PROFESSIONAL CONFIDENCES AND THE PSYCHOLOGIST

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Psychologists[1] are irrevocably committed to the ideal of confidentiality in their relationship with clients. Their justification for this commitment is not difficult to discover:

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition . . . . It would be too much to expect them to do so if they knew that all they say—and all that the [psychotherapist] learns from what they say—may be revealed to the whole world . . . .[2]

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1 This paper is concerned with the legal position of *psychologists* and while much of what is presented applies equally to *psychiatrists* it is important to keep the distinction between the two professional groups clearly in mind. The psychologist is a non-medically trained specialist in psychology: 'a branch of science dealing with behaviour, acts or mental processes and with the mind, self or person who behaves or acts or has the mental processes' (English and English, *Dictionary of Psychological and Psychoanalytical Terms* (1958), 419). In Australia, most psychologists hold a university Arts degree in the course of which they have studied a variety of psychology subjects over three or more years. In addition, some universities offer postgraduate courses in clinical, educational and industrial psychology. Psychologists are involved, in general terms, with the measurement, prediction and control of human behaviour but within this discipline there exist a multitude of specialists reflecting a wide variety of professional interests. There are industrial, educational and clinical psychologists; specialists in the psychology of children or groups; experimental psychologists and those who are primarily concerned with the design and validation of psychological tests. Some work as marriage guidance counsellors, as probation and parole officers, as student counsellors in both schools and universities or as vocational guidance officers. Psychologists are to be found in industry, government and also in private practice. Psychologists often work in conjunction with social workers, psychiatrists and other specialists within a hospital environment. While a psychologist may engage in psychotherapy in a clinical setting, he is not qualified to prescribe drugs or administer other medical treatment to his client. On the other hand a psychiatrist is a medical practitioner professionally engaged in the medical treatment of mental illness. He is foremost a doctor. While it is not legally essential, most psychiatrists have undertaken some form of specialist study in abnormal psychology and hold the postgraduate Diploma in Psychological Medicine or an equivalent qualification. While some of the treatment techniques used by psychiatrists are not specifically medical in nature and are indistinguishable from those used by psychologists, the psychiatrist usually prescribes drugs in the course of treating his patient and may in severe cases, administer electro-convulsive shock therapy or engage in operative procedures such as prefrontal leucotomy.

2 Guttmacher and Weihofen, *Psychiatry and the Law* (1952), 272.

Not every psychologist is engaged in intensive psychotherapy involving extended and detailed investigations into the client's personality, character, and interpersonal relationships, but all psychologists who come into face-to-face contact with their clients obtain information (by way of test data, personal interview or both) which is perceived by the client as dangerous, threatening or embarrassing and is clearly intended to be confidential. Thus it is argued that unless the client can obtain some assurance that his secrets will be respected, he may elect to sacrifice adequate professional assistance rather than risk having embarrassing and possible harmful confidences disclosed at large. For these reasons the principle of preserving the secrecy of communications with the client is highly valued by psychologists: it is no mere shibboleth—it is a mark of professionalism. Indeed legal recognition of this commitment to confidentiality, together with the creation of a statutory monopoly on the right to practise, today represent the two most significant status symbols for any rising professional group. So far, only Victoria has enacted legislation restricting the right of individuals to practise psychology. In that State only psychologists registered with the Victorian Psychological Council are entitled to practise. There is, however, not one word in the enabling legislation[3] which either expressly or impliedly recognizes the psychologists' claim for the right not to divulge their clients' confidences, and no other State in Australia has anything even remotely approaching the Victorian Act. The purpose of this paper is to examine two complementary questions. Firstly, when is a psychologist legally obliged to divulge confidential information obtained in a professional relationship with a client? And, secondly, when can a psychologist be legally restrained from divulging such information?

The solution to any given problem involving confidentiality will obviously be determined by reference not only to the psychologist's legal position, but also to the ethical standards of his profession and the wider demands of good citizenship. In formulating his course of action the psychologist is called upon to engage in a neat balancing of conflicting interests and, too often, the balancing task is impossible. In what follows consideration will be also given to the impact of professional ethics and other extra-legal pressures on the principle of confidentiality.

The Ethical Standards of the Profession

It is not intended here to engage in a detailed discussion of the ethical standards of psychologists beyond observing that it is abundantly clear that while psychologists are committed to the principle of confidentiality in their relationships with clients, it is never suggested that the standard to be adopted is that of absolute secrecy. Nevertheless, the ideal aimed at is extremely high. The 1967 Draft Code of

[3] Psychological Practices Act 1965.

Professional Conduct of the Australian Psychological Society prescribes, *inter alia*, the following as 'mandatory' principles of professional conduct:

5. Where the client has been guaranteed, or can reasonably expect, that information given by him will be treated confidentially, the member must not divulge such information without the client's permission.
6. When some departure is required from the basic principle that clinical or consulting relationships are strictly confidential, the member must make clear the nature of his role or function to the client before entering upon the relationship.
7. No information about criminal acts of a client should be communicated save when there is a legal duty to make such a communication.
8. Before communicating any confidential information to another professional worker, the member must obtain the client's permission to do so, unless professional communication is already clearly implied by the nature of the consulting relationship or the setting in which it takes place.

These principles in themselves do not, of course, constitute binding rules of law and to that extent can, in states other than Victoria, be ignored without risk of greater sanction than exclusion from the Society. And since in the other states membership of the Australian Psychological Society is not a pre-requisite to the right to practise psychology, this penalty will not prevent the offending member from continuing in employment as a psychologist in those states. Thus, in practical terms, the standards of professional conduct prescribed by the Society are unenforceable. Nevertheless they are accepted as essential for the maintenance of high levels of professional competence and most psychologists attempt to give effect to them. In Victoria the Society's Code of Professional Conduct takes on additional legal significance in view of the enactment in 1965 of the Psychological Practices Act. Under this Act only those persons who are registered with the Victorian Psychological Council may practise psychology in Victoria. In addition to being over twenty-one years of age and of good fame and character,[4] an applicant for registration must be either (i) a member of the Australian Psychological Society, (ii) an associate or member of the British Psycho-Analytic Society, or (iii) a holder of an Australian University degree in the course of or after attaining which he successfully completed a progressive three year course of study in psychology and has, in addition, had at least three years experience in the practice of psychology.[5]

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[4] S. 16(1)(*a*) and (*b*).
[5] S. 16(1)(*c*)(i)—(iii).

Other methods of qualifying for registration exist[6] but of all those available, membership of the Australian Psychological Society is by far the most commonly relied upon. It is theoretically possible for a psychologist to be expelled from membership of the Society for a gross breach of the rules of professional conduct in relation to, say, confidentiality but this would not automatically lead to his de-registration since most certainly he would remain qualified for registration under some other head of eligibility (notably (iii) above). However, the conduct which led to his expulsion from the Society might well lay the psychologist open to a charge of 'conduct discreditable to a psychologist' under ss. 17 and 19 of the Psychological Practices Act. Only the Victorian Psychological Council is authorized to deal with such a charge and if, after inquiry, it is satisfied of the psychologist's guilt, it is empowered to admonish, reprimand or fine him, or to withdraw his right to practise by suspending or cancelling his registration[7] subject to the right of the aggrieved psychologist to appeal to a judge of the Supreme Court.[8] Since neither the Act nor the regulations made under it define what is encompassed within the term 'conduct discreditable to a psychologist' it is not unreasonable to predict that the Council will be strongly influenced in its determinations by the published Code of Professional Conduct of the Australian Psychological Society. And the fact that a majority of the eight member Council are members of the Society adds weight to this hypothesis.[9] Thus the prediction is ventured that, through its influence on the Victorian Psychological Council, the Australian Psychological Society code of professional conduct will have a considerable impact on all psychologists in Victoria, irrespective of their membership of the Society. One may well come to find in time that in determining what is 'conduct discreditable to a psychologist' the Council will not find it necessary to look beyond the code. This will mean that, for the Victorian psychologist, the mandatory provisions of the code can only be ignored at the risk of de-registration. When seen in this light, the high ethical standards of confidentiality demanded by the code take on new significance even though the determination of the Council is reviewable by the Supreme Court of Victoria which is at liberty to disregard the code in making its own determination of what are appropriate standards of professional conduct.[10]

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6 S. 16(1)(*c*)(iv) and (v).
7 S. 19.
8 S. 23.
9 The Council is composed of a medical practitioner recommended by the Victorian Branch of the Australian Medical Association, one psychiatrist nominated by the Victorian Mental Health Authority, another recommended by the Australian and New Zealand College of Psychiatrists, a Professor of Psychology and four persons nominated by the Minister of Health. At least three of these last four must be persons selected from a list of names submitted by the Victorian Branch of the Australian Psychological Society. At the present time, of the eight members of the Council, five are in fact members of the Australian Psychological Society.
10 In the medical context see *Furniss* v. *Fitchett* [1958] N.Z.L.R. 396, 405.

The Requirements of the Law

The ethical considerations discussed above are subject to the prior claims of the law. Unfortunately, it is of little comfort to the psychologist seeking legal advice to be told that those areas of law which most affect him in his professional role are those which are least settled or well defined. Much of the law in this field is uncertain since there are few reported cases involving psychologists and even less in the way of legislation. The law must therefore be discovered largely by way of analogy with cases involving other professional groups for whom confidentiality is important, namely, doctors and lawyers. Yet even here there is a paucity of authority.

I. *Disclosure of Confidential Information out of Court*

Only when the psychologist is called as a witness in court can he be compelled to divulge information about his client. Outside court he is entitled to refuse to answer questions concerning his client and, as we have seen, his professional ethics demand silence except where information is given with the client's express or implied consent. Though the client's confidences are primarily protected against disclosure out of court by the psychologist's code of professional conduct, it is not merely a matter of ethical obligation, sterile at law. While there are, in Australia, no provisions comparable with those in the French, German, and other foreign Penal Codes which make breach of confidentiality in a professional relationship a crime punishable by fine or imprisonment,[11] it is possible for a civil action for damages to be commenced against a psychologist by a client injured by the unauthorized disclosure of confidences. Before discussing the civil sanctions which may be applied against a psychologist for breach of confidentiality, it is necessary to consider whether there are any circumstances in which the psychologist is under a positive legal duty to provide the police or others with information relating to the commission of a criminal offence by his client.

As a general rule there is no positive legal obligation on a citizen to report criminal offences to the police. It is clear that a person who

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11 French Penal Code, Article 378: Physicians, surgeons and health officers, pharmacists, midwives and other persons to whom, by reason of their temporary or permanent position, secrets have been confided, and who reveal such secrets in cases other than those in which they are compelled or authorized to reveal by law, shall be punished by jailing from one to six months and by fine of 500 N.F. to 3,000 N.F. Penal Code of the German Federal Republic, § 300: Anybody who without authority discloses the secrets of another, shall be punished by imprisonment for a term not to exceed six months or by a fine, if the secret was entrusted or became known to him in his capacity as a (1) physician, dentist, pharmacist or member of another healing profession, the training of which is regulated by the state, or (2) attorney, patent attorney, notary public, defence counsel, auditor, certified public accountant, or tax consultant. See Hammelman, 'Professional Privilege: A Comparative Study,' (1950) 28 *Can. B. Rev.* 750, 754-757 and also Korean Criminal Code, Article 317; Norwegian Penal Code, § 390; and the Draft Penal Code of Japan, Article 335. (The foregoing criminal codes are reproduced in *The American Series of Foreign Penal Codes* edited by G. O. Mueller).

actively assists a felon[12] escape apprehension is guilty as an accessory after the fact. But there must be a positive act of assistance.[13] There is the kindred offence of compounding a felony[14] and also the common law and statutory misdemeanours of interfering with the course of justice[15] and obstructing the police in the execution of their duty[16] but again each of these offences requires some positive act on the part of the accused. Mere omissions to prevent or reveal crime do not make a person a secondary party to the crime[17] but they may constitute the independent common law misdemeanour of misprision of felony. In misprision the failure or refusal to disclose a felony is enough. Since it is a common law offence it no longer exists in the code states but it survives in New South Wales, Victoria and South Australia and continues to be a source of anxiety to psychologists as well as to practitioners in other professions in those states.[18]

Misprision was long thought to be moribund but, as is now well known, it was recently revived in both England and Australia.[19] The elements of the offence are:

(i) A felony must have been committed by someone. The offence of misprision of treason also exists[20] but there is no such thing as misprision of a misdemeanour.[21] Unless it amounts to a conspiracy to obstruct or defeat the course of justice, an agreement not to prosecute a misdemeanour is not criminal.[22] In *Howard* v. *Odhams Press*[23] Park J. held that 'the mere concealment of the commission of misdemeanours . . . is not in itself a wrongful act. There is misprision of felony but no misprision of misdemeanour.'[24] The question whether concealment of a contemplated felony amounts to misprision remains undecided by the courts. The House of Lords carefully expressed no opinion on the

12 Crimes Act 1900 (N.S.W.), ss. 347, 371; Crimes Act 1958 (Vic.), ss. 325, 363; Criminal Law Consolidation Act 1935-1957 (S.A.), s. 268. Under the Queensland and Western Australian Criminal Codes, s. 10 and the Tasmanian Criminal Code, s. 6(1) the offence is not limited to assisting felons.

13 Williams, *Criminal Law* (2nd ed., 1961), 411-412.

14 Russell, *On Crime* (12th ed., 1964), 339; Howard, 'Misprisions, Compoundings and Compromises,' [1959] *Crim. L.R.* 750.

15 Williams, *op. cit.* at 415-418.

16 A person who refuses to supply the police with information is not guilty of obstruction: Williams, *ibid.* at 419-420; *Rice* v. *Connolly* [1966] 2 Q.B. 414 and commentary [1966] *Crim. L.R.* 390-391. The Supreme Court of Victoria has held that a person was not guilty of obstruction when he advised a suspect not to answer police questions: *Hogben* v. *Chandler* [1940] V.L.R. 285. *Cf. Steele* v. *Kingsbeer* [1957] N.Z.L.R. 552.

17 Williams, *op. cit.* at 411, 422.

18 *E.g.* (1967) 41 *Law Institute Journal* 349. For a discussion of the difficulties misprision poses for English probation officers see Allen, 'Misprision,' (1962) 78 *L.Q.R.* 40, 59-60.

19 *R.* v. *Crimmins* [1959] V.R. 270; *R.* v. *Wilde* [1960] *Crim. L.R.* 116; *Sykes* v. *D.P.P.* [1962] A.C. 528.

20 *Halsbury's Laws of England* (3rd ed.), Vol. 10, para. 1036.

21 *Ibid.* para. 549.

22 *Id.*, see also Russell, *op. cit. supra* n. 14 at 340.

23 [1936] 2 All E.R. 40.

24 *Id.* at 46.

point in *Sykes* v. *D.P.P.*[25] but Glanville Williams, referring to Hawkins, gives an affirmative answer[26] and Halsbury[27] is in agreement.

(ii) The accused must have known that a felony has been committed. There must be evidence that a reasonable man in the accused's position would have known that a felony had been committed.[28] He does not have to know that the offence is a felony, nor need he know the difference between a felony and a misdemeanour (since mistake of law is no defence). It is sufficient that he knows that a serious offence has taken place.

(iii) The accused must have concealed or kept secret his knowledge. He need not have done anything active, for the offence is established upon proof of his failure to act. It is sufficient that he has failed in his legal duty to disclose to proper authority (police or magistrate) all material facts known to him relative to the offence. It is not enough to tell the police merely that a felony has been committed. The accused must disclose all material facts known to him *e.g.* the offender's name, place of the offence and so forth.[29] It is not essential that the concealment be of advantage or a source of profit to the accused.[30] If he fails or refuses to perform his duty to disclose when there is reasonable opportunity available for him to do so, he is guilty of misprision and may be punished by fine and/or imprisonment at the court's discretion.[31]

On its face, the offence of misprision of felony appears to present a considerable source of anxiety and conflict of interests for the psychologist. From a practical point of view, however, it need not be a cause for alarm. The offence is certainly a convenient one for the police to have in reserve and they are not reluctant to threaten its use in order to extract information from hesitant witnesses. But the professional psychologist has very little, if anything, to fear from this area of the criminal law. It is true that the law is not entirely clear, and is subject to certain ambiguities, but there are a number of matters which operate in the psychologist's favour. Firstly, the courts, in resurrecting this offence, have warned that it should be sparingly prosecuted and used in situations in which there is technical difficulty in framing a charge against an accomplice or an accessory to a felony, or where police are trying to break an underworld code of silence in a gang-warfare situation.[32] The cases in which misprision of felony has been charged have never involved a situation where

25 [1962] A.C. 528.
26 Williams, *op. cit. supra* n. 13 at 423.
27 *Laws of England* (3rd ed.), Vol. 10, para. 574.
28 *Sykes* v. *D.P.P.* [1962] A.C. 528, 563.
29 *R.* v. *Crimmins* [1959] V.R. 270, 274; *Sykes* v. *D.P.P.* [1962] A.C. 528, 563.
30 *R.* v. *Crimmins* [1959] V.R. 270, 272-273 and *Sykes* v. *D.P.P.* [1962] A.C. 528, 562, 568, 571-572, 573 disapproving *Williams* v. *Bayley* (1866) L.R. 1 H.L. 200, 220 and *R.* v. *Arberg* [1948] 2 K.B. 173, 176.
31 The only limitation is that the sentence should not be inordinately heavy: *Sykes* v. *D.P.P.* [1962] A.C. 528, 564.
32 *Id.* at 569.

silence is maintained because of the ethical demands of some professional relationship between adviser and client or therapist and patient. Invariably they arose when an intimidated victim refused to name his assailant, or a person refused to divulge information deliberately in order to hamper police investigations.

Even if an overzealous police officer decided to prosecute a psychologist for this offence for refusing to divulge information without his client's consent, there are a number of defences which the psychologist could call in aid. The first relates to knowledge of the felony, for not only must a felony have actually been committed, but the person charged with misprision must have known of this fact—or at least known that a serious offence had been committed. Rumours, gossip or suspicion are not enough. To suspect is not to know. In *Arberg,*[33] *Wilde,*[34] *Crimmins*[35] and *Sykes* v. *D.P.P.*[36] the person accused of misprision has known that a felony has been committed because he was unfortunate enough to have been the victim of the felony or was, in some other way, directly involved in it. His knowledge was thus derived from personal observation or participation. This is quite different from the situation in which the psychologist knows only because he is told by his client. If a client tells the psychologist that a felony has been committed by a third person the psychologist does not have direct knowledge of the felony for the purpose of the offence of misprision, because the information communicated to him is secondhand and would normally be excluded as hearsay evidence. A more difficult situation arises where the client himself admits to the psychologist that he has committed a felony. It is true the psychologist does not have direct knowledge in the sense that he has observed the felony being committed, but it is well established that statements adverse to the maker's case may be admitted in evidence, both in criminal and civil proceedings, as proof of the truth of their contents.[37] Strictly speaking, when proved by someone other than the person making them, such disserving statements, whether in the form of admissions or confessions, are hearsay but they are nevertheless admissible as evidence of their truth and may, alone, constitute sufficient evidence to support a conviction for a criminal offence.[38] It may well be that the judges will hold that if a person admits to having committed a felony, the recipient of that information has sufficient knowledge to support a conviction for misprision should he fail to communicate that admission to the police. As yet, the point is undecided but so far

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33 [1948] 2 K.B. 173.
34 [1960] *Crim. L.R.* 116.
35 [1959] V.R. 270.
36 [1962] A.C. 528.
37 *Halsbury's Laws of England* (3rd ed.), Vol. 10, para. 860, Vol. 15, para. 536; Cross, *Evidence* (3rd ed., 1967), 431.
38 *McKay* v. *The King* (1935) 54 C.L.R. 1; *R.* v. *Edwards* [1956] Q.W.N. 16; *R.* v. *Sullivan* (1887) 16 Cox C.C. 347.

there has never been an attempt to found a prosecution for misprision of felony simply on one person's failure to report to the police another person's confession of guilt.[39]

Secondly, even if the rule did extend to this extreme, the psychologist still may argue persuasively that he did not know a felony had been committed (even though his client confessed the offence to him) simply because he did not believe his client. This is no fanciful defence, for most psychologists in clinical practice have been consulted by clients who are glib but outrageous liars whose stories are symptomatic of their psychological disturbance. In children especially, fantastic exaggerations and distortions are commonly used as attention-getting devices, and in fact are part of normal childhood development. It is notorious that unfounded complaints of serious sexual offences are often made by adolescent girls as revenge for some real or imagined rejection on the part of a teacher or other male on whom they have a 'crush.' The psychologist may receive complaints or confessions relating to serious criminal offences in circumstances in which he simply does not believe his informant. If the information does turn out to be true, it is submitted that the psychologist may still justify his failure to inform the police on the basis that he did not know a felony had been committed because he had genuine and reasonable grounds for not accepting the confession or information presented to him. This is no more than a special application of the test proposed by Lord Denning in *Sykes* v. *D.P.P.*:[40] 'there must be evidence that a reasonable man in [the accused's] place, with such facts and information before him as the accused had, would have known that a felony had been committed.'

The third ground of defence which may be available to the psychologist is likely to be the most fruitful although it is still ill-defined. It appears that non-disclosure of a felony may be justified by a 'claim of right made in good faith.' In the original reports of *Sykes* v. *D.P.P.*[41] Lord Denning refers to this defence in the following terms:

> I am not dismayed by the suggestion that the offence of misprision is impossibly wide: for I think it is subject to just limitations. Non-disclosure may be due to a claim of right made in good faith. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it. For instance, if an employer discovers

39 *R.* v. *Wilde* [1960] *Crim. L.R.* 116 can be distinguished on the ground that in that case the accused had a great deal of evidence, in addition to the girl's confession, of the commission of the felony of larceny.

40 [1962] A.C. 528, 563.

41 [1961] 3 W.L.R. 371, 385; [1961] 3 All E.R. 33, 42.

> that his servant has been stealing from the till, he might well be justified in giving him another chance rather than reporting him to the police. Likewise with the master of a college and a student. But close family or personal ties will not suffice where the offence is of so serious a character that it ought to be reported.

In the authorized report[42] the second sentence in the above passage reads: 'Non-disclosure may sometimes be justified or excused on the ground of privilege.' Despite the ambiguities created by these contradictory versions, it is clear that the underlying theory is that there are certain important social interests which must be protected even at the risk of allowing the guilty to escape. In *R.* v. *King*,[43] the Court of Criminal Appeal decided that a person would not be guilty of misprision of felony if he refused to answer questions concerning the commission of a felony on the ground that his answers would tend to incriminate him in regard to that or some other offence. The right to refuse to answer incriminating questions was to prevail against the duty to report felonies. Lord Denning's *dicta* in *Sykes'* case suggests that the public interest, as manifested in the need to protect certain professional and other relationships, should similarly prevail against the duty to disclose. In the authorized report his lordship refers to justification on the ground of privilege. However it is interesting to note that although in England the legal rights of professional privilege are extended only to lawyer-client communications,[44] most of the examples given by Lord Denning of relationships which may give rise to an excuse for non-disclosure are plainly outside the normal ambit of professional privilege. Glanville Williams[45] interprets the original reference to a 'claim of right made in good faith' as apparently meaning that the existence of a professional confidential relationship itself confers the justification for non-disclosure. This would greatly comfort the psychologists. But even on the narrower 'privilege' formulation, having regard to the nature of the examples given, it is logical that the defence should be equally available to psychologists who refuse to divulge information to the police without the prior consent of their client. It is proper that the defence should be available to psychologists but they will only gain its protection if, whenever the occasion arises, they claim it.

So far it has been shown that the criminal law neither compels nor punishes out of court violations of professional confidences. On the other hand the civil law may well be prepared to allow a wronged client his remedy by way of an action for breach of contract, defamation, or negligence.

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42 [1962] A.C. 528, 564.
43 (1965) 49 Cr. App. R. 140.
44 See below p. 35.
45 *Criminal Law* (2nd ed., 1961), 426.

Breach of Contract: Attempts have been made to find an obligation to secrecy arising from an implied term in the contract between the practitioner rendering service and his client or patient. The normal relationship between doctor and patient or lawyer and client is that of contract,[46] and the obligation of these practitioners to maintain secrecy in relation to information which they obtain in the course of acting professionally for the person who consults them, is said to arise out of an implied term in the contract between the parties. Rarely will the parties be found to have expressly provided in the contract for a term relating to the question of confidentiality, but the implication is justified on the ground that the parties must be taken to have assumed that any information given to the practitioner would not be divulged by him to third parties, without the consent of the client or patient. In the case of the relationship between lawyer and client, the client's right to secrecy is so well established that it seems that not only is it a proper implication in any contractual relationship, but that it may also exist independently of contract.[47] In the case of doctor-patient relationships the law is not so clear but the cases seem to indicate that it is proper to imply a term relating to professional secrecy in the contract. There are very few reported cases on the legal duty of a practitioner with regard to professional confidences and one writer has observed: 'this may be a tribute to the discretion of professional men or a mark of their timorousness as defendants, or it may be due to the difficulty of proving damage; but a consequence is that the law is not very fully developed.'[48] The earliest case was a Scottish one in which the parties are known only as *A.B.* v. *C.D.*[49] The plaintiff was an elder in the church and his wife gave birth to a child within six months of their wedding. The local minister, anticipating a request to baptise the child, brought the matter before the Kirk Session and asked the plaintiff to provide an explanation accompanied by medical testimony. The plaintiff, believing that the child had been born prematurely, requested a doctor to examine the child but the doctor formed the opinion that the child had been conceived before marriage. He wrote out a certificate in duplicate to this effect and had one copy delivered to the plaintiff while he left the other at the house of the local minister. The minister brought the document to the Kirk Session and as a result the plaintiff was declared no longer a member of the Session or an elder of the church. He subsequently brought an action against the doctor for damages arising out of this breach of professional secrecy. The defendant doctor argued that although there might be an honourable

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46 *Groom* v. *Crocker* [1939] 1 K.B. 194, 205, 222; *Clark* v. *Kirby-Smith* [1964] 3 W.L.R. 239, 241-242. See also *Furniss* v. *Fitchett* [1958] N.Z.L.R. 376, 400.

47 *Taylor* v. *Blacklow* (1836) 3 Bing. (N.C.) 235; 132 E.R. 401.

48 Aickins, 'Professional Secrecy as an Enforceable Obligation,' (1960) 9 *Proceedings of the Medico-Legal Society of Victoria* 1, 3. See also the observation of Scrutton L.J. in *Tournier* v. *National Provincial and Union Bank of England* [1924] 1 K.B. 461, 479.

49 (1851) 14 *Session Cases* (*Dunlop*) 177.

understanding that secrecy was one of the conditions in a contract between a physician and a patient, breach of that understanding could not give rise to an action for damages unless secrecy was the essence of the contract. The actual decision only related to whether certain issues should go for trial and the ultimate result of the action is not known. However the court was plainly unwilling to accept the doctor's argument:

> The question here is . . . whether the relation between [a medical] adviser and the person who consults him is or is not one which may imply an obligation of secrecy forming a proper ground of action if it be violated. It appears to me that it is, and that the present case as stated on the record is one to which the principle may apply. The obligation may not be absolute, it may and must yield to the demands of Justice if disclosure is demanded in a competent Court. It may be modified perhaps in the case alluded to in the argument of the disclosure being conducive to the ends of science, though even there concealment of individuals is usual, but that a medical man consulted in a matter of delicacy of which the disclosure may be most injurious to the feelings and possibly the pecuniary interests of the party consulting, can gratuitously and unnecessarily make it the subject of public communication without incurring any imputation beyond what is called a breach of honour and without the liability to a claim of a redress in a Court of law is a proposition to which when thus broadly laid down I think the Court will hardly give their countenance.[50]

In a second Scottish case, also reported as *A.B.* v. *C.D.*,[51] the plaintiff sued a doctor for damages for breach of confidentiality. The matter arose out of an action brought by the plaintiff against her husband for judicial separation on the ground of cruelty affecting her health. In preparing for this proposed litigation the plaintiff employed the defendant doctor to examine her and report on her medical condition. After examining the plaintiff, the doctor formed an opinion adverse to the proposed action. Notwithstanding this, in the following year, the plaintiff commenced separation proceedings against her husband but it was not until another year had elapsed that the case came on for trial. At that time it was proposed by the husband that there should be a medical examination of the plaintiff by doctors nominated by him. One of the doctors so nominated was the defendant. He was reminded by the plaintiff's solicitors that he had already been consulted by the plaintiff in the matter of this action; that he had attended the plaintiff professionally; and that all of the earlier examinations and disclosures had been in strictest confidence. Despite this reminder, the defendant examined the plaintiff and not only did he report the result of the second examination to the husband, he also

50 *Id.* at 180.
51 (1904) 7 *Session Cases* (*Fraser*) 72.

took it upon himself to disclose information obtained at the first examination and even went so far as to show the husband the notes that he had made on the former occasion. Later the defendant gave evidence for the husband in the separation proceedings and again referred to information obtained at the first examination and put in evidence his notes made at that time.[52] The result was that the plaintiff was unsuccessful in her separation proceedings.

In the action against the doctor, the plaintiff pleaded that he had wrongfully and in breach of his duty to her as her professional adviser, or otherwise of the implied terms of his employment, disclosed to third parties confidential information by reason of which she had suffered loss and damage. There also was an allegation of slander and the issues for the court were whether there had been this breach of confidentiality and whether there had been slander. For technical reasons of pleading the court refused to allow the issue of whether the disclosures to the husband amounted to a breach of contract to proceed to trial but there was little doubt that the court was prepared to hold that in other circumstances such an action could be successfully maintained. Of the case in hand, the most the court was prepared to say was:

> It is evident that information which a medical man obtains as to a patient in his professional capacity is confidential, and ought not to be disclosed to others. At the same time, it must depend on circumstances whether any disclosure made to others is a wrong, for which compensation may be sought by an action of damages in a court of law. And it would be necessary that a pursuer proposing to take an issue should be most specific in putting in issue the matters said to have been disclosed, of which it is alleged that the disclosure was an actionable wrong.[53]

In the American case of *Simonsen* v. *Swenson*,[54] a decision of the Supreme Court of Nebraska, the plaintiff, a stranger in a small town, resided temporarily in one of the local hotels. He became afflicted with sores and consulted the defendant, a doctor practising in the town. The defendant examined the plaintiff and informed him that he believed his disease to be syphilis but that it was impossible to be positive without making certain tests for which he had no equipment. The defendant happened to be the physician to the hotel proprietor and acted as the hotel doctor as occasion demanded. He told the plaintiff that there would be much danger of his communicating the disease to others in the hotel if he remained there and requested that he leave the next day which the plaintiff promised to do. On the

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52 In Scotland, as in England, there is no statute corresponding to s. 28 of the Evidence Act 1958 (Vic.) or s. 96(2) of the Evidence Act 1910 (Tas.) under which communications to medical practitioners are privileged in civil proceedings.

53 (1904) 7 *Session Cases* (*Fraser*) 72, 81.

54 (1920) 9 A.L.R. 1250.

following day, the defendant, while making a professional call at the hotel, learned that the plaintiff had not moved. He therefore warned the hotel proprietor that he thought that the plaintiff was infected with a contagious disease and for her to take care to disinfect his bed clothes and to take other precautions. The proprietor, acting on this warning, removed all of the plaintiff's belongings out into the hallway and fumigated his room so that he was forced to leave. The evidence at the trial did not show whether or not the diagnosis was correct, but there was evidence that the defendant's belief was a reasonable one and that he had acted in good faith. A Nebraskan statute provided that no physician should practice medicine without a licence and that a licence could be revoked when a physician is found guilty of 'unprofessional conduct.' Among the acts of misconduct defined by the statute is the 'betrayal of a professional secret to the detriment of a patient.' The court thus took the view that an obligation not to betray the patient's secrets was properly to be imported into the professional relationship between doctor and patient:

> It is often necessary for the patient to give information about himself which would be most embarrassing or harmful to him if given general circulation. This information the physician is bound, not only upon his own professional honor and the ethics of his high profession, to keep secret, but by reason of the affirmative mandate of the statute itself. A wrongful breach of such trust, would give rise to a civil action for the damages naturally flowing from such wrong.[55]

However the court observed that there were certain qualifications and exceptions to the implication of secrecy:

> The doctor's duty does not necessarily end with the patient; for on the other hand, the malady of his patient may be such that a duty may be owing to the public and, in some cases, to other particular individuals . . . . When a physician, in response to a duty imposed by statute, makes disclosure to public authorities of private confidences of his patient to the extent only of what is necessary to a strict compliance with the statute on his part and when his report is made in the manner prescribed by law, he of course has commited no breach of duty towards his patient, and has betrayed no confidence, and no liability would result. Can the same privilege be extended to him in any instance in the absence of an express legal enactment imposing upon him a strict duty to report? . . . . No patient can expect that if his malady is found to be of a dangerously contagious nature he can still require it to be kept secret from those to whom, if there was no disclosure, such disease would be transmitted. The information given to a physician by his patient, though con-

55 *Id.* at 1252.

> fidential, must, it seems to us, be given and received subject to the qualification that if the patient's disease is found to be of a dangerous and so highly contagious or infectious a nature that it will necessarily be transmitted to others unless the danger of contagion is disclosed to them, then the physician should, in that event, if no other means of protection is possible, be privileged to make so much of a disclosure to such persons as is necessary to prevent the spread of the disease . . . . In making such disclosure a physician must also be governed by the rules as to qualifiedly privileged communications in slander and libel cases. He must prove that a disclosure was necessary to prevent spread of disease, that the communication was to one who, it was reasonable to suppose, might otherwise be exposed, and that he himself acted in entire good faith, with reasonable grounds for his diagnosis and without malice.[56]

Because the defendant doctor satisfied these various requirements judgment was given in his favour. The exceptions discussed by the court are important because they propose that even if a contractual implication as to secrecy is proper in a professional relationship, the implication itself will be subject to limitations not unlike qualified privilege in defamation. Such a limitation must equally be relevant in any attempt to define the content of the implication as to secrecy in relationships between psychologists and their clients.

So far, attention has been focused upon the lawyer-client and doctor-patient relationships as parallels to the psychologist-client situation, but there is another relationship which also provides a useful analogy. The relationship of banker and customer has been treated by the law as being one of confidence. If secrecy is a proper implication in the contractual relationship between a banker and his customer, it is unlikely that the courts will expect psychologists to be less discreet. The leading case with regard to a banker's obligation to secrecy is *Tournier* v. *National Provincial and Union Bank of England.*[57] The facts, briefly stated, were that the plaintiff was a customer of the defendant bank and had overdrawn his account to the sum of £9-8-6d. The manager of the bank had ascertained that a cheque had been drawn by another customer of the bank in favour of the plaintiff, who, instead of paying it into his account, endorsed it to a third person who had an account at another bank. On the return of the cheque to the defendant bank, the manager discovered that the person to whom it had been paid was a bookmaker. The manager then rang the plaintiff's employers and told them that the plaintiff had overdrawn his account and that he was 'mixed up with bookmakers.' As a consequence of this, the plaintiff's employers, with whom he was engaged on three months probation as a salesman, refused to renew

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56 *Id.* at 1253.
57 [1924] 1 K.B. 461.

his employment. The plaintiff brought an action for slander and for breach of an implied contract that the defendants would not disclose to third persons the state of his account or any transactions relating thereto. At the trial of the action judgment was entered for the defendant bank but the Court of Appeal ordered a new trial because the trial judge's direction to the jury was inadequate. In regard to the duty of secrecy, Bankes L.J. asked whether the duty was a legal or only a moral one, and if legal whether it arose out of contract or tort. His conclusion was that:

> At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification, and to indicate its limits . . . . On principle I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.[58]

That the implication as to secrecy is not limited to the banker-customer relationship is made clear by Scrutton L.J.:

> The Court will only imply terms which must necessarily have been in the contemplation of the parties in making the contract . . . I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances. This duty equally applies in certain other confidential relations, such as counsel or solicitor and client, or doctor and patient.[59]

An example of the first qualification proposed by Bankes L.J. would be, in the case of doctors, their obligation to report infectious diseases under the Health Act or Venereal Diseases Act.[60] So far no such statutory duties of this nature have been imposed upon psychologists as such, but as the state increases its range of social welfare legislation it would not be surprising if similar obligations were imposed upon psychologists in respect of, say, a duty to report mentally retarded or severely emotional disturbed children to a department of Mental Health or Social Welfare. As to the second qualification, *i.e.* the duty to the public, his Lordship gave no examples but was content to say that they may be summed up in the statement that there are cases

58 *Id.* at 471-472, 473.
59 *Id.* at 480-481.
60 *E.g.* Public Health Act 1902-1965 (N.S.W.), s. 29(1A); Venereal Diseases Act 1918-1963 (N.S.W.), ss. 7, 10; Health Act 1958 (Vic.), s. 137; Venereal Diseases Act 1958 (Vic.), s. 9; Health Act 1937-1964 (Qld.), ss. 51(3), 53(i), 54(2) and (6); Public Health Act 1935 (Tas.), s. 27; Health Act 1935-1967 (S.A.), s. 128.

where a higher duty than the private duty is involved, as where danger to the state or public duty may supersede the duty of the agent to his principal.[61] A recent example of the type of situation his Lordship may have had in mind is *Initial Services* v. *Putterill*[62] in which the Court of Appeal applied the ruling in *Gartside* v. *Outrim*[63] that 'there is no confidence in the disclosure of iniquity' to hold that the implied contractual obligation of a servant not to disclose confidential information received in the course of his employment did not extend to misconduct of such a nature that it ought to be disclosed in the public interest. In the *Initial Services'* case[64] an employee had disclosed to the press confidential information which indicated that his employer was guilty of a breach of the Restrictive Trade Practices Act 1956. Lord Denning's view was that an action for breach of contract could not be maintained in respect of disclosures relating to 'crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always . . . that the disclosure is justified in the public interest.'[65] The disclosure must, moreover, be to the person or persons having a proper interest to receive the information.[66] The significance to the psychologist of this second qualification is that while he may not be legally obliged to divulge confidential information relating to the commission of criminal offences by his client, should he decide to do so voluntarily, he will have a complete defence to any action for breach of contract brought by the aggrieved client, provided always that the disclosure was made to a proper authority. Again this qualification exempts the psychologist from liability if, on reasonable grounds, he warns relatives, police or the local doctor that his client intends to commit suicide.

The third qualification proposed by Bankes L.J. would, in the case of the psychologist, cover the situation in which he is seeking to recover fees for consultations and in order to substantiate his claim he divulges information about his client's condition. The fourth qualification is self evident.

It must be re-emphasised that the legal position of the psychologist with respect to confidentiality as an implied term in a contract with the client has not yet been discussed in the courts. As has been shown, the judges are prepared to imply such terms in other professional relationships and there are many examples of a condition as to secrecy being implied into non-professional relationships particularly that of

61 [1924] 1 K.B. 461, 473 quoting from Lord Finlay in *Weld-Blundell* v. *Stephens* [1920] A.C. 956, 965.
62 [1967] 3 W.L.R. 1032.
63 (1857) 26 L.J. Ch. 113, 114.
64 [1967] 3 W.L.R. 1032.
65 [1967] 3 W.L.R. 1032, 1038 distinguishing *dicta* of Bankes L.J. in *Weld-Blundell* v. *Stephens* [1919] 1 K.B. 520, 527.
66 [1967] 3 W.L.R. 1032, 1038.

master and servant.[67] Thus on general principle there seems no reason why the courts will not equally imply a term relating to secrecy in the contract between psychologist and client. The precise nature of that term is a more difficult problem. To a very large extent it will be governed by the publicly declared and recognised ethical standards of the profession. In addition to the various qualifications discussed above, the implied term would have to take into account the right of the psychologist to discuss the client's case with other psychologists, psychiatrists and social workers in the normal course of practising psychology. The formulation of the implied term is no more than a prediction of what the courts might do and the whole question, particularly that of the exceptions to be allowed, remains imprecise and highly contentious. While not seeking to make a virtue of imprecision, it is worth noting that precision can be a two-edged sword. A careful listing of all the circumstances in which a psychologist would be entitled to forsake his obligation to respect the secrecy of his client's communications (even if such a compilation were possible) may operate to limit the psychologist's flexibility of action in new circumstances not previously forseen. Psychologists may find greater safety in broadly defined exemptions and, to this end, it may be worth tolerating imprecision. In any case it should be stressed that the onus will always lie heavily on the psychologist to justify his breach of secrecy. He must establish that he acted as would a reasonably prudent member of his profession.

The consequence of a psychologist committing a breach of the implied term relating to secrecy will be to open himself to an action by his client for breach of contract. The normal remedy available is that of damages. In most cases the client will be unable to establish more than nominal damages[68] but if, for instance, a client loses his job because of an unauthorised disclosure by the psychologist to the client's employer, the damages awarded might be quite substantial.

Most psychologists are not in private practice, but are employed by governmental agencies and thus act in a professional capacity in relation to persons with whom they are not in any contractual relationship and to whom they cannot be said to owe any contractual duty in the ordinary sense. All psychologists employed in government departments which gratuitously offer psychological services fall into this category. Their clients thus cannot sue them for damages for breach of contract. Though in special circumstances such clients may call in aid other limited heads of civil liability, namely defamation and negligence (see below), in order to obtain damages from

[67] *Robb* v. *Green* [1895] 2 Q.B. 315; *Merryweather* v. *Moore* [1892] 2 Ch. 518; *Kirchner* v. *Gruban* [1909] 1 Ch. 413; *Pebble* v. *Reeves* [1910] V.L.R. 88; *Wilson Malt Extract Co.* v. *Wilson* [1919] N.Z.L.R. 659; *Bents Brewery Co. Ltd.* v. *Hogan* [1945] 2 All E.R. 570; *Cranleigh Precision Engineering Ltd.* v. *Bryant* [1964] 3 All E.R. 289.

[68] See *Groom* v. *Crocker* [1939] 1 K.B. 194, 206.

the psychologist for his breach of secrecy, their major remedy is that of injunction.

An injunction may be granted to restrain a person in a confidential relationship from disclosing information which he acquired through that relationship. The remedy is not limited to restraining employees from disclosing information obtained in the course of their employment but may be granted in respect of any other confidential relationship.[69]

There is no doubt as to the exercise of this power although the grounds on which the jurisdiction is founded are disputed. In ***Kirchner & Co.*** v. ***Gruban***[70] it was stated that the real principle upon which the court acted was that of implied contract but the jurisdiction has also been justified as being founded upon the protection of proprietory rights or upon breach of trust or confidence.[71] The current position was summed up by Ungoed-Thomas J. in *Argyll* v. *Argyll*[72] when he stated:

> [The] cases, in my view, indicate (1) that a contract or obligation of confidence need not be expressed but can be implied . . . (2) that a breach of confidence or trust or faith can arise independently of any right of property or contract other, of course, than any contract which the imparting of the confidence in the relevant circumstances may itself create; (3) that the court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right at law.[73]

It is, however, doubtful whether, in the absence of an express or implied contract, damages can be awarded for a breach of confidence except in lieu of an injunction.[74]

Defamation: Statements made by a psychologist about his client are subject to the ordinary law of defamation. If a psychologist makes an unauthorized communication of information to others about his client and that information is false and such as to lower the client in the estimation of his fellow men, the client may bring an action for defamation. If the defamation is slanderous but does not constitute an imputation of crime, loathsome disease or unfitness for profession, trade or office the client will have to prove special damage of a material nature. This cause of action merits little space in this discussion of confidentiality since not only is it an extremely indirect

69 *Halsbury's Laws of England* (3rd ed.) Vol. 21, para. 825, Vol. 8, para. 795; *Copinger and Skone James on Copyright* (10th ed., 1965) 36-45. In *Carter* v. *Palmer* (1839) 1 Irish Eq. R. 289, 302 the court indicated its willingness to restrain counsel by injunction from divulging the secrets of a former client.

70 [1909] 1 Ch. 413, 422.

71 Halsbury, *op. cit.* Vol. 21, para. 825, note (*q*) and cases there cited.

72 [1965] 2 W.L.R. 790.

73 *Id.* at 801.

74 *Nicrotherm Electric Co. Ltd.* v. *Percy* [1957] R.P.C. 207, 213. *Cf. Robb* v. *Green* [1895] 2 Q.B. 315. See also Copinger and Skone James, *op. cit. supra* n. 67. at 45.

means of enforcing the obligations of professional secrecy but also it is invoked very rarely in the context of breach of confidence in a professional relationship.[75] This is understandable since the practitioner, be he lawyer, doctor or psychologist, has a complete defence if he can establish the truth of the statement made.[76] Defamation only relates to false statements and even then, if the false statement is made at the request or with the consent or aquiescence of the complainant, no action can be maintained.[77]

What protection does a psychologist have from an action for defamation in the following situations?

(a) After a series of interviews, and the administration of a number of psychological tests, a psychologist employed in the armed services forms the opinion that a new recruit is a practising homosexual. In order to restrict the recruit's influence on other servicemen, he submits a written report to this effect to the commanding officer. Though exhibiting some homosexual characteristics, the recruit is in fact not a practising homosexual.

(b) A school psychologist receives a complaint from a child that he has been sexually molested by a teacher. The psychologist tells the headmaster. The child's story is false.

It is to be observed that in the first problem the action for defamation will be brought by the recruit and thus indirectly serves the purpose of enforcing the confidentiality of the information communicated by him during the professional relationship. In the second case, the action against the psychologist for defamation will be commenced by the teacher and thus it is not a case where the client is seeking redress for breach of professional secrecy. In both situations described above the psychologist may successfully turn to the defence of 'qualified privilege.' This conditional defence allows a person who makes an untrue and defamatory statement of another to escape civil liability by showing that it was made without improper motive in circumstances in which there was a legal or moral duty to make it, and that the statement was

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75 The case of *Kitson* v. *Playfair* is the usual example given. The case is reported only in *The Times*, 23-28 March, 1896 and the *British Medical Journal* 1896, Vol. 1, pp. 815 and 882. Mrs. Kitson visited England in 1892 leaving her husband in Australia. In 1894 she was medically examined by Dr. Playfair who formed the opinion that she had suffered a recent miscarriage. He communicated this information to his wife and to relatives of Mrs. Kitson. As a consequence Mrs. Kitson brought an action in defamation against Dr. Playfair for publishing statements which imputed immoral conduct to her. Surprisingly Dr. Playfair did not plead justification but qualified privilege. The jury found that the statements were made not from a sense of duty but maliciously and they awarded Mrs. Kitson damages of £12,000. See also *Berry* v. *Moench* (1958) 331 P. 2d. 814 and *Halls* v. *Mitchell* [1928] 2 D.L.R. 97.

76 And, in a majority of Australian states, that it was for the public benefit: Defamation Act 1958 (N.S.W.), s. 16; Defamation Act 1957 (Tas.), s. 15; Criminal Code (Qld.), s. 376; Criminal Code (W.A.), s. 356. See generally Fleming: *The Law of Torts* (3rd ed., 1965). 522-523.

77 *Chapman* v. *Ellesmere* [1932] 2 K.B. 431, 465; *Cookson* v. *Harewood* [1932] 2 K.B. 478; *Russell* v. *Duke of Norfolk* [1949] 1 All. E.R. 109.

made to some person who had a corresponding interest or duty to receive it. The occasions that qualify for this form of privilege cannot be catalogued and rendered exact. The test is usually stated in terms of the 'good of society' or 'the welfare of the community.' The criteria used are sufficiently flexible to allow courts to individualize decisions, and the defence will certainly operate to protect an ordinarily prudent psychologist.

Negligence: Another way in which a client can indirectly enforce the psychologist's obligation to respect the confidentiality of professional communications is by way of an action for negligence. The specific tort of breach of privacy has not yet been recognized in Australia and, apart from defamation, the only other action that the betrayed client can call in aid is that of negligence. No liability in tort can be based simply on the breach of confidence itself.

There has been only one reported case in which an action for negligence has been brought for breach of professional secrecy. The case of *Furniss* v. *Fitchett*[78] was a decision of a single justice of the New Zealand Supreme Court in 1958. It arose in respect of a doctor-patient relationship and can be applied to that of psychologist-client only by way of analogy, but the analogy is strong and the judgment will be a persuasive authority for any court in Australia called upon to decide a similar case. The action was not one which arose out of a practitioner's negligence in performing diagnostic tests, administering treatment, or giving advice. The liability was alleged to arise out of the practitioner's carelessness in divulging professional confidences in such a manner as to cause injury to his patient. The injury complained of was not to the patient's reputation through the dissemination of untruthful statements (as in defamation), but to her physical and mental health through the careless and unwarranted disclosure of confidential information in a situation in which it was reasonable to foresee that she would suffer physical or nervous injury. Had the patient consented to the information being divulged, the action would have failed. However it was no defence for the practitioner to prove the truth of what was disclosed.

In the particular case, the plaintiff and her husband had been regularly attending the defendant, the local family doctor. At one stage when the relationship between husband and wife was very strained the husband asked the doctor for a certificate as to the wife's sanity. Without seeking the wife's consent, the doctor supplied a certificate to be given to the husband's solicitor. The certificate stated that the wife had been a patient of the doctor for some time and after describing her conduct concluded: 'On the basis of above I consider she exhibits symptoms of paranoia and should be given treatment for same if possible. An examination by a psychiatrist would be needed to

78 [1958] N.Z.L.R. 396. See commentary (1958) 34 *N.Z.L.J.* 65.

fully diagnose her case and its requirements.' The wife continued to see the doctor professionally and a year later she commenced proceedings against her husband for separation and maintenance. In the course of the court hearing the certificate was shown to her for the first time. As the result of seeing this document, the wife suffered injury in the form of nervous shock and sued the doctor for damages.

The case against the doctor could be presented on three grounds: breach of contract, defamation and negligence. For technical reasons the action for breach of contract was not pursued although the court was of the opinion that there was a contractual relationship between the doctor and the wife, and that there was sufficient evidence for a jury to have found that there was an implied term of confidentiality and that the doctor was in breach of it.[79] The defamation action was also abandoned presumably because the doctor had a complete defence, namely, that the statements contained in the certificate were substantially true. The case therefore proceeded on the footing that it was a claim in tort and the jury ultimately brought in a verdict in favour of the wife and awarded her damages of £250. The defendant moved for judgment notwithstanding the verdict, or alternatively for an order setting aside the verdict and judgment, and for a new trial.

Counsel for the doctor argued that the mere novelty of the claim raised a presumption against its validity and although Barraclough C.J. acknowledged that the issue before the court had never been the subject of a reported case, he was not moved by counsel's argument. His Honour considered that the claim fell properly within Lord Atkin's concept in *Donoghue* v. *Stevenson*[80] of 'relations giving rise to a duty of care' and dismissed the doctor's motion. The evidence showed that the doctor knew, and that a reasonable man in the doctor's position would have foreseen, that disclosure to the wife of his opinion as to her mental condition would be harmful to her. He had been careful himself not to let her know his opinion, yet he wrote out and gave her husband a certificate expressing that opinion without imposing any restrictions as to its use. In the circumstances of the case, having particular regard to the strained relationship between husband and wife, His Honour concluded that the doctor ought reasonably to have foreseen that the contents of his certificate were likely to come to his patient's knowledge, and that if they did, they would be likely to injure her in her health:

> In these circumstances, I am of opinion that, on the principle of *Donoghue* v. *Stevenson* there arose a duty of care on his part. I have not forgotten that the certificate was true and accurate, but I see no reason for limiting the duty to one of care in seeing that it is accurate. The duty must extend also to the exercise

[79] *Id.* at 400.
[80] [1932] A.C. 562, 580.

> of care in deciding whether it should be put in circulation in such a way that it is likely to cause harm to another.[81]

The right to recover damages for loss or injury resulting from negligent as well as fraudulent *mis-statement* is well established, but in countenancing liability for injury sustained as the result of a foreseeable misuse of *accurate* statements *Furniss* v. *Fitchett*[82] has made a substantial extension to the field of tortious liability. The case stands as an isolated decision but, as yet, has not been the subject of judicial disapprobation. In any case the decision is not likely to be of great significance in the context of breaches of professional secrecy, because of the considerable difficulty faced by the aggrieved client or patient in proving damage. In very few cases will he be able to establish more than fear, annoyance or embarrassment as a consequence of the breach of confidentiality. Nevertheless, it is submitted that even though His Honour expressly reserved his opinion as to whether the members of other professions are under a similar duty of care,[83] the parallels between doctor-client and psychologist-client relationships are so striking that had the defendant in this case been a psychologist instead of a doctor, the result would have been no different.

II. *Disclosure of confidential information in court*

It is well established at common law that no oath of secrecy or promise of confidentiality (whether express or implied) can avail against a demand for the truth in a court of law.[84] However, in certain circumstances, the judges have recognized that unrestricted communications between parties and their professional advisers is of such importance as to render it advisable to protect such communications even at the risk of concealing matters otherwise essential for the adequate conduct of a case. Accordingly, they have been prepared to allow certain persons a limited right to refuse to divulge confidential information in judicial proceedings.

The concept of privileged professional communications can be traced back at least as far as the reign of Elizabeth I. Already, at that time, lawyers enjoyed a well recognized right of privilege against forced disclosure of professional confidences between themselves and their clients.[85] However it is interesting to note that the original justification for this exception to the general rules of testimonial compulsion was

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81 [1958] N.Z.L.R. 396, 403.
82 [1958] N.Z.L.R. 396.
83 *Id.* at 403-404.
84 *R.* v. *Shaw* (1834) 6 Car. & P. 372, 172, E.R. 1282; *R.* v. *Thomas* (1836) 7 Car. & P. 345, 173 E.R. 154; *Greenlaw* v. *King* (1838) 1 Beav. 137, 145, 48 E.R. 894; *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675; *Howard* v. *Odhams Press Ltd.* [1937] 2 All E.R. 509; *Halsbury's Laws of England* (3rd ed.) Vol. 8, paras. 237 & 239 and cases there cited.
85 *Berd* v. *Lovelace* (1577) Cary 88, 21 E.R. 33; *Dennis* v. *Codrington* (1580) Cary 143, 21 E.R. 53; *Kelway* v. *Kelway* (1580) Cary 121, 21 E.R. 47; *Waldron* v. *Ward* (1654) Sty. 449, 82 E.R. 853; *Sparke* v. *Middleton* (1664) 1 Keeble 505, 83 E.R. 1079.

not that it was designed for the protection of the client's interests, but that it aimed at protecting the oath and honour of the lawyer.[86] The modern theory of privilege, however, proffers the hypothesis that assurance of confidentiality is necessary to provide security for the interests of the client in consulting his legal adviser. It recognises the fact that it is impossible to conduct litigation or other legal business without the assistance of professional legal advisers and that, in order to render that assistance effective, it is vital to guarantee (as far as possible) the confidentiality of the communications which take place between the parties.[87] Because the theory is concerned with the protection of the client and not of his professional adviser, the right to claim privilege is vested exclusively in the client. It follows that if the client consents to the confidential information being divulged, the adviser must disclose it and conversely, if the client refuses his consent, the professional adviser is bound to remain silent.[88] He has no discretion in the matter. Only the client can waive privilege. It should be noted that the rationale of privileged communications differs from that of testimonial incompetence; the latter rules are designed to exclude unreliable, prejudicial or misleading evidence whereas the rules of privilege exist to protect relationships which are considered to be socially valuable.

Who may claim professional privilege? The English courts have always confined the privilege attaching to confidential professional communications to the lawyer-client relationship. Confidences between a person and his doctor,[89] clergyman[90] or close friend[91] are not privileged.[92] In two states of Australia the situation has been modified by statute. Under s. 28 of the Victorian Evidence Act 1958 and s. 96 of the Tasmanian Evidence Act 1910 privilege is allowed to ministers of religion in both civil and criminal cases and to medical practitioners in civil cases only.[93]

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86 Wigmore, *Evidence* (McNaughton rev., 1961), Vol. 8, §. 2290.

87 *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675, 681-682; *Bullivant* v. *A.-G. for Victoria* [1901] A.C. 196; *Jones* v. *Great Central Railway Co.* [1910] A.C. 4.

88 *R.* v. *Davies* (1921) 21 S.R. (N.S.W.) 31; *C.* v. *C.* [1946] 1 All E.R. 562.

89 *Duchess of Kingston's Case* (1776) 20 State Trials 355; *R.* v. *Gibbons* (1823) 1 C. & P. 97, 171 E.R. 1117; *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675, 681; *Garner* v. *Garner* (1920) 36 T.L.R. 196; *Nuttall* v. *Nuttall* (1964) 108 S.J. 605. In the last case a psychiatrist was subpoenaed to give evidence in divorce proceedings by the husband who was not his patient and was asked a question about a confession of adultery made to him by his patient, Mrs. Nuttall, in the course of his psychiatric treatment of her. His objection to answering the question was overruled and he did not persist in his refusal. This ruling was criticised by the English Law Reform Committee (*infra* n. 92) although it did not recommend the granting of statutory privilege on communications made by a patient to his doctor.

90 *Norminshaw* v. *Norminshaw* (1893) 69 L.T. 468; *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675, 681.

91 *Wheeler* v. *Le Marchant* (1881) 17 Ch. D. 675, 681; *R.* v. *Robinson* [1917] 2 K.B. 108.

92 See generally—Nokes, 'Professional Privilege,' (1950) 66 *L.Q.R.* 88; Law Reform Committee, *Sixteenth Report* (*Privilege in Civil Proceedings*), H.M.S.O., Cmnd. 3472 (1967).

93 New Zealand has a similar provision in its legislation: Evidence Act 1908, s. 8.

The law does not extend the right of professional privilege to psychologists as such, even though, in some circumstances, it might appear that a psychologist is able to claim privilege. Thus under s. 12 of the Commonwealth Matrimonial Causes Act 1959 a marriage guidance counsellor employed by an approved marriage guidance organisation is sworn to secrecy and may not disclose in any court admissions or communications made to him in his capacity as a marriage guidance counsellor. However this is more of an absolute prohibition than a matter of privilege since the restriction cannot be waived by the client. Similar restrictions on divulging information are to be found in Acts such as the Commonwealth Social Services Act 1947-1967, but these do not amount to a grant of professional privilege since the information may be disclosed 'in the public interest' and in any case the prohibition cannot be waived by the client, but only by the Minister or Director-General of Social Services.[94] No state in Australia has even begun to approach the generosity of the legislature of the American state of Oregon which has extended rights of professional privilege to stenographers who 'shall not, without the consent of his or her employer, be examined as to any communication or dictation made by the employer to him or her in the course of professional employment.'[95]

The effect of the law's unwillingness to recognise a right of professional privilege for psychologists is simply that psychologists may be compelled to appear before a court to give evidence about a client when that client has not consented to such disclosures, and when the ethical standards of the profession demand that the information be treated as confidential. There are, however, two built-in safeguards which operate to help the psychologist avoid this conflict. The first is that the questions which the psychologist is asked in court must be reasonably relevant to the matters in issue in the case. If questioning proceeds beyond what is reasonably relevant, the psychologist may seek the protection of the court by drawing attention to the ethical requirements of confidentiality and requesting that the questioning insofar as it touches upon confidential matters, be confined as narrowly as possible to relevant issues. In cases where the psychologist is called as a witness by the opposing side, and the client has not consented to confidential information being divulged, the psychologist need only answer the exact questions asked in court. He should divulge no more than the minimum information required to answer the questions put to him. But when the client himself has asked the psychologist to appear as a witness it is correct to assume that, by so doing, the client has automatically waived privilege and the psychologist may feel free to volunteer information which goes beyond the strict limits of the questions asked.

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94 S. 17.

95 Oregon Revised Statutes 1957, § 44.040 (1)(*f*), cited by Wigmore, *op. cit. supra* n. 83, § 2286.

The second safeguard is that while a psychologist is bound to answer questions put to him in court, he is under no obligation to divulge confidential information *in advance* of the court hearing. A psychologist is not obliged to make statements or answer questions out of court. In this respect he stands in the same position as an ordinary citizen who has precisely these rights.[96] The right continues even though the witness has been subpoenaed to give evidence, for it is not until he is actually in court that his duty to answer arises. As a matter of practical advocacy, a barrister or solicitor will rarely, if ever, call a witness if he does not have at least a broad outline of what the witness's evidence is likely to be. Knowledge of this fact is often successfully used by psychologists eager to avoid divulging confidential information in court without their client's consent. Individual psychologists engage in a number of tactics deliberately designed to protect themselves from being in a situation in which they will be obliged to breach confidences without their client's consent. The first step obviously is to plead the relationship of confidence with the client and to refuse to divulge information without permission. Where the psychologist is employed in a psychiatric or medical setting he may strengthen his stand purporting to shelter behind the umbrella of doctor-patient privilege, although, in law, the validity of such a claim is doubtful. If this strategy proves ineffective, the next step taken is usually to warn the person threatening to subpoena the psychologist that the psychological evidence he is likely to obtain in court will probably turn out to be unfavourable to his case. Few legal practitioners are willing to fish blindly for evidence in court with this warning in their ears. If the psychologist is employed in private industry or government departments in circumstances in which his records are liable to be called for by persons other than fellow psychologists or other professionals recognizing the principle of confidentiality, the strategies used to protect the client's secrets invariably turn on some form of censorship of the contents of the client's file or record sheets. Sometimes confidential or contentious matter is not recorded at all or is only noted superficially without supporting detail and it is not unknown for records, or parts of them, to be lost, mislaid or inadvertently destroyed.

The claim for the right to preserve the secrecy of communications between the psychologist and his client is invariably presented on the basis that confidentiality is indispensible to the establishment of an effective working relationship between the parties.[97] But the modern

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96 *Rice* v. *Connolly* [1966] 2 Q.B. 414.

97 See—Louisell, 'The Psychologist in Today's Legal World,' (1957) 41 *Minnesota Law Review* 731; Fisher, 'The Psychotherapeutic Professions and the Law of Privileged Communications,' (1964) 10 *Wayne Law Review* 609; Rosenheim, 'Privilege, Confidentiality and Juvenile Offenders,' (1965) 11 *Wayne Law Review* 660; Braman, 'Group Therapy and Privileged Communications,' (1967) 43 *Indiana Law Journal* 93.

legal theory which underlies the recognition of professional adviser-client privilege is that protection of professional secrets is justified only if the social utility of the professional relationship is so great that it outweighs society's interest in the correct disposition of litigation. Wigmore summed up the position in his 'four fundamental conditions' which he claimed must be thoroughly satisfied in order to justify a right of privilege against closure of confidential communications:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
> (4) The injury which would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[98]

Cross puts the case for the conferring of any new privilege in the following terms:

> The crucial question is whether there is some interest protected by the privilege which is at least as significant as the proper administration of justice. It is, of course, important not to exclude the possibility that the law is defective on account of its failure to recognise certain legitimate claims to privilege, and not merely because of its protection of interests which do not merit such solicitude. The influence of public opinion must never be ignored. The proper administration of justice mentioned above includes the notion of the rejection of relevant evidence because its reception would be unduly offensive to contemporary public opinion. It follows that that which was the subject of privilege in one generation should not necessarily be privileged in the next and vice versa.[99]

The primary question is therefore not whether confidentiality is essential to the maintenance of the professional relationship but whether the professional relationship itself is essential to the maintenance of the good order and government of society. The failure of Australian law to recognise psychologist-client privilege indicates that, as yet, the professional practise of psychology is not perceived as being vital to the welfare of the community as a whole. Certainly the injury to the psychologist-client relationship which may follow compulsory disclosure of confidential information is not thought to outweigh the advantages to the judicial process of full and complete disclosure of facts in a court of law.

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98 Wigmore, *op. cit. supra* n. 83, § 2285.
99 Cross, *Evidence* (3rd ed., 1967), 226-227.

The Demands of Good Citizenship

Sometimes the psychologist will find that the social and moral demands of good citizenship will appear to clash with his strict ethical duties and legal rights in relation to his client. It then becomes a matter for each individual psychologist to balance these conflicting interests and to determine for himself which is to be given priority. So far as the psychologist's legal obligations are concerned, it has already been shown that the law makes some effort to accommodate the demands of good citizenship by allowing a claim of right made in good faith as a defence to a charge of misprision of felony, by limiting the width of the implied condition as to confidentiality in contracts between professional adviser and client and by providing for the defence of qualified privilege in actions for defamation. Even in *Furniss* v. *Fitchett* the following qualification was added:

> I cannot think that [the duty not to divulge information about a patient to third parties in such a manner as to cause the patient injury] is so absolute as to permit, in law, not the slightest departure from it. Take the case of a doctor who discovers that his patient entertains delusions in respect of another, and in his disordered state of mind is liable at any moment to cause death or grievous bodily harm to that other. Can it be doubted for one moment that the public interest requires him to report that finding to someone? Take the case of a patient of very tender years or of unsound mind. Commonsense and reason demand that some report on such a patient should be made to the patient's parent or other person having control of him. But public interest requires that care should be exercised in deciding what shall be reported and to whom. . . . That which will justify a departure from the general rule must depend on what is reasonable professional conduct in the circumstances under consideration in the particular case, and as such is a question for the jury.[100]

The Australian Psychological Society's draft Code of Professional Conduct makes a passing attempt to deal with this problem in its formulation of advisory clause B (iii) which states:

> When a member through his professional relationship with a client forms the opinion that there exists a clear and imminent danger to an individual or to society, the member should intervene, preferably first by an approach to the client if likely to be effective, or otherwise by communication with the appropriate authorities.

However this is presented merely as advice and remains subject to the mandatory provisions of the code relating to the maintenance of professional secrecy.

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100 [1958] N.Z.L.R. 396, 405-406.

The clash between the ethical demands of the profession of psychology with its emphasis on the rights and integrity of the client and the wider demands of good citizenship can become quite acute. Take the example of the case of a student who tells a visiting school psychologist that he or she has been sexually molested by a teacher but begs the psychologist not to tell anyone. How is the psychologist to act? Is he to regard himself as being bound to respect the child's request for secrecy or, as a good citizen, should he divulge the information in order to assist in ridding the school of an unworthy teacher? The simplest solution to this particular problem may be to re-interview the child with a view to obtaining his or her permission to divulge the information. In order to be released from his ethical obligation of secrecy the psychologist would have to convince the child (or its parents, depending on who is considered to be the client) that it would be in their best interests for this to be done. What of the clinical psychologist who is told in confidence by an adolescent female client that her father has forced her to engage in incestuous relations and that she is too afraid of him to complain either to her mother or to the police? The examples given illustrate the fact that there can be many situations where the psychologist will be subject to considerable extra-legal pressure to re-consider his ethical obligation to respect clients' confidence. These pressures are to be found in their most irreconcilable form whenever the psychologist is employed by a government department or private industry, for in such situations the psychologist owes a dual loyalty—on the one hand to his client, and on the other to his employer. And in some cases, loyalty to the employer carries with it a greater share of the public interest than loyalty to the client. The school pyschologist's case is but one example of this occupational hazard. The psychologist who is a probation and parole officer is in a far more difficult dilemma since he is supposed to assist in the rehabilitation of his client yet, at the same time, he must report his transgressions. Again, what of the prison psychologist who learns of a planned escape while interviewing a prisoner? The information he is given may be true, but it may equally be false and supplied to the psychologist as a device for testing whether he can be trusted with prisoners' confidences. In each of these cases it is said that the psychologist's ethical obligation is to the client and that secrecy should be maintained whenever possible. However, it is submitted that a more realistic assessment of the situation would be to recognise that when a psychologist is employed in a government department concerned with public welfare or law and order his capacity to guarantee non-disclosure of confidential information may in fact be considerably limited. This is so because if the psychologist forms the opinion that his client's conduct poses a threat to the area of public welfare or law and order administered by his department, he is likely to ignore the confidential nature of the information in order to report the client's

actions to the employer. Moreover, as long as the psychologist is in a position where, at any time, he is likely to be called upon to produce his files to a superior officer (who may not be a psychologist) he cannot, and ought not, to represent to his client that the confidentiality of their communications will be respected in all circumstances. The only certain way in which the psychologist can fulfil such a promise is by completely omitting strictly confidential matters from his files or by making clear to the client those areas or topics in which confidentiality cannot be guaranteed.

The Future

What are the future possibilities of the law acknowledging the psychologist's ethical principle of confidentiality by recognizing a claim for psychologist-client privilege? The primary argument against extending privilege to new professional groups is that by expanding the shield of privilege an increasingly wide range of relevant information will be withdrawn from the courts thus hampering, even further, an already inefficient investigatory process. To all effects and purposes the development of new common law heads of privilege has halted[1] and the movement of the law of evidence is increasingly towards a weakening of the restrictions on full investigation of the facts. In particular this movement has taken the form of limiting absolute rules of evidence in favour of the exercise of judicial discretion. If anything, this is predictive of a narrowing of the field of privilege. Of course any proposal to do away with existing rights of privilege will be strenuously resisted by the particular professions concerned, not only because of the social utility of these rights, but also because the granting of privilege rights bestows prestige and dignity on the professions concerned. Since the judges are unlikely to recognise any new claims for professional privilege, the psychologist will have to turn to Parliament. Many states of America have already allowed legislative extension of privilege to cover the relationships of journalist-informant, accountant-taxpayer and psychologist-client.[2] But in Australia the only legislative extensions to privilege took place in 1857 and 1910 when Victoria[3] and Tasmania[4] respectively sanctioned privilege for communications between doctor and patient and priest and penitent.

It is submitted that if the psychologist's claim takes the form of an application for a blanket privilege against disclosing confidential information without the client's consent, it is likely to meet with

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1 *McGuiness* v. *Attorney-General of Victoria* (1940) 63 C.L.R. 73; *Attorney-General* v. *Clough* [1963] 2 W.L.R. 343; *Attorney-General* v. *Mulholland* [1963] 2 W.L.R. 658.

2 Wigmore, *op. cit. supra* n. 83, § 2286 at 532-534 lists the relevant statutes by state.

3 Law of Evidence Consolidation Act 1857, s. 18; now Evidence Act 1958, s. 28.

4 Evidence Act 1910, s. 96.

little success. The law of privilege is concerned with reconciling and compromising the conflict between the practical demands of the judicial trial process on the one hand and the ethical standards of the professional adviser on the other. Possibly the best compromise may take the form of a change from a claim for positive legal rules granting professional privilege to psychologists, to an application for the exercise of judicial discretion in the light of the particular circumstances of each case. A trial judge allowed this discretion, can prevent or limit those disclosures of professional confidences which are not essential to the matters in issue before the court, or which needlessly embarrass the client or threaten the professional relationship. At the same time, he can over-ride the client's refusal to consent to the information being divulged whenever this appears vital for the ascertainment of facts essential to a just disposition of the case.