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ABSTRACT

This article critiques how Lord Taylor of Gosforth CJ, in R v Derby Magistrates' Court; ex parte B, came to assign legal professional privilege an absoluteness from which there could be no derogation. Particular attention is paid to Balabel v Air India which stands in direct contrast to the judicial pronouncement formulated in Derby. Where Lord Taylor proclaimed that the privilege applied across the board, Balabel reveals a series of shifts in judicial thinking. Lord Taylor equally emphasised the importance of maintaining the exclusivity of legal professional privilege within the confines of the legal profession. His ruling in R v Umoh Mfongbong is relevant in this regard. Promoted as a necessary corollary of the relationship between lawyer and client, the 'exclusivity rationale' draws out the underlying assumptions with respect to the justifications for the rule and enhances the value of services which lawyers are uniquely qualified to offer. A more intricate discussion of the inconsistencies thwarting the privilege will be canvassed in Section II, where waiver and the crime-fraud exception are analysed. Judicial opinion has varied as to whether the legal profession should permit the privilege to be re-established upon protected communications being forfeited. The relevant question to ask is whether material affected by partial disclosure which is not misleading should retain its privileged character. This question was settled in Tanap Investments (UK) v Tozer on which Lord Taylor ruled. The judgment was strikingly different from Goldman v Hesper in which Lord Taylor allowed the rule to be invoked on a case-by-case basis according to specific purposes and contexts. The distinguishing feature of these cases is that waiver was effected only after the party's conduct touched a certain point of disclosure, irrespective of the fact each had waived their right to invoke the privilege. Through tracing the judicial evolution of Lord Taylor's reasoning, this article concludes that judicial uncertainty, arbitrariness and inconsistency have muddied a consistent application of the rule, with Derby illuminating what courts were prepared to put, or read into, the concept of legal professional privilege.

I.0 SWORD AND SHIELD

Shhh. Can you keep a secret? The concealed weapon in the lawyers' arsenal is as much double-edged sword as it is shield for these defenders of the underclass; proponents of justice and embodiments

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of truth. If lawyers sound like briefcase-toting superheroes, the reality is much more sobering. As members of an ancient and esteemed profession who have responded to the honourable calling to plead at the bar,[1]these advocates have — since the earliest days of the Roman Republic[2] — advanced their clients' interests from behind a provision known as legal professional privilege.

Defined as a single privilege consisting of two limbs with corresponding qualities; namely, legal advice privilege[3] and litigation privilege, the principle has been mired in controversy; offering a shroud of secrecy for communications passing between lawyer and client. Originating as a mechanism for the protection of individuals who were unfamiliar with, and vulnerable in the face of overwhelming legal complexities,[4] the notion of 'privilege' essentially bound lawyer and client in a special contractual relationship.[5] Little wonder then, that Lord Taylor of Gosforth CJ, like Bentham and Wigmore before him, sought to reconcile the obstructive nature of the privilege with the truth-finding process.

His judicial legacy culminated in the oft-repeated pronouncement that once legal professional privilege attached to a certain communication, the privilege was absolute and could not be breached by any court for any reason. Anchoring the doctrine to a 16th-century paradigm, Lord Taylor held that

> … If a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the

[1] Max Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 CALI. L. REV. 487, 487 (1928).

[2] *ibid.*

[3] Lord Taylor noted that the foundation for the 'legal advice test' was laid in *Smith-Bird* v. *Blower* [1939] 2 All ER 406 and *Conlon* v. *Conlons Ltd* [1952] 2 All ER 462.

[4] *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1502 (1985).

[5] John Gergacz, 'Attorney-Corporate Client Privilege', section 1.04 at 1-5 (3rd Ed, 2000); John Wigmore, Evidence In Trials At Common Law, section 2290, 543 (John T. McNaughton, 1961)

> 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits.[6]

Contrary to the above sentiment, Lord Taylor did not always champion the immutability of legal professional privilege. When Peter Taylor QC, as he then was, appeared as junior prosecutor in *R v Ward*,[7] which led to the 1974 conviction of Judith Ward for the murder of British soldiers, Lord Taylor offered to testify during her 1992 appeal. This was the same year in which Lord Taylor was appointed Lord Chief Justice of England. When his offer was declined and he was advised that his evidence was not required, he was vexed to the extent that he later spoke publicly of it.[8]

Indeed, the Court in *Ward* underscored the importance of "ensuring that there is a proper understanding of the nature and scope … of the duty".[9] This led Lord Taylor to champion reform in the area of full disclosure of evidence. Calling for a review of legal professional privilege and acknowledging that the law was in an unsatisfactory state, Lord Taylor conceded.

In the last three years, almost everything has been changed or thrown overboard in the criminal justice system. When you are going to legislate, you should do it less hectically and with a little more preparation and not have to introduce amendments because you had not got them ready before.[10]

A review would prove impossible, however, because the ruling in *Derby* froze the law of privilege at a particular point in history and proscribed courts from continuing the evolutionary development of the rule according to common law principles or in light of reason and

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[6] *R* v. *Derby Magistrates' Court; Ex Parte B* [1996] AC 487, 508E (Lord Taylor).

[7] [1993] 96 Cr App R 1.

[8] 'Lord Taylor of Gosforth', The Times, 22 (1997).

[9] [1993] 96 Cr App R 1.

[10] Peter Taylor, *Richard Dimbleby Lecture: The Judiciary in the Nineties* 19 COMM. L. BUL. 323, 329 (1993). See also Peter Taylor, 'Richard Dimbleby Lecture: The Judiciary in the Nineties' (Lecture, BBC Education, London, 30 November 1992).

experience. Significantly, his judgment conveyed the message that if but one exception were permitted to the privilege, it would destroy the rule itself.

Heard on appeal, *Derby* raised significant questions concerning the scope of legal professional privilege and s 97 of the *Magistrates' Courts Act 1980* (UK).[11] The genesis of the case dated back to the 1978 murder of a 16 year old girl. 'A' had confessed to killing the teenager, but later recanted his statement and asserted that his stepfather, Brooks, was the murderer. A was acquitted and Brooks charged. At Brooks' committal hearing, Rougier J ruled that A's original 1978 confession and subsequent inconsistent statements were relevant to Brooks' plea of innocence. Accordingly, they were not protected by legal professional privilege. Rougier J ordered production of all lawyer-client communications pertaining to the murder charge, including notes of attendances, proofs of evidence and factual instructions. This decision was upheld by McCowan LJ in the Divisional Court.

These consolidated appeals formed the basis for the House of Lords appeal, whereby the *Derby* Court, constituted by Lord Taylor CJ, Lord Nicholls of Birkenhead, Lord Keith of Kinkel, Lord Mustill and Lord Lloyd of Berwick, deliberated whether or not the Court was empowered to demand production of evidence. While recognising that the refusal of A to reveal secrets wrought grave harm upon Brooks, the Court ultimately decided not to compel A's confidential communications on the grounds that clients should be free to communicate with their lawyers absent a fear of disclosure.[12]

The *Derby* Court resolved that lawyer-client communications were absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence.[13]

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[11] The judgment incorrectly states (at 385), that the victim was murdered in 1987, but (at 388), states she was killed on 3 April 1978; the latter being the correct date.

[12] [1996] AC 487, 488(2)D.

[13] Id 510G (Lord Nicholls).

Marking one of the most momentous events in the history of legal professional privilege, Lord Taylor's key judicial development ushered in a new era where the Court effectively excused itself from rendering service to justice by virtue of the fact it could no longer determine the scope of the rule. Instead, the privilege had primacy over other compelling interests of equal or greater significance. Lord Taylor paraphrased Wigmore when he observed that 'it is common ground that the basic principle justifying legal professional privilege [arose] from the public interest requiring full and frank exchange of confidence between lawyer and client to enable the latter to receive legal advice'.[14]

The decision to overrule Rougier and McCowan JJ by not demanding production of confidential lawyer-client communications contradicted Lord Taylor's earlier efforts to satisfy the judicial conscience, including his own position in *R v Keane* that trial judges should 'carry out a balancing exercise, having regard to the weight of the public interest in non-disclosure and to the importance of the documents to the defence'.[15] Contrary to his desire to leave no pebble unturned, Lord Taylor's *Derby* pronouncement was distinct from earlier judgments over which he presided.

1.1 Balabel v Air India

The position adopted by Lord Taylor in the earlier 1988 case of *Balabel* v *Air India*[16] was that the privilege should be strictly confined. Notwithstanding his stipulation that the privilege attached where a continuum of communication was aimed at keeping lawyer and client 'informed so that advice may be sought and given as required';[17] Lord Taylor, with whom Donaldson and Parker LJJ concurred, sought to obviate conduct that prejudiced the proper administration of justice. He aimed to foster a judicial preference for truth finding and opined

[14] [1988] Ch 317, 327 (Lord Taylor).

[15] [1994] 1 WLR 746, 751.

[16] [1988] Ch 317.

[17][1988] Ch 317, 330 (Lord Taylor).

that there were rules of conduct about making sure all materials were available at trial. Lord Taylor expressed a desire to confine the availability of legal professional privilege and establish a presumption in favour of disclosure.

Briefly, the facts giving rise to *Balabel* concerned the formation of a leasing agreement in which Air India sub-leased a Bond Street property from Marchcoin Ltd, owned by Ahmed and Elsa Balabel. Marchcoin fell into arrears on the rent, causing Air India to forfeit their sub-lease. Upon Marchcoin paying the arrears in full, relief from forfeiture was granted and they enjoyed protection under Part II of the *Landlord and Tenant Act 1954* (UK).[18] Although a new sub-lease was negotiated between the parties, Air India sought specific performance to compel the lessee to honour the existing sub-lease.

The case turned on whether any agreement had been entered into with respect of a fresh sub-lease. In order to substantiate this, Marchcoin sought discovery of documents including memoranda and notes. At trial, Master Munrow upheld Air India's claim of privilege. Marchcoin appealed and issued a subpoena for the production of evidence. Judge Paul Baker QC heard the appeal. While he discharged the subpoena, he adopted a restrictive view with respect to legal professional privilege when he distinguished documents which recorded information, transactions or meetings as not enjoying the protection of the privilege because they were not made in contemplation of giving or receiving legal advice.[19]

Air India brought an appeal to the Court of Appeal, constituted by Lord Donaldson MR, Parker and Taylor LLJ. Their Lords were required to discern whether Baker's pronouncement was correct with respect to limiting the privilege, or if all communications between lawyer and client within the ordinary business of professional relations were encompassed within the scope of the privilege.[20] If the latter

[18] *ibid.*

[19] *Committee of Receivers of Galadari* v. *Zealcastle Ltd* (6 October 1986) (Unreported) (Scott J).

[20] [1988] Ch 317.

were correct, a blanket privilege would apply over all documents in dispute.

Linking the constriction of the privilege to truth-seeking values, Lord Taylor was conscious of the need to discern the bounds of the privilege by ascertaining the proper point of balance between two imposing imperatives; specifically, the need to make available to the court the maximum amount of information while avoiding unfairness to clients through having confidential client–counsel communications divulged. His dicta did not tie the justification for legal advice privilege to the conduct of litigation; thereby reflecting the policy reasons that justified its presence in the law and creating a loophole in which the veil of privilege could be pierced.[21]

Lord Taylor's formulation sat somewhere between Baker and Munrow by expanding Baker's test and reshaping Munrow's in order to create a sustainable medium. In refining the existing formulations, Lord Taylor limited the privilege to the giving and receiving of appropriate legal advice. By the terms of this narrow qualification, the privilege had no relevance outside the realm of disseminating legal advice.

Admitting that a divergence of judicial authority obscured the scope of the rule, Lord Taylor emphasised the importance of reverting to the basic principles justifying the privilege as being an exception to the general rule that all relevant evidence is discoverable and admissible.[22] Lord Taylor did not foresee the seeking of non-legal advice or communications made in the day-to-day course of business as coming within the ambit of the privilege.

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[21] This may be said to accord with Wigmore's own interpretation in which the latter favoured litigation values over the harm to other values. According to Stephen Saltzburg, the Wigmorean paradigm did not require evidence that a client's need for confidential communications was *essential*; rather it favoured a narrow cost–benefit analysis which weighed the harm to litigation more heavily than the harm to other values. See Steven Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists,* 66 VA. L. REV. 597, 605 (1980).

[22] [1988] Ch 317 (Lord Taylor).

Moreover, if Lord Taylor and the House of Lords were still attempting to define the parameters in which the privilege did, or ought to operate, the logical conclusion follows that the test espoused in *Derby* was incorrect. The privilege could *not* have been immutable in the four preceding centuries, nor could it have been predictably applied across the board in every case if the 20th century *Balabel* Court was still discerning its breadth and scope.[23]

While it might be argued that *Balabel* merely demonstrates an instance of the settled law not being correctly applied, Geoffrey Hazard remarked that the privilege was "applied with hesitation" and "recognition of the [the rule] was slow and halting until after 1800".[24] Donaldson LJ in that same case conceded that the existing authorities with respect to legal professional privilege were not as clear as they might be, or as clear as they might have been prior to Lord Taylor's ruling in *Balabel*.[25]

The *Derby* Court equally admitted that it was not until the 18th century that the rule was on the way to being established in its present incarnation.[26] Even Wigmore observed that 'the period from 1790 to 1830 was the full spring tide of the system of rules of evidence'[27] and 'the shackles of the earlier precedents were not finally thrown off until the decade of 1870'.[28] This view was reproduced by William Twining who argued that in the 19th century the laws of England were little

[23] [1996] AC 487 (Lord Taylor CJ). Although it may appear that *Balabel* and *Derby* address distinct points with respect to the privilege, a close textual analysis confirms that each concerns the scope and breadth of the rule. In *Balabel,* Lord Taylor qualified the privilege by limiting it to the giving and receiving of legal advice. In *Derby,* he again expressed a preference that legal professional privilege be applied only in the context of litigation and saw no value in extending it to legal advice privilege.

[24] Geoffrey Hazard, *An Historical Perspective on the Attorney-Client Privilege,* 66 CALI. L. REV. 1061, 1070 (1978).

[25] [1988] Ch 317 (Donaldson LJ).

[26] [1996] AC 487, 504F (Lord Taylor).

[27] John Wigmore, supra 5, section 8, 60g.

[28] *Ibid* section 2290, 3196.

more than a few general maxims collected under a single principle known as 'the best evidence rule'.[29]

Lord Taylor stated in *Balabel* that the cases which adopted a broad view of the scope of privilege[30] and extended it without limit to all client–counsel communications were too wide.[31] Noting that legal professional privilege obviously attached to communications concerning legal advice passing between lawyers and clients, Lord Taylor cautioned the need to re-examine the scope of the rule and keep it within justifiable bounds.[32] Extending the definition of 'legal advice' to 'advice as to what should prudently and sensibly be done in the relevant legal context',[33] Lord Taylor returned the scope of legal professional privilege to its 19th-century roots. Furthermore, 'to extend privilege without limit to all [lawyer] and client communication upon matters within the ordinary business of a [lawyer] and referable to that relationship [would be] too wide'.[34]This meant that confidential communications passing between lawyer and client were immune *only* if they directly correlated to legal advice of a professional character.

According to Lord Scott in *Three Rivers v Bank of England*[35] 'this remark is, in my respectful opinion, plainly correct. If a solicitor becomes the client's "man of business" … responsible for advising the client on all matters of business … the advice may lack a relevant legal

[29] *Ibid* 1–2.

[30] The cases which adopted a broad scope with respect to legal professional privilege were: *Pearse* v. *Pearse* (1846) 63 ER 950; Morgan (1873) LR 8 Ch App 361; *Calcraft* v. *Guest* [1898] 1 QB 759; *Carpmael* v. *Powis* (1846) 50 ER 495; Minter v. Priest [1930] AC 558.

[31] *Balabel* v. *Air India* [1988] Ch 317, 331 (Lord Taylor).

[32] *ibid.*

[33] *ibid.* According to Richard Pike, in *The English Law of Legal Professional Privilege: A Guide for American Attorneys*, 4(1) LOY. U. CHI. INT'L L. REV. 51 72 (2006), 'English lawyers arguably took these statements as a license to claim privilege in virtually all client communications'.

[34] [1988] 1 Ch 317, 331 (Lord Taylor).

[35] *Three Rivers DC* v. *Bank of England* (No 6) [2004] UKHL 48.

context...The criterion, in my opinion, must be an objective one.[36] Lord Taylor highlighted in *Balabel* that the rule did not cover lawyer-client relations where the relationship was not essential to the outcome of the case. Observing that the privilege originally related only to communications where legal proceedings were contemplated or on foot, Lord Taylor asserted that this rationale enhanced the standing of the legal profession and elevated the lawyer-client relationship above other professional relations.[37]

1.2 Hand over Fist

Taylor LJ, as he was then known, together with Lord Lane CJ and Rose J, was faced with the task of considering whether legal professional privilege should remain a preserve of the legal profession or extended to other professional relationships. The occasion for this came in the 1987 case of *R v Umoh Mfongbong*,[38] where a prisoner sought legal advice from a prison officer who was acting in the capacity of legal aid officer.

At trial, Worthington J rejected the argument that communications passing between Mfongbong and a prison officer were privileged. He compelled disclosure, which led to Mfongbng's conviction.[39] Mfongbong advanced a similar contention that communications passing between himself and Tucker were privileged on the basis that they involved a legal aid application.[40] The House of Lords disagreed and ruled that the communications made scant mention of legal assistance and therefore lacked the necessary requirement of giving or receiving legal advice in order to remain confidential.[41]

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[36] *Ibid* (Scott L).

[37] [1988] Ch 317.

[38] (1987) 84 Cr App R 138.

[39] *ibid.*

[40] (1987) 84 Cr App R 138, 138.

[41] *ibid.*

Lord Lane CJ, with whom Taylor and Rose JJ concurred, stated that "in our view, no privilege analogous to that between lawyer and client can arise and such privilege should be strictly confined to communications with lawyers or their agents".[42] A legal aid officer is neither.[43] The House of Lords ruled that, except in extenuating circumstances, communications between a prisoner and prison officer acting in the capacity of a legal officer, were subject to legal professional privilege; however disclosures made to prison officers on other occasions did not fall within the scope of that protection.[44] This correlates with the dicta of Lord Taylor in *Derby,* whereby he distinguished the continued significance of lawyers:

> 'A man must be able to consult his lawyer in confidence … The client must be sure that what he tells his lawyer in confidence will never be revealed'.[45]

Although this refrain has become the standard justification for the existence of the rule, certain commentators have disparaged this notion. Claiming that the legal profession has been less than forthcoming about the real purpose for legal professional privilege, Professor Norman Spaulding remarked: 'Our lack of candour now verges on duplicity. We seem to be ashamed to admit what we do for our clients under cover of the privilege. And with our shame and circumlocution, confusion and controversy about the doctrine has multiplied'.[46]

William Simon, Professor of Law at Columbia University, espoused a different albeit equally controversial notion as to the usefulness of confidential communications. He argued that the privilege was not merely an ideology, but a marketing strategy. Simon claimed that in the legal field's competition with other professions, strong

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[42] *Ibid* 141.

[43] *ibid.*

[44] *Ibid* 138.

[45] [1996] AC 487, 507D.

[46] Norman Spaulding, *Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege,* J. Prof. Law 135, 135 (2013).

confidentiality rights were a more valuable advantage than legal expertise and put a premium on services that lawyers were distinctly qualified to provide. He concluded: 'The net effect of confidentiality, therefore, is probably to reduce compliance with the law'.[47] This is exemplified in the fact that many lawyers insist that it is their duty to exploit loopholes in the interests of their clients, whereby legal advice is framed in such a way that it assists clients bypass a law by casting their affairs in a way that technically conforms to it but ultimately defeats its purpose through skilful evasion.

Unfortunately, 'references to "truth" tend to obfuscate rather than clarify the role of the lawyer'.[48] According to Rodell: 'It is the legend of the law that every legal dispute can, and must be settled by hauling an abstract principle down to earth and pinning it to the dispute in question'.[49] It was doubtful that the privilege did much to promote candour on the part of the client to his lawyer.[50] Lord Brougham notably declared that the efficacy of laws depended on the sanction of public opinion and opined that:

> By long use and custom … men especially that are aged, and have been long educated to the profession and practice of the law, contract a kind of superstitious veneration of it beyond what is just and reasonable. They tenaciously and rigorously maintain those very forms and proceedings, and practices, which, though possibly at first they were seasonable and useful, yet by the very change of matters they become not only useless and impertinent, but burthensome and inconvenient, and prejudicial to the common justice and the common good of mankind; not considering the forms and prescripts of laws were not introduced for their own sakes, but for the use of public justice; and therefore, when they become insipid,

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[47] William Simon, *The Confidentiality Fetish: The Problem With Attorney-Client Privilege,* 12 The Atlantic (2004).

[48] Peter Henning, *Lawyers, Truth and Honesty in Representing Clients* 20 Notre Dame J. Law, Ethics And Public Policy 7, 212 (2014).

[49] *Fred Rodell, Woe Unto You, Lawyers! (*Pageant-Poseidon, 1939*) 48.*

[50] *O'Reilly* v. *Commissioners of the State Bank of Victoria* (1983) 153 CLR 1, 26 (Mason J).

> useless, impertinent, and possibly derogatory to the end, they may and must be removed.[51]

Indeed, he went so far as to proclaim that 'the administration of the law is more wretchedly defective than the law itself. Justice is sold at an enormous price.'[52]

Andrew Boon, in 'Lawyers' Ethics and Professional Responsibility' concurred that confidentiality and legal professional privilege were valuable products which lawyers, unlike any other professionals, could sell to their clients. He declared that lawyers were the chief beneficiaries of the arrangement by virtue of the legal protection it afforded them — and this protection applied exclusively to them and their clients. Professor Allen similarly suggested that it made sense to perceive of confidentiality as dangling an artificial sweeter, with McCormick adding that any proposal to do away with a privilege for professional confidences would be strongly resisted by the legal profession.

Promoted as a necessary corollary of the relationship between lawyer and client, legal professional privilege is said to induce clients to engage in full and frank disclosure of all facets of their particular legal problem; without which, a lawyer would not know how best to represent their interests. Indeed, Lord Taylor borrowed from Lord Brougham in *Greenough v Gaskell*[53] when he concluded that it was 'not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those who might otherwise be deterred from telling the whole truth to their [lawyers].'[54]

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[51] Henry Brougham, 'Present State of the Law – The Speech of Henry Brougham, Esq., M. P., in the House of Commons, on Thursday, February 7, 1828' (1828) 38 *Quarterly Review* 75, 243.

[52] University of Northern Iowa, *Review: Life and Character of Henry Brougham* 33(72) North American Review 227, 247 (1831).

[53] (1883) 1 M & K 98.

[54] [1996] AC 487, 508H (Lord Taylor).

Admitting that 'legal professional privilege [did] not provide an absolute protection against disclosure of evidence',[55] the *Derby* Court employed vague conjunctions when affirming that 'full and frank disclosure' underpinned the traditional doctrine and enhanced the administration of justice by facilitating legal representation of clients and protecting their communications from disclosure.[56]

2.0 FRANKLY, MY DEAR

Precisely how critical is this need for full and frank disclosure? In a 1994 parliamentary debate in England, Lord Taylor conveyed his belief that full and frank disclosure to one's lawyer was unlikely to be chilled by the prospect of communications one day being revealed, technically with the client's consent but in circumstances in which this could not realistically be refused at trial.[57] The term 'full and frank disclosure' is divined from the dicta of Lord Brougham in *Greenough* v *Gaskell,*[58] in which he opined:

> 'The foundation of this rule is not difficult to discover. … It is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources, deprived of professional assistance, a man would not venture to consult any skilful person, or would only dare tell his counsellor half his case'.[59]

Addressing recent judicial developments, Lord Taylor stated that the judiciary had extended the principle of legal professional privilege and cited a recent example in which a judge ordered disclosure of

[55] *Ibid* 493H.

[56] *Ibid* 510H (Lord Nicholls).

[57] United Kingdom, Parliamentary Debates: Criminal Justice and Public Order Bill', House of Lords, 23 May 1994, vol 555, 520.

[58] (1883) 1 M & K 98.

[59] *Greenough* v. *Gaskell* (1883) 1 M & K 98.

government documents over which privilege was claimed.[60] This, in turn, enabled three defendants to be acquitted of criminal charges.[61] Lord Taylor agreed that the criminal side of the justice system involved important issues of confidence owing to the fact that a number of the most celebrated 'miscarriage of justice' cases turned upon whether information had been disclosed or withheld from the defence. Arguing that the House of Lords should, 'as far as humanly possible, produce rules that would protect against wrongful conviction and safeguard the possibly innocent',[62] Lord Taylor stressed that, if evidence could cast light on a fact in issue, it was very welcome.[63] After all, 'the Golden Rule is a twofold aim . . . that guilty shall not escape or innocence suffer'.[64]

Frankel J concurred with this rhetoric when he asked whether criminal lawyers, who were specifically imbued with the duty of defending the rights of the innocent, should habitually be able to thwart the search for truth.[65] He declared that humanity was interested in discovery and the paramount objective of justice be the disclosure of all legally operative facts.[66] Spaulding rhetorically questioned why lawyers 'should be embarrassed to admit that [they] use the privilege to counsel resistance to law … for what would be the consequence for the profession in renouncing this false piety?'[67]

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[60] Peter Taylor, 'Richard Dimbleby Lecture', *supra* 10, 328. Lord Taylor of Gosforth CJ did not name the case.

[61] *ibid.*

[62] Geoffrey Robertson, Justice in All Fairness, The Guardian, 30 April 1997, 19.

[63] *ibid.*

[64] *Berger* v. *United States* 295 U.S. 78, 88 (1935).

[65] Marvin Frankel, *Clients' Perjury and Lawyers' Options* 1 J. INST. STUDY OF LEGAL ETHICS 25, 26 (1996).

[66] Id 38.

[67] Norman Spaulding, *supra* 46, 158.

Lord Taylor elucidated that there was a need to restore public confidence in the criminal justice system.[68] It is certainly not easy, in a modern society, to sustain the argument that lawyer-client communications should be preserved at the expense of justice.[69] 'Society has always been aware that any encounter between one individual and the entire judicial system is a collision of epic disproportion'.[70] As with those issues often encountered in civil trials, criminal proceedings present increasingly complex challenges to the administration of justice.[71]

Appearing for the prosecution in one such case which culminated in the wrongful conviction of Stefan Kiszko, Lord Taylor was considered, from his earliest days at the bar, a grand master of crime, having encountered common law litigation in its various manifestations on both sides of the equation.[72] For that reason, Melford Stevenson J, a trial judge of 'unrivalled experience' in post-war England, branded him a threat to the administration of justice.[73] Lord Taylor declared that, if the courts of England were to make any progress, the prosecution must be regarded, and must regard itself, as the trustee of information, not its monopoly owner.[74]

In *The Queen* v *The Commissioners of Inland Revenue Ex parte Thomas Patrick Denton Taylor*,[75] the House of Lords, constituted by Taylor LJ, together with O'Connor and Nicholls LJJ, were required to settle a

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[68] Michael Beloff, *supra* 68.

[69] David Ipp, *Lawyers' Duties to the Court,* 114 L. Q. REV. 63, 72 (1998).

[70] Edward Greenspan and George Jonas, The Case For The Defence*,* 261–2 (1987).

[71] Peter Taylor, *Speech by the Rt Hon the Lord Taylor of Gosforth, Lord Chief Justice of England, at the Lord Mayor's Dinner to HM Judges: 6 July 1994,* 61 Arbitration 1 (1995), 4–5; Taylor, *The Lund Lecture,* 35 Medicine, Science And The Law 1, 6 (1995).

[72] Michael Beloff, Taylor, Peter Murray, Lord Taylor of Gosforth (1930-1997), In Oxford Dictionary of National Biography (2004).

[73] *ibid.*

[74] Peter Taylor, 'Richard Dimbleby Lecture', supra 10, 329.

[75] [1988] WL 624291.

civil matter concerning Thomas Taylor; a solicitor who specialised in tax avoidance and tax mitigation schemes for corporate and private clients. Having conducted investigations into Taylor's personal and professional tax affairs pursuant to s 20(2) of the *Taxes Management Act 1970* (UK), the Revenue Office sent notice to Taylor compelling him to deliver a large class of documents including books of account, business correspondence and all other records relating to his practice as a solicitor for the period 1979 to 1985.[76]

In determining whether disclosure of communications was vital for fairly disposing of the cause, O'Connor LJ conceded that the right answer to that is: 'I don't know'.[77] Nicholls LJ added that it would be unwise to 'say anything which might be thought to tie the hands of the judge'.[78] Moreover, in future cases, a different outcome may commend itself to the court when examining the privilege in a clearer light.[79] Leaving the door open to the extent mentioned, he concluded that the applicant should not be proscribed from renewing his application for disclosure if such an eventuality arose.[80]
His view was strengthened by the agreement of Taylor LJ who endorsed each of the judgments delivered.[81]
Lord Taylor acknowledged that a degree of doubt existed with respect to the application of legal professional privilege, such that no ruling should be absolute or fixed so as to tie the hands of the judge. Moreover, he advocated judicial discretion as a vital and realistic safeguard for the accused[82] and recognised the possibility that subsequent proceedings may necessitate a contradictory finding based

[76] *The Queen* v. *The Commissioners of Inland Revenue Ex parte Thomas Patrick Denton Taylor* [1988] WL 624291.

[77] *Ibid* (O'Connor LJ).

[78] *ibid.*

[79] *ibid.*

[80] *ibid.*

[81] *ibid.*

[82] United Kingdom, *supra* 57, 520.

on the individual merits of the case. Lord Taylor accepted that no applicant should be precluded from pursuing discovery of confidential communications even if previous attempts were denied.

Although the rationale for the rule of strict confidentiality is that the privilege ensures complete disclosure by the client and facilitated effective assistance and a proficient defence by the lawyer',[83] it is imperative to acknowledge that legal professional privilege stems from 'two sources that are inconsistent in critical respects'.[84] From the tug-o-war between 'presumably working to advance the truth'[85] and simultaneously obstructing its access, it comes as little surprise that the legal profession and the general public are divided as to the merits and benefits of employing the provision, yet the high status to which it is held offers 'no guarantee of stability. It is submitted that the doctrine of legal professional privilege suffers from an inherent instability, for it straddles a fault line in the surface of the law, where two opposing tectonic themes in its basic structure meet'.[86]
The privilege expresses 'a value choice between protection of privacy and discovery of truth and the choice of either involves the acceptance of an evil betrayal of confidence or suppression of truth'.[87] Presenting a conflict between two desirable policy goals, the rule operates at the expense of substantial justice both as a defence and an exception to the rule that relevant evidence must be admitted. Several surveys undertaken in 1962, 1977 and 1993 established that lawyerly apprehension surrounding the myth that clients would refrain from full and frank disclosure was unfounded.[88] Out of twelve lawyers who

[83] *Baird* v. *Koerner* 279 F.2d 623, 629 (9th Cir. 1960)

[84] Harry Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm,* 70 IOWA L. REV. 1091, 1098 (1985).

[85] Peter Henning, *Lawyers, Truth and Honesty in Representing Clients,* 20 Notre Dame J. L. Ethics And Public Policy 7, 211.

[86] Ronald Desiatnik, Legal Professional Privilege in Australia, 3 (1999) 3.

[87] Geoffrey Hazard, *supra* 24, 1085.

[88] The surveys were conducted by (Yale Law Journal in 1962, Tompkins County in 1977 and Leslie Levin in 1993.

actually *had* disclosed client information, five reported that disclosure had resulted in a lesser degree of damage to their relationship with their clients than might be imagined, while one noted that their professional relationship with their client had been enhanced.[89]

David Louisell contended that it was 'the historic judgment of the common law ... in western society that whatever handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations'.[90] The inference, therefore, was that legal professional privilege was a 'power to shut off inquiry to pertinent facts in court',[91] whereby truth *should* cede to confidentiality. Ronald Desiatnik succinctly stated that 'every communication or document may in some way affect a right of some [other] person'.[92]

Some justices have declared that, even if the House of Lords found a previous decision wrong, 'the fact that they no longer had to regard previous decisions as absolutely binding did not mean that whenever they thought a previous decision wrong, it should be reversed'.[93] It was deemed to be in the general interest of certainty that the decision, however erroneous or anomalous, must stand unless there were very good grounds to overturn it.[94]

2.1 Exposing the Flaws

While the *Derby* ruling outwardly appeared to have curtailed judicial discretion by rendering courts powerless to displace the unassailable

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[89] Leslie Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others,* 47 RUTGERS L. REV. 81, 139 (1994). In those scenarios, disclosure had occurred in order to prevent a future harm.

[90] David Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today,* 31 Tulsa L. Rev. 101, 110 (1956).

[91] Charles Mccormick, Mccormick on Evidence, 175 (1984).

[92] Ronald Desiatnik, supra 86, 211.

[93] *Miliangos v. George Frank (Textiles) Ltd* (1975) AC 433, 495–6 (Lord Cross). See also Michael Zander, The Law-Making Process, 216 (2015).

[94] *R* v. *Knuller* (Publishing, Printing and Promotions) Ltd [1973] AC 435, 455 (Lord Reid).

application of legal professional privilege, the fallibility of Lord Taylor's *Derby* pronouncement is evident if for no other reason than several post-*Derby* judgments have reversed his epic aphorism and guided the privilege in a different direction. The most notable of these are *In Re L (A Minor),* and the collection of cases colloquially known as *Three Rivers.*

Decided by a differently constituted House of Lords, *Re L* indicated that the broad principle stated in *Derby* was incorrect.[95] In that case, Lord Nicholls opined that the privilege may be curtailed if the interests of a minor were at stake, with the court ultimately resolving that this constituted a legitimate public interest,[96] whereby legal professional privilege could be forced to cede to competing interests of higher value. In order to eschew the stranglehold of *Derby*, the Court in *Re L* held that expert reports obtained with view to litigation were not privileged.[97] Rather, they were discoverable in the same way as any other material.[98] Proving that *Derby* was incorrectly decided, *Re L* mopped up the overeager 'spill' by placing some limit on the absoluteness of that earlier decision.

Derby also formed a theme of discussion in *Three Rivers*. In that long-running dispute, the correctness of Lord Taylor's decision was again called into question during litigation between the Bank of England and liquidators and creditors of the collapsed Bank of Credit and

[95] See Patrick O'Hagan, *Legal Professional Privilege: Some Developments* 2 PVT. CLIENT BUS. 131 (1997). Patrick O'Hagan, writing about developments in legal professional privilege, observed that *Re L* demonstrated the ability to balance competing public interests, with the House of Lords indicating that each case turned on its facts.

[96] *Re L (A Minor)* [1998] 51 BMLR 137. In spite of his pronouncement in *Re L*, Lord Nicholls nevertheless affirmed his absolutist stance when he maintained that legal professional privilege was so integral to the administration of justice that only express statutory wording could abrogate its scope or absolute application.

[97] Adrian Zuckerman, *Legal Professional Privilege: The Cost of Absolutism* 112 LAW Q. REV. 535, 538–9 (1996).

[98] *ibid.*

Commerce International SA (BCCI).[99] That proceeding turned on whether the bank was compelled to furnish to the court communications disclosed during an earlier inquiry into the collapse.[100] At trial, Tomlinson J dismissed the claimants' request for specific disclosure against the bank.

On appeal in *Three Rivers (No 1)*,[101] Lord Justice Chadwick MR and Lord Justice Keene upheld the judgment of Tomlinson J because the circumstances of the case were so highly unusual since the documents were never in the physical possession of the bank, nor did the bank have a right to possession. No obligation of disclosure existed. Conversely, *Three Rivers (No 2)* held that a breach of privacy 'was necessary for the protection of the rights and freedoms of the parties to the litigation',[102] while appeals (No 3 and No 4) cited, with approval, the authority of *Derby* when confirming that legal assistance and advice could be effectively rendered only if clients were candid and forthcoming, this being the very consideration which justified the absolute character of the privilege in the first place.[103]

In *Three Rivers (No 5)*, the House of Lords restricted the definition of 'client' when it ruled that, for the purpose of legal professional privilege, information tendered by an employee was akin to information received from an independent agent and was not subject to protection.[104] *Three Rivers (No 6)* reined in the privilege and reduced

[99] *Three Rivers DC v. Bank of England* (No 6) [2004] UKHL 48 was presided over by Lord Scott, Lord Rodger, Baroness Hale, Lord Carswell and Lord Brown.

[100] Chaired by Bingham LJ, the inquiry was known as the 'Bingham Inquiry'.

[101] *Three Rivers DC* v. *Bank of England* (No 1) [2003] CP Rep 9 was heard before Lord Justice Chadwick MR and Keene LJ.

[102] The Court stated that, for this reason, Article 8 of the European Convention on Human Rights 1950 did not apply to the parties. Three Rivers DC v. Bank of England (No 2) [2002] EWHC 2309.

[103] *Three Rivers DC* v. *Bank of England* (No 4) [2004] 3 WLR 1274.

[104] *Three Rivers DC* v. *Bank of England* (No 5) [2003] EWCA Civ 474 (Longmore LJ).

its ambit to those communications pertaining to the giving or receiving of legal advice in a professional capacity.[105]

Declaring that legal professional privilege should be accorded a scope which reflected the policy reasons that justified its presence in our law,[106] Scott and Carswell LJJ proposed a test for discerning, in marginal cases, the relevant legal context attracted legal professional privilege. Scott LJ specifically stated that if a communication pertained to the rights, liabilities, obligations or remedies of the client under private or public law, it would be privileged.[107] This was premised on the purpose and occasion for which the communication was made.[108] *Three Rivers No. 6* noted that when considering claims for legal professional privilege, the court should acknowledge the 'continuity of communications', however, where the traditional role of the lawyer had expanded, the scope of legal professional privilege should not be broadened.

2.2 All is Fair in Love and …Waiver

Not only did Lord Taylor broaden the scope of the privilege in *Derby;* he toyed with waiver of the rule in two prior judgments; *Goldman* v *Hesper*[109] and *Tanap Investments (UK)* v *Tozer.*[110] In the narrowest sense of the term, waiver occurs when a client who is entitled to assert the privilege volunteers the privileged communication in the course of legal proceedings.[111] If the client is not desirous of secrecy, privilege

[105] *Three Rivers DC* v. *Bank of England* (No 6) [2004] UKHL 48 (Lord Scott). This statement was borrowed from Lord Taylor in *Balabel* v. *Air India* [1988] Ch 317.

[106] *Three Rivers DC* v. *Bank of England* (No 6) [2004] UKHL 48, 35.

[107] *Ibid* 1277 (Lord Scott).

[108] *ibid.*

[109] *ibid.*

[110] [1991] WL 839041.

[111] Richard Pike, *Legal Professional Privilege: A Guide for American Attorneys,* 4 LOY. UNIV. INT. L. REV. 51, 83 (2006).

ceases and once confidentiality has been irretrievably lost it cannot be reclaimed.

The practical foundation to this argument can be expressed as being grounded in the fact that any form of disclosure is inconsistent with the purpose of legal professional privilege, however judicial opinion has varied as to whether the legal profession should, in a variety of different contexts, permit the privilege to be re-established over waived communications. The relevant question was whether material affected by partial disclosure which is not misleading should retain its privileged character.

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.[112]

In *Goldman,* the question to be decided was whether an assertion of privilege could be claimed over a bill of taxation pursuant to Order 62 of the Rules of the Supreme Court. A divorce suit between Michael Goldman and Walpurga Hesper culminated in trial judge Calvert QC ordering Goldman to pay all of Hesper's costs on a common fund basis.[113] Goldman subsequently persuaded Hesper to provide written consent voluntarily surrendering the privilege and permitting him to inspect papers relating to taxation of costs in the suit. After waiving her right to claim privilege over the documents, Hesper sought legal advice and was instructed to withdraw her consent and reassert her claim of privilege.[114]

Goldman advanced the position that, as a matter of natural justice, he should be entitled to inspect any communication which Hesper sought

[112] *Ibid* section2292, 3204.

[113] *ibid.*

[114] *ibid.*

to use.[115] He stated that only through viewing the taxation bill could he know whether to challenge any of the items listed and suggested that it was wrong to permit the Registrar to see Hesper's documents while he was denied sight of them.[116] Counsel for Goldman, Mr Pleming, argued that Hesper could not recant her waiver over specific privileged material.[117]

Lord Taylor, who delivered the leading judgment of the court, with which Lord Donaldson MR and Woolf LJ concurred, contended that this argument could not succeed.[118] In the course of his ruling, Lord Taylor added that there may be instances in which taxing officers may need to disclose part, if not all, of the contents of a privileged document in striking the appropriate balance'.[119] He distinguished the material facts of *Goldman*, in which no action had been taken on the letter of waiver, from a hypothetical scenario in which documents had already been dispatched for inspection and concluded that, upon taking legal advice, Hesper was perfectly entitled to withdraw permission.[120] *Goldman* serves as an early example of a ruling which pronounced that waiver could be retracted upon a client subsequently obtaining legal advice.

Just as he had done in *Balabel*, Lord Taylor again recognised that legal professional privilege was not immutable. Applying a pragmatic approach, he averred that it necessitated the weighing of competing interests through 'striking an appropriate balance' with respect to privileged communications. Lord Taylor additionally observed that litigants must be availed recourse to any relevant material upon which

[115] [1988] 1 WLR 1238.

[116] *ibid.*

[117] *ibid.*

[118] *ibid.*

[119] [1988] 1 WLR 1238 (Lord Taylor).

[120] *ibid.*

their adversary relies and which is utilised by a court or tribunal in reaching its conclusion.[121]

In adhering to a 'natural justice' approach with respect to the rule, Lord Taylor recognised that legal professional privilege was not one-directional. That is to say, the rule could not have applied 'irrespective of the client's individual merits', as he stated in *Derby*, because the privilege could not operate to include confidential communications on one hand, while, on the other hand, exclude further confidential communications in which partial disclosure had not compromised the integrity of that information. In fact, Lord Taylor concluded that even a voluntary waiver or disclosure to or by a third party, such as a taxation officer, would not proscribe the owner of the document from reasserting a claim of privilege in any subsequent context.[122]

To illustrate his point, Lord Taylor deferred to *British Coal Corporation* v *Dennis Rye Ltd (No 2).*[123] In that instance, the Court of Appeal, presided over by Dillon, Neill and Stocker LLJ, held that it was possible for the privilege to be waived 'for a specific purpose and in a specific context only'.[124] In *British Coal*, communications brought into existence for a civil proceeding were subsequently disclosed in a criminal investigation.[125] The question to be decided by the Court was whether disclosure to police could be construed as a waiver of privilege in favour of the defendant for the purposes of the civil proceeding. Neill LJ stated that British Coal Corporation had divulged communications for the limited purpose of facilitating a criminal investigation in accordance with their duty, and objectively this did not conform to an express or implied waiver of privilege in relation to the civil suit.[126]

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[121] [1985] 2 All ER 185, 190 (Hobhouse J).

[122] [1988] 1 WLR 1238 (Lord Taylor).

[123] [1988] 1 WLR 1113.

[124] *Ibid* 1244-1245.

[125] *ibid.*

[126] *Ibid* (Neill LJ).

Lord Taylor utilised the 'limited purpose' rationale to restore the privilege which Hesper had voluntarily surrendered.

Ethics scholar Charles Wolfram[127] observed that, in order to amount to a waiver, the client's act of disclosure must have been voluntarily made to a non-privileged individual; that is, a person not recognised as being covered by the privilege.[128] He added that, once the privilege struggled into existence, its fragile life was threatened by forces that could extinguish it.[129] Those forces lie within the client's control and can be snuffed out with their consent.[130] Sidney Phipson, in *Phipson on Evidence*, put this into practical effect when he stated that the conduct of the party who volunteered material to the court is what gives rise to a waiver of privilege.[131] He noted that, if that party elected to tender part of a document or a sequence of documents before the court, they must also tender the remainder of the information in order to ensure fairness to their adversary.[132]

This principle was reiterated by Mustill J in *Nea Katerina*:

> [W]here a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.[133]

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[127] Cornell University Law School, Charles W Wolfram Available at http://www.lawschool.cornell.edu/faculty/bio.cfm?id=183. (accessed 12 April 2018)

[128] Charles Wolfram, Modern Legal Ethics, 270 (1986).

[129] *Ibid* 268.

[130] *ibid.*

[131] Sidney Phipson, *Phipson On Evidence*, 812 (2013.

[132] *ibid.*

[133] [1981] Com LR 138 (Mustill J).

The *Goldman* judgment was strikingly different from *Tanap v Tozer,* over which Lord Taylor, together with Balcombe LJ, presided. Where the *Goldman* Court permitted the privilege to be reasserted once waived, *Tanap* discerned that, if the privilege was partially waived in respect of a correspondence or communication, it was waived over the entire document.

In that case, the plaintiff company complied with the judicial order and disclosed attendance notes, while resisting any further disclosure of documents.[134] Tozer argued that partial disclosure of information constituted a full waiver of legal professional privilege and sought production of the remaining materials.[135] In deciding whether legal professional privilege could be claimed over client–counsel communications that had been partially disclosed at trial, Lord Taylor approved of the reasoning of Hobhouse J in *General Accident Fire and Life Assurance Corporation Ltd v Tanter.*[136]

In *Tanter*, Hobhouse J averred to an expanse of judicial authority when discerning the circumstances in which privilege is waived, and the extent to which communications should thereafter be disclosed. Hobhouse J contended that it was at the discretion of each party to decide whether or not to waive the privilege and, if so, the extent to which they did. Although this case was ultimately decided on appeal, it was heard in the first instance by Lloyd J as he was then known. It will be recalled that Taylor and Lloyd LJJ were two of the five judges who presided over *R* v *Derby Magistrates Court; Ex parte B.*[137]

The *Tanap* Court stated that if privilege was waived in respect of a note outlining counsel's advice, it was also waived in respect of any

[134] [1991] WL 839041 (Lord Taylor). Lord Taylor stated: 'Any waiver of privilege … would be liable to have the most wide ranging consequences and [would] give rise to a *reductio ad absurdam* if one follows it to the length to which the defendants seek to follow it in the present case.'

[135] *ibid.*

[136] [1984] 1 WLR 100.

[137] [1996] AC 487.

written or oral instructions given to counsel for the purposes of obtaining that advice. In the absence of disclosure, a real risk existed that the advice would not be seen in its correct context and its weight and meaning may be misunderstood.[138] This ran contradictory to Lord Taylor's comments in *Goldman*, whereby he was content to allow a client to reassert a claim of legal professional privilege once confidentiality had been waived.

Producing markedly different outcomes and adding significantly to the confusion, the distinguishing feature of *Goldman* and *Tanap* was that waiver was effected only after the party's conduct touched a certain point of disclosure, irrespective of the fact each had waived their right to invoke the privilege. As a consequence, the problem of whether privilege could be reasserted over waived communications was not sufficiently resolved.

It is argued that the *Tanap* Court clearly stated the correct position by adopting a stricter interpretation. This was the better application of the doctrine of waiver, as it would otherwise have permitted the scope to be broadened to such an extent that any communication, whether or not divulged through intent or inadvertence, could conceivably be challenged as privileged.

Academic opinion differs as to whether these two interests have been sufficiently balanced. James Bradley Thayer, in surveying the development of the law of evidence in his most famous work, the 1898 *A Preliminary Treatise on Evidence at the Common Law*, obliquely touched on the theme of legal professional privilege when he wrote that the law was not merely concerned with objective truth, but equally preoccupied with other elements:

There is another precept which should be laid down as preliminary, in stating the law of evidence; namely, that unless excluded by some rule or principle of law, all that is logically probative is admissible … [yet] there are many exceptions to it …

[138] [1991] WL 839041 (Balcombe LJ).

These rules of exclusion have had their exceptions; and so the law has come into the shape of a set of primary rules of exclusion; and then a set of exclusions to those rules.[139]

Charles McCormick and Charles Wolfram have argued that voluntary disclosure of confidential information prevents a subsequent claim of privilege.[140] McCormick described 'waiver' as the intentional relinquishment of a known right regardless of whether an individual knew about the existence of the privilege rule.[141] Ultimately, the dictates of fairness prohibited parties from withholding the remainder of a partially divulged communication and this would be fatal to the privilege, irrespective of the client's intent.[142] Even accidental waiver of information would suffice to preclude any continuing confidence in privileged documents.

Wolfram argued that intent should be an irrelevant consideration when determining whether privilege had been waived.[143] While confirming that communications may be 'stripped of their privileged status where clients elected to make a voluntary revelation of a communication or its contents after the privilege had attached',[144] he stated that no case had gone so far as to hold that every client repetition of information constituted a waiver and such a rule would be needlessly rigid.[145] Wolfram noted the need to create a rule which accommodated the competing values of encouraging client–counsel disclosure, while keeping the privilege within reasonable bounds so as to provide access to facts by other parties.[146]

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[139] James Thayer, A Preliminary Treatise on Evidence at the Common Law, 101 (1898).

[140] Charles McCormick, *supra* 91, 194.

[141] *ibid.*

[142] John Wigmore, *supra* 5, section 2327, 636.

[143] Charles Wolfram, *supra* 128, 272.

[144] *Ibid* 269.

[145] *Ibid* 271.

[146] *Ibid* 272.

3.0 CONCLUSION

Although the reasoning of the courts is 'too often loosely or obscurely stated',[147] *Derby* illuminated what courts were prepared to put, or read into, the concept of legal professional privilege. Though attempting to freeze the law of privilege at this particular point in history, *Derby* sought to proscribe courts from continuing the evolutionary development of the rule according to common law principles or in light of reason and experience. This result left no opportunity to balance competing interests against the interest in preserving the confidentiality of privileged communications and culminated in subsequent House of Lords' judgments placing some limit on the absoluteness of that decision.

There are strong indications that *Derby* may not be good law on this point, with several judgments, including *In Re L* and *Three Rivers* reducing the scope of the rule and produced cracks in the intellectual armour of *Derby.* Holding that more compelling interests permitted the House of Lords to depart from a previous decision where there were cogent reasons to do so, these cases demonstrated that the privilege should be accorded a scope. Lord Taylor, himself, swung between narrow and broad interpretations, with the decision promulgated by the House of Lords going against the weight of authority espoused by Lord Taylor in *Balabel, Keane* and *Ward.*
Where *Balabel* signalled a trend towards narrowing the application of the rule and returned to the position which upheld the right to a fair trial, *Derby* reformulated the standard of protection to encompass within its ambit all client–counsel communications. Demonstrating that the operation of legal professional privilege is a double-edged sword which can 'be found to lend the benediction of the law to either side of any case',[148] this article concludes that no opportunity previously existed in which to consistently apply the privilege. It follows that the rule was neither absolute nor balanced, given that

[147] *Ibid* section 2312, 3235.

[148] Fred Rodell, *supra* 49, 50.

Balabel reverted to basic 19th-century principles which recognised communications between lawyer and client *only* if their purpose was the giving or receiving of legal advice. All other relevant client–counsel communications were rendered discoverable and admissible.

Conceding that the existing authorities with respect to legal professional privilege were ambiguous and lacked clarity, Lord Taylor constrained the privilege as narrowly as possible. Notwithstanding this fact, he recognised that the rationale for the rule elevated the client–counsel relationship above other professional relations and imbued them with an exceptional exclusivity unattainable by others in whom at least equal confidence was reposed.

Highlighting the complexity in applying, waiving and restoring legal professional privilege, this article has addressed Lord Taylor's early judicial stance with respect to narrowly interpreting and applying the rule. Ultimately, fairness to the adversary necessitates that all relevant material be furnished to ensure that what is presented is not partial.[149] The problem, though, has been difficult from the beginning: 'Better no light from history, however, than false light'.[150]

[149] Sidney Phipson, supra 131, 26-04, 812.

[150] *ibid.*