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Absolute Privilege: A Legal Fiction

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ABSOLUTE PRIVILEGE: A LEGAL FICTION

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ABSTRACT

This article challenges the immutability of legal professional privilege and adopts, as its focus, the profound impact of Lord Taylor's aphorism in R v. Derby Magistrates' Court; Ex Parte B.[1] By affirming the absoluteness of legal professional privilege this decision, made at the highest level of the English judicial system, placed the nature of legal professional privilege beyond doubt.[2] In drawing out the fallible judicial pronouncement, this article argues that the ruling amounts to a legal fiction and concludes that the twentieth century incarnation of the principle has evolved into a rigid rule carrying a far greater certainty than historically intended.

Utilising Jeremy Bentham and John Henry Wigmore to inform the debate, this article notes that the continuing significance of these preeminent scholars lay in the fact that they, unlike their predecessors, adopted a broad view of the subject of evidence. Together they pioneered a homogenous intellectual tradition in which their thinking was instrumental to the way in which the privilege evolved and infiltrated judicial thinking. Accordingly, this article analyses how their respective philosophies shaped Derby's sweeping pronouncement.

I. INTRODUCTION

In attempting to limit the breadth of legal professional privilege, or in the alternative abolish its application altogether, Bentham and Wigmore represent the ideal starting point for discerning the parameters in which the privilege does, or should, operate. As a single privilege whose sub-headings are "legal advice privilege" and "litigation privilege", legal professional privilege encompasses communications passing for the giving or receiving of legal advice between solicitor and client and for communications made in

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1. [1996] AC 487 (HL) (appeal taken from Eng.).

2. R v. Derby Magistrates' Court; Ex Parte B (1996) AC 487 at ¶ 48 (HL) (appeal taken from Eng.) (noting that "the court will not permit, let alone order, the attorney to reveal the confidential communications which have passed between him and his former client. His mouth is shut forever.")

anticipation of adversarial proceedings.[3] Historically, the latter has been limited to the curial setting, with any extension beyond the field of litigation carefully restricted.[4]

Depicted as a standard by which to measure lawyerly conduct in a given situation, legal professional privilege remains relevant today for its ability to guarantee a measure of trust between solicitor and client, while presenting the potential to withhold inculpatory evidence from courtrooms.[5] Juxtaposing the legal profession's quest "to narrow the gap between . . . professional ideals [with] competing realities,"[6] legal professional privilege has attracted its share of criticism over the course of its lifetime. The privilege has faced opposition in all quarters, with a number of commentators and courts questioning whether the privilege necessitated a permanent status.[7] Its most prominent detractor, Jeremy Bentham, attacked both the rule and the efficacy of the common law. Viewing the common law as a living organism capable of adjusting and adapting to the needs of society as they unfolded over time, Bentham contended that the common law was not an "absolutely fixed, inflexible system"[8] and "precedents are not of absolute authority."[9] He asserted that judicial decisions in one age were disregarded in another.[10] It naturally follows that legal professional privilege, as a bastion of the common law, could not be of a permanently fixed character either.

This Benthamic pronouncement has been a recurrent theme in legal opinion and it is doubtful that the privilege "[did] very much to promote candour on the part of the client to his [lawyer]."[11] It has been argued by members of the judiciary[12] that when a precedent was the only argument "made to support a court-fashioned rule, it is time for the rule's creator to destroy it."[13] Wigmore similarly labelled legal professional privilege

3. Three Rivers District Council v. Governor and Company of the Bank of England [2004] UKHL 48, at ¶ 10 (HL).

4. *Id.* at ¶ 88.

5. *Derby*, (1996) AC 487 at ¶¶ 72-73.

6. Rosalie Silberman Abella, Justice, Court of Appeal for Ont., Opening Address at the Law Society of Upper Canada Benchers' Retreat: Professionalism Revisited (Oct. 14, 1999).

7. *See, e.g., O'Reilly v State Bank of Victoria Comm'rs* (1983) 153 CLR 1 at ¶ 45 (Austl.) (holding that the nature of the privilege should be "closely confined.").

8. JEREMY BENTHAM, CODIFICATION OF THE COMMON LAW: LETTER OF JEREMY BENTHAM, AND REPORT OF JUDGES STORY, METCALF AND OTHERS 29-30 (1882).

9. *Id.* at 48.

10. *Id.*

11. *O'Reilly*, (1983) 153 CLR 1 at ¶ 44.

12. Justice Black was in the minority in the 1948 case, *Francis v Southern Pacific Company*, wherein he stated that precedents should be destroyed when there was no justification to adhere to them, aside from the fact they were court-made rules. Francis v S. Pac. Co., 333 U.S. 445, 471 (1948). Justice Mason was in the majority in *O'Reilly v Commissioners of the State Bank of Victoria*, when he stated that the benefits of the privilege were doubtful. *O'Reilly* (1983) 153 CLR 1 at ¶ 45. Lord Brougham also stated that nothing imbued with the character of permanence could retain public respect.

13. *Francis*, 333 U.S. at 471.

anomalous, plagued by obstacles and indeterminate benefits.[14] Indeed, Bentham's most important successor, Wigmore, went so far as to label his predecessor "the greatest opponent of [all the] privileges."[15] He stated that no one aside from Bentham has "taken such an uncompromising stance against all types of rigid formality and regulation in adjudication[s],"[16] yet both scholars shared similar sentiments about the privilege and assigned the highest priority to rectitude of decision in adjudication.

It is clear that by his own measure, Wigmore would never have endorsed a blanket application of the rule. Instead, he affirmed that the privilege should be abrogated where it served a higher public interest, for in the end, the needs of man were more important than blind adherence to a rule.[17] In his estimation, the privilege "is worth preserving for the sake of general policy," although "it is nonetheless an obstacle to the investigation of the truth."[18] Where Wigmore expressed the opinion that legal professional privilege should be "strictly [construed] within the narrowest possible limits consistent with the logic of its principle,"[19] Lord Taylor CJ emphasised a different ideology in Derby.[20]

Producing a radical break with the predominant tradition, the harsh and uncompromising stance taken by the House of Lords eliminated the possibility to carry out an objective analysis to assess what a party had done.[21] By restraining itself from inquiring into a party's affairs, the Derby court placed the client in the novel position of being beyond the reach of the law. To borrow a Benthamism, the court effectively excused itself from rendering service to justice by virtue of the fact that it could no longer discern the parameters of the rule.

II. DERBY: A FALLIBLE PRONOUNCEMENT

A. The 'Absoluteness' Justification

In assessing the extent to which the House of Lords' ruling departed from the rationales of Bentham and Wigmore, it is first necessary to revisit the facts giving rise to R v Derby Magistrates' Court; Ex Parte B.[22] This proceeding

14. JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 3364 (1905).

15. *Id.* at 3364.

16. WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 27 (1985).

17. *Id.* at 161.

18. Wigmore, *supra* note 14, at 3204.

19. *Id.*

20. *Derby*, (1996) AC 487 at ¶ 58 (noting that the legal profession "is a fundamental condition on which the administration of justice as a whole rests.").

21. *Id.* at ¶ 63 (holding that the privilege "has applied across the board in every case, irrespective of the client's individual merits.").

22. *Id.* at ¶ 5.

centred on two consolidated appeals from the Queen's Bench division to the appellate court, constituted by Lords Taylor CJ, Lloyd, Nicholls, Keith, and Mustill.[23] The case raised significant questions concerning the scope of legal professional privilege and section 97 of the Magistrates' Courts Act 1980 (UK), which empowered the court to demand production of evidence concerning the murder, by A, of a teenage girl.[24]

1. Derby Magistrates' Court: The Facts

A confessed to and was charged with her murder.[25] He later recanted his statement and claimed that his stepfather, Brooks, was the killer.[26] A was acquitted and his stepfather charged.[27] During Brooks' committal hearing, the prosecution called A as a witness, at which time he was examined about confidential client-counsel communications regarding his original 1978 confession and subsequent inconsistent accounts.[28] A asserted legal professional privilege to excuse himself giving evidence; however, the stipendiary magistrate, Rougier J, adopted the test formulated in R v Barton[29] and R v Ataou[30] when he ruled that the documents in question were not subject to legal professional privilege.[31]

In R v Barton,[32] Caulfield J enunciated, in Benthamic fashion, that he "cannot conceive that [the] law would permit a [lawyer] or other [individual] to screen from the jury information which, if disclosed . . . [might] enable a [defendant] . . . to establish his innocence or resist an allegation [advanced] by the Crown."[33] The reasoning of Caulfield J is of a convincing nature and was central to Bentham's own contention for abrogating the privilege altogether.[34] Espousing a broad exception to the rule, Caulfield J held that a proportionality test applied in which the privilege must yield if innocence is at stake and information might enable the defendant to prove his innocence.[35] In making this distinction, Caulfield J championed a balancing approach to the privilege.[36] While failing to enunciate any authority for this proposition,

23. *Id.* at ¶ 3.
24. *Id.* at ¶ 3-4.
25. *Derby*, (1996) AC 487 at ¶ 4.
26. *Id.*
27. *Id.* at ¶¶ 5, 9.
28. *Id.* at ¶ 10.
29. (1972) 2 All ER 1192, 1194 (Eng.).
30. (1988) QB 798 (Eng.).
31. *Derby*, (1996) AC 487 at ¶ 32.
32. *R v Barton*, (1972) 2 All ER 1192, 1194 (Eng.).
33. *Id.*
34. BENTHAM, *supra* note 8, at 36.
35. *Barton*, (1972) 2 All ER at 1194.
36. *Id.*

he claimed to derive the principle "from the rules of natural justice."[37] He perceived that if privileged communications could assist a defendant in establishing his innocence, this was sufficient ground for destroying the rule, because it was a matter of public interest that no innocent man be convicted of a crime.[38] Barton remained good authority for 22 years and was mirrored in R v Ataou,[39] when French J endorsed the principle. French J refers to Caulfield J confirming that legal professional privilege did not attach to documents in the control or possession of a lawyer if they could aid the defence of an accused man.[40]

In similar vein, the court in the 1981 Canadian judgment, Regina v. Dunbar and Logan[41] observed that the adage of "'once privileged, always privileged'"[42] presented a danger in criminal proceedings if it screened from the jury information which would benefit an accused.[43] Martin, Lacourcière and Robins JJA observed that "[n]o rule of policy requires the continued existence of [legal professional] privilege in criminal cases . . . ."[44] Furthermore, the privilege was not absolute if the client no longer had any ground on which to assert a recognisable interest in protecting what the privilege was sought for.[45] If the privilege became spent, a balancing of interests fell in favour of admitting communications.[46]

B. The House of Lords' Formulation

Prior to forming its judgment, the Derby court deliberated the underlying principles on which the doctrine was based.[47] While a significant volume of case law was considered, the starting point for the House of Lords was the long history of legal professional privilege.[48] Weaving references to the older English authorities throughout,[49] Derby explicated that legal professional privilege was absolute, having been settled once and for all in the 16th

37. I. H. DENNIS, THE LAW OF EVIDENCE 327 (1999).
38. *Barton*, (1972) 2 All ER at 1194.
39. *R v. Ataou*, (1988) QB 798 (Eng.).
40. *Barton*, (1972) 2 All ER at 1194.
41. [1982] 68 C.C.C. (2d) 13.
42. Calcraft v. Guest, (1898) QB 759, 761 (Eng.) (emphasis added).
43. R v. Dunbar, [1982] 68 CCC (2d) 13, at ¶ 104.
44. *Id.*
45. *Id.*; see also R v. Craig [1975] 1 NZLR 597 at [599] (N.Z.).
46. *Id.*
47. *Derby*, (1996) 1 AC 487 at ¶ 34.
48. *Id.*
49. See Berd v. Lovelace, [1577] 21 Eng. Rep. 62; Dennis v. Codrington, [1579] 21 Eng. Rep. 100; Wilson v. Rastall, (1792) All ER Rep. 597, 597; Greenough v. Gaskell, (1883) All ER Rep. 767, 767; Bolton v. Corporation of Liverpool, [1833] 39 Eng. Rep. 614, 96; Holmes v. Baddeley, [1844] 41 Eng. Rep. 476, 476; Anderson v. Bank of British Columbia, [1876] 2 Ch. D 646; Southwark and Vauxhall Water Co. v. Quick, [1877] 3 QBD. 315, 315; Pearce v. Foster, [1885] 15 QBD 114, 114; Wheeler v. Le Marchant, [1881] 17 Ch. D. 675, 675; *Calcraft*, (1898) All ER Rep. at 346.

century.[50] The court announced that upon the privilege being effected, the lawyer's mouth was shut forever.[51] "[I]f a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits."[52]

There are three problems with this reasoning; the first of which lies in the fact that the 16th century privity of communication was justified not on legal professional privilege, but on the tenets of oath and honour.[53] None of the 16th century authorities, from Lee v. Markham[54] and Breame v. Breame[55] to Windsor v. Umberville[56] and Berd v. Lovelace,[57] articulated the right of a lawyer to avoid testimony as a result of invoking legal professional privilege.[58] It was merely their oath and honour that excused lawyers from testifying.[59]

The second problem lies in the refrain that the lawyer's mouth is shut forever. This edict is not a sixteenth century manifestation. Rather, it is an 18th century pronouncement made by Buller J in Wilson v. Rastall.[60] Wilson declared the privilege absolute in very specific circumstances, with only three classes of legal professionals entitled to invoke a claim of privilege.[61] These were counsel, solicitors, and attorneys.[62] Indeed, the antecedents of Wilson can be traced back to the medieval Bailiffs of Sheriff's etc. Act[63] which was passed in 1413. This statute precluded sheriffs and under-sheriffs from acting as attornati on behalf of clients.[64]

The third problem with the court's contention was dictated by long lines of contradictory precedent. Through acting in reliance on the weight of

50. *Derby*, (1996) AC 487 at ¶ 41.

51. *Id.* at ¶ 58.

52. *Id.* at ¶ 63.

53. P. Brereton, *Legal Professional Privilege*, in 2 HISTORICAL FOUNDATIONS OF AUSTRALIAN LAW: COMMERCIAL COMMON LAW 131-32 (J.T. Gleeson et al. eds. 2013).

54. Lee v. Markham, (1569) Monro 375, 375.

55. Breame v. Breame, [1571] 21 Eng. Rep. 120; see also R. O. Bridgman, A DIGEST OF THE REPORTED CASES ON POINTS OF PRACTICE AND PLEADING IN THE COURTS OF EQUITY IN ENGLAND AND IRELAND AND OF THE RULES AND ORDERS OF THE SAME COURTS; FROM THE EARLIEST PERIOD TO THE PRESENT TIME 178 (1829).

56. Windsor v. Umberville, (1574) Monro 411, 411.

57. *Berd*, [1577] 21 Eng. Rep. 62.

58. Brereton, *supra* note 53, at 131-32.

59. *Id.* (The House of Lords failed to note the fundamental differences between these court of Chancery cases and the common law, whereby parties could be deposed to answer interrogatories).

60. (1792) All Eng. Rep. at 599. ("[T]he privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is shut for ever. I take the distinction to be now well settled to the three enumerated cases").

61. *Id.*

62. *Id.*

63. Bailiffs of Sheriffs Shall Not Be in Office More Than One Year 1413Bailiff of Sheriff's Act etc. 1413, 1 Hen. 5 c. 3-6, § 4 (Eng.).

64. *Id.*

authority stemming from Wilson when asserting the absoluteness of the rule, the House of Lords overlooked the decisions which preceded or succeeded it, including but not limited to, Annesley v. Earl of Anglesea.[65] In that 1743 matter Lord Baron Bowes stated that upon a cause ending, only then was the lawyer to be considered with respect to his former employer as one man to another; in which case a breach of trust did not fall within the jurisdiction of the Court for the Court cannot determine what is honour, only what is law.[66]

In 1753, Sir John Strange MR, in Winchester v. Fournier,[67] commented that while it was "a very right rule" that an attorney ought not to betray the secrets of his clients, if "he himself [did] not object[] to it, the court has nothing to do with it".[68] Proving historically significant for overruling the Wilson v. Rastall[69] pronouncement that a lawyer's lips were forever sealed,[70] Turquand v. Knight[71] observed that the court would not enforce a lawyer to obey the rule of legal professional privilege if he were not professionally employed in the cause.[72] In refusing to uphold the rule enunciated in Wilson, Turquand signified that although Wilson might be amongst the most frequently cited cases on the subject, it was not the final word with respect to legal professional privilege. By the end of the 19th century, Lord Esher MR in Marks v. Beyfus[73] acknowledged that the public policy which says "an innocent man is not to be condemned when his innocence can be prove[n] is the policy that must prevail."[74]

Thus, where the Derby court erroneously claimed that they settled legal professional privilege in the 16th century, it subsequently contradicted itself by admitting that it was not until the 18th century that "[the rule] was . . . on the way to being established on its present basis."[75] Prior to this era, the laws of England often consisted of disconnected and scattered precedents.[76] Even Wigmore observed that 'the period from 1790 to 1830 was "the full spring tide of the system of rules of evidence,"[77] where the principles of English law "began to be developed into rules and precedents of minutiae relatively

65. Annesley v. Earl of Anglesea, [1743] 21 Eng. Rep. 202.
66. *Id.*
67. [1753] 28 Eng. Rep. 445 (Eng.).
68. Winchester v. Fournier, [1753] 28 Eng. Rep. 445, 447 (Eng.).
69. (1792) All ER Rep 597 (Eng.).
70. *Rastall*, (1792) All ER Rep at 599-600.
71. [1836] 150 Eng. Rep. 685, 686 (Eng.).
72. Turquad v. Knight, 150 Eng. Rep. 685, 686 (Eng.) (privilege did not apply in this case because the attorney was acting as a scrivener only.).
73. [1890] 25 QBD 494 (Eng.).
74. Marks v. Beyfus, 25 QBD 494, 498 (Eng.).
75. *Derby*, (1996) AC 487 at ¶¶ 45, 63.
76. TWINING, *supra* note 16, at 1-2.
77. WIGMORE, *supra* note 14, at 3196.

innumerable in comparison with what had gone before."[78] He emphasised that the changes to legal professional privilege "brought a residuum of trouble and confusion into the precedents of the 1800s," and stated that "the shackles of the earlier precedents were not finally thrown off until the decade of 1870."[79]

1. Derby and the Modern Authorities

In addition to recognising the rule from its early English origins, the House of Lords averted to modern precedents set in the Commonwealth jurisdictions of Australia,[80] Canada,[81] New Zealand,[82] and South Africa.[83] Collectively, these seminal cases contributed to the modern-day approach to legal professional privilege. The first of these examined is the 1976 Australian case, Grant v Downs,[84] which required the High Court "to determine and state the relevant [legal professional privilege] principle to operate in Australia"[85]

Barwick CJ commented that "no such statement of authority" presently bound the courts in this country.[86] Although the Grant court noted the necessity of the privilege with the majority stating that its existence was "so firmly entrenched in the law that it [could] not . . . be exorcised by judicial decision,"[87] they cautioned that powerful considerations suggested that the privilege should be strictly contained.[88] The court labelled it more of "an impediment, not an inducement, to frank testimony [which] detract[ed] from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise."[89] Through confining the application of the

78. JOHN WIGMORE & COLIN MCNAUGHTON, EVIDENCE IN TRIALS AT COMMON LAW, Vol. X, § 8, 60g. (1961).

79. *Id.*

80. *Grant v Downs* [1976] 135 CLR 674 (29 November 1976) (Austl.); Baker v Campbell [1983] 153 CLR 52 (26 October 1983) (Austl.).

81. *Dunbar*, [1982] 68 CCC 13 (Can.).

82. *Craig*, [1975] 1 NZLR 597 (N.Z.).

83. *S. v. Safatsa* 1987 SA 242/1986 (CC).

84. [1976] 135 CLR 674, 679 (29 November 1976) (Austl.). In *Grant*, the question that came to be decided before the Court centred on whether certain medical records, relating to the type and nature of injuries sustained by patients in mental hospitals, were exempt from discovery on the basis that they attracted the privilege. The deceased, Neville William John Grant, had been an inpatient at North Ryde Psychiatric Centre when, during an unsupervised period, he escaped from his room overnight and died from exposure to cold. Outlining the material purposes for which the documents were brought into existence, Wilfred James Maundrell, an officer of the Health Commission of New South Wales cited several reasons as necessitating exclusion from inspection; namely: disciplinary action against staff, coronial proceedings and the possibility of a civil suit for damages.

85. *Grant*, 135 CLR at 677.

86. *Id.*

87. *Id.* at 685.

88. *Id.*

89. *Id.* at 686.

privilege to documents solely created for the purpose of legal advice or use in litigation, the High Court restrained the privilege from "travel[ling] beyond the underlying rationale to which it is intended to give expression".[90] In simple terms, if the privilege's sweep is too broad, the search for the truth is compromised because a greater number of justifications would exist to shield communications from discovery.

The second Australian case considered by the House of Lords was Baker v Campbell,[91] in which Mason J indicated that it was "by no means self-evident" that legal professional privilege was superior to the "public interest in facilitating the availability of all relevant materials for production in litigious disputes."[92] Indeed, the court recognised that the ability to compel disclosure of professional confidences carried significant consequences because it curtailed the judicial search for truth.[93]

In a 4:3 judgment, the majority overruled Grant when they held that documents were exempt from search and seizure, thus subject to a claim of privilege.[94] The view articulated by Wilson J was particularly significant because, in it, he acknowledged that he had finally "arrived at the only result which afford[ed him] lasting satisfaction".[95] Wilson J conceded that he had been plagued by "much anxious thought, in the course of which [his] opinion . . . fluctuated from one conclusion to another."[96] Finally, he resolved that "[t]he perfect administration of justice is not limited to legal proceedings."[97] He deferred to Wigmore when he opined that the privilege was an essential mark of a free society which attached to the relationship between lawyer and client.[98]

In the South African appeal case of S. v. Safatsa,[99] Botha JA, on delivering the judgment of the court, criticised the Baker ruling when he cautioned, "that any claim to . . . relax[] the privilege . . . [should] be approached with the greatest circumspection.[100] He could not fathom how judges could otherwise be called upon to carry out any form of balancing exercise with respect to the privilege by weighing the conflicting principles

90. *Grant*, 135 CLR at 688.
91. [1983] 153 CLR 52 (26 October 1983) (Austl.).
92. *Baker*, 153 CLR at 75.
93. *Id.* at 69.
94. *Id.* at 70.
95. *Id.* at 93.
96. *Id.* at 93.
97. *Baker*, 153 CLR at 95.
98. *Id.*
99. 1987 SA 242/1986 (CC). The Court was constituted by Botha JA, Hefer JA, Smalberger JA, Boshoff AJA and MT Steyn AJA. Id.
100. *Safatsa* 1987 S.A. 242-1986 (CC) at 55.

of public policy without being supplied information relevant to the issue in question.[101]

These latter cases considered by Derby provide a strongly consistent view of the nature and scope of the privilege as it evolved in each of the aforementioned jurisdictions.[102] The central principles derived from the Commonwealth authorities overwhelmingly support the proposition that the privilege is not unqualified. In fact, this theme was argued by Goldberg QC, for the respondent, who submitted that the balance between competing interests should not be snuffed out.[103] He prevailed upon the Derby court to weigh each case individually rather than apply an 'all or nothing' approach.[104]

By attaching equal importance to any prejudice suffered by clients as a result of disclosure and prejudices faced by the accused through non-disclosure, Goldberg Q.C. advocated in favour of a balancing test whereby the privilege could be breached only in truly exceptional circumstances.[105] The phrase truly exceptional circumstances was not defined in the case. Asserting that "times have changed," he argued that greater emphasis was now being placed on putting courts in "possession of all relevant material, in order to arrive at the truth."[106] Goldberg's contention may arguably be an allusion to Bentham who maintained that the primary virtue of legal professional privilege lies in the fact that it was a mechanism behind which a guilty party could conceal their misdeeds.[107]

2. The Weight of Authority

However, the decision promulgated by the House of Lords went against the weight of authority espoused in the Commonwealth jurisdictions when it resolved "the clash of principles . . . in favour of the paramountcy of [the rule.]"[108] The Derby court did not view the privilege as a question of balancing the interests of Brooks against A, despite Brooks' interest in not being wrongfully convicted outweighing A's interest in not being convicted of a crime for which he had previously been acquitted.[109] The consequence

101. *Id.* at 56.
102. *Derby*, (1996) AC 487 at ¶¶ 76-78.
103. *Id.* at ¶ 78.
104. *Id.*
105. *Id.*
106. *Id.* at ¶ 69.
107. JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE PART TWO (1838), *reprinted in* 7 THE WORKS OF JEREMY BENTHAM 474 (John Bowring ed., 1843).
108. Michael Bowes, *The Supremacy of Legal Professional Privilege: The Derby Magistrates Case*, 1996 Arch. News 4, 8 (1996).
109. *Derby*, (1996) AC 487 at ¶¶ 79-80.

for A, while unfortunate, was not as unpalatable as the prospect of an innocent person being falsely imprisoned.[110]

Substantially departing from precedent, Lord Taylor CJ, in his summary, announced that Barton and Ataou had been wrongly decided and ought to be overruled due to the overriding importance of the privilege.[111] The logical question is whether the justification for legal professional privilege has been undermined in the intervening years between Barton and Derby.[112] It is critical, at this juncture, to note that the respective judicial pronouncements of Caulfield and French JJ survived unchallenged for decades. Throughout this period, their respective rulings caused no damage to the integrity of the justice system, nor did they undermine or impair the functioning of the broader legal system. In light of this, it is possible to rebut the presumption that damage would arise from a limited exception to the rule.

The House of Lords contended that Craig was similarly flawed and speculated that the no 'recognisable interest' argument must have been raised in numerous cases in which the privilege was upheld despite the client ceasing to have grounds for asserting a claim, yet it was never suggested that this might make a difference.[113] It has subsequently been stated that "as long as the rule is based on its present premises and is accepted as being for its present purpose, the rule must be accepted as absolute. There can be no half-way house (to accommodate, for example, the witness without a 'recognisable interest')".[114]

Of Dunbar and Logan, the Derby court stated that the notion of weighing competing interests was unacceptable on the basis that a client may have an ongoing interest in non-disclosure which could be outweighed by another interest if the court, in its discretion, overrode the rule.[115] Applying this reasoning to the present case, Lord Nicholls stated that no rational person, on finding themselves in the circumstances with which Brooks was confronted, would seek to maintain confidentiality; however as A was acquitted, A remained entitled to claim the privilege as a means of refusing to divulge communications which would infer guilt.[116]

With respect to the Australian authorities, the House of Lords concentrated on a singular quote in Grant, specifically that legal professional

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110. *Id.* at ¶ 80.

111. *Id.* at ¶ 65.

112. *Privilege - Prosecution Witness Acquitted of Offence Of Which Defendant Later Charged - Defence Seeking to Question Witness as to Original Instructions To Legal Advisers Admitting Offence*, 190 CRIM L. REV. 193 (1996).

113. *Derby*, (1996) AC 487 at ¶ 68.

114. J.A. Coutts, *House of Lords: Evidence of Instructions to Legal Advisers*, 60 J. CRIM. L. 176, 179-80 (1996).

115. *Derby*, (1996) AC 487 at ¶ 84.

116. *Id.*

privilege promoted the public interest by facilitating the representation of clients by legal advisers and was so firmly entrenched that it could not be exorcised by judicial decision.[117] The Derby court disregarded all references to the sole purpose test in which Grant adopted a narrow scope of the rule, so as not to compromise the search for truth by shielding from discovery a greater number of communications. Furthermore, the Grant court cautioned that the privilege should be strictly construed on the basis that it impeded frank testimony and diminished fairness by denying a party access to relevant documents.[118]

While the House of Lords appears to have been persuaded by the reasoning in Baker, Lord Taylor CJ described legal professional privilege as being "a fundamental condition on which the administration of justice as a whole rests,"[119] he conceded that where litigation was not anticipated, it was difficult to justify why communications between client and lawyer should be privileged.[120] In seeking to apply his "absoluteness" justification to legal professional privilege only in the context of litigation, Lord Taylor saw no value in extending it to legal advice.[121] Thus, if advice was not sought in anticipation of litigation then such advice was not privileged. Lord Taylor claimed there would be little to fear if the privilege was not available under these circumstances, for client-counsel communications would not be inhibited.[122] In delimiting the privilege in this manner, Lord Taylor CJ also left the door open for a "future harm" exception.[123]

The Derby court touched briefly on Safatsa when recognising the need to exert caution over any claim to relax the privilege; however, Lord Taylor CJ ultimately formed the opinion that "no exception should be allowed to the absolute nature of the rule once established."[124] He borrowed from Lord Brougham in Greenough v Gaskell[125] when he concluded: "it is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those who might otherwise be deterred from telling the whole truth to their solicitors."[126]

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117. *Id.* at ¶ 75 (quoting *Grant*, [1976] 135 CLR at 685.

118. *Grant*, [1976] 135 CLR at 685.

119. *Derby*, (1996) AC 487 at ¶ 58.

120. *Id.* at ¶ 61 (noting that "[n]obody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protection by the European Convention for the Protection of Human Rights . . . .").

121. *Id.* at ¶ 65.

122. *Id.* at ¶ 62.

123. *Id.* at ¶¶ 62, 65 (emphasising the amicus curaie argument that "[t]here might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance.")

124. *Derby*, (1996) AC 487 at ¶ 65.

125. *Greenough*, (1883) All ER Rep at 770.

126. *Derby*, (1996) AC 487 at ¶ 65.

Although Lord Taylor CJ observed that the privilege was integral to the administration of justice, the rule should not be understood as being the sole ingredient in the whole recipe for justice or the cornerstone upon which the legal profession was built. Indeed, a number of other pillars are equally integral to the administration of justice; these include trust, competence, ethical and professional conduct, integrity, and efficacy of the legal profession.[127] While Lords Keith and Mustill concurred with the Chief Justice and added nothing further to his pronouncement, Lord Nicholls noted the tension between the doctrine of legal professional privilege and the public interest, when he countenanced that: "all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome."[128]

On one reading of it, it appears that Lord Nicholls opposed an absolutist approach to the privilege; however, on a closer reading it becomes evident that he rejected the idea of a balancing test because it would present the court with an impossible task.[129] He concluded that, in the absence of any measure by which judges could ascribe an appropriate weight to civil and criminal actions of differing severity,[130] the prospect of such an exercise was illusory.[131]

Derby therefore represents a change from treating legal professional privilege as a rule of admissibility which was the view a generation ago, to the modern view initially taken in Australia in Baker, that the principle constituted a fundamental right. A fundamental human right is defined as "[the] freedoms [accorded] equally and without distinction to each and every human being."[132] In the context of legal professional privilege however, the important principle underpinning this 'fundamental right' rests in the public interest in enabling clients to speak to their lawyers in confidence without fear of ever having those conversations exposed or subjected to scrutiny.[133]

Despite the prevalence of doubt that the privilege did "very much to promote candour on the part of the client to his [lawyer],"[134] the Derby court proved that the common law now classed the privilege as a fundamental asset which had morphed into "an important common law immunity."[135] While

127. *Vance v McCormack* [2004] 184 FLR 62, at ¶ 42.
128. *Derby*, (1996) AC 487 at ¶ 73.
129. *Id.*
130. *Id.* at ¶ 80.
131. *Id.* at ¶ 81.
132. *Human Right*, DUHAIME'S LAW DICTIONARY, http://www.duhaime.org/LegalDictionary/H/HumanRight.aspx (last visited Nov. 26, 2018).
133. *Derby*, (1996) AC 487 at ¶ 58.
134. *O'Reilly*, 153 CLR at 44.
135. *Daniels Corp. Int'l Pty Ltd v Austl. Competition and Consumer Comm'n* [2002] HCA 1, ¶ 11.

recognising that the refusal of A to reveal secrets wrought grave harm upon Brooks, the decision not to compel A's confidential communications went against Lord Taylor's efforts to satisfy the judicial conscience. Contrary to his desire to leave no pebble unturned, Lord Taylor's Derby pronouncement was distinct from the earlier judgments over which he presided.[136] In R v. Inland Revenue Commissioners; Ex p. Taylor (No. 1),[137] Lord Taylor concurred with Nicholls LJ that it would be unwise to "say anything which might be thought to tie the hands of the judge."[138] This case evidenced that the boundaries of legal professional privilege were not always clearly drawn, and the court went so far as to admit that the correct answer eluded them.[139] Where that court conceded that in future cases a different outcome may commend itself to the judiciary when examining legal professional privilege in a clearer light, this was at odds with the Derby judgment which effectively bound and gagged the judiciary from engaging in any form of balancing exercise.[140]

In Balabel v Air India,[141] Lord Taylor criticised cases which extended the doctrine without limit to all communications.[142] This evidences that, in limiting the breadth of the principle, Balabel succeeded in developing a firm rule.

Lord Taylor's judgment in R v. Umoh Mfongbong[143] also aligned with Benthamic and Wigmorean pronouncements in confirming that legal professional privilege should remain a preserve of the legal profession.[144] Lord Taylor denied protection to communications passing between prisoner and prison officer where the latter was acting in the capacity of a legal aid officer.[145] With respect to waiver of privileged communications, Lord Taylor passed two conflicting rulings. In Tanap v. Tozer,[146] he remained faithful to Wigmore's philosophy that the dictates of fairness required full disclosure on the basis that a party to a proceeding should not be permitted to "cherry pick" which portions of a privileged communication they wished to divulge against those they wished to guard from disclosure.[147] Conversely, in Goldman v. Hesper,[148] he again recognised that the privilege is not absolute and

136. *See* Balabel v. Air India (1988) Ch 317 at 331 (Eng.).
137. R v. Inland Revenue Comm'rs; Ex Parte Taylor, [1989] 1 All ER 906.
138. *Id.* at 917-18.
139. *See id.* at 917.
140. *See id.* at 917-18; *Derby*, (1996) AC 487 at ¶ 63.
141. *Balabel*, (1988) Ch at 331.
142. *Id.*
143. R v. Umoh, [1987] 84 Cr. App. R. 138, 143.
144. *Id.*
145. *Id.*
146. Tanap Investments (UK) v. Tozer, 1991 WL 839041 (1991).
147. *See id.*
148. Goldman v. Hesper [1988] 3 All ER 97.

emphasised the need to weigh competing interests through "striking [an] appropriate balance" with respect to privileged communications.[149] In a deviation from Wigmore, he resolved that a voluntary disclosure of privileged information would not "prevent the owner of a document from reasserting [a] claim of privilege in any subsequent context."[150] In the year prior to Derby being decided, Lord Taylor CJ announced in R v. Keane[151] that trial judges should carry out a balancing exercise, having regard to the weight of the public interest in non-disclosure and to the importance of the documents to the defence.[152]

This raises the question as to whether the Derby court made its judicial pronouncement without fully considering the consequences. Lord Taylor himself conceded that at the conclusion of trials judges may "overpitch" dicta when "summing-up."[153] He cautioned that restraint should be exerted when making comment on cases over which they presided[154] because it was in everyone's interest that the administration of justice functioned well and enjoyed the respect and confidence of the public.[155] By his own admission, Lord Taylor CJ noted that, "unfortunately, a single remark from a judge can be picked up and is put into a litany of such remarks which is trotted every time a new one arises."[156] This has proven true of the sweeping, albeit fallible, pronouncement in Derby.

> It is essential to note that despite the "absolutist" stance of the House of Lords, Lord Taylor CJ called for a review of legal professional privilege and acknowledged that the law was in an unsatisfactory state:[157] "[W]e have a system of justice, but it is marred as we all know. In both the criminal and civil fields, we need changes to streamline our administration and modernise its procedures."[158] However, upon declaring that the rule was absolute, with courts proscribed from breaching it for any reason, no further review could be undertaken.[159] Speaking in May 1996 shortly before his retirement, Lord Taylor CJ said:[i]n the last three years, almost everything has been changed or thrown overboard in the criminal

149. *Id.* at 102.
150. *See id.*
151. R v. Keane [1994] 2 All ER 478, 485.
152. *Id.*
153. Peter Taylor, *The Judiciary in the Nineties*, 19 COMMONWEALTH L. BULL. 323, 329 (1993).
154. *Id.* at 330.
155. *Id.*
156. DESERT ISLAND DISCS at 10:51 (BBC Radio 4 1992).
157. Peter Taylor, *Speech by the Rt. Hon the Lord Taylor of Gosforth, Lord Chief Justice of England, at the Lord Mayor's Dinner to HM Judges: 6 July 1994*, 61 J. ARBITRATION, 1, 4-5 (1995).
158. *Id.* at 4-5.
159. *Id.* at 4-5

> justice system. When you are going to legislate, you should do it less hectically and with a little more preparation and not have to introduce amendments because you had not got them ready before.[160]

While the Derby decision "may well be expected to lead to hard cases . . . [a]nd hard cases may cause injustice to individuals . . .,"[161] Professor Coutts applauded Lord Taylor's precise and succinct articulation that if but one exception were permitted to the privilege, it would destroy the rule itself and the basis of confidence; this being and the purpose it served.[162] By contrast, Lord Hobhouse criticised the dicta of Lord Taylor when he declared, "at the least, some and, more probably, all of these premises would benefit from further examination."[163] It may well be regretted in hindsight that legal professional privilege outweighs the injury that would occur if a falsely accused person were wrongfully convicted.[164]

3. Re L (A Minor)

Despite the Derby court ruling that privileged communications could not be overridden in deference to a more compelling interest, this did not detract from the power of the House of Lords to depart from a previous decision where there were cogent reasons to do so. Ironically, the Derby decision was overruled three years later in Re L.[165] This decision produced cracks in the intellectual armour of the original Derby decision and represented the principal occasion in which the House of Lords was confronted with the unenviable task of considering the correctness of Derby. A differently constituted House of Lords in Re L[166] was left to mop up the overeager spill by placing some limit on the absoluteness of that earlier decision.[167]

There are indeed strong indications that Derby may not be good law on this point. Derby, if correct, would have the effect of enabling all communications, even those with dubious causal nexus, to be shielded. This proposition was contested in Re L.[168] In that case, Lord Nicholls[169] opined that the privilege may be curtailed if the interests of a minor were at stake, with the court ultimately resolving that this constituted a legitimate public

160. Taylor, *supra* note 153, at 329.
161. Coutts, *supra* note 114, at 179.
162. *Id.* at 180.
163. R v. Special Comm'r, (2002) UKHL 21, at ¶ 43.
164. STEVE UGLOW, EVIDENCE: TEXT AND MATERIALS 207 (1997).
165. Re L (A Minor), (1996) 2 All ER 78, 83.
166. *Id.*
167. *Id.*
168. *Id.* at 90.
169. *Id.* (affirming Lord Nicholls' absolutist stance when he maintained that legal professional privilege was so integral to the administration of justice that only express statutory wording could abrogate its scope or absolute application).

interest.[170] Indicating that the broad principle stated in Derby was incorrect, Re L[171] held that expert reports obtained with view to litigation were not privileged. Rather, they were discoverable in the same way as any other material.[172]

Lord Lloyd in Derby was the sole justice to acknowledge that legal professional privilege may wring hardship on those seeking to assert their innocence; however, he concluded that it was better to preserve the principle fully intact for the sake of the administration of justice.[173] The Derby court ultimately resolved that client-counsel communications were, "absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence."[174]

If one looks at the authority itself, Lord Taylor continued immediately after that with these words:

> Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as to which we did not hear any argument. [The] difficulty is this: whatever inroads may have been made by Parliament in other areas, legal professional privilege is a field which Parliament has so far left untouched.[175]

Taken alone, neither of these arguments is sufficient to explain why the privilege warrants an absolute status. Particularly when contrasted against the collective judgments throughout the career of Lord Taylor, it becomes apparent that he did not consider the seeking of non-legal advice or communications as coming within the ambit of the privilege. Cautioning the need to re-examine the scope of the rule to keep it within justifiable bounds, his ruling in Balabel v. Air India[176] introduced a rigid requirement and restored the scope of the rule to its 19th century roots.[177] This remained consistent with the Wigmorean Paradigm in which client-counsel

170. *Re L*, (1996) 2 All ER at 90.
171. *Id.* at 83.
172. Adrian Zuckerman, *Legal Professional Privilege: The Cost of Absolutism*, 112 L.Q. REV. 538-539 (1996).
173. *Derby*, (1996) AC 487 at ¶ 69.
174. *Id.* at ¶ 74.
175. *Id.* at ¶ 61.
176. *Balabel*, (1988) Ch. at 331.
177. *Derby*, (1996) AC 487 at ¶¶ 57-58.

communications attracted legal professional privilege only if they directly correlated to legal advice in a professional character.[178]

In drawing its conclusion, Derby declined to craft further exceptions to the privilege, even if doing so could establish innocence or aid in the defence of an accused individual.[179] By broadening, without exception, the rule of legal professional privilege, Wigmore's articulation was invalidated and the force of the doctrine weakened. It now usurped the central truth-finding function of the courts and impaired the fairness and accuracy of the trial process. In consequence of this, the balancing test was rendered obsolete and the nature of legal professional privilege placed beyond doubt.[180]

4. Three Rivers

Derby formed the theme of discussion in a later English case colloquially known as Three Rivers.[181] In that long-running dispute, the correctness of Lord Taylor's decision was again called into question[182] during litigation between the Bank of England and liquidators and creditors of the collapsed Bank of Credit and Commerce International SA (BCCI).[183] That proceeding turned on whether the bank was compelled to furnish to the court communications disclosed during an earlier inquiry into the collapse.[184] At trial, Tomlinson J dismissed the claimants' request for specific disclosure against the bank.[185]

On appeal in Three Rivers 1,[186] Lord Justice Chadwick MR and Lord Justice Keene upheld the judgment of Tomlinson J because the circumstances of the case were so highly unusual in regard to the fact that the documents were never in the physical possession of the bank, nor did the bank have a right to possession.[187] Accordingly, no obligation of disclosure existed.[188] Conversely, Three Rivers 2 held that a breach of privacy was "necessary for

178. *See generally* WIGMORE, *supra* note 14, 3220-222.

179. *Derby*, (1996) AC 487 at ¶ 69.

180. *Id.* at ¶¶ 67, 81, 84.

181. Three Rivers Dist. Council v. Bank of England (2003) C.P. Rep. 9 [hereinafter *Three Rivers 1*]; Three Rivers Dist. Council v. Bank of England (2002) EWHC 2309 [hereinafter *Three Rivers 2*]; Three Rivers Dist. Council v. Bank of England (2003) EWCA Civ 474 [hereinafter *Three Rivers 3*]; Three Rivers Dist. Council, (2004) UKHL 48 [hereinafter *Three Rivers 4*].

182. *Three Rivers 4*, (2004) UKHL 48. This case was presided over by Lord Scott, Lord Rodger, Baroness Hale, Lord Carswell and Lord Brown. *Id.*

183. *Three Rivers 1*, (2003) CP Rep 9.

184. *Id.* at ¶ 5 (noting that the inquiry was chaired by Bingham LJ, and the inquiry was known as the "Bingham Inquiry").

185. *Id.*

186. *Three Rivers 1*, (2003) CP Rep 9 (showing that Three Rivers 1 was heard before Lord Justice Chadwick M.R. and Keene LJ).

187. *Id.* at ¶ 51.

188. *Id.*

the protection of the rights and freedoms of the parties to the litigation,"[189] while appeals Three Rivers 3 and Three Rivers 4 cited, with approval, the authority of Derby when confirming that legal assistance and advice could be effectively rendered only if clients were candid and forthcoming, this being the very consideration which justified the absolute character of the privilege in the first place.[190]

In Three Rivers 5, the House of Lords restricted the definition of "client" when it ruled that for the purpose of legal professional privilege, information tendered by an employee was akin to information received from an independent agent and was not subject to protection.[191] Three Rivers 6 reined in the privilege and reduced its ambit to only those communications pertaining to the giving or receiving of legal advice in a professional capacity.[192]

Declaring that legal professional privilege "should . . . be [accorded] a scope [which] reflects the policy reasons that justify its presence in our law,"[193] Scott and Carswell LJJ were conscious of the need to discern the bounds of the privilege. For marginal cases, Lord Scott proposed a test for discerning the relevant legal context in which advice attracted legal professional privilege.[194] He specifically stated that if a communication pertained "to the rights, liabilities, obligations or remedies of the client" under private or public law, it would be privileged.[195] This was premised on the purpose and occasion for which the communication was made.[196]

Citing Wigmore who emphasised that "the privilege should be strictly confined within the narrowest possible limits consistent with the logic of its principle,"[197] the House of Lords concluded that it would continue to adhere to the historical practice of English courts in limiting the ambit of the privilege to "communications made in confidence between [lawyer and client] for the purpose of . . . obtaining legal advice" or assistance.[198]

III. PRIVILEGE: A MATTER OF SUBSTANCE

Where the House of Lords misunderstood the older English authorities and failed to adequately survey the cases that advocated a balancing

189. *Three Rivers 2*, (2002) EWHC 2309 at ¶ 5 (noting the Court stated that, for this reason, Article 8 of the European Convention on Human Rights 1950 did not apply to the parties).
190. *Three Rivers 3*, (2003) EWCA Civ 474 at ¶ 116; *Three Rivers 4*, (2004) UKHL 48 at ¶ 10.
191. *Three Rivers 3*, (2003) EWCA Civ 474 at ¶¶ 18, 20.
192. *Three Rivers 4*, (2004) UKHL 48 at ¶ 38 (quoting *Balabel*, [1988] Ch 317).
193. *Id.* at ¶ 35.
194. *Id.* at ¶ 38.
195. *Id.*
196. *Id.*
197. *Three Rivers 4*, (2004) UKHL 48 at ¶ 86.
198. *Three Rivers 4*, (2004) UKHL 48 at ¶ 50.

approach, the court was instead persuaded by a ruling stemming from AM & S Europe Ltd. v. Commissioner of the European Communities.[199] The correlation between the ECJ case and Derby lies in the fact that AM & S promulgated legal professional privilege to be a fundamental human right, deserving of protection for that reason.[200] The rationale expounded in AM & S held that, irrespective of "whether it is described as [a fundamental human] right of the client or the duty of the lawyer, [the] principle of [legal professional privilege] has nothing to do with the protection or privilege of the lawyer."[201] Rather, it was bound in the need for clients to turn to lawyers for advice, aid, and legal representation.[202] The Derby court, in turn, utilizes the "fundamental human right" rationale as partial justification for rendering the privilege absolute.[203]

A. AM & S Europe: A Global Community

In AM & S Europe Ltd. v. Commission of the European Communities,[204] the European Court of Justice[205] (hereinafter ECJ) convened to rule, for the first time, on whether client-counsel communications were privileged under Community Law[206] from disclosure.[207] In that 1983 case, the ECJ pronounced the principle to be a fundamental human right which was deserving of special protection for that reason.[208] The facts in this case are grounded in competition law, whereby AM & S Europe Ltd. had a subsidiary-owned zinc smelter which distributed zinc metals, alloys, and concentrates.[209] Concerned about AM & S adhering to competitive conditions, three inspectors from the Commission of the European Communities were tasked with investigating the subsidiary's production and distribution to ensure they were not in violation of Articles 85 and 86 of the European Economic

199. AM & S Eur. Ltd. v. Comm'n of the Eur. Cmtys., (1982) E.C.R. 1575, (1983) QB 878.
200. *Id.* at 1600.
201. *Id.* at 1654.
202. *Id.*
203. *Derby*, (1996) AC 487 at ¶ 61.
204. *AM & S Eur. Ltd.*, (1982) E.C.R. at 1605 (depicting that AM & S is an abbreviation for "Australian Mining and Smeltering").
205. *Id.* at 1578 (noting the European Court of Justice comprised Menens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuan, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, JJ, with Advocate General, Sir Gordon Slynn and Registrar, A. Van Houtte).
206. *Community Law*, *Duhaime's Law Dictionary*, http://www.duhaime.org/LegalDictionary/C/CommunityLaw.aspx. (last visited Nov. 26, 2018) (demonstrating that Community Law is defined, in Duhaime's Law dictionary as: "The law of the European Union as established by treaties and cases of the E[uropean] U[nion] courts").
207. *AM & S Eur. Ltd.*, (1982) E.C.R. at 1581.
208. *Id.* at 1600.
209. *Id.* at 1579.

Community Treaty.[210] Upon concluding the investigation, the inspectors "left the [Bristol] premises of AM & S, taking with them copies of . . . documents and leaving with AM & S a written request for further specified documents,"[211] with almost all of the communications made, or connected to, legal opinions.[212]

Although AM & S furnished some documents, they refused to avail the Commission communications which its lawyers deemed privileged[213] and directed the commission to contact its lawyers should further clarification be required regarding the character and nature of the documents.[214] AM & S emphasised that under Community law, which was defined as part of a wider area of international law or of the law of international organizations,[215] "the confidential relationship between lawyer and client is entitled . . . to protection from disclosure."[216] In a subsequent meeting[217] between the appellant's lawyers and the Commission, AM & S expressed a desire to reach a consensus that the documents were privileged per the necessity of upholding the secrecy of client-counsel communications.[218]

Notwithstanding the fact that disclosure, inadvertent or otherwise, would suffice to waive the privilege, "AM & S was prepared to permit part of the documents to be seen," so as to enable their nature to be identified; with the inspectors then able to "satisfy themselves that the [materials] were indeed privileged."[219] The Commission inferred from this that their inspectors could exercise their right to access and read documents in their entirety[220] and argued the extent to which documents were accorded protection was predicated on the purpose for which discovery was sought.[221] The greater the importance in having available all of the evidence, the weaker the protection.[222]

Had the ECJ ruled in favour of the respondent, "there would be no possibility . . . of maintaining [privilege] even [over] documents of which the protected nature is wholly [undisputed]."[223] Noting that individual

210. *Id.*
211. *Id.*
212. *AM & S Eur. Ltd.*, (1982) E.C.R. at 1614.
213. *Id.* at 1579.
214. *Id.*
215. RENE BARENTS, THE AUTONOMY OF COMMUNITY LAW 2 (2004).
216. *AM & S Eur. Ltd.*, (1982) E.C.R. at 1581.
217. *Id.* at 1580 (noting the meeting between the lawyers representing AM & S and the Commission "took place in Brussels on 18 September 1979").
218. *Id.*
219. *Id.*
220. *Id.*
221. *AM & S Eur. Ltd.*, (1982) E.C.R. at 1584.
222. *Id.*
223. *Id.* at 1582.

circumstances informed the question of "whether compliance with Community law is more effectively obtained by disclosure [than] protection,"[224] the ECJ sustained the appellant's claim of legal professional privilege on the ground that the circumstances justified the communications as "falling within the context of the rights . . . and the lawyer's specific duties in that connection."[225]

The ECJ held that such a privilege did exist in Community law, and that communications were protected "beyond the Commission's powers of investigation" provided "they emanate from an independent [practicing] lawyer . . . in a Member State."[226] Advocate-General, Gordon Slynn stated, "[i]f one considers the real purpose of the protection . . . . I can for my part see no justifiable distinction between such documents in the hands of the lawyer and in the hands of the client."[227] Furthermore, for the purpose of invoking the privilege and provided that the lawyer was bound by a code of professional ethics, Slynn made no distinction between a salaried lawyer and one engaged in private practice.[228]

B. Ties That Bind

The common denominator linking Derby and AM & S is that Community Law is binding on both decisions and the courts of England could not nullify its effect. "Community law . . . encompassed the common elements of the Member States' domestic laws of attorney-client privilege . . . ."[229] In order to appreciate why the ECJ imbued legal professional privilege with the status of a "fundamental, constitutional or human right",[230] as reiterated by Lord Taylor CJ in Derby, it is first necessary to revert to the European Convention on Human Rights and Fundamental Freedoms 1953[231] (ECHR), which decreed the privilege as part of the right to privacy guaranteed under Articles

224. *Id.* at 1584.
225. *Id.* at 1614.
226. *AM & S Eur. Ltd.*, (1982) E.C.R. at 1614.
227. *Id.* at 1654.
228. *Id.* at 1646-47.
229. Jeffrey Taylor Makoff, *Attorney-Client Privilege in the European Communities after A.M. & S. v. Commission: The Secret is Out*, 7 HASTINGS INT'L L. REV. 459, 463 (1984).
230. *AM & S Eur. Ltd.*, (1982) E.C.R. at 1600.
231. Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 8, 10, Nov. 4, 1950, E.T.S. No. 005, https://www.echr.coe.int/Documents/Convention_ENG.pdf [Hereinafter ECHR).

8[232] and 10.[233] As England was a signatory to this convention, its courts were bound by the treaty and required to accept the compulsory jurisdiction of the Court of Human Rights.[234] According to Lord Taylor CJ, "judges . . . appl[ied] European law without special difficulty just as they apply English law."[235] He stated, "we have the worst of both options. Our ratification of the Convention obliges us . . . to accept it, but our refusal to incorporate it means acceptance only occurs after . . . much delay and humiliation".[236]

In its explanatory memorandum, the ECHR stipulated that the freedoms contained in Article 8, namely the privacy of correspondence, could be curtailed by a public authority for the defence of a number of legitimate aims;[237] however, Article 10 acts as an adjunct to Article 8 by laying down the freedom to receive and impart information without interference.[238] This provision is understood to imply the "freedom to seek information," including the exchange of communication between lawyer and client.[239] Any

232. *Id.* at art. 8 (demonstrating that the provisions contained in Article 8(1) of the Convention stipulate that "Everyone has the right to respect for . . . his correspondence"; and 8(2) "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

233. *Id.* at art. 10 (nothing that the provision contained in Article 10(1) states: "Everyone has the right to freedom of expression [which] shall include freedom . . . to receive and impart information . . . without interference by public authority and regardless of frontiers . . . "; while 10(2) states "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law . . . for the prevention of . . . crime, for the protection of . . . morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.").

234. *See* Taylor, *supra* note 153, at 329 (stating that Lord Taylor CJ concluded that "40 years on, [we have] not made the Convention part of our domestic law" and "[a]lthough there is provision to refer legal points for decision by the European Court in Luxembourg, this is rarely necessary." He further explained that the ECHR was complemented by the 1957 Treaty of Rome, which was absorbed into English law through statute, where after European Community Law became binding upon the courts of England).

235. *See id*. at 329; *AM & S Eur. Ltd.*, (1982) E.C.R. at 1597-98 (noting that Article 189 confirmed the precedence of community law over domestic legal provisions. This regulation stipulated that community law, as an independent source of law imbued with a special and original nature, was binding and directly applicable to all member states and carried with it a permanent restriction on their sovereign rights, against which any act incompatible with the concept of community law could not prevail).

236. *See* Taylor, *supra* note 153, at 329.

237. European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights*, 2018 COUNCIL EUR. ¶¶ 15-18 (2018), https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (citing ECHR, supra note 231, at art. 8) [hereinafter Guide on Article 8] (describing that pursuant to Article 8, these legitimate aims were presupposed to mean the existence of facts or information which a reasonable person would infer as the abuse of the privileged channel of communications. As a result, Article 8 is not absolute and could be overridden when society "in the interests national security, public safety or the economic well-being of the country, for prevention of disorder or crime, for the protection of health or morals, or for protection of the rights and freedoms of others.").

238. Committee of Ministers, *Recommendation No.R (97) 18 and Explanatory Memorandum*, 1997 COUNCIL EUR. 1, , (1997), https://rm.coe.int/16806846ca.

239. *Id.*

interference with client-counsel communications is therefore said to contravene the treaty, except in defence of a number of legitimate aims. An inference may be made that the types of communications passing between clients and lawyers, whatever their purpose, were of a private and confidential nature.[240] Nevertheless, the ECHR was prepared to balance competing interests and did not declare legal professional privilege to be an absolute right.[241] Contrary to the conclusion reached in Derby, the ECHR implied that a balancing test should apply[242] such that the privilege could be derogated from with reasonable cause where "such interference is proportionate and in furtherance of other legitimate aims".[243] This raises the question as to whether the all-or-nothing approach taken by the House of Lords may be subject to challenge.

C. Absolutism: A Rebuttable Presumption

The fallibility of the Derby court's sweeping pronouncement is evident on a number of levels and for a number of reasons. This article already documented two of three planks where Derby fell short; specifically, Derby misunderstanding the historical authorities, and later, hanging its hat on the ECJ ruling in AM & S as a means of fusing "fundamental human rights" with an "absoluteness rationale." The third plank where Derby failed was in its correlation between legal professional privilege and express statutory authority.

The premise that legal professional privilege is absolute and cannot be breached by any court for any reason is premised on faulty logic and overlooks the common law decision of Re L,[244] in which the rule yielded, in exceptional circumstances, to the interests of a minor.[245] Furthermore, it runs contrary to remarks made by Lord Taylor CJ in Derby, wherein he proceeded to state, "[n]obody doubts that [the rule] could be . . . abrogated, by statue . . . ."[246] As a creature of common law, the privilege does not derive its authority from statute. Moreover, parliament is not presumed to intend to intrude on the common law, but will adopt a statutory construction which preserves, rather than interferes with, its operation owing to the fact that the privilege is now understood to represent a fundamental human right

240. *See Guide on Article 8*, *supra* note 237, at ¶ 419.
241. Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide for American Attorneys*, 4 LOY. U. CHI. INT'L L. REV. 51, 55-56 (2006).
242. *Id.* at 56.
243. *Id.*
244. Re L (a minor), [1998] 51 BMLR 137, 140.
245. *Id.*
246. *Derby*, (1996) AC 487 at ¶ 61.

underpinned by the public interest in availing clients the right to access legal representation.[247]

Lord Taylor CJ subsequently resolved that parliament had left the realm of legal professional privilege untouched.[248] This in incorrect. By the time Derby came before the House of Lords in 1995, a number of English statutes expressly overrode the rule.[249] One of these, the Criminal Justice Act 1988 (UK), provided at sections 93A and 93B[250] that no privilege could be maintained in instances where a party had assisted another to make or retain benefits through criminal conduct or the proceeds of crime.[251] Given that a judge, in upholding this legislation would be required to satisfy himself or herself as to whether the privilege had either been made out or vitiated by virtue of crime, a balancing exercise would have to occur to determine which interest should prevail.[252]

Where AM & S and Derby viewed legal professional privilege as a vital principle, the judgment has been sharply criticized. Edward Imwinkelried stated that, "[some commentators] have [called] for Parliament to overrule the decision and declare that even [a] purportedly absolute privileges must yield in extreme cases."[253] Further, A.A.S Zuckerman expressed his hope that "the absolutist approach to legal professional privilege . . . [would] be short-lived" because "a discretionary jurisdiction offers a better solution . . . ."[254]

A balancing of conflicting interests to straighten out "confused areas of the law which give rise to constant litigation, inconsistent decisions and perhaps even plain wrong decisions"[255] would prevent interference with the administration of justice.[256] As the public interest in the proper administration of justice should prevail over all else, judges should be accorded a discretionary power to examine the privileged communications, together with a statement supporting the reasons for non-disclosure, and decide on that basis whether or not the material should be produced.[257]

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247. Francis Cardell-Oliver, *Parliament, The Judiciary and Fundamental Rights: The Strength of the Principle of Legality*, 41 MELB. U.L. REV. 1, 2 (2017); See Three Rivers 4, (2004) UKHL 48, ¶ 28.

248. *Derby*, (1996) AC 487 at ¶ 61.

249. *See* Criminal Justice Act 1988, c. 33 §§ 93A, 93B (Eng.) (repealed on Feb. 24, 2003).

250. *Id.*

251. *Id.*

252. *Id.*

253. Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145, 174-75 (citing Dennis, *supra* note 37, at 327-30).

254. A.A.S. Zuckerman, Note, *Legal Professional Privilege – The Cost of Absolutism*, 112 L. Q. REV. 535, 539 (1996).

255. CHRISTOPHER ALAN DE COURCY RYDER, THE JUSTIFICATION FOR LEGAL PROFESSIONAL PRIVILEGE, 28 (1990).

256. Harry Street, *State Secrets - A Comparative Study*, 14 Mod. L. Rev. 121, 134-35 (1951).

257. *Id.*

The need to depart from the current concept of privilege and develop a rationale which promotes judicial discretion is supported by Thorpe J, who advocated an alternate rationale when confirming his desire to see the common law plainly stipulate that lawyers in possession of confidential communications "relevant to determination but contrary to the interests of their client . . . [be] unable to resist disclosure by reliance on legal professional privilege, but have a positive duty to disclose to the other parties and to the court."[258]

This view is reinforced by commentary from academics, including Charles Hollander QC. In Documentary Evidence, he claimed that the right to a fair trial is an obvious right which is hampered when information that can prove innocence or aid in a defence of an accused is omitted from evidence.[259] The right of every accused to a fair trial is a basic and fundamental right.[260] He added, "[t]he law of legal professional privilege is an area which has to adapt . . . ."[261]

Commentator Harry Street denied that there was any justification for the assumption that legal professional privilege overrode all other considerations and petitioned for judges to be empowered in deciding whether disclosure of communications "would be injurious to the public interest."[262] Colin Passmore similarly commented that the Derby decision raises a few questions in terms of whether the defendant, Brooks, ought to have been given recourse to Article 6 of the Human Rights Act 1998[263] to challenge the House of Lords' ruling on the ground that the unavailability of A's communications deprived him of due process and the right to a fair trial.[264]

This accorded with the view adopted by Adam Dodek that the legal system should not regard the privilege as absolute, but apply it

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258. Essex Cty Council v. R (1994) Fam. 167, 168-69 [1993].

259. CHARLES HOLLANDER & TOM ADAM, DOCUMENTARY EVIDENCE 131 (7th ed. 2000).

260. ECHR, *supra* note 231, at art. 6.

261. Charles Hollander, *The Legal Spotlight: A Question of Privilege*, FUNDING IN FOCUS: CONTENT SERIES, May 2015, at 10.

262. Street, *supra* note 256, at 134.

263. The Nat'l Council for Civil Liberties, *A Parliamentarian's Guide to the Human Rights Act*, 2010 Liberty 1, 27 (2010), https://www.refworld.org/pdfid/4ed640552.pdf. Explaining that:

> [t]he right to a fair trial is fundamental to the rule of law and to democracy itself. The right applies to both criminal and civil cases, although certain specific minimum rights set out in Article 6 apply only in criminal cases. The right to a fair trial is absolute and cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The procedural requirements of a fair hearing might differ according to the circumstances of the accused.

Id.

264. Colin Passmore, *The Future of Legal Professional Privilege*, 3 INT'L J. EVIDENCE & PROOF 71, 73-74 (1999).

"more as a matter of case-by-case balancing."[265] In fact, if dual rationales existed in judicial decision-making with respect to legal professional privilege, "the process of that decision making would be [significantly] improved."[266] By contrast, Professor Johannes Chan contended that it was "not open to the court to conduct any further balancing exercise between [legal professional privilege] and other public interests," and Lord Taylor's depiction of the rule as an "absolute right" simply inferred that, as a matter of common law, it could not be overridden by a greater public interest.[267]

The sum of these remarks indicates that litigation cannot be correctly concluded without a fair trial, yet a fair trial cannot be guaranteed when potentially spurious claims to legal professional privilege are freely asserted. By permitting exculpatory or decisive evidence relevant to the establishment of a party's defence or claim of innocence to be withheld from the court, it is foreseeable that grave injustices may result. For this reason, Wigmore propounded that when justice required the investigation of the truth, no man could declare he had any knowledge which was rightly private.[268]

This view accorded with developments in the Commonwealth jurisdictions of Canada and Australia. Contrasting the Derby approach with the approach earlier taken by the Canadian Supreme Court in Descôteaux v. Mierzwinski,[269] Chan observed that the Canadian court rejected the approach adopted by the House of Lords and instead subjected legal professional privilege to the same balancing test as any other fundamental constitutional right.[270] Professor Gavin Murphy added that the House of Lords' inflexibility is out of sync with the right to a fair trial.[271] Similarly, in the Australian case of Carter v Managing Partner, Northmore, Hale, Davey & Leake,[272] the High Court of Australia specifically referenced Barton,[273] National Society for the Prevention of Cruelty to Children[274] and Ataou.[275] That court ruled that there was a legitimate argument to be made that, as a matter of policy, legal professional privilege should be relinquished in any case, but particularly a criminal one when the considerations favouring disclosure of confidential

265. Adam M. Dodek, *Reconceiving Solicitor-Client Privilege*, 35 QUEEN'S L.J. 493, 526 (2010).
266. Ryder, *supra* note 255, at 28.
267. Johannes Chan, *Legal Professional Privilege: Is it Absolute?*, 36 HONG KONG L.J. 461, 465 (2006).
268. Wigmore & McNaughton, *supra* note 78, at 72.
269. *See* Descôteaux v. Mierzwinski, 1982 1 R.C.S. 860, 875 (Can.).
270. Chan, *supra* note 268, at 470, 471-42.
271. Gavin Murphy, *The Innocence at Stake Test and Legal Professional Privilege: A Logical Progression for the Law . . . But Not in England*, 2001 CRIM. L. REV. 728, 730 (2001).
272. Carter v. Managing Partner, Northmore, Hale, Davey, & Leake (1995) 129 ALR 593, ¶¶ 9-10.
273. *Barton*, [1972] 2 All ER 1192.
274. House of Lords v. Nat'l Soc'y for the Prevention of Cruelty to Children, (1978) AC 171 (HL) (Eng.).
275. *Ataou*, [1988] QB 798.

communications outweighed those favouring the preservation of confidentiality.[276]

VI. CONCLUSION

Judicial rulings surrounding the application of legal professional privilege have been fraught with doubt, fluctuating from one conclusion to another as judges in Commonwealth jurisdictions seek to reconcile this tension.[277] Even Lord Taylor CJ, in his rulings preceding Derby, did not recognise the supremacy of legal professional privilege.[278] Only when the House of Lords distinguished Derby from cases which had previously stood for decades as good authority, was the rule resolved in favour of non-disclosure.[279] Reversing the priorities of the innocence at stake when it overruled both Barton and Ataou, the House of Lords confirmed the substantive dimension of legal professional privilege such that no exception should be allowed.[280]

This was clearly a change from treating legal professional privilege as a rule of admissibility (which was the view a generation ago), to the modern view, initially taken in Australia in Baker and subsequently in England. The Lords' sole justification for elevating legal professional privilege into something resembling a constitutional principle,[281] was grounded in a questionable belief that the courts of England remained bound by public policy considerations that had prevailed centuries earlier.[282] Representing a paradigm shift from the fundamental concepts that had historically guided legal professional privilege, it was extraordinary that the Derby court should abolish an exception to the privilege that Caulfield and French JJ recognized as a matter of natural justice.[283]

With Derby now conferring an absolute immunity from disclosure, the major consideration behind the House of Lords' formulation lay, first in the erroneous Wigmorean pronouncement with respect to the origins of legal

276. *Carter*, 129 ALR at ¶ 14.

277. *See Barton*, [1972] 2 All ER at 1194 (holding that there is an exception to privilege, "[i]f there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches."); *but see Carter*, 129 ALR at ¶ 10 (holding against an exception to privilege, "[b]ut if the purpose of the privilege is to facilitate the application of the rule of law in the public interest, it is not possible to allow the interest of an individual accused to destroy the privilege which is conferred to advance that public interest.").

278. *See Keane*, [1994] 2 All ER at 485 (holding that judges need to balance the interests to determine privilege).

279. *See Baker*, 153 CLR at 95.

280. Dennis, *supra* note 37, at 329.

281. *See Three Rivers 4*, (2004) UKHL 48 at ¶¶ 24-25, 28.

282. Dennis, *supra* note 37, at 330.

283. *Id.*

professional privilege,[284] and second in a ruling stemming from AM & S Europe Ltd. v. Commissioner of the European Communities.[285]

This facilitates the making of an important distinction, whereby, neither the European Court of Justice in AM & S nor the European Convention on Human Rights and Fundamental Freedoms 1953 pronounced legal professional privilege as above reproach.[286] Accordingly, the reliance on, or misinterpretation of, Wigmore and AM & S led Lord Taylor CJ into error, whereby he overlooked or disregarded the fact that these authorities were prepared to balance competing interests, such that the privilege could be derogated from with reasonable cause and in defence of legitimate aims.[287] No decisive answer exists as to why Lord Taylor CJ refrained from applying AM & S in his earlier judgments, all of which occurred after the European Court of Justice ruling. There is no clear reasoning as to why he elected to follow it only in Derby.

In the modern English context, legal professional privilege was elevated to the realm of 'fundamental human right' when the European Court of Human Rights affirmed that it could be departed from only in exceptional circumstances.[288] The House of Lords endorsed this expansive approach when it favoured the paramountcy of the doctrine and placed its status beyond doubt. Assigning it an absoluteness from which there was no derogation, it extended further than necessary to enable clients to obtain legal advice.

Derby's rigid and unyielding application of legal professional privilege is out of step with the general interpretation of the privilege and strips the ideals of the privilege of much of its meaning by ceasing to avail any degree of flexibility or judicial discretion. At its core, Derby illuminates what courts are prepared to put into, or read into, the concept of legal professional privilege. By freezing the law of privilege at this particular point in history, Derby prevented legal professional privilege from evolving and adapting according to judicial discretion.

Where the prevailing orthodoxy holds that legal professional privilege is absolute, this article has drawn a correlation between the falsity of this notion and the inescapable influences of Bentham and Wigmore who argued against this overriding protection. Having exposed the reality that the primacy of legal professional privilege is starting to erode, this article concludes that Lord Taylor's conception of legal professional privilege was inherently flawed and without intrinsic justification as to why it should prevail if counter-indicative to reason. The absoluteness of privilege is anti-ethical to

284. *Derby*, (1996) AC 487 at ¶ 31.
285. *AM & S Eur. Ltd.*, (1982) E.C.R. at 1601.
286. *See id.* at 1655-56.
287. *Derby*, (1996) AC 487 at ¶ 65.
288. *See Three Rivers 4*, (2004) UKHL 48 at ¶ 28.

a system which purports to have as its end rational decision-making. After all, justice does not exist in the microcosm of a courtroom. The keystone of legal reasoning and "[t]he life of the law has not been logic: it has been experience."[289]

289. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolf Howe, ed., 15th ed. 1963).