Evidentiary Privilege - the specific relationships of the Evidence Amendment Act (No 2) 1980

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A. Introduction

The concept of relevance lies at the heart of the evidentiary machine. It drives admissibility, subject to the operation of any exclusionary rule, such as hearsay, similar fact or privilege.[1] This push-pull dynamic creates considerable tension since the exclusionary rules seek to protect some value, other than relevance, inherent in the administration of justice. In relation to evidentiary privilege, the competing value is the freedom to choose to resist the forensic process in order to preserve a confidence.

Privilege may be claimed at any stage of the fact-finding process.[2] It enables a person to resist answering written questions during the pre-trial process or oral questions during trial. It justifies refusal to make available documents for inspection and production. The Evidence Amendment Act (No 2) 1980 contains the general statutory regime. Part III provides for marital, spiritual, medical and patent attorney relationships, by virtue of which particular communications may remain free from forensic invasion.[3]

This article explores the operation of these specific privileges during the past 15 years. The value which outweighs the imperative of relevance and which grounds protection from disclosure is explored in relation to each privilege. Some comment will also be made on the ability of a claimant to a specific privilege, who has been unsuccessful in attracting a communication within the statutory criteria, to apply for a discretionary grant of privilege upon an *ad hoc* basis.

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1 In determining admissibility, the initial enquiry is whether the item is relevant to a fact in issue (those which the plaintiff/prosecution must prove in order to succeed, together with any further facts the defendant/accused must prove in order to establish a defence). The next question is whether any exclusionary rule operates to bar the admission of that otherwise admissible evidence. If so, it must then be determined whether any exception exists which will have the inclusionary effect of repatriating the evidence.

2 The concept differs from questions of competence and compellability, which relate to the legal capacity to be a witness. Evidentiary privilege relates to freedom from disclosing particular evidence, even where the witness is competent and compellable. It may in some cases extend to the disabling another from disclosure.

3 The Act came into force on 1 January 1981. It followed the recommendations in *Professional Privilege in the Law of Evidence*, 1977, Torts and General Law Reform Committee. The final report was presented in March 1977 and resulted in particular in the enactment of section 33 (medical privilege in criminal proceedings) and section 35 (the judicial discretion to excuse a witness on an ad hoc basis).

B. Part III Evidence Amendment Act (No 2) 1980

1. The marital relationship

29. Communication during marriage — A husband shall not be compellable in any proceeding to disclose any communication made to him by his wife during the marriage, and a wife shall not be compellable in any proceeding to disclose any communication made to her by her husband during the marriage.

(i) The value protected

The basis upon which freedom from disclosure prevails over relevance here is a repugnance of the effects of compelling an unwilling spouse to disclose statements made within the climate of marital confidence. The privilege is venerable[4] though not necessarily venerated.[5]

(ii) Ownership

The privilege is testimonial, vesting in the witness-spouse being asked to disclose the communication made to him or her by the other spouse. That is clear from the statutory wording "shall not be compellable to disclose". It is not therefore jointly enjoyed by parties to a marriage. If the spouse-witness is willing, the other spouse cannot prevent disclosure. Those critical of the privilege argue that its operation is dependent on the dynamics of the particular relationship from which it draws its source. A spouse-witness willing to protect the other spouse will claim the privilege, and thereby conceal relevant and damaging communications. A less protective spouse may waive privilege and disclose. The destructive corollary is that a claim to privilege is equally possible in order to resist disclosure of communications helpful to the spouse.[6]

(iii) Operation

The privilege is confined to *de jure* conjugal relationships. It also ceases to be available once a potential witness loses the legal status of husband or wife, either through death or dissolution.[7] The balance of judicial opinion appears to be

4 Its original statutory home was in section 6 Evidence Act 1908, corresponding with section 3 Evidence Amendment Act 1853 (UK).

5 For example, section 16(3) Civil Evidence Act 1968 (UK) has abolished marital privilege in civil proceedings. It remained in criminal proceedings until the enactment of s 80 Police and Criminal Evidence Act 1984 (UK).

6 *Rumping v DPP* [1964] AC 814, 833, per Lord Reid: "It is a mystery to me why it was decided to give the privilege to the spouse who is a witness". His Lordship then goes on to enumerate the possible permutations referred to in this paragraph. In *R v Bradley* [1996] 1 NZLR 441, 443 Anderson J also observed that the vesting of privilege in the witness spouse was perhaps paradoxical.

7 In *Shenton v Tyler* [1939] Ch 620 the plaintiff alleged a secret trust had been created by Mr Shenton (now deceased). His widow wished to resist disclosure in the context of the interrogatory process, but was held obliged to answer in relation to communications made to her by her deceased husband. Her widow's status meant the privilege ceased to subsist. The court indicated the same result would have occurred if divorce had terminated the marriage.

that "during the marriage" qualifies "not be compellable" and that therefore the ability to resist disclosure ceases when there is no marital bond left to protect. It may be a nice question as to whether the bare wording of the section supports a counter-argument. "During the marriage" could be argued to qualify "communication" rather than being linked to "compellable". However the rebuttal is that the section refers to "wife" and "husband", which presupposes an existing union.

Marital privilege provides freedom from disclosure of spousal communications even where the spouse-witness is compellable and his or her other evidence would be admissible. This may seem a trite observation, but in *R v Bradley*[8] the point arose in a somewhat novel fashion. Bradley had initially been tried with a co-accused (Kelly) who was acquitted. In Bradley's re-trial, Kelly's wife (who now became compellable at the suit of the prosecution) attempted to have her witness summons set aside on the basis of reluctance to give evidence, since it would place strain on the relationship with her husband. Anderson J did not accept that marital privilege could be pleaded to excuse a spouse from giving evidence against a co-accused with whom her spouse had been jointly tried and acquitted. However his Honour did observe that the privilege would give the witness the ability to refuse to answer questions touching upon communications made to her by her husband.

Section 29 embraces both oral and written communications but the protective ambit extends only to those made to the spouse being asked to disclose. It does not literally permit the witness to refuse to disclose his or her own communications. However a series of questions along the lines of "Tell us what you said or did as a result of what your spouse said / wrote" would probably be disallowed on the basis that it is an illegitimate device to evade the protective cloak of privilege.[9]

Because the marital privilege renders the spouse witness immune from forced disclosure, it does not protect the communication itself. Two cases illustrate its limited testimonial nature. In *Rumping v DPP*[10] the "communication" was a letter the accused (a sailor) had written to his wife while at sea and which he had given to another crew member to post at the next port. It contained statements tantamount to a partial confession to a charge of murder. Before the letter was posted, Rumping was arrested and the letter handed to police. Marital privilege was held by the House of Lords to have no application where the communication is intercepted by a third party prior to its being received by the other spouse. In the view of their Lordships, a communication cannot literally be "made" to the other spouse if it does not reach them. This ruling is entirely consistent with the testimonial nature of the privilege.

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8 [1996] 1 NZLR 441

9 In *Glinkski v McIvor* [1962] AC 726, 780-781, Lord Devlin makes specific reference to the unacceptable use of a series of questions designed to evade an exclusionary rule (such as privilege or hearsay). His Lordship sets his face against the "permissible if decently veiled" line of questioning (asking what a conversation was about rather than what was said) and also disapproves of the strategy of asking what the witness did as a result of what was said (the real value of which evidence lies in the inference as to what was said which cannot be elicited directly because of the exclusionary rule).

10 Supra, n 6

R v Crockett[11] acknowledges the same testimonial effect where the communication has reached the other spouse, but is thereafter intercepted. Crockett was charged with threatening to kill, breaking and entering and firearms offences. The police were informed that he had written a suicide note and went to the house to remove the firearms. Possession was also taken of a number of letters written by the accused, including one to his wife. The letters contained an admission of intent to kill. Holland J ruled on an interlocutory application that section 29 does not render the evidence itself inadmissible, if evidence of it can be given independently of calling the spouse.[12]

The privilege applies in both criminal and civil proceedings, by virtue of the definition of "proceeding"[13] in section 2 of the Evidence Act 1908. Its ambit has also been extended to inquisitorial arenas by the ruling in *Hawkins v Sturt*.[14] There the issue was whether the *de jure* wife of an Equiticorp director (Alan Hawkins) could resist a notice received on March 31, 1992, pursuant to s 9(1) of the Serious Fraud Office Act 1990, to attend to answer questions concerning the investigation of Equiticorp Holdings. Hawkins' trial on fraud charges was set down for June 2, 1992. Mrs Hawkins sought a declaration as to whether she had to attend (a question of compellability)[15] and, if so, whether she was compelled to disclose communications made to her by her husband (a question of privilege). The respondent argued the attendance procedure of section 9(1) was not a "proceeding" and that therefore the compellability and privilege protections did not operate.

Mrs Hawkins was held to have a lawful justification to decline to attend and answer Serious Fraud Office questions relating to the pending trial of her husband.[16] Tompkins J seemed prepared to extend "proceeding" beyond the inclusive definition in section 2 of the principal Act to a non-curial enquiry during which disclosures might be made which would assist the Crown in the trial itself.

> In my view, the public policy considerations relating to the marriage relationship ... justify interpreting [section 29] as embracing a spouse being compelled to disclose

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11 (1988) 3 CRNZ 396

12 Holland J was careful to leave open the question of whether the police had lawfully obtained the letter, observing that this would have to be determined at the trial.

13 "Proceeding includes action, trial, enquiry, cause or matter, whether civil or criminal depending or to be inquired of or determined in any Court".

14 [1992] 3 NZLR 602

15 Resistance was based on spousal non-compellability under section 5(6) of the Evidence Act 1908 as substituted by section 2 of the Evidence Amendment Act 1987.

16 In fact the terms of the declaration were expressed more widely that the protective ambit of marital privilege, which embraces only communications made to the witness-spouse by the other spouse. Lawful justification was also declared for declinature in relation "to any other information [Mrs Hawkins] may have that may have any bearing on charges against her husband". Tompkins J would have had in mind the non-compellability of a spouse at the suit of the prosecution conferred by section 5(6) Evidence Act 1908 which would protect Mrs Hawkins from forced disclosure of any material at trial. Presumably the terms of the declaration attempted to ensure some congruence in a pre-trial situation.

> communications from the other spouse for the purpose of aiding the prosecutions of the other spouse. She is thereby being compelled to disclose communications made to her for the purpose of her husband's trial. It is my conclusion that [section 29] of the Evidence Act ... provides a lawful justification for refusing to do so.[17]

The judge acknowledges that the outcome may have been very different if the request had been made before any charges had been laid against Mr Hawkins. No "proceeding" would then have been in existence and so an ability to resist based on spousal status might have been nullified.[18]

2. The spiritual relationship

> **31. Communication to minister -** (1) A minister shall not disclose in any proceeding any confession made to him in his professional character, except with the consent of the person who made the confession.
>
> (2) This section shall not apply to any communication made for any criminal purpose.

(i) The value protected

The rationale of section 31 lies in the perceived need to strike a balance between temporal and spiritual values. In the words of the Court of Appeal in *R v Howse*, "a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief".[19]

(ii) Ownership

Section 31(1) uses the words "except with the consent of the confession maker" to condition disclosure. This privilege therefore operates very differently from marital privilege, where it is the unwillingness of the witness which is determinative. Here the refusal of the confession maker to permit disclosure will disable the minister-witness from giving evidence of the matters contained in the "confession".

(iii) Operation

The privilege is capable of operating in an eclectic manner because of the width of the definition of "minister" in section 2 of the principal 1908 Act.[20] The

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17 Supra, n 14, 609. The judgment (including this quotation) refers several times to "section 6" as if it contains the spousal privilege. This is probably a slip reference to s 6 Evidence Act 1908 which contained the predecessor to s 29 of the 1980 Act.

18 Idem

19 [1983] NZLR 246, 251

20 "Minister means minister of religion, and in relation to a religious body the constitution or tenets of which do not recognise the office of minister of religion, includes a person for the time being exercising functions analogous to those of a minister of religion."

following scheme is drawn from *R v Howse*,[21] the only decision which takes an overview of section 31.

"Confession" in section 31 embraces communications made for a spiritual purpose as opposed to those constituting a legal confession (and therefore admissible against the maker despite the rule against hearsay).[22] The Court acknowledged the interpretive ambiguity and resolved the issue contextually. Legislative use of "communication" in the rest of the privilege provisions made the court comfortable in inferring, from the differentiation in the noun used in section 31(1), that "confession" was intended to have some specialised meaning. The firm placing of "confession" in the spiritual rather than the evidentiary realm reflects the rationale of the privilege. It may also have resulted in a wider potential for its operation, since a legal meaning would have removed the cloak of non-disclosure from much of what is now protectable at the suit of an unwilling confessor.

The interpretive inference of a spiritual nature to the "confession" is supported by the need for the confession to be made to the minister witness in "his or her professional character". Whether such a threshold can be satisfied was also traversed in *R v Howse*. The Court reviewed the statutory history of the provision and the widening of its operation in 1895, when restrictive procedural wording was removed.[23] Relying upon that, the Court held that there need be no degree of formality required as a matter of "religious duty, ritual or established custom".[24] It also indicated in obiter that there need be no prior association between the confessor and the minister. An existing relationship was merely background against which the court must decide whether a "confession" in the spiritual sense existed. The judicial formula to determine whether the content qualifies as such echoes the rationale underlying the privilege:

> [T]here must be a seeking of some spiritual response for the person making the confession... We think it essential that the person confessing should be at least partly impelled by the dictates of his own spiritual belief or practice.[25]

In *R v Howse* the claim was made in a murder trial, in relation to phone calls the accused made to a minister after he had inflicted stab wounds upon his

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21 Supra, n 19

22 The rule against hearsay has no universally agreed formulation, but in essence it prohibits narration of out of court assertions in order to establish the truth of the matters therein asserted. The value of such a statement, tendered as proof of its contents, is difficult to assess as it asks the tribunal of fact to rely upon the sincerity, perception and memory of the out of court asserter and is also prone to ambiguity which is unable to be clarified. There are numerous category based exceptions (including confessions) which are capable of repatriating many items of evidence which breach the rule.

23 Under the previous law the confession had to be made to a minister "in the course of discipline enjoined by the law and practice of such denomination or under sanction thereof".

24 Supra, n 19, 250.

25 Idem. This was essentially an adoption of the formulation put by Grieg J, the trial judge, and adopted with approval by the Court of Appeal.

partner. In the first call Howse allegedly said that he had stabbed the deceased and left her, not knowing if she were dead, and requested the pastor to pray for her. In the later call he asked if the deceased were dead, and on being so told indicated that he would shoot himself but that first he would 'take out' some police. In response to the pastor's reply that he would go to hell, Howse said "I'm going there anyway so it doesn't matter".

The trial judge had admitted the calls on the basis that neither evidenced any request for spiritual help for the maker, thereby falling short of the "confession" required by section 31.[26] The Court of Appeal essentially agreed, both with the test of "confession" posed by Greig J at first instance and with its application to the facts. The prior association (Howse had occasionally attended church) was background against which to measure the existence of a confession. The request for spiritual help for the deceased would not abrogate the privilege, so a confessor may have a partly altruistic motive for the communication. However it was considered that here the essential feature of a confession was lacking: the seeking of some spiritual response for the accused impelled by his own religious beliefs. The court treated the phone calls as being made simply to inform the pastor of what was happening, not in order to "acknowledge sin".[27]

The Court of Appeal is careful to ensure that section 31 will be approached liberally, by indicating that formality of the confessional context and the fact of prior association are not necessary conditions. This is a clear signal to concentrate on the substance of the "confession". But while *R v Howse* takes a flexible approach to the context in which a claim might arise, it does leave some open questions. Must a confession maker use some such word as "sin" to evidence a request for spiritual help, in order to claim the section 31 benefit? Does seeking a spiritual response connote some idea of penitence or absolution? If so, not all faiths have absolution as a tenet.[28] This seems to fit somewhat uneasily with the wide definition of "minister"[29] which seems intended to give the privilege a discursive sphere of operation.

3. The medical or clinical relationship

Sections 32 and 33 of the Evidence Amendment Act (No 2) 1980 provide for privilege where a patient makes a disclosure in the context of medical treatment.

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[26] Howse pleaded self defence and accidental stabbing. Quite how the calls were relevant is not a matter which appears self evident from the judgment.

[27] It could be faintly argued that Howse acknowledged sin, when he said "I'm going to hell anyway". The ruling might have been differently cast if Howse had shown any contrition.

[28] This was acknowledged by the trial judge in the course of his reasoning and quoted in the appellate judgment (supra, n 19, 249): "[A] confession in the religious sense ... requires that the person is seeking some spiritual response for himself. In the ordinary sense that means an avowal of penitence and a request for forgiveness or absolution. That may not apply in the forms and beliefs of all churches but, at the least, there must be a request for spiritual help for the person making the confession".

[29] Supra, n 20

(i) The protected value

The value which outweighs relevance is the ability of a patient to consult a medical practitioner or a clinical psychologist (as they are defined) in frankness and without fear of disclosure. The Act provides separate regimes for civil litigation and criminal proceedings. In civil matters (section 32) the public interest in non-disclosure is paramount; in the criminal context (section 33) the public interest in relevance is given the greater weight.[30]

(ii) Ownership

Section 32 and 33 both use the formula "no.... shall disclose.... except with the consent of the patient...". Medical privilege therefore belongs to the patient in either context, disabling a witness who is governed by the section from giving evidence of the communication which attracts the privilege. However, the privilege can be claimed in criminal proceedings only if the patient is the defendant in that proceeding.[31] There is no such restriction in relation to the civil privilege, which exists even after death by virtue of section 32(1) and may be claimed by the personal representative of the patient.

(iii) Operation

Disclosure in civil proceedings

32. Disclosure in civil proceeding of communication to a medical practitioner or clinical psychologist - (1) Subject to subsection (2) of this section, no registered medical practitioner and no clinical psychologist shall disclose in any civil proceeding any protected communication, except with the consent of the patient or, if he is dead, the consent of his personal representative.

(2) This section shall not apply -

(a) In respect of any proceeding in which the sanity or testamentary capacity or other legal capacity of the patient is the matter in dispute:

(b) To the disclosure of any communication made to a registered medical practitioner or a clinical psychologist in or about the effecting by any person of an insurance on the life of himself or any other person:

(c) To any communication made for any criminal purpose.

(3) In this section -

"Clinical psychologist" means a psychologist registered under the Psychologists Act 1981 who is engaged in the diagnosis and treatment of persons suffering from mental and emotional problems; and includes any person acting in a professional character on behalf of the clinical psychologist in the course of treatment of any patient by that psychologist:

"Protected communication" means a communication to a registered medical practitioner or a clinical psychologist by a patient who believes that the communication is necessary to enable the registered medical practitioner or clinical psychologist to examine, treat, or act for the patient:

"Registered medical practitioner" includes any person acting in his

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30 This is explicitly acknowledged in *Pallin v Department of Social Welfare* [1983] NZLR 266, 275

31 Section 33(1) specifically refers to the "... patient, being a defendant in the proceeding" in which disclosure is sought.

> professional character on behalf of a registered medical practitioner in the course of the treatment of any patient by that practitioner.

The extended definitions of "clinical psychologist" and "registered medical practitioner" in section 32(3) condition disclosure of patient communications not only by those named professionals but also by others acting on their behalf in the course of treatment. However an ambulance driver at the scene of the accident may not be evidentially controlled, because arguably a course of treatment has not yet been initiated and so the person is not yet a "patient" nor in the "course of treatment".

Patient status is a threshold qualification which governs entry to section 32. *Q v Q*,[32] which discussed medical privilege under the previous regime in section 8 of the Evidence Act 1908, ruled a patient to be a person who sees a doctor for treatment. That includes non-contractual relationships such as emergency or crisis situations where the person does not consent to treatment: for example, where the patient is unconscious or the person is psychologically disturbed.

The concept of patient status exercised Tipping J in *Brown v Brown*[33] in the context of a court ordered psychiatrist's report prepared for the purpose of custody and access proceedings. The report made comments upon the father's mental state and objection was taken to its admission on the basis of section 32. However Tipping J refused to apply privilege on the basis that the father had not assumed the status of a "patient" when he participated in interviews for the purpose of the report. No medical relationship was found to exist.[34] The statutory formula which defines the "protected communication" was taken to fortify this conclusion. The communication must be believed to be necessary to enable the person to whom disclosure is made to "examine, treat or act for the patient".

Even if the person has assumed the status of a patient, the privilege does not protect every communication during the course of treatment. Clear limits lie in section 32(2) and specifically exclude its operation where the sanity or capacity of the patient is in issue (section 32(2)(a)) or if the disclosure is made in the context of the effecting of life insurance on *any* person (section 32(2)(b)), or if the communication is for any criminal purpose (section 32(2)(c)).

To qualify as a "protected communication" (as defined), what is conveyed must first satisfy the concept of a "communication", by virtue of the circular form of drafting in the opening words of the definition in section 32(3). The lack of statutory definition of this word throws the interpreter back to the common law to determine this threshold requirement. In *Lucena v National Mutual Life Association of Australasia*[35] the interpretive choice was whether "communication" was limited to the imparting of information within the patient's knowledge, or whether it embraced information acquired by the doctor from the patient

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32 [1976] 2 NZLR 639

33 (1987) 2 FRNZ 355

34 Equally, Tipping J took the view that essentially there would have been no expectation of confidentiality as it appeared obvious that the contents of the report would inevitably be disclosed.

35 (1911) 31 NZLR 481

submitting his or her body for examination.[36] If it were the latter, then clearly the privilege would be capable of being very wide in its operation.

The Court took the restrictive approach, holding communication required knowledge on the part of the communicator.[37] Information acquired by virtue of the patient submitting to examination was a product of the doctor's skill and knowledge and did not constitute a "communication" by the patient which would attract the privilege. Thus what the patient disclosed by way of oral or written statements, signs and gestures was protected. What the practitioner discovered in the course of examination, the tests performed, the ultimate diagnosis, and treatment prescribed were all matters which could be disclosed.

Lucena was decided in 1911 under section 8 of the principal 1908 Act and, while technically unanimous, contains a plea to parliament to attempt the task of definition. However when the section was replaced in 1980, the term remained legislatively indeterminate.[38] The inference that *Lucena* therefore remains the law is expressly accepted by the Court of Appeal, in 1983, in *Pallin v DSW*.[39]

Of course, as Jeffries J observes in *Q v Q*,[40] the concept of "communication" laid down in *Lucena* is not necessarily useful where the relationship is ongoing, as in the case of psychiatric treatment. There the course of treatment of a patient continued for one month in hospital. His Honour felt unable to make the kind of distinctions between communications (which presuppose patient knowledge) and information acquired (as a result of clinical skill and diagnostic tests) upon which *Lucena* is based. That is understandable given the psychological forum of the original disclosure by the patient, which simply was not an issue in the *Lucena* case. While *Q v Q* was determined under the previous provision relating to civil medical privilege, the comment retains its pertinence given the retention and lack of definition of "communication".

Even if what the patient says, writes, signs or gestures is a "communication", the subject matter must still qualify as a "protected communication" as defined in section 32(3). The statutory wording protects only communications which

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[36] The claim arose in litigation between Lucena's executors and the insurance company which declined to pay the proceeds of a contract of life insurance on the basis of incomplete disclosure by the deceased in the proposal. The medical evidence, if admitted, would allow the Court to draw the inference that Lucena had actual knowledge of his condition.

[37] The third judge, Edwards J, did not formally dissent, but did make a persuasive case for interpreting communication as embracing the mere act or fact of communicating, which does not require knowledge. As the judge posits, if a patient receives a report in French from a doctor and gives that to a French speaking person, he has communicated its contents without knowledge of them. The analogy may be drawn with the submission of the body for examination. (Supra, n 35, 496)

[38] "Protected communication" is defined in the 1980 amendment, but the circularity of its drafting means the lacuna of the term remains a matter of statutory silence.

[39] [1983] NZLR 266, 271 (per Cooke J), 276 (per Somers J)

[40] Supra, n 32, 642. *Lucena* was applied in *McDougall v Henderson* [1976] 1 NZLR 59, where privilege was claimed in respect of an interview with a psychiatrist. The Court held that observable physical facts (such as physical defects) and the treatment prescribed could be related, as this was not information communicated by the patient for the purpose of treatment. The rider was posited however that treatment was only able to be related if it did not, in itself, disclose a privileged communication.

emanate from the patient and which are necessarily referable to his or her examination, treatment or action for treatment. Communications which are unrelated to clinical matters would seem unprotected, but for the curious style of definition, which casts the necessity for the communication in terms of the patient's subjective belief.

In *Pallin v Department of Social Welfare* Cooke J states that "the requirement of belief is evidently a deliberate change in the previous law to emphasise the social justification for the privilege".[41] This observation echoes the view of the Torts and General Law Reform Committee when it recommended the subjective modification to the privilege:

> [I]t is unreasonable to exempt from the protection of the privilege communications that were not in truth relevant to the particular treatment sought, but which the patient with his mere lay understanding of his own complaint, cannot avoid disclosing if he is to put the doctor in the picture. This is not to advocate the attachment of privilege to information which is not medically relevant; it merely means that the line should be drawn by considering what matters the patient considered medically relevant, rather than by objective analysis.[42]

For example, a patient may communicate a fact which neither relates to any clinical matter nor is directly relevant to symptoms which are presented for treatment, yet feels it is necessary to explain this fact in order to facilitate treatment. Is disclosure of that fact barred by the privilege, where the patient wishes to claim its benefit? How is the court to draw the line?

Foley v Prudential Assurance[43] explores the referential nature of the communication and therefore the effective ambit of the privilege. Foley's executor (his mother) sought the proceeds of three life insurance policies, the company denying liability because of asserted non-disclosure by the deceased of his substance abuse and epilepsy. Medical privilege was claimed in relation to doctor's notes recording statements made by the mother-executor concerning her son, when she herself attended as a patient. Counsel for the insurance company successfully argued the communications were hardly to enable examination, treatment or action for the mother and the court held that the majority failed to attract privilege.

> The privilege in my view is that of the patient but it relates only to matters concerning that patient. If a person discusses others with their doctor then such communications do not necessarily fall within the protection.[44]

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41 Supra, n 30, 276

42 Supra, n 3, Appendix I, 11. The section on medical privilege was the subject of a separate Report presented to the Minister of Justice on November 11, 1974 and published as Appendix I in the 1977 Report.

43 High Court, Christchurch, 16 June 1994, CP 155/89, Williamson J

44 Ibid, 7

It would be interesting to inquire why Williamson J used the word "necessarily". If there will be occasions on which statements of fact about a third party will be held to be protectable, it would be proper to explore those limits in the light of the apparently subjective cast to the test of disclosure established by the words "in the belief of the patient". However, any attempt to claim the section's protective ambit in this situation may require some reconciliation with the Reform Committee's observation, when it recommended the subjective test, that the disclosure should be "medically relevant".[45] A Court could take the view that causative factors for a patient's clinical situation which are external to the patient are not relevant in a "medical" sense even if, holistically approached, they explain the reason for the problem the patient presents.

The concept of "subjective belief" is also capable of operating in a restrictive manner where the disclosures do not concern a third party. In *Brown v Brown*, Tipping J observed that if a person were, for example, making disclosures to a psychiatrist to assure the professional there was nothing wrong, subjective belief in the necessity of the communication might not necessarily be present and the disclosure could not be protected against by section 32. By contrast, if a person attended a psychiatrist for the express purpose of having an assessment of their mental state made, then clearly subjective belief in the necessity of the communication to enable "examination" would qualify the disclosures for protection.[46]

The only Court of Appeal case addressing section 32 in depth explores its operation where the patient is a minor. This begs the question of whether a parent making a communication on behalf of a child can claim the statutory protection. In *Pallin v Department of Social Welfare*[47] complaint proceedings were taken under section 27(1) of the Children and Young Persons Act 1974, in which it was alleged that a child of 7 was in need of care and protection.[48] The factual basis of the claim was that the mother suffered "Munchausen's syndrome by proxy".[49] She appealed against her unsuccessful claim to privilege in respect of the medical evidence presented in support of the complaint.

The Court of Appeal ruled the complaint proceedings to be civil in nature, therefore section 32 was appropriately claimed. However, applying *Lucena v National Mutual Life Association of Australasia*[50], it considered that what was discovered on the physical examination of the child and from tests, together with the ensuing reports, did not qualify as "communications". In relation to the oral interviews with the mother and the child, the Court considered that, by taking a liberal view of section 32, it would be possible to attach the privilege to a communication by a parent or someone *in loco parentis* acting as the alter-ego

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45 Supra, n 42

46 Supra, n 33, 366

47 Supra, n 39

48 The statutory grounds relied upon were the avoidable prevention or neglect of the child's development and the presence or likely presence of ill-treatment.

49 Munchausen's syndrome relates to the fabricating of symptoms in order to receive medical treatment. By proxy means the fabricating of symptoms in someone else. Here it was alleged that the mother was fabricating symptoms of epilepsy in her son.

50 Supra, n 35

of the child.[51] If the child were too young to have the required belief in the necessity of the communication, the court would be prepared to substitute the belief of the parent. On the facts the Court felt unable to do so. Because the syndrome involves the feigning of illness, the absence of the necessary subjective genuine belief meant that the section could not be attracted. The evidence was admissible as the mother had no independent privilege.

Section 33 - Disclosure in criminal proceedings

33. Disclosure in criminal proceeding of communication to medical practitioner or clinical psychologist - (1) Subject to subsection (2) of this section, no registered medical practitioner and no clinical psychologist shall disclose in any criminal proceeding any protected communication made to him by a patient, being the defendant in the proceeding, except with the consent of the patient.

(2) This subsection shall not apply to any communication made for any criminal purpose.

(3) In subsection (1) of this section, "protected communication" means a communication made to a registered medical practitioner or a clinical psychologist by a patient who believes that the communication is necessary to enable the registered medical practitioner or clinical psychologist to examine, treat, or act for the patient for-

(a) Drug dependency; or

(b) Any other condition or behaviour that manifests itself in criminal conduct;-

but does not include any communication made to a registered medical practitioner or a clinical psychologist by any person who has been required by any order of a Court, or by any person having lawful authority to make such requirement, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test or other purpose.

(4) In subsection (3) of this section -

"Clinical psychologist" means a psychologist registered under the Psychologists Act 1981 who is engaged in the diagnosis and treatment of persons suffering from mental and emotional problems; and includes any person acting in a professional character on behalf of the clinical psychologist in the course of treatment of any patient by that psychologist:

"Drug dependency" means the state of periodic or chronic intoxication, produced by the repeated consumption, smoking or other use of a controlled drug (within the meaning of section 2(1) of the Misuse of Drugs Act 1975) detrimental to the user, and involving a compulsive desire to continue consuming, smoking or otherwise using the drug or a tendency to increase the dose of the drug:

"Registered medical practitioner" includes any person acting in his professional character on behalf of a registered medical practitioner in the course of the treatment of any patient by that practitioner.

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[51] Supra, n 39, 271 (per Cooke J), 276 (per Somers J), 278 (per Bisson J).

Until 1980, there was no statutory privilege in criminal proceedings, merely a common law discretion to refuse to compel a doctor to give evidence of communications. The privilege is an attempt to foster due compliance to law which may be achieved by medical treatment, particularly where, as the Law Reform Committee notes, the "medical consultation is itself an alternative to the criminal process".[52]

Section 33 now confers a limited statutory privilege.[53] The wide definitions of "registered medical practitioner" and "clinical psychologist" which apply in the civil context are repeated in section 33. However, the ambit of "protected communication" for the purpose of criminal proceedings is narrower than for civil proceedings. Again it requires a subjective belief by the defendant-patient in the necessity of the communication, but only for the purposes of examination, treatment or action for the patient in relation to either of the conditions in section 33(3)(a) or (b): "drug dependency" (as defined in section 33(4)) or "any other condition or behaviour which manifests itself in criminal conduct". The cases which address the section reflect the narrowness of the operation of the privilege in the criminal context.

In *R v Nielson*[54] the accused was jointly charged with three other police officers of assaulting and kidnapping the complainant, who maintained he had bitten the finger of one his hooded assailants. Evidence was received of the accused's visit the following day to the hospital (during which he told a receptionist and a staff nurse that he had received a human bite). The contested evidence was what he had said to the house surgeon who had treated him. It included the time of the bite and, if admitted, would have significantly corroborated the complainant's account. Counsel conceded that section 33 could not apply. While the communication was clearly for treatment (a tetanus shot), it did not fall within "protected communication" as it was not for the purpose of treating either of the two conditions listed in section 33(3).

The section specifically states that privilege will not attach to court or other lawfully ordered examinations (section 33(3)). A damaging admission made to a defendant's general practitioner or psychiatrist may be freed from disclosure, provided the communication is a "protected communication". The same statement offered to the same professional during an examination not initiated by the defendant will fail to qualify for protection.[55]

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52 Supra, n 3, Appendix I, 19.

53 The 1885 provision which conferred some privilege upon communications to a medical practitioner did not distinguish between civil and criminal proceedings. However its amendment in 1895 saw the exclusion of the latter from its operation and it was only in 1980 that a limited statutory privilege was recreated. Its objective is to ensure that in some situations the social imperative of treatment outweighs the need for punishment. The kinds of activities which the Committee canvassed included drug dependency (now specifically catered for in section 33(3)(a)), sexual deviancy, kleptomania and "baby bashing".

54 Unreported, High Court, Gisborne, 4 December 1987, T 3/87, Tompkins J

55 Observed in passing by the New Zealand Court of Appeal in *R v Smith* [1989] 3 NZLR 405, 409.

In *R v Aston*[56] the accused claimed section 33 protection to disable disclosure by a medical practitioner who had conducted an examination at the request of the police on the night of the homicide and arson. The content (that the accused appeared calm and lucid) would have had an effect on the defence of insanity being raised at trial. Tompkins J held the evidence failed to qualify. No doctor-patient relationship existed at the time of the observation of the accused's demeanour because the purpose of the examination was not treatment oriented. Even if there had been such a relationship, the doctor's observation of the accused's state of mind, evidenced by what he said, was not a "protected communication". The subjective belief in disclosure necessary for treatment was not present. Nor was there any question of the communications falling within either of the two matters listed in section 33(3)(a) or (b), the necessary conditions to qualify a communication as a "protected communication".

R v Rapana[57] reflects the same reasoning. The claim (inter alia) to section 33 privilege was made by the accused, charged with attempted murder, in relation to statements made in an interview at the police station with a psychiatric nurse, in the presence of a police officer. The nurse was present to assess informally the need of the accused for some formal psychiatric evaluation. Hence section 33 could have no application. The privileged nature of the communication to the nurse was conditional upon her qualification under either of the extended definitions of "medical practitioner" or "clinical psychologist". Since the interview was preliminary and informal, section 33 could not operate, as no "course of treatment" (required by the extended definitions) had been commenced.[58]

4. The patent attorney relationship

34. Communication to or by patent attorney etc – (1) A registered patent attorney shall not disclose in any proceeding any communication between himself and a client or any other person acting on the client's behalf made for the purpose of obtaining or giving any protected information or advice, except with the consent of the client, or if he is dead, the consent of his personal representative.

(2) A person shall not disclose in any proceeding any communication between himself and any other person made for the purpose of obtaining or giving any protected information or advice sought by that other person for submission to a registered patent attorney in his professional character, except with the consent of that other person, or if he is dead, the consent of his personal representative.

(3) This section shall not apply to any communication made for any criminal purpose.

(4) In this section "protected communication or advice" means information or advice relating to any patent, design, or trademark, or to any application in respect of a patent, design or trademark, whether or not the information or advice relates to a question of law.

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56 High Court, Whangarei, 23/11/88, T 25/88, Tompkins J

57 [1995] 2 NZLR 381

58 Presumably if a course of treatment had been initiated, thereby allowing the nurse to be regarded as falling within the extended definition of "medical practitioner", the basis of the claim would have been section 33(3)(b).

(i) The value protected

This is an entirely new privilege, described in *Whangapirita v Allflex New Zealand Ltd* as "unique to New Zealand".[59] Its purpose is to confer some recognition, in terms of evidentiary privilege, upon the work of patent attorneys which neither the common law nor statute had previously offered.

(ii) Ownership

The section 34(1) privilege belongs to the client who has sought the help of a patent attorney and covers communications between the attorney and client or agents of the client for the giving or receiving of "protected information" (as defined). The privilege operates in a similar manner to the privileges arising from the spiritual and medical contexts. The client as owner-claimant can disable the patent attorney from disclosure, just as the confessor may the minister and the patient may the registered medical practitioner or clinical psychologist.

In terms of the separate privilege in section 34(2), ownership rests in a seeker of advice or information who has communicated with some one else to gather "protected information" to be submitted to the patent attorney. A successful claim will disable the person with whom the information seeker has communicated.

(iii) Operation

Section 34(1) is very similar in its operation to solicitor client privilege, which operates under the rubric of legal professional privilege.[60] Solicitor-client privilege protects communications between a solicitor (or agent) and a client (or agent), if they are referable to the professional relationship, are intended to be in confidence and are for the purpose of giving or receiving legal advice.[61] This is analogous to section 34(1). For the patent attorney privilege to operate, communications must be referable to "protected information or advice" as defined in section 34(4). They must relate to information or advice (either on matters of fact or law) in relation to a patent, design or trademark or an application in respect of those.[62] For solicitor client privilege to operate, there need be no litigation in prospect. Equally, section 34(1) seems unconstrained by the need for a litigation context.[63]

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[59] (1991) 5 PRNZ 151, 152

[60] The common law concept of legal professional privilege embraces two separate heads in New Zealand. Solicitor client privilege protects communications within the relationship of legal adviser and client whenever they are grounded in the context of legal advice, subject to limited exceptions (such as fraud or criminal purpose). Litigation privilege will protect from disclosure communications either between the legal adviser and a third party or between the client and a third party where the communication is made to enable the adviser to advise upon apprehended litigation or to conduct that litigation.

[61] *R v Uljee* [1982] 1 NZLR 561; *Rosenberg v Jaine* [1983] NZLR 1

[62] The omission of copyright from subsection (4) was commented upon in *Whangaparita v Allflex NZ* as "incomprehensible" by Master Williams, supra n 59, 154

[63] The provision as originally drafted by the Reform Committee actually made reference to "privileged to the same extent as a communication between a solicitor and his client

The similarity in operation between the privileges is acknowledged in *Whangapirita v Allflex New Zealand Ltd.*[64] In an action for breach of patent rights and copyright, the defendant sought to claim section 34 privilege for communications with its patent attorneys for the purposes of the action. The elements of section 34 could not be traversed on the facts, since the claim to privilege was inextricably melded with legal professional privilege. Master Williams could only rehearse the statutory wording of section 34(1) before adjourning the application in order that the claim be refined.

No observations were made about the operation of section 34(2), as the nature of the claim to privilege did not appear to require it. Perhaps that is just as well, since its drafting is not felicitous. It is difficult to discern the purpose of this evidentiary protection from the bare wording of the section. The owner of the privilege is described as the "other person" who may disable a person from giving evidence if the "other person" has sought from that person "protected information or advice" to be submitted to the patent attorney. If the subsection had stated (as owner) a "client" or a "person acting on their behalf", it would have been clear that the protection was in relation to disclosures which a third party might otherwise be free to make. For example, privilege would attach to a communication with a technical or scientific expert, which is necessary to provide the factual basis for the attorney's advice.[65] If that is the intended purpose of the section, the change in terminology seems somewhat unnecessary.[66]

C. The ad hoc privilege of section 35 (as a "backstop" for the specific statutory privileges)

In 1980 Parliament vested the courts with a discretion to excuse a witness from giving evidence (whether orally or by producing a document) on the ground that to do so would be a "breach of confidence in the context of a special relationship". Section 35 resulted from the recommendation of the Torts and

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made for the purpose of obtaining or giving legal advice". (Supra, n 3, 73). There is a hint in *Whangapirita v Allflex New Zealand Ltd,* supra n 59, 153 that section 34(1) might be dependent on a litigation context when the Master states: "[T]he section clearly relates to disclosure in "proceedings' but no point is raised in this application as to whether the documents enumerated ... were brought into being in respect of the claim or not." It is submitted that this does not accurately reflect the statutory text. Section 34(1) explicitly protects communications in a situation of "information relating to" or "application in respect of" patents, designs or trademarks. That drafting appears designed to therefore allow the privilege to operate, whether or not any litigation is in prospect. The Master's comments may be attributed to the ground on which privilege was actually claimed for the documents in the case. The claim was twinned with aspects of litigation privilege which does require a litigation context.

64 Supra, n 59

65 This is the interpretation of subsection 4 which appears in Garrow and McGechan's *Principles of the Law of Evidence,* 7th ed., Butterworths, 269.

66 It seems probable that section 34(2) is modelled on section 15(1)(b) of the Civil Evidence Act 1968 (UK), to which the Committee refers (supra n 3, 24) and which is clearly directed to communications between the client and third persons to obtain information for submission to the patent attorney.

General Law Reform Committee[67] which envisaged that the section would operate upon counsellors, social workers, school teachers and journalists.

> **35. Discretion of Court to excuse witness from giving any particular evidence -** (1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.
>
> (2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:
>
> (a) the likely significance of the evidence to the resolution of the issues to be decided in the proceeding:
>
> (b) the nature of the confidence and of the special relationship between the confidant and the witness:
>
> (c) the likely effect of the disclosure on the confidant or any other person.
>
> (3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.
>
> (4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.
>
> (5) In this section "Court" includes -
>
> (a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and
>
> (b) Any other person acting judicially.

In the past 15 years applications to excuse a witness under section 35 have been made in a variety of contexts.[68] The following discussion of the operation of section 35 is confined to its potential as a "back stop device", where the claim to a specific privilege under Part III has been unsuccessful.

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[67] Supra, n 3, 75

[68] For example, applications have arisen from the following relationships: probation officer and client (*R v Secord* [1992] 3 NZLR 570); police officer and complainant (*Police v Morgan* [1993] DCR 746); Security Intelligence Service and an intelligence officer (*Rankine v Attorney General* (1992) 6 PRNZ 484); victim support officer and putative victim (*R v Bain (No 5) High Court*, Dunedin, 22/5/95, T1/95, Williamson J); family court counselling coordinator and mother (*Martin v Reid* (1985) 3 NZFLR 725); co-accused and co-accused (*R v Adams* High Court, Auckland, 16/9/92, T 240/91, Tompkins J); media source and media (*European Pacific Banking Corporation v Television*

(i) The value protected

Parliament adverts in section 35(2) to the factor which may be held to outweigh relevance:

> .... the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communications between such persons....

But the court is not entirely free - it must take into account the matters specifically laid out in section 35(2): the likely significance of the evidence to the resolution of the issues (section 35(2)(a)), the nature of the confidence and the special relationship between the confidant and the witness (section 35(2)(b)) and the likely effect of the disclosure on the confidant or any other person (section 35(2)(c)).

(ii) Ownership

Section 35(3) indicates that an application to excuse the witness may be made by any party or by the witness concerned. This begs the question of to whom the privilege belongs. Is it testimonial, belonging to the witness being asked to disclose, or does it reside in the confidant who may then seek to disable the witness from recounting or producing the content to the court?

This question has been answered in *R v Howse*[69] where the accused, charged with murder, unsuccessfully pleaded section 31 privilege in respect of phone calls made after the homicide to a pastor. Section 35 was claimed in the alternative. However the application was only faintly pursued and the Court gave it short shrift, holding in the course of its refusal that section 35 was testimonial in nature. The Court of Appeal was firm in the view that the section did not disable an otherwise willing witness on the initiative of a reluctant confidant (the factual basis of *Howse*). Thus the privilege provides a shield for a witness, not a sword for the confidant.[70]

(iii) Operation as a "back stop" to a specific statutory privilege

An acknowledgment of the potential width of the section's operation and of the tension inherent in that availability has been a continuing theme in relation to section 35. In *R v Howse*, the first case to comment on the section's potential, the Court of Appeal suggested it could properly operate as a "backstop", where

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New Zealand Ltd [1994] 3 NZLR 43. This list is not exhaustive. Applications which touch upon the specific statutory privileges of Part III are dealt with in the text.

69 Supra, n 19

70 This point was explicitly accepted in *Nielson* (supra n 54, 7) using the words of Cooke J in *Howse* (supra, n 19, 251): "[T]he section does not authorise a direction that the witness refrain from disclosure, it goes only to whether he can be compelled to do so." The approach taken by the Court of Appeal was reaffirmed in passing in *R v Kiu* [1990] NZLR 340, 344.

a communication failed to attract a specific privilege and the witness was unwilling to give evidence:

> There is no reason why a minister of religion who has received in confidence information not constituting a confession within the scope of s 31 should not be excused from disclosure under s 35 if the Court in its discretion, having regard to the prescribed matters, so decides. The jurisdiction under section 35 should enable professional advisers and others to ensure that confidences are never lightly broken in evidence.[71]

In *Howse*, the Court of Appeal did not have to undertake the balancing exercise required. Its primary ruling as to the testimonial effect of the privilege (protection of an unwilling witness) foreclosed, on the facts, the need for evaluation of the factors laid down in section 35(2). In *Pallin v Department of Social Welfare*, decided in the same year, this recognition of the ability of section 35 to act as a second level filter is reiterated, in passing, by the same Court in the context of privilege arising from the medical relationship.[72] Again the facts of the case were not considered to warrant a full exploration of precisely how the backstop regime would operate.

Two cases which traverse in depth the "back stop" device demonstrate that the efficacy of section 35 as a second level filter in criminal proceedings is not guaranteed.

In *R v Nielson*[73] a claim to medical privilege in criminal proceedings was unavailable to prevent disclosure of a statement made during the course of treatment of the accused by a medical practitioner. The statement did not qualify under the limited definition of "protected communication" in section 33(4). Instead a ruling was sought (on behalf of the doctor) as to whether she could be excused on the basis of section 35. Applying himself to the obligatory considerations of section 35(2), Tompkins J held in relation to paragraph (a) that the likely significance of the evidence was high in determining a fact in issue (whether the accused was present). There was a "special relationship" of doctor and patient (as required by paragraph (b)) and the confidence was within the clinical context. The likely effect of the disclosure (adverted to in paragraph (c)) was the increased risk of conviction of the confidant-accused. Nevertheless, the provision of a specific regime for medical privilege in criminal proceedings persuaded the judge that the use of section 35 was an undesirable avoidance of that legislative scheme.

It may therefore be difficult, *R v Howse* notwithstanding, to persuade a judge to use section 35 to avoid the limited nature of specific statutory privileges.[74]

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71 Supra, n 19, 251, per Cooke J

72 Supra, n 39, 269, per Cooke J: "Sections 32 and 33 ... together with s 35 ... constitute a comprehensive code as to doctor-and-patient privilege".

73 Supra, n 54

74 In *Howse* itself the Court of Appeal saw the relationship between the specific privilege and the ad hoc regime operating together in the opposite fashion: "the very existence of section 35 is a reason for not placing an unduly wide interpretation on section 31". (Supra, n 19,251)

However, *Nielson* may be compared with *R v Rapana*[75] which gives force to the concept that this privilege is not granted on a class basis, but rather is determined within the factual context of each "particular case", as section 35(2) states. The accused, charged with attempted murder, claimed medical privilege in relation to statements he made during an informal assessment by a psychiatric nurse, in the presence of a police officer. Section 33 could not operate, as no "course of treatment" (required by the extended definition of medical practitioner) had been commenced. An alternative application was made under section 35.

A "special relationship" was held to exist between the accused and the nurse who was essentially acting on behalf of the hospital (and the psychiatric emergency team). Thomas J felt the accused had responded to her on that basis. His Honour also had no difficulty in finding that what the accused said was imparted in confidence in the expectation it was to be used for the purpose of assessment. These findings seem to be an explicit observance of the mandatory consideration in section 35(2)(b). The judgment discloses no process of weighing of the factors laid out in section 35(2)(a) or (c) before granting privilege to the nurse and excusing her from giving evidence. The foundation of the grant appeared to be based on the unfairness of having the nurse's interview, overheard by the police officer and conducted for a clinical purpose, used as evidence against the accused. Thomas J was troubled by the informality of the vetting procedure and gave a different response to that of Tompkins J in *Nielsen*. The judgment in *Rapana* makes no ruling on the legitimacy or otherwise of the procedure adopted by the police, but does provide a novel use of section 35 to regulate police conduct:

> [I]f the police do adopt this procedure, they must expect that in all likelihood anything said to an interviewer and overheard by a police officer will be ruled inadmissible. The substance of the requirements of the Bill of Rights Act cannot be circumvented in such a manner. Nor can the policy, or policy considerations, which underlie s 35 of the Evidence Amendment Act (No 2) be avoided or disregarded simply because of the status of the interviewer.[76]

D. Conclusion

It is the non-class based and discretionary approach which distinguishes section 35 from the other privileges in the 1980 amendment. Under section 35 the balancing exercise between relevance and confidence is determined during the application. In relation to the specific privileges, that exercise has already been conducted and the balance which has been struck is inherent in the requirements and limitations built into each.

Section 35 demands that the Court focus upon several mandatory considerations during the evaluative process. Section 35(2)(a) asks for an assessment of the relevance of the evidence to a fact in issue, which requires a contextual answer that will vary from case to case. Section 35(2)(b) is simultaneously contextual and non-contextual; it requires analysis of the nature

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[75] [1995] 2 NZLR 381

[76] Supra, n 57, 384

of the confidence and the special relationship within which it was made. That requires a fact based approach but also permits the judge to look outward and judicially notice the kinds of social relationships which are deemed to be inherently confidential and valuable for that reason.

Section 35(2)(c) is again based on the opportunity for a double perspective. The paragraph requires taking into account the likely effect of disclosure "on the confidant or any other person". Taking a contextual view (the effect of disclosure in *this* case) is certainly permitted, given the normally disjunctive operation of "or". But the reference to "any other person", in assessing the detrimental effect of disclosure, allows the judge to consider whether forced disclosure will cause injury to other relationships of a similar kind.

Provided the witness asked to disclose the confidence is unwilling to do so, the "backstop" or second level filter operation of section 35 is available where one of the specific privileges fails to qualify the communication for protection. The likely response to each is considered below.

The marital relationship

The protective regime of section 29 does not apply to communications made by one partner to another before they assume the status of husband and wife. Section 35 would be an appropriate device to turn to in this situation, especially to ensure congruence of protection of communications within a subsisting relationship, of which part was spent informally and then formalised. However, an unwilling spouse may prefer to look to spousal non-compellability under section 5(6) Evidence Act 1908 for freedom from forced disclosure by avoiding witness status at the suit of the prosecution.

Marital privilege does not protect communications within *de facto* or same sex relationships. Yet the considerations of candour and confidence which support the privilege are not confined to formal marriage. Forced disclosure of a partner-partner communication (irrespective of the gender basis of the informal conjugal relationship) will often have the same deleterious effect as that which marital privilege seeks to guard against. Such considerations would clearly be able to be rehearsed properly under the requirements of section 35 on a case by case basis. In balancing the public interest, as the section requires, an analogy can be drawn with the already existing marital privilege, in terms of categorising the informal conjugal partnership as a "special relationship", quintessentially possessing confidence. In fact it is surprising that this has not already occurred.[77]

[77] It may be submitted there will be problems establishing the indicia of such relationships. But given the fact that the Court of Appeal in *R v Secord*, supra n 68, 574, was prepared to say in obiter that the "special relationship" may arise out of the *fact* of the confidence having been reposed in the witness, this may not be such a barrier to relieving the witness of the duty to disclose. The categorisation problems which will arise in conferring other legal rights or privileges upon informal conjugal partnerships do not need to be addressed in the light of *Secord*'s liberal approach.

The medical treatment relationship

An application under section 35 is clearly available, where a claim under the specific statutory head of section 32 or 33 fails to qualify the communication.[78] *Nielson* and *Rapana* demonstrate the discretionary nature of the exercise and the process of weighting the differing public interest factors in section 35(2). In both cases the evidence was highly relevant (section 35(2)(a)) and neither judge had difficulty in acknowledging the medical relationship as patently valuable, especially in the light of its specific statutory recognition (section 35(2)(b)).

It is in relation to section 35(2)(c) that the differing outcomes can perhaps be assessed. In *Nielson*, Tompkins J considered the likely effect upon the confidant (i.e. an increased risk of conviction). In *Rapana*, it appears that the judge took a non-contextual view and also considered the effect of the breach on "any other person".[79] The decision is effectively an amplification of the exemption to privilege in section 33(3). While medical privilege does not attach to court ordered or other lawfully authorised examinations, *Rapana* demonstrates that a discretionary grant may attach to those conducted in informal circumstances with an initial clinical purpose, which are then used for their evidential value.

The ruling in *Rapana* may well operate vigorously, particularly in the climate of the New Zealand Bill of Rights Act 1990. The decision does no particular violence to the specific regime of medical privilege since it can be confined to these kinds of situations of essential unfairness. By contrast, a successful application in *Nielson* would have rendered nugatory the entire medical privilege of section 33. Given that the section's purpose is to set up a limited protective regime, Tompkins J's reluctance in *Nielson* to reset generally its parameters via section 35 was probably entirely appropriate. Nevertheless *Rapana* indicates the potential of section 35 as a route to avoid the exigencies of the specific statutory regimes of section 32 and 33.

The patent attorney relationship

The possibility of employing section 35 where section 34 would not govern disclosure was recognised by Barker J in *Yves Saint Laurent Parfum v Louden Cosmetics Ltd.*[80] The documents contained advice as to the availability of certain trade marks and potential conflict between those and associated marks, and emanated from patent attorneys beyond the jurisdiction. The ruling is more concerned with the implications of a waiver of privilege given by the defendants, but the issue of whether section 34 protection extended to English trade mark

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78 Such failure may be on the ground that the treatment relationship had not commenced, or the matter is not one which falls within the relevant definition of "protected communication", or it concerns conduct of a third party and is not considered to have satisfied the test of subjective belief in the necessity of the original disclosure.

79 This is of course a matter of inference, since in *Rapana* the balancing exercise is not completely executed in terms of serially approaching each of the three mandatory considerations.

80 High Court, Auckland, 26/7/95, C.L. 55/93, Barker J

and patent agents was raised in obiter by Barker J. His Honour drew the inference that the protection of section 34 is domestic and observed:

> [O]ne would think it likely that the Court would exercise its discretion under s.35 of the same Act and confer privilege on communications between patent and trade mark attorneys in England and their clients made for the purpose of seeking and receiving advice on matters such as those covered by this litigation.[81]

Final Comment

It should not be taken as the view of the author that the judicial activity in relation to section 35 renders the specific privileges otiose. Sections 29 to 34 still operate as the primary descriptors of privilege within the four specific relationships the legislature has addressed in the 1980 amendment. But outside those especially cut cloaks of protection, section 35 provides an opportunity for judicial re-weighting of relevance and a consideration of whether the public interest will benefit more from the maintenance of confidentiality than from disclosure.

[81] Ibid, 7