sufficient to justify waiver.<sup>358</sup> The reasoning for the approach is well explained by the Massachusetts district court in *Vanderbilt v Town of Chilmark*.<sup>359</sup> First, the court refers to the Supreme Court's approach to the establishment of psychotherapeutic privilege. The court found that:

"*Jaffee's* 'no balancing' instruction drastically changes the waiver formula... After *Jaffee*, a court cannot force disclosure of communications solely because it may be extremely useful to the finder of fact. Giving weight to the usefulness of the evidence as a factor in a decision regarding the scope of the privilege would be a balancing exercise that was barred by *Jaffee*."<sup>360</sup>

Second, the court considered waiver of attorney-client privilege.<sup>361</sup> By analogy, the court held that psychotherapeutic privilege could be waived only if the communications between the psychotherapist and client are in dispute or if the client uses any communications with the psychotherapist to further their own claim.<sup>362</sup> Furthermore, *Hucko v City of Oak Forest*,<sup>363</sup> following *Vanderbilt's* reasoning, notes that the broad approach to waiver and the fairness/relevance argument do not consider the Supreme Court's overriding policy reasons behind the adoption of the privilege:<sup>364</sup> namely the protection of society's mental health.<sup>365</sup>

The courts have also tried to find a middle ground between the two approaches. According to this approach, waiver does not occur if the client only alleges a "garden variety" form of

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<sup>357</sup> *Vanderbilt v Town of Chilmark* 174 F.R.D 225 (D. Mass 1997); *Hucko v City of Oak Forest* 189 F.R.D 526 (N.D Ill. 1999); *Allen v Cook County Sheriff's Department* no 97-C3625, 1999 WL 168466 (N.D Ill Mar 16, 1999) *Fitzgerald v Cassil* 636.

<sup>358</sup> McDonnell 2001 *HL.J* 1381.

<sup>359</sup> 174 F.R.D 225 (D Mass 1997).

<sup>360</sup> 229. *Vanderbilt* is cited with approval in *Fitzgerald v Cassil* 636-637.

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*

<sup>363</sup> 189 F.R.D 526 (N.D Ill. 1999). *Hucko* also supported the analogy to attorney-client waiver, stating: "In light of the Supreme Court's view that that the psychotherapist-patient privilege serves private and public interests similar to those advanced by attorney-client privilege, this Court agrees that the principles governing implied waiver of the attorney-client privilege should apply in determining what is sufficient to constitute an implied waiver of the psychotherapist-patient privilege." 528-529.

<sup>364</sup> 530.

<sup>365</sup> See the discussion of *Jaffee v Redmond* above.

emotional/psychological distress.<sup>366</sup> Ordinary or commonplace claims for emotional damages would not result in any waiver by the client.<sup>367</sup> *Jackson's* case explains that if a plaintiff merely alleges “garden-variety” emotional distress, privilege is still present, but a “separate tort for the distress, any specific injury of disorder, or unusually severe distress” can result in waiver.<sup>368</sup>

It is submitted that a narrow approach to waiver best follows the reasoning behind *Jaffee*. First, the mere mention of emotional distress, often claimed in delictual matters, should not warrant unfettered access to a client’s confidential communications. Second, relevance and fairness should not be a deciding factor on whether there has been an exception to the privilege. It is submitted that finding otherwise runs contrary to one of the main features of privilege law in general: namely that privileged information, however relevant, remains inadmissible because there is some overriding factor that warrants further protection against disclosure.<sup>369</sup> Broad waiver results in what McDonnell correctly states as running counter to “the very nature of privilege”.<sup>370</sup> The courts should also consider the impact of broad waiver on the client’s privacy interests. Access to all confidential communications, even those that are not directly related to litigation, severely encroaches on the client’s personal sphere.<sup>371</sup> Furthermore, a broad waiver encourages “fishing expeditions” by the opposing side once emotional distress is raised.<sup>372</sup> If evidence supporting the possible exaggeration of an emotional distress claim can be found elsewhere, legal counsel should seek such evidence before demanding access to privileged information. Finally, as the common law has already established when legal

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<sup>366</sup> *Rhulman v Ulster County Department of Social Services* 194 F.R.D 445 ( N.D.N.Y 2000) 449; *Santelli v Electro-Motive* 188 F.R.D 306 (N.D Ill. 1999) 309; *Jackson v Chubb Corp* F.R.D 216 (D.N.J 2000); *Fitzgerald v Cassil* 637.

<sup>367</sup> *Rhulman v Ulster County Department of Social Services* 450, *Fitzgerald v Cassil* 637.

<sup>368</sup> *Jackson v Chubb Corp* 226. The court also used Rule 35(a) of the Federal Rules of Civil Procedure as a framework for establishing waiver. R 35(a) governs court orders for physical or mental examinations when a party’s physical or mental condition is under question. The court held that privilege would be waived if “(1) the plaintiff has pled a cause of action for intentional or negligent infliction of emotional distress; (2) the plaintiff has alleged a specific mental or psychiatric injury; (3) the plaintiff has pled a claim for unusually severe emotional distress; (4) the plaintiff plans to offer expert testimony to support a claim of emotional distress; and/or (5) the plaintiff has conceded that his or her mental condition is ‘in controversy’ for the purposes of 35(a). *Fitzgerald v Cassil* fn 2 explains that the *Jackson* court had reason to apply such an analogy. He writes that both the waiver of psychotherapeutic privilege and Rule 35(a) examinations “involve invasion into sensitive privacy interests”. Nonetheless, *Jackson* found that Rule 35(a) examinations are more invasive.

<sup>369</sup> Refer to Chapter 2. Cross and Tapper *Evidence* 443.

<sup>370</sup> McDonnell 2001 *H.L.J* 1386. *Hucko* at 530 also held that: “The very nature of a privilege is that it prevents disclosure of information that may be relevant in the case, in order to serve interests that are of over-arching importance.”

<sup>371</sup> See privacy argument for the privilege and the court *a quo* decision of *Jaffee v Redmond* 1358.

<sup>372</sup> *Vasconcellos v Cybex Int’l Inc* 962 F. Supp 701 (D.Md 1997) 709 citing *Bridges v Eastman Kodak Co* 850 F.Supp 216, 223 (S.D.N.Y 1994). See also McDonnell 2001 *H. L. J* 1381.

professional privilege is waived by the client, well-established guidelines for waiver of psychotherapeutic privilege has already been developed.

The middle ground is also unsatisfactory as the courts are left to determine what constitutes “garden-variety” emotional distress. This involves a clear understanding of both the party’s mental health concerns and the fields of psychology and psychiatry.<sup>373</sup> It is submitted that the courts are not in the position to determine this. The result is thus likely to be both ambiguous and uncertain.<sup>374</sup>

#### 4.4.5 State Psychotherapeutic Privilege

Some form of psychotherapeutic privilege and its exceptions is legislated in all fifty states.<sup>375</sup> Fortunately, Auerbach has conducted a recent and thorough study on the different positions of state psychotherapeutic privilege.<sup>376</sup> Her findings were that: (1) Florida, California, Georgia and Kentucky have each enacted a uniform privilege for all mental health professionals, including psychotherapists.<sup>377</sup> (2) Several states have enacted individual privileges depending on the profession – again, including the psychotherapy profession.<sup>378</sup> (3) Ten states have enacted extensive psychologist privilege akin to attorney-client privilege,<sup>379</sup> with only two of these providing both psychological *and*

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<sup>373</sup> Refer to Chapter 3. Psychotherapy itself is not easy to compartmentalise, nor is the classification between “normal” emotional distress and psychological harm. There is also significant differences between mental disorders which involve medical conditions/disease and psychological distress.

<sup>374</sup> The court in *McKenna v Cruz* No.98 CIV 1853, 1998 WL 809533 (S.D.N.Y Nov 19, 1998) was also concerned about the garden-variety approach to waiver. The court found that an attempt to distinguish between garden variety and non garden-variety emotional distress claims would “re-introduce the very uncertainty the Supreme Court eliminated when it endorsed the psychotherapist-patient privilege as an unconditional privilege”. Cited in Nelkon 2000 *Review* 25-26.

<sup>375</sup> This was recognised by the majority in *Jaffee v Redmond* 12.

<sup>376</sup> Auerbach researched the position of psychotherapeutic privilege in the state of New York compared to the rest of the United States. Auerbach 2006 *A.L.R* 901-906. Auerbach also refers to the study conducted by P Marrow *Privilege and the Psychologist: Statutory Differences Yield Untailored Multilateral Confusion* NY ST. B.J March 1999 as well as the Codes listed by the majority in *Jaffee v Redmond* 12 fn11.

<sup>377</sup> Cal. Evid. Code 1010, 1012 (West 1995); Fla. Stat. Ann 90.503 (West 1999); Ga. Code. Ann 43-39-16 (2005); Ky. R. Ed 507 (2005). Auerbach 901 Fn 71.

<sup>378</sup> Connecticut has enacted different privileges depending on the profession. CONN. GEN. STAT. ANN 52-146d, 52-146c, 52-146q (2005). Colorado has separate psychologist and physician privilege. COL. REV. STAT 13-90-107(1)(d)(g) (2004). Auerbach 901 fn 73,74 respectively. New York also has separate privileges for physicians, psychologists and social workers. N. Y C.P.L.R 4504-4508 (McKinney 1992).

<sup>379</sup> Ala.Code 34-26-2 (Lexisnexis 2002); Ariz. Rev. Stat. Ann. 32-2085(A) (2002); Ga Code. Ann. 43-39-16 (2005); Idaho. Code. Ann. 54-2314 (2003); Kan. Stat. Ann. 74-5323 (2002); Mont. Code. Ann. 26-1-807 (2005); N.J. Stat Ann. 45:14b-28 (West Supp.2005); N.Y. C.P.Lr. 4507 (McKinney 1992); 42 P.A Cons. Stat. Ann. 5944 (West 2000); Wash. Rev. Code. Ann. 18.83.110 (West 1999).

psychiatric communications with similar attorney-client evidentiary protection.<sup>380</sup> For example, the Evidentiary Code for Alabama states that:

“The confidential relations and communications between licensed psychologists, licensed psychiatrists, or licensed psychological technicians and their clients are placed upon the same basis as those provided by law between attorney and client...”<sup>381</sup>

New Hampshire also provides the broadest scope of psychotherapeutic privilege possible – extending attorney-client privilege protection to almost all mental health professionals.<sup>382</sup> (4) Twenty-seven states have enacted specific psychotherapeutic privilege.<sup>383</sup> Some states provide protection depending on the professional’s classification,<sup>384</sup> or under the rubric of one single privilege statute.<sup>385</sup> Notably, only three states actually classify psychiatrists, psychologists and social workers as psychotherapists.<sup>386</sup>

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<sup>380</sup> Auerbach 902. Ala.Code 34-26-2 (LexisNexis 2002); 42 P.A Cons. Stat. Ann. 5944 (West 2000).

<sup>381</sup> Ala.Code 34-26-2 (LexisNexis 2002). The Evidence Code of Pennsylvania states: “The confidential relations and communications between a psychologist or psychiatrists and his client shall be on the same basis as those provided or prescribed by law between and attorney and client.” 42 P.A Cons. Stat. Ann. 5944 (West 2000).

<sup>382</sup> N.H. Rev. Stat. Ann 330-A:32 (2004). The Code states, “the confidential relations and communications between any person licensed under provisions of this chapter”. Refer to s330A:18 for such persons. It does include clinical social workers. Auerbach fn 77.

<sup>383</sup> Ala Code 34-26-2 (LexisNexis 2002); Alaska Stat 08.86.200 (2004); Ark Code Ann 16-41-101 (1999); Cal. Evid. Code 1010, 1014 (West 1995); Del. R. Evid. 503; D.C Code Ann 7-1201.01-03 (LexisNexis 2001); Fla. Stat. Ann 90.503 (West 1999); Ga Code Ann 24-9-21 (1995); Idaho Code Ann 54-2314 (2D.C03); Iowa Code Ann 622.10 (West 1999); KY. R Evid. 507; LA. Rev. Stat. Ann. 13:3734 (1991); ME. R. Evid 503; MD. Code Ann, CTS & Jud Proc 9-109 (LexisNexis 2002); Mass. Ann. Laws ch 233 20B (LexisNexis 2000); Mich. Comp. Laws Serv 330.1750 (LexisNexis 2005); Minn. Stat. Ann. 595.02(g) (West 2000); Neb. Rev. Stat 27-504 (1995); N.H. Rev. Stat. Ann 330-A:32; N.M.R Evid. 11-504; N.D. R Evid 503; Ohio Or. Rev. Stat 40.230 (2003); 42 Pa. Cons. Stat. Ann tit. 12 2503 (West 1993); Okla. Stat. Ann tit 12 2503 (West 1993); 2 Or. Rev. Stat 40.230 (2003); 42 Pa. Cons. Stat. Ann 5944; Utah. R. Evid. 50; Vt. Stat. Ann. tit 12 1612 (2002); Wis. Stat. Ann 905.04 (West 2000 & Supp 2005). Auerbach fn 78.

<sup>384</sup> Auerbach 902. For example, thirteen states do not classify social workers as protected by psychotherapeutic privilege. Rather only communications made with psychologists and psychiatrists are protected under psychotherapeutic privilege. Ala Code 34-26-2 (LexisNexis 2002); Ark Code Ann 16-41-101 (1999); Del. R. Evid. 503; Idaho Code Ann 54-2314 (2D.C03); ME. R. Evid 503; MDMD. Code Ann, CTS & Jud Proc 9-109 (LexisNexis 2002); Mass. Ann. Laws ch 233 20B (LexisNexis 2000); Mich. Comp. Laws Serv 330.1750 (LexisNexis 2005); N.M.R Evid. 11-504; N.D. R Evid 503; Ohio Or. Rev. Stat 40.230 (2003); Okla. Stat. Ann tit 12 2503 (West 1993) 42 Pa. Cons. Stat. Ann 5944.

<sup>385</sup> Cal. Evid. Code 1010, 1014 (West 1995); D.C Code Ann 7-1201.01-03 (LexisNexis 2001); Fla. Stat. Ann 90.503 (West 1999); Ga Code Ann 24-9-21 (1995); Iowa Code Ann 622.10 (West 1999); KY. R Evid. 507; LA. Rev. Stat. Ann. 13:3734 (1991); Neb. Rev. Stat 27-504 (1995); N.H. Rev. Stat. Ann 330-A:32; Or. Rev. Stat 40.230 (2003); Vt. Stat. Ann. Tit 12 1612 (2002); Utah. R. Evid. 50; Wis. Stat. Ann 905.04 (West 2000 & Supp 2005). Auerbach fn 80.

<sup>386</sup> Cal. Evid.Code 1010; Fla. Stat. Ann 90.503; KY Evid. 507(a)(2); N.H Rev Stat. Ann 330-A:2; Or. Rev. Stat 40.230. Auerbach fn 81.

Auerbach's research indicates that there is no uniform example of psychotherapeutic privilege in state law.<sup>387</sup> This was noted by the Supreme Court in *Jaffee*,<sup>388</sup> but Justice Scalia stressed that, "[T]he state laws vary to such a degree that the parties and lower federal judges confronted by the new common-law have barely a clue as to what its content might be."<sup>389</sup> In order to avoid such confusion, the Florida Evidence Code<sup>390</sup> provides a useful and thorough example of legislated psychotherapeutic privilege for the purposes of assessment. The enacted provision establishing the privilege reads as follows:

"(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism, and other drug addiction, between the patient and psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

(3) The privilege may be claimed by:

- (a) The patient or the patient's attorney on the patient's behalf.
- (b) A guardian or conservator of the patient.
- (c) The personal representative of a deceased patient.
- (d) The psychotherapist, but only on behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.

(4) There is no privilege under this section:

- (a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.
- (b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.

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<sup>387</sup> *Jaffee v Redmond* 12. See also Justice Scalia's dissent at 26.

<sup>388</sup> *Ibid.*

<sup>389</sup> 26.

<sup>390</sup> Fla. Stat. Ann 90.503 (West 2008).

(c) For communications relevant to an issue of mental or emotional condition of the patient in any proceeding in which the patient relied upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense."

The Code also defines what professionals are recognised as psychotherapists and what communications are considered as "psychotherapeutic".<sup>391</sup> Some aspects of this provision require further study. First, the privilege belongs to the patient. Other persons, such as the psychotherapist or the client's legal representative, may claim it but only on the client's behalf. Second, by protecting communications made for treatment of alcoholism or drug addiction, the provision indicates that it is not significant what the psychotherapy was for, but that it was (1) made for the purposes of diagnosis or treatment (2) done by the appropriate professional or under the supervision of the appropriate professional. This is similar to the approach used for legal professional privilege: namely (1) for the purposes of legal advice (2) with the appropriate professional.<sup>392</sup> This is a wise alternative to trying to define what constitutes protected psychotherapeutic treatment but it introduces concerns that the net has been cast too wide.<sup>393</sup> Nonetheless, by adopting such a broad approach, one of the main problems of psychotherapeutic privilege – how and when the courts delineate what constitutes privileged communications – is avoided.<sup>394</sup> Third, the provision clearly indicates what the exceptions are: (1) if disclosure is for the purposes of hospitalization,<sup>395</sup> or (2) if disclosure concerns questions of capacity during litigation; or (3) if the client has waived his or her privilege. With regard to the third exception, there are two significant points. First, the provision refers to mental or emotional conditions and not simply emotional or mental harm. Second, clients must wish to use the communications with their psychotherapists to prove a specific issue that concerns mental or emotional conditions. It is submitted that this would not promote the use of fishing expeditions, as privilege is waived only if and when clients wish to use their psychotherapist's expertise to prove/disprove a mental or emotional condition.

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<sup>391</sup> See s90.503 (1) (a) that defines the psychotherapist in terms of the privilege. It includes licensed physicians, psychologists, clinical social workers and advanced registered nurses who are certified to practice mental healthcare. S90.503(1)(c) defines privileged communication as one that is (1) intended to be confidential, (2) for the purposes of treatment under the direction of a psychotherapist and (3) furthers the interest of the patient.

<sup>392</sup> See Chapter 2 section 2.4 which discusses the conditions for legal professional privilege.

<sup>393</sup> See Chapter 2.

<sup>394</sup> Again see Chapter 2.

<sup>395</sup> See section 4.4.4.1 above where this is considered as the only possible exception to federal psychotherapeutic privilege by some authors.

#### 4.4.6 Conclusion

A number of guidelines can be enumerated from the approach of the United States. First, the utilitarian approach is still followed. It is however in need of fine-tuning. Wigmore's criteria on their own do not provide a solid argument for the establishment of psychotherapeutic privilege. Imwinkelreid is correct in questioning the behavioural assumption whether evidentiary rules affect society at large.<sup>396</sup> Second, Justice Scalia is correct in not wanting a privilege hovering between certainty and uncertainty as has occurred post-*Jaffee*. Ironically, even though the Supreme Court established absolute privilege similar to legal professional privilege, by leaving the contours of the privilege open to a multitude of differing interpretations, the Supreme Court developed an unreliable rule of evidence. The result being that McDonnell, for example, recommends that psychotherapists discuss all potential disclosures with their clients, and "limit the issues discussed in psychotherapy, and avoid topics that would prove distressful if discussed publicly".<sup>397</sup> Advice such as this, given after establishing a so-called absolute privilege, contradicts the very purpose of the privilege: to encourage free communication between the psychotherapist and client. Third, this uncertainty confirms Slovenko's argument that psychotherapeutic privilege does not provide as much protection as hoped. In order to provide an effective approach to protecting psychotherapeutic communications, it is perhaps necessary to develop procedures for disclosure similar to the Canadian approach to protecting personal information in criminal matters.

State enacted privilege provides a useful example of how psychotherapeutic privilege may be introduced via legislation. Although less flexible, a legislated privilege provides better guidance and certainty for both mental health and legal professionals, as well as for the courts.

Numerous practical and theoretical concerns have emerged since the implementation of absolute psychotherapeutic privilege in the United States. Absolute privilege promised more certainty but many unforeseen complexities and anomalies regarding the application of the privilege have emerged. The

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<sup>396</sup> See section 4.4.3.1 above and Chapter 2 section 2.3.2.

<sup>397</sup> McDonnell 2001 *H.L.J* 1389.

problems encountered in the United States reinforce the need to proceed cautiously when adopting any foreign solutions into our own law.<sup>398</sup>

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<sup>398</sup> Refer back to the introduction to this Chapter for a discussion on the advantages and disadvantages of comparative research.

## CHAPTER 5

### COMPARATIVE OBSERVATIONS AND RECOMMENDATIONS

#### 5.1 Comparative Observations

##### 5.1.1 Common-Law Privilege

###### 5.1.1.1 Absolute Privilege

The United States has introduced an absolute form of psychotherapeutic privilege. This wide-ranging privilege relies heavily on the behavioural assumption that without such extensive protection, the American populace would be deterred from seeking mental health treatment. Both the Supreme Court and state legislatures found that absolute confidentiality provided the requisite assurance that people in need of mental health treatment would seek the appropriate help. Imwinkelreid has however suggested that this reasoning is flawed. He argued that absolute privilege does influence the behaviour of laypersons as prominently as believed.<sup>1</sup> Even though confidentiality was recognised as a fundamental element of psychotherapy, Imwinkelreid indicated that protection against court-ordered disclosure did not deter people from utilizing psychotherapy as their chosen mode of mental health treatment. In addition, the scope of the privilege has not been clearly outlined.<sup>2</sup> Any exceptions to the privilege have been left to the courts for incremental development. Thus, although absolute privilege is said to firmly established, the protection provided by it can be – and often is – watered down extensively by the courts.<sup>3</sup> In practice, this results in only a limited number of instances where the privilege is applied.

Apart from the United States, the other jurisdictions studied have clearly rejected extending absolute privilege beyond the legal profession. In Canada, the primary basis for denying other relationships absolute or class privilege was because no other relationship had, thus far, been considered as

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<sup>1</sup> See Chapter 4 s4.4.3.1.

<sup>2</sup> See Chapter 4 s4.4.4.

<sup>3</sup> Slovenko's argument becomes increasingly more relevant – see further Chapter 4 s4.4.4.

important to the public interest as the legal relationship.<sup>4</sup> Furthermore, the Supreme Court found that the absolute privilege established in *Jaffee* was unsuitable because the number of exceptions already severely limited the privilege. This, the Court held, undermined the original purpose for establishing absolute privilege.<sup>5</sup> In England, the courts have also routinely rejected absolute privilege.<sup>6</sup> Class claims under PII have also been difficult to prove.

It is submitted that the South African courts or legislature should be wary of adopting or accepting absolute psychotherapeutic privilege. Even Zeffertt, one of South Africa's theorists supporting the extension of privilege beyond the legal profession, found absolute privilege unsuitable.<sup>7</sup> The privilege would not be flexible enough to ensure that no prejudice to the other party or to the trial process itself occurs. However, should absolute privilege be considered it is recommended that a combined approach to establishing the privilege is followed.

#### 5.1.1.2 Case-by-case/Qualified Privilege

In Canada, case-by-case privilege was slowly developed by the common-law. This form of privilege provided a solution that was more suitable to protecting the confidential communications of other relationships. This privilege used Wigmore's four utilitarian criteria to justify its acceptance.<sup>8</sup> Case-by-case privilege provides the courts with more flexibility than absolute privilege. The courts maintain the discretion to determine, with reference to the circumstances of the case, whether the communications warrant privilege. There is no need to introduce exceptions to this form of privilege either, as in such instances, the court would not grant privilege in the first place.

There are however some problematic aspects to case-by-case privilege that deserve mention. First, Wigmore's criteria were not designed to be used in an *ad hoc* manner. Rather, once a class of relationships was held to be protected by privilege, any future confidential communications within that

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<sup>4</sup> Chapter 4 s4.4.2.

<sup>5</sup> *M(A.) v Ryan* 1997 (1) SCR 157 para 34-35.

<sup>6</sup> See Chapter 4 s4.2.3.1

<sup>7</sup> See Chapter 2 s2.3.5. To recapitulate Zeffertt promoted a form of qualified privilege that relied on the circumstances surrounding the case.

<sup>8</sup> See Chapter 4 s4.3.3.

class were also privileged.<sup>9</sup> Second, adopting a utilitarian case-by-case privilege insufficiently addresses the impact of disclosure on the client's privacy. This, L'Heureux-Dubé J correctly states, fails to consider *Charter* values sufficiently.<sup>10</sup> A similar criticism could be raised in South Africa should Canadian case-by-case privilege be adopted. Third, another concern is the notion of "qualified case-by-case privilege" as seen in *M(A) v Ryan*.<sup>11</sup> To recapitulate, once case-by-case privilege is successfully argued, the courts reserve the right to inspect the privileged information and still grant limited disclosure. Both the content and to whom it must be disclosed are regulated. This negates a central feature of privilege, namely that information, once privileged, whether relevant or not, is immune from disclosure. It is therefore dangerous to refer to this as a form of "privilege."<sup>12</sup>

In conclusion, if case-by-case privilege is considered in South Africa, a combined approach to determining privilege is advisable. The courts should determine the overall impact of disclosure both on the profession itself and on the client's individual interests. Whether it is in the public interest to grant the privilege will rely on the circumstances of the case. This would include considering for example: the form of psychotherapy used; if the evidence could be found elsewhere; whether the communications were extremely private in nature (especially sexual violence counselling);<sup>13</sup> the purpose for which the information is requested; and finally, any other factor relevant to the matter. In order to adopt this approach, the courts should also be entitled to inspect the documents *in camera*. Disclosure, if any, should be limited to information that ensures that overall fairness for both parties is maintained.

England's approach to protecting confidential communications on a case-by-case basis relies on Public Interest Immunity. It is submitted that it would be erroneous for South Africa to adopt a similar approach. First, even though Crown privilege was the template for South Africa's State privilege, PII has since developed away from South African State privilege. Albeit that State privilege has rejected *Duncan's* principle prohibiting the court the right to inspect certified information,<sup>14</sup> it remains linked to

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<sup>9</sup> See Chapter 2 s2.3.2. See also Chapter 4 s4.3.3. L'Heureux-Dubé J's criticism of case-by-case privilege.

<sup>10</sup> See Chapter 4 s4.3.3.

<sup>11</sup> 1997 (1) SCR 157.

<sup>12</sup> Refer to L'Heureux-Dubé J's criticism of the majority opinion in *M(A) v Ryan*. Chapter 4 s4.3.3.

<sup>13</sup> See for example, Pithey *Thesis* 70 whereby she recommends that absolute privilege should apply to personal records for those suffering from sexual violence.

<sup>14</sup> *Van der Linde v Calitz* 1967 (2) SA 239 (A). For a discussion of this see Schwikkard *Evidence* 149-151.

state or governmental information. In *Swissborough Diamond Mines (Pty) Ltd v Government of Republic of South Africa*<sup>15</sup> for example, the court introduced principles to govern State privilege in accordance with constitutional values. Joffe J states:

“(1) The Court is not bound by the *ipse dixit* of any cabinet minister or bureaucrat irrespective of whether the objection is taken to a class of documents or a specific document and irrespective of whether it relates to matters of *State security, military operations, diplomatic relations, economic affairs, cabinet meetings* or any other matter affecting the public interest. (2) The Court is entitled to scrutinise the evidence in order to determine the strength of the public interest affected and the extent to which the interests of justice to a litigant might be harmed by its non-disclosure. (3) The Court has to balance the extent to which it is necessary to disclose the evidence for the purpose of doing justice against the public interest in its non-disclosure. (4) In this regard the *onus should be on the State* to show why it is necessary for the information to remain hidden. (5) In a proper case the Court should call for oral evidence, *in camera* where necessary, and should permit cross-examination of any witnesses or probe the validity of the objection itself.”<sup>16</sup>

It is submitted that even though reference is made to matters that are in the public interest, the focus of State privilege remains embedded in protecting State-related interests. Second, the confusion surrounding the application of State privilege for non-governmental matters would introduce unnecessary procedural problems. These would include questions concerning waiver; the difference between civil and criminal matters; the use of circumstantial evidence; and whether the court is obliged to enforce privilege *mero motu*.<sup>17</sup> Finally, since PII still involves balancing competing interests, there appears to be little advantage in arguing State privilege over private privilege.

### 5.1.2 Statutory Psychotherapeutic Privilege

An alternative to common-law privilege is to introduce statutory provisions establishing psychotherapeutic privilege. This has been the approach of most of the State legislatures to

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<sup>15</sup> 1999 (2) SA 279 (T).

<sup>16</sup> 343-344. My emphasis. These principles formulated by Paizes and Zeffertt. See Zeffertt *Law of Evidence* 655, Schwikkard *Evidence* 152 also proposes that the courts should be able consider whether partial disclosure of the evidence is possible.

<sup>17</sup> See Chapter 4 s4.2.3.3 and Chapter 2 s2.2. fn 14.

psychotherapeutic privilege in the United States.<sup>18</sup> Statutory privilege provides more certainty on the application of the privilege, to whom the privilege benefits and what exceptions to the privilege are present. Furthermore, privilege that no longer rests on a common-law enquiry provides a more reliable rule of evidence. For example, the professional will have a better understanding of privilege as it relates to confidentiality and will be able to advise their client accordingly. Legal professionals, on the other hand, will be able to determine with more confidence the scope of the privilege and whether an exception applies. It also obviously firmly establishes psychotherapeutic privilege, thereby possibly promoting the use of psychotherapy and protecting the individual's privacy interests.

There are some reservations whether this would be a suitable solution for South Africa. First, the concerns regarding absolute privilege re-emerge on a statutory level –it remains questionable whether privilege encourages people to enter into psychotherapy. It is also difficult to establish that the privilege does not negatively influence the effectiveness of the legal system. In the interests of fairness, both the client's interests to preserving confidentiality and the impact of privilege on the opposing party must be considered. The best forum for this is the courts, as the courts are exposed to the individual circumstances of the case. Statutory guidelines for this can be introduced. Second, all state privileges, including attorney-client privilege, are established via statute in the United States. In South Africa, however, most private privileges have thus far developed through the common-law. If statutory psychotherapeutic privilege is to be recommended, the position of all professions reliant on confidentiality would also require further study. The legislature would also have to consider whether other confidential professions warrant statutory protection. This includes legal professional privilege. The paucity of South African study on this issue indicates a need for further research. Consider for example the possibility of priest-penitent privilege in light of the right to freedom of religion,<sup>19</sup> or journalist-source privilege in light of the right to freedom of expression.<sup>20</sup>

Finally, if psychotherapeutic privilege were to be enacted, secondary issues regarding the application of the privilege would need to be resolved. These range from determining what form of psychotherapy

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<sup>18</sup> See Chapter 4 s4.4.5.

<sup>19</sup> Section 15 of the Constitution of the Republic of South Africa, 1996.

<sup>20</sup> Section 16(1)(a) of the Constitution expressly provides that the right to freedom includes the freedom of the press and the media. See further R Brand "Between Privilege and subpoena: Protecting Confidential Sources" (2006) 27(2) *Equid Novi* 113.

should be protected,<sup>21</sup> when privilege is waived,<sup>22</sup> and what possible exceptions to the privilege should be recognised on grounds of public policy.<sup>23</sup> Unfortunately, limiting the scope of the privilege reintroduces the possibility that in practice, the privilege will not be exercised often. As Slovenko argued, if the privilege becomes dependent on fulfilling a number of rigid requirements and is subject to many exceptions, it runs the risk of becoming nothing more than a flimsy shield offering only the illusion of protecting psychotherapeutic communications.

### 5.1.3 Two-Stage Balancing Process Incorporating Relevance

#### 5.1.3.1 Introduction

It is submitted that South Africa's current position continues to be unacceptable. South African psychotherapists have become increasingly aware of the lack of protection surrounding their clients' privacy interests.<sup>24</sup> Chapter 3 has also highlighted that psychotherapy will continue to grow in importance in South African society. Furthermore, the negative impact of forced disclosure of psychotherapeutic communications on the client's right to privacy and dignity remain significant concerns. The different solutions provided in Canada and the United States are also indicative of the need to introduce some degree of legal protection against full and unrestricted disclosure. Thus, *in lieu* of privilege, another possible solution is to adopt an amended form of s278 of the Canadian Criminal Code. To restate the position under the Code: it provides that any party requesting the disclosure of personal records during criminal litigation must make an application to the court proving that the confidential records are both likely relevant and that non-disclosure would amount to an injustice.<sup>25</sup> Before continuing, it is submitted that South Africa need not limit this procedural protection to criminal matters and should extend its application to both civil and criminal proceedings.

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<sup>21</sup> For example the differing confidentiality requirements depending on the mode of psychotherapy practices. Refer back to Chapter 3 s3.3.

<sup>22</sup> It is submitted that the best approach is to adopt similar principles of waiver as found in legal professional privilege. See Chapter 2 s2.4.2.

<sup>23</sup> For a brief outline of possible legislative exceptions see s5.3 below.

<sup>24</sup> A "Psychologist and Rape Survivor Unsupported by the Justice System and the HPCSA" [www.psychotherapy.co.za](http://www.psychotherapy.co.za) (accessed 21 February 2007).

<sup>25</sup> For a full discussion of the provision, see Chapter 4 s 4.3.4.2.

Additionally, even though s278 is limited to personal records,<sup>26</sup> it is recommended that it should also include confidential communications and information generated between a psychotherapist and client.

#### 5.1.3.2 Recommendations for South African law

*Stage 1:* The party requesting disclosure of psychotherapeutic records/communications must make an application proving:

(a) The evidence is likely to be relevant to litigation:

When assessing the likely relevance of psychotherapeutic communications, s210 of the Criminal Procedure Act<sup>27</sup> and s2 of the Civil Proceedings Evidence Act<sup>28</sup> provide some guidance. Both Acts do not define relevance but rather provide that no evidence shall be admissible if it is irrelevant or immaterial and cannot prove or disprove any point or fact in dispute. If this negative approach to the relevance of psychotherapeutic communications is applied, the party requesting disclosure would have to establish relevance for litigious purposes, in addition to other formal requirements. This includes for example proving that: (1) information gathered during psychotherapy does not differ too significantly from information gathered for litigation;<sup>29</sup> (2) the mode of psychotherapy has not influenced the relevance of information gathered,<sup>30</sup> and; (3) no significant transference has occurred between the psychotherapist and client.<sup>31</sup>

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<sup>26</sup> Note that the South African Law Commission has introduced the Personal Records Bill that could further extend its protection to include court-ordered disclosures. Refer back to Chapter 3 s3.5.1.2 and Nell *Confidentiality* 52-67.

<sup>27</sup> Act 51 of 1977.

<sup>28</sup> Act 25 of 1965.

<sup>29</sup> For example, when making a statement to the police. See Chapter 4 s4.2.3.1 for A Hayman's argument concerning the lack of informational objectivity between psychotherapist and client. A Hayman "Psychoanalyst subpoenaed" *The Lancet* 16 October 1965 in P Jenkins *Legal Issues in Counselling and Psychotherapy* (2002) 22.

<sup>30</sup> Particular attention should be paid on the difference between Cognitive Behavioural Therapy and Psychoanalytical/psychodynamic psychotherapy. See Chapter 3 s3.3.3.

<sup>31</sup> Transference is where a client transfers significant aspects or elements of their real-life relationships onto their relationship with their psychotherapist. For a more detailed explanation refer to Chapter 3, s3.3.3.1.

(b) A possible injustice would occur if the evidence is not disclosed:

In order to determine whether refusing disclosure of psychotherapeutic communications would cause an injustice, a number of factors should be proved by the party requesting disclosure: (1) that the evidence is of important probative value to litigation. For example, the request for disclosure amounts to more than a “fishing expedition” or only for the purposes of cross-examination; (2) that the evidence cannot be found elsewhere – for example that there were no other witnesses to the incident; (3) that no constitutional rights and/or values are infringed by disclosure. Notably, this includes establishing that the other party’s right to privacy, dignity and possibly equality have not been infringed;<sup>32</sup> (4) that the societal interests in that particular matter favour disclosure over non-disclosure. The party must prove that disclosure would not deter the public from seeking psychotherapeutic treatment; (5) that the client had no reasonable expectation of privacy in the circumstances of the case. The party should establish for example that the communications were not made in confidence, that confidentiality was not an agreed component of the fiduciary relationship or that some other statutory provision negates confidentiality;<sup>33</sup> (6) finally, that non-disclosure would render the trial unfair. Focus is likely to be on the adversarial nature of litigation and the need for full disclosure as well as the right to make a full defence.

*Stage 2:* Should the party requesting disclosure succeed in stage 1, the court must then review the potential evidence. During this stage, the court must consider both the likely relevance of the information and whether justice, as well as the interests of the public, are best served by disclosure. In this process, the court may view any psychotherapeutic records *in camera* and/or question the

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<sup>32</sup> Primarily referring to the disclosure of psychotherapeutic communications during sexual offence trials. It is also important to note that the South African Law Reform Commission recommends that if one establishes a statutory definition of relevance, “ A court may refuse to admit evidence if its probative value is *substantially outweighed by the danger that the evidence might:*

(a) *be unfairly prejudicial to a party;* or  
(b) cause or result in undue waste of time.

(2) When determining whether the probative value of evidence is outweighed by the risk that evidence will have an unfairly prejudicial effect, a presiding officer may not adopt assumptions or make generalisations that are in conflict with the constitutional values embodied in the Constitution of the Republic of South Africa Act 108 of 1996.” My emphasis. South African Law Reform Commission *Review Of The Law Of Evidence (Hearsay And Relevance)* (August 2005) Discussion Paper 113 Project126 at 26.

<sup>33</sup> For discussion of these possible exceptions, see s5.3 of this Chapter.

psychotherapist. Thereafter, should the court find that disclosure is appropriate, it should limit disclosure to the bare minimum required by the circumstances.

In conclusion, although this proposition does not provide the same degree of protection as absolute privilege,<sup>34</sup> it is more practical than case-by-case privilege. By enacting statutory provisions on requests for confidential communications, harmful or unnecessary invasions of the client's privacy are avoided. Relevance also remains significant, thus granting the courts the opportunity to ensure that the opposing party is not unfairly or unreasonably prejudiced. Moreover, if the courts are given clear statutory guidelines on how best to regulate the disclosure of particularly sensitive evidence, further certainty surrounding the protection of confidential communications is assured. Finally, this approach has also been subjected to judicial scrutiny in Canada and was found to be in accordance with their *Charter* values.<sup>35</sup> Should a similar challenge be raised in the South African context *R v Mills*<sup>36</sup> provides a useful comparative guideline for our courts.<sup>37</sup>

## 5.2 "Just Excuse"

Another argument, already established in South African law, may be utilised by psychotherapists without legislative or common law modification. In terms of s189 of the Criminal Procedure Act, a witness who without "just excuse" refuses to testify, or answer specific questions, or produce any documents, is in danger of summary punishment by the court. The court is required to consider reasons advanced by the witness for refusal before imposing punishment. "Just excuse" has been held to have a wider ambit than "lawful excuse". In *Attorney-General, Transvaal v Kader*<sup>38</sup> Grosskopf JA held that:

"the expression "just excuse" in s189 has a wider connotation than merely embracing excuses arising for the rules of privilege, admissibility and compellability. And for the purposes of the present case ... There

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<sup>34</sup> Established via the common law or statute.

<sup>35</sup> *R v Mills* 1999 (3) SCR 668.

<sup>36</sup> *Ibid.*

<sup>37</sup> Section 39(1)(b) provides that when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law.

<sup>38</sup> 1991 (4) SA 727 (A).

may well be circumstances in which a just excuse may exist even if it is not humanely intolerable for the person concerned to have to testify...the “humanely intolerable” formulation is in itself a general guideline which should not be treated as it were a legislated enactment.”<sup>39</sup>

This reasoning was followed in *S v Cornelissen; Cornelissen v Zeelie*<sup>40</sup> in which the appeal court had to decide whether a journalist had a just excuse to refuse to testify under s205 of the CPA.<sup>41</sup> The appellant, a journalist, argued that his newspaper “was dependent on its reporters having a relationship of trust with the public”<sup>42</sup> and that if the reporters were considered as informers to the police, their reputation would be severely impaired. This, it was argued would result in the loss of vital informational sources. The court held in this circumstance, that the advantage of questioning did not outweigh the potential public prejudice caused by the forced disclosure. The sentence of 12 months’ imprisonment by the court *a quo* was accordingly set aside.<sup>43</sup> Nonetheless, the defence of “just excuse” is not certain. In contrast to *Cornelissen*, in the earlier decision of *S v Pogrand*,<sup>44</sup> the appellant, also a journalist, argued that the magistrate had incorrectly imprisoned him in terms of s212 (1) of the Criminal Procedure Act 56 of 1955.<sup>45</sup> The court *a quo* had held that he did not have a just excuse for refusing to identify the source of his information. This decision was confirmed because first, there was no journalist privilege in South Africa and second, forced disclosure would not incriminate the journalist himself.<sup>46</sup> “Just excuse” has also been rejected for a church minister who wanted to maintain priest-penitent confidentiality<sup>47</sup> and for a witness who did not want to incriminate a friend.<sup>48</sup> These decisions indicate that while the courts might hold sympathy towards psychotherapists who seek to uphold their ethical obligation to their clients, there is little security in arguing just excuse.

Furthermore, the implications of a psychotherapist’s decision to refuse disclosure depend on the court’s view on confidentiality, the profession in question, as well as the overriding interests of the

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<sup>39</sup> 737D-G.

<sup>40</sup> 1994 (2) SACR 41 (W).

<sup>41</sup> This was the next consideration as the court accepted that there was no recognised journalist professional privilege.

<sup>42</sup> Taken from the English translation of the headnote.

<sup>43</sup> *Ibid.*

<sup>44</sup> 1961 (3) SA 868 (T).

<sup>45</sup> Criminal Procedure Act 56 of 1955. Section 212(1) relating to “just excuse” is very similar to s189 of the current Criminal Procedure Act 55 of 1977.

<sup>46</sup> 868. Taken from the English translation of the head note.

<sup>47</sup> *Smit v Van Niekerk* 1976 (4) SA 293 (A)

<sup>48</sup> *S v Carneson* 1962 (3) SA 437 (T).

public. It is therefore a dangerous solution to protecting the integrity of the profession and/or the client's privacy interests, as it may result in incarceration for the professional. Development of the law along such lines may thus well depend on the courage of the pioneers who incur the risks of refusal to testify.

The provisions regarding just excuse must also be viewed in the context of the Constitution. In *Nel v Le Roux*<sup>49</sup>, the Constitutional Court considered the constitutionality of s189 and s205 of the CPA.<sup>50</sup> Ackermann J referred to *Bernstein v Bester*<sup>51</sup> where, under s418(5)(b)(iii)(aa) of the Companies Act,<sup>52</sup> a witness need not answer questions put before them if they show that they have "sufficient cause" to refuse disclosure. *Bernstein* interpreted "sufficient cause" to include any question that might threaten or infringe any of the examinee's rights in the Bill of Rights provided that the rights in question remain subject to constitutional limitation.<sup>53</sup> Ackermann J adopted the same interpretation for determining the meaning and application of just excuse. The Constitutional Court in *Nel* held that a witness would have a just excuse for refusing to answer questions under s205 if the question infringes or threatens to infringe any of the witness's Chapter 3 rights.<sup>54</sup> Consequently, if the witness proves that certain questions infringe any of their fundamental rights, the witness would not be subject to imprisonment as a recalcitrant witness. The basis for this decision is that s189 must be read with s35(3) of the interim Constitution<sup>55</sup> under which the court is obliged, when interpreting any legislation to "promote the spirit, purport and objects of the Bill of Rights."<sup>56</sup>

*Nel v LeRoux* increases the chances of a successful argument that professionals have a just excuse in maintaining confidentiality on the grounds of protecting their client's or other fundamental human rights. For example, this argument was raised in 2005, when the National Director of Public Prosecutions, the Justice Department, SANEF (South African National Editors Forum) and the

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<sup>49</sup> 1996 (3) SA 562 (CC).

<sup>50</sup> To explain further, under s205(1) of the CPA, a witness would have to answer any relevant questions put before them by a magistrate or judge. However, if the witness refused to answer any questions put before them, the court's decision would then be governed by s189 of the CPA.

<sup>51</sup> 1996 (2) SA 751 (CC).

<sup>52</sup> Act 61 of 1973.

<sup>53</sup> *Bernstein v Bester* paras 58 to 63.

<sup>54</sup> *Nel v Le Roux* para 7. Chapter 3 refers to the Bill of Rights in the Interim Constitution.

<sup>55</sup> Section 38(2) of the Final Constitution.

<sup>56</sup> *Nel v Le Roux* para's 7-9.

Parliamentary Portfolio Committee on Justice met to consider the question of the just excuse for journalists.<sup>57</sup> This followed from an agreement made between SANEF, the Ministers of Justice and Safety and Security and the NDPP that there is a “need to balance the interests of the maintenance of law and order and the administration of justice on the one hand with the right to freedom of expression and specifically freedom of the press and other media.”<sup>58</sup> Brand emphasises that this agreement acknowledges that it is necessary in certain circumstances that the journalist’s sources and information be protected against forced disclosure.<sup>59</sup>

The Constitutional Court’s approach could aid psychotherapists who wish to protect their client’s right to privacy and human dignity,<sup>60</sup> and it could also provide a significant defence for client themselves if they are questioned on their relationship and communications with their psychotherapists.<sup>61</sup> However, it is arguable that the same concern regarding whose rights are protected remains valid. *Nel’s* case refers to protection against infringement of the witness’s rights and not rights of another person. Thus, if the psychotherapist on the witness stand wants to claim just excuse against disclosure of another person’s rights – namely their client’s rights – the defence of just excuse lacks certainty. Furthermore, *Nel’s* case emphasises the importance of compelling witnesses to answer questions lawfully put to them.<sup>62</sup>

### 5.3 Current Statutory Exceptions to Psychotherapeutic Confidentiality

Irrespective of whether an argument for privilege is successful or another solution to the problem is developed, the confidential relationship between psychotherapists and their clients should never be

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<sup>57</sup> R Brand “Between Privilege and subpoena: Protecting confidential sources”(2006) 27(2) *Equid Novi* 113.

<sup>58</sup> Brand 2006 *Equid Novi* 128-129.

<sup>59</sup> *Ibid.* Note that in *Munusamy v Hefer and others (Freedom of Expression Institute and others as amicus curiae* 2004 (5) SA 112 (O) the court rejected the argument that journalists automatically had a just excuse for refusing to testify or answers any questions put before them on the grounds that disclosure would amount to an infringement of section 16 of the Constitution.

<sup>60</sup> See Chapter 3 of this thesis.

<sup>61</sup> It would likely be argued that in such circumstances the client would assert their right against self-incrimination. See *S v Mahlangu* 2000 (1) SACR 565 (W) 569A-D where the applicant was seeking access to records of telephonic conversations involving him and another that had been recorded five years earlier. Snyders J applied *Nel’s* case in reaching his decision, stated that although the applicant could not be likened to a witness since trial proceedings were yet to begin, should the applicant find at the time of questioning, that he is unable to recollect the information sufficiently and then possibly incriminate himself, this would justify a just excuse in the circumstances.

<sup>62</sup> Para 11.

entirely absolute. There are instances where it is in the best interests of society that confidentiality is broken. This is evident from the approach to psychotherapeutic privilege in the United States. This section of the thesis will outline what statutory provisions – excluding court-ordered disclosure – currently demand disclosure from psychotherapists. An understanding of these exceptions is important for the purposes of this thesis because they highlight where counsellor-client confidentiality should be subject to limitation. Any future statutory dispensation protecting psychotherapeutic communications should integrate these limitations into its provisions.

### 5.3.1 The Mental Health Care Act 17 of 2002<sup>63</sup>

MHCA commenced on 15 December 2004. It repealed the Mental Health Act<sup>64</sup> almost in its entirety, leaving only Chapter 8 of the earlier Act in force.<sup>65</sup> This much-needed new legislation significantly alters the protection provided for mental health care users in a number of areas.<sup>66</sup> For the purposes of this thesis, a few changes should be noted. First, the MHCA provides broader definitions of mental health care practitioners and users than previously enacted. Psychotherapists are classified as mental health practitioners whether they come from a psychological or medical background,<sup>67</sup> and persons under psychotherapy are classified as mental health care users.<sup>68</sup> Second, the MHCA provides that information should be kept confidential once so established by any other law.<sup>69</sup> Unfortunately, what is meant by “any other law” remains unspecified. Arguably, this would include Rule 24 (1) of the Ethical Rules for psychologists, which states that a psychologist must safeguard confidential information

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<sup>63</sup> Abbreviated as MHCA.

<sup>64</sup> Act 18 of 1973.

<sup>65</sup> The Chapter is not relevant to this study as it deals with Hospital Boards only.

<sup>66</sup> See Chapter III of the Act which lists the rights and duties relating to mental health care users. Significantly, the Act provides protection against unfair discrimination based on one’s mental health. See T Zabow ‘The Mental Health Care Act (Act 17 of 2002)’ in Kaliski *Psycholegal Assessment* 58-82 for a comprehensive and useful guide of the main provisions of the Act.

<sup>67</sup> Section 1(viii) defines a mental health care practitioner includes a psychiatrist or registered medical practitioner or nurse, occupational therapist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment or rehabilitation services.

<sup>68</sup> Defined in s1(xix) as “a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, state patient and mentally ill prisoner and where the person is below the age of 18 years or is incapable of taking decisions, and in certain circumstances may include – (i) prospective user, (ii) the person’s next of kin, (iii) a person authorised by any other law or court order to act on that persons behalf, (iv) and administrator appointed in terms of this Act; and (v) an executor of the deceased persons estate and ‘user’ has a corresponding meaning.” This would encompass clients receiving psychotherapy.

<sup>69</sup> In terms of s13(1) of the MHCA, “a person or health establishment may not disclose any information which a mental health care user is entitled to keep confidential in terms of any other law.”

obtained during the course of his or her practice...subject only to the limits of confidentiality as may be determined by law or court of law.<sup>70</sup> Third, the MHCA allows psychotherapists to reassign issues of client confidentiality and possible disclosure to higher authorities when harm to the client or others is foreseen. Section 13(2) provides that “the head of the national department, a head of provincial department or the head of a health establishment may disclose such information if it would seriously prejudice the health of either the mental health care user or others.”<sup>71</sup> Thus, higher authorities in the mental health care system are allowed to disclose confidential information when the health of the client or others is seriously at risk. As a result, psychotherapists should inform authorities of any issues regarding potential harm of the client or others rather than consider disclosure by themselves. This limits the scope and opportunities for accepted disclosure to heads of health departments and establishments alone, and only when serious harm to the health of the client or others is foreseen.<sup>72</sup> A possible single concern regarding s13(2) is that there are no procedural guidelines for these heads to follow once such concerns are brought to their attention by psychotherapists.<sup>73</sup> For example, what actions should the authority take to prevent the harm? To whom should the information be disclosed?

### 5.3.2 The Children’s Act 38 of 2005

Section 110 of the Children’s Act obliges psychologists, *inter alia*, to report any injury or abuse that may have been deliberately inflicted on a child to any designated child protection organisation or police officer. Failure to report is a criminal offence. The section goes on to protect those who are obliged to disclose against litigation flowing from *bona fide* disclosure.

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<sup>70</sup> Refer back to Chapter 3 s 3.2.2.

<sup>71</sup> Act 18 of 1973.

<sup>72</sup> Accordingly, if the mental health practitioner foresees any intention on the client to harm property, disclosure is not warranted.

<sup>73</sup> Under s13 of the old Mental Health Act the concerned medical professional was obliged to disclose such information to a police official or magistrate. Failure to report such persons was also considered as a contravention of the Act and therefore resulted in a fine or imprisonment.

### 5.3.3 The Prevention of Family Violence Act 133 of 1993 and the Domestic Violence Act 115 of 1998

Section 4 of the Prevention of Family Violence Act states that “Any person who examines, treats, attends to, advises, instructs, or cares for any child” who is suspected of suffering from injuries caused intentionally by another person must report it to a police official or a child welfare social worker. It should be mentioned that sections 1, 2, 3, 6 and 7 of the Prevention of Family Violence Act have been repealed by the Domestic Violence Act 116 of 1998. Section 4 of the Prevention of the Family Violence Act however remains intact.

Interestingly, in order to address the problem of domestic violence in South Africa, ss4(3) of the Domestic Violence Act allows “any person, including a counsellor, health service provider...who has a material interest in the well-being of the complainant” to apply for a protection order for the complainant. Unfortunately, this section does not specifically refer to psychotherapists, but it is likely that the section would include psychotherapists as it states that any person may apply for an order if there is a material interest in the complainant. Furthermore, the legislature considered counsellors as an example of who may apply and it is likely that registered psychologists and psychiatrists are also meant to be included in the section. In terms of ss4(3), the written consent of the complainant is required unless the complainant is a minor, mentally retarded, unconscious or a person the court is satisfied is unable to give written consent.<sup>74</sup>

Furthermore, Rule 27(1)(d) of the Ethical Code also provides that a psychologist is allowed to disclose information, such as potential evidence of domestic violence, in order to protect a client or other people from harm.<sup>75</sup> These two sections clearly indicate that in circumstances of domestic violence, the psychologist should seek to protect the client from future harm. This may obviously include a protection order.

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<sup>74</sup> Subsections 4(3)(a);(b);(c) and (d) respectively.

<sup>75</sup> *Ibid.*

## 5.4 Conclusion

It is recommended that any future statutory dispensation integrate the abovementioned laws into its provisions. It is in the best interests of the public that psychotherapists, who are aware of child or domestic abuse, report such abuse to the appropriate authority. Any protection against the disclosure of psychotherapeutic communications during court proceedings should not apply in these instances. Furthermore, by acknowledging specific instances where statutory protection is limited, future litigation concerning the scope and application of any form of statutory protection is reduced.

## CHAPTER 6

### DRAFT STATUTORY PROVISION

This draft is based on s278 of the Canadian criminal code<sup>76</sup> which was introduced to protect against the unfettered disclosure of personal records during sexual offence trials.<sup>77</sup>

#### 1. Definitions

For the purposes of this Provision, unless the context indicates otherwise –

- (i) **‘Children’s Act’** means the Children’s Act, 2005 (Act no. 38 of 2005);
- (ii) **‘Client’** means a person who consults, or is interviewed by, a psychotherapist for the purposes of diagnosis or treatment of a mental or emotional condition, including sexual abuse, alcoholism and other drug addiction, or consults, or is interviewed by, a psychotherapist at a health establishment aimed at enhancing or treating the mental or emotional health condition of the client, and in certain circumstances may include –
  - (a) prospective clients;
  - (b) the client’s next of kin;
  - (c) a person authorised by any court of law or court order to act on that person’s behalf;
  - (d) an administrator appointed in terms of Chapter VIII of the Mental Health Care Act 17 of 2002;
- (iii) **‘Criminal Procedure Act’** means the Criminal Procedure Act, 1977 (Act no. 51 of 1977);
- (iv) **‘Domestic Violence Act’** means the Domestic Violence Act, 1998 (Act no. 115 of 1998)
- (v) **‘Evidence’** means confidential communications, records or any information generated between a psychotherapist and client classified as confidential in terms of the Health Professions Act
- (vi) **‘Health Professions Act’** means the Health Professions Act, 1974 (Act no.56 of 1974);
- (vii) **‘Mental Health Care Act’** means the Mental Health Care Act, 2002 (Act no. 17 of 2002);
- (viii) **‘Prevention of the Family Violence Act’** means the Prevention of the Family Violence Act, 1993 (Act no. 113 of 1993);

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<sup>76</sup> See further Chapter 4 section 4.3.4.

<sup>77</sup> The definitions have followed the definitions provided in the Mental Health Care Act 17 of 2002. Take note that the definition of ‘client’ is similar to the definition of a ‘mental health care user’ under the Mental Health Care Act. The reason for adopting a similar definition is to ensure that the proposed provision also encompass deceased clients whose psychotherapeutic communications remain confidential.

- (ix) **‘Psychotherapy’** means the practise of diagnosing or treating a client’s mental or emotional condition, including alcoholism, sexual abuse or other drug addictions;
- (x) **‘Psychotherapist’** means a person who is, or is reasonably believed by the client to be:
- (i) A person registered under the Health Professions Act to practise psychiatry in the Republic, who devotes or is reasonably believed by the client to devote, a substantial portion of his or her time to the practise of psychotherapy;
  - (ii) A person registered under the Health Professions Act to practise as a clinical or counselling psychologist in the Republic, who devotes or is reasonably believed by the client to devote, a substantial portion of his or her time to the practise of psychotherapy;
- (xi) **‘Screening process’** means the process of adjudication as to the admissibility of communications as governed by sections 7 to 10.

## **2. Access to Confidential Information**

Any party who, without the consent of a client, intends to question a client or a psychotherapist, in evidence at civil or criminal proceedings about any communication made by that client to such psychotherapist during the course of psychotherapeutic treatment, must make an application to the judicial officer trying the case in the manner set out in section 3.

## **3. Form and Content of Application**

An application must be made in writing and set out –

- (a) particulars identifying the client and psychotherapist, as well as the evidence that the applicant seeks to have produced;
- (b) the grounds on which the applicant relies to establish that such evidence, is relevant to an issue or fact in the proceedings.

## **4. Insufficient grounds**

(1) Any one or more of the following assertions by the applicant are not sufficient on their own to establish that the evidence is relevant to an issue or fact in issue in the proceedings:

- (a) the mere existence of confidential communications between the client and psychotherapist;
- (b) that the evidence relates to psychotherapy or counselling that the client has received or is receiving;

- (c) that the evidence relates to an incident or occurrence that is the subject matter of the proceedings
  - (d) that the evidence may disclose a prior inconsistent statement of an opposing party or witness;
  - (e) that the evidence may relate to the credibility of an opposing party or witness;
  - (f) that the evidence may relate to the reliability of the testimony of the opposing party or witness because the opposing party or witness had received or is receiving emotional or mental health treatment;
  - (g) that the evidence relates to any sexual activity of an opposing party or witness with any person including the applicant;
  - (h) that the evidence relates to the presence or absence of a recent complaint ;
  - (i) that the evidence was generated close in time to the activity or incident that forms the subject-matter of the proceedings.
- (2) This section shall not be interpreted in any manner that would render admissible any questioning or evidence that would not be allowed under s227 of the Criminal Procedure Act.

#### **5. Service of application and subpoena**

The applicant shall serve the application on the client, the psychotherapist, other parties, and any other witness who may be affected by such evidence.

#### **6. Judicial Officer may order production of record for review**

The judicial officer may order the client or psychotherapist to testify or produce information or part of the information to the court during the screening process if the judicial officer is satisfied that

- (a) the application was in accordance with sections 2 to 5;
- (b) the applicant has established that the record is relevant to an issue or fact in issue in the proceedings and;
- (c) the disclosure of the confidential communications or information generated between the psychotherapist and client is in the interests of justice.

#### **7. Factors to be considered**

In determining whether to order the client or psychotherapist to testify or disclose confidential information during the screening process, the judicial officer shall consider the salutary and deleterious effects of the determination on the applicant's right to make a full answer and defence and on the right

to privacy, dignity and equality of the client, as the case may be, and any other person to whom the evidence relates. In particular, the judicial officer shall take the following factors into account:

- (a) the extent to which the evidence is necessary for the applicant to present his or her case adequately;
- (b) the probative value of the evidence;
- (c) the nature and extent of the reasonable expectation of privacy with respect to the evidence;
- (d) whether admissibility of the evidence is based on unfair discriminatory belief or bias;
- (e) the potential prejudice to the client's right to dignity and privacy;
- (f) society's interest in encouraging the treatment and promotion of the emotional and mental health of its members;
- (g) society's interest in encouraging access to evidence for legal proceedings;
- (h) the effect of the determination on the integrity of the trial process.

#### **8. Review of Evidence**

Where the judicial officer has ordered full or part disclosure of the confidential communication or information for the screening process, the judicial officer shall *in camera* review the information and/or ask any questions the judicial officer deems fit to the psychotherapist concerned, in the absence of the parties, in order to determine whether the psychotherapist should submit evidence in front of the applicant.

#### **9. Hearing *in camera***

- (1) The judicial officer concerned shall hold a hearing *in camera* to determine whether to order the psychotherapist to testify or produce information in accordance with section 6.
- (2) The judicial officer concerned may hold a hearing *in camera* if the judicial officer considers that it will assist in making a determination in accordance with section 8.

#### **10. Judicial Officer may order the production of the evidence to applicant**

Where the judicial officer is satisfied that the evidence is likely to be relevant to an issue or fact in issue in the proceedings and its admission is necessary in the interests of justice, he or she may order that the evidence be admitted at the trial, subject to any conditions that may be imposed pursuant to section 12.

**11. Factors to be considered before disclosure to the applicant**

In determining whether to order the disclosure of any confidential communications or information generated between psychotherapist and client to the applicant, the judicial officer shall consider the salutary and deleterious effects of the determination on the applicant's right to present his or her case adequately, on the one hand, and on the right to dignity, privacy and equality of the client and any other person to whom the evidence relates and in particular shall take the factors specified in sections 7(a) to 7(h) into account, on the other.

**12. Conditions on disclosure**

Where the judicial officer orders the disclosure of any confidential communications or information generated between psychotherapist and client to the applicant, the judicial officer may impose conditions on disclosure to protect the interests of justice and, to the greatest extent possible, the dignity, privacy and equality interests of the client and any other person to whom the evidence relates, including for example, the following conditions:

- (a) that any records in possession of the psychotherapist be edited as directed by the judicial officer;
- (b) that copies of any confidential information, rather than the original, be produced;
- (c) that the applicant and counsel for the applicant not disclose any confidential information to any other person, except with the approval of the court;
- (d) that no copies of any confidential information be made or that restrictions be imposed on the number of copies that may be made;
- (e) that the questioning of the psychotherapist be limited to areas that the judicial officer deems fit;
- (f) that any confidential information regarding any person named and/or recorded during psychotherapy, such as their address, telephone number and place of employment, be omitted from disclosure.

**13. Evidence cannot be used in other proceedings**

The evidence disclosed or part thereof pursuant to an order under section 11 shall not be used in any other proceedings.

#### **14. Reasons for decision**

(1) The judicial officer shall provide reasons for ordering or refusing disclosure of any confidential communications or information generated between psychotherapist and client under sections 6 and 10 and for any conditions that may be attached to such order.

(2) Reasons for refusing disclosure, or placing conditions on disclosure, shall be given in such a way that they do not cause the harm that unfettered disclosure would have caused.

#### **15. Publication prohibited**

(1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

- (i) the contents of an application made under section 3;
- (ii) any evidence taken, information disclosed or submissions made at a screening process hearing under section 9;

unless the judicial officer, after taking into account the interests of justice and the rights to dignity and equality of the client to whom the evidence relates, orders that the evidence may be published.

(2) Any person who contravenes section 15(1) is guilty of an offence and on conviction is liable to a fine or a maximum of three years' imprisonment, or to both such fine and imprisonment.

#### **16. Exceptions to Section 2**

The application procedure does not apply to:

- (a) communications or evidence relevant to an issue in proceedings to compel involuntary care, treatment or rehabilitation of client for mental illness under section 33 of the Mental Health Care Act, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe that the client is in need of involuntary care, treatment or rehabilitation;
- (b) proceedings under Chapter 13 of the Criminal Procedure
- (c) communications or evidence introduced raised by a client as an element of his or her claim or defence, and cross-examination reasonably flowing from such communications or evidence;
- (d) communications or evidence relevant under section 110 of the Children's Act;
- (e) communications or evidence relevant under section 4 of the Prevention of Family Violence Act;
- (f) communications or evidence relevant under subsection 4(3) of the Domestic Violence Act.

