AD HOC PRIVILEGE - WEIGHING RELEVANCE IN THE LIGHT OF CONFIDENCE

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I. ABSTRACT

The general statutory regime governing evidentiary privilege is contained in the Evidence Amendment Act (No 2) 1980. Part III provides for a number of defined relationships by virtue of which particular communications remain free from forensic invasion. It also creates a statutory privilege whose operation is not dependent upon a specified relationship, provided the disclosure occurred in confidence. This paper explores the sphere of operation in the past 15 years of this "ad hoc privilege".

II. INTRODUCTION - THE FIXED REGIME OF EVIDENTIARY PRIVILEGE

A successful claim to privilege will impede the forensic process by denying access to highly relevant material.[1] In an adversarial system such an impediment must, like all other exclusionary rules, bear a rationale which allows non-disclosure to prevail over relevance. Here it is the public interest in the climate of confidence inherent in certain relationships. Parliament has provided fixed evidentiary bulwarks for disclosures made within the marital, spiritual, medical and patent attorney contexts.[2] Other statutes contain limited privileges in relation to their own subject matter.[3] The common law regulates disclosures arising in the context of legal advice or litigation.[4] Within this fixed regime of privilege, the public policy aspect which supports each genus is well established.

For marital privilege, it is the reluctance to invade the climate of confidence which ideally subsists between spouses.[5] In the religious context, the acknowledgment of the twin imperatives of the secular and the parochial world grounds protection.[6] The limited medical privilege attempts to provide some defined boundary of confidence for patient disclosures in order to facilitate medical treatment.[7] The protection for transactions involving a

1 Privilege enables resistance to interrogatories during the pre-trial process, to answering questions in oral evidence at trial and also excuses making available documents for inspection and production at both stages.

2 Part III Evidence Amendment Act (No 2) 1980, ss 29-34.

3 For example Children, Young Persons and their Families Act 1989: s 37, s 77, s 176; Family Proceedings Act 1980: s 18; Human Rights Act 1993: s 130.

4 Solicitor client privilege protects, with limited exceptions, communications between legal adviser and client whenever they are grounded in the context of legal advice. Litigation privilege protects communications between legal adviser or client and a third party made to enable the adviser to advise upon or conduct litigation.

5 *Hawkins v Sturt* [1992] 3 NZLR 602 provides a useful review of marital privilege.

6 In *R v Howse* [1983] NZLR 246, 251, Cooke J observed: "[A] person should not suffer temporal prejudice because of what is uttered under the dictates of spiritual belief".

7 The value is the ability of a patient to consult a medical practitioner or clinical psychologist (as defined) in frankness and without fear of disclosure: *Pallin v Department of Social Welfare* [1983] NZLR 266, 275.

patent attorney[8] bears a similar rationale to that which buttresses legal professional privilege. It has long been accepted that, whether or not litigation is in view, the fostering of a climate of confidentiality promotes full disclosure and as a corollary maximises the quality of legal advice.[9]

In adjudicating upon a claim to any of these privileges, a court is not required to test the value of the specific relationship from which the privilege may spring. That public policy aspect of the evidentiary enterprise is not open to reassessment. The relative values of cogency and confidence have already been set.

III. Embedding Confidence in a Non Specific Context - The Balancing Exercise of s 35

Section 35 of the Evidence Amendment Act (No 2) 1980 vests in the courts a discretion to excuse a witness from giving evidence (whether orally or by producing a document). The section resulted from the recommendations of the Torts and General Law Reform Committee.[10] It advocated statutory embedding of the judicial practice of disallowing a question or permitting a refusal to answer, based on the confidential nature of the communication. This would regulate on a case by case basis the respective public interests in the disclosure of relevant material and in the maintenance of confidentiality. Hence the epithet "ad hoc", which has been coined as shorthand for the Committee's view that this was a more appropriate response than the establishment of further relationship based categories of privilege.

35. Discretion of Court to excuse witness from giving any particular evidence - (1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would be otherwise compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.

(2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:

(a) the likely significance of the evidence to the resolution of the issues to be decided in the proceeding:

(b) the nature of the confidence and of the special relationship between the confidant and the witness:

(c) the likely effect of the disclosure on the confidant or any other person.

(3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness

8 This is a new privilege inserted by the Evidence Amendment Act (No 2) 1980 and has been described in *Whangapirita v Allflex New Zealand Ltd* (1991) 5 PRNZ 151, 152 as "unique to New Zealand".

9 Both solicitor-client privilege and litigation privilege bear the same rationale: baring the breast to obtain proper legal advice: *R v Uljee* [1982] 1 NZLR 561, 567.

10 *Professional Privilege in the Law of Evidence*, Torts and General Law Reform Committee, 1977. The Report's primary purpose was to explore whether groups such as psychologists, bankers, counsellors, citizens advice bureaus, teachers, social workers and journalists should each have a separate evidentiary privilege. The Committee also reviewed the existing privileges arising from the marital, spiritual and medical contexts.

concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

(4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.

(5) In this section "Court" includes -

(a) Any tribunal or authority constituted by or under any Act and having the power to compel the attendance of witnesses; and

(b) Any other person acting judicially.

In section 35(2) Parliament adverts to the factor which may outweigh relevance: "... the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communications between such persons". But the court is not entirely free in setting the balance. It must take into account the matters laid out in subsection (2): the likely significance of the evidence, the nature of the confidence and of the special relationship between confidant and witness, and the likely effect of disclosure on the confidant or any other person.

"Confidant" is used in the section to represent the imparter of the confidence.[11] However it is clear the discretion is protectively geared to excuse from normal witness obligations the person in whom the confidence has been reposed. In ordinary language this person would be considered the "confidant".[12] Yet to attribute the passive role to "confidant" would result in the section not making sense, especially when the mandatory factors of s 35(2) are considered. For example, s 35(2)(b) asks the court to consider "the special relationship between the confidant *and* the witness". Seemingly the drafters of the section intended, and judicial decisions assume without question, that "confidant" is a reference to what, in ordinary language, would be considered the "confider". The following discussion will therefore use "confidant" in its strained statutory sense, to represent the person making the original disclosure.

IV. Procedural Aspects - When, by Whom and About What May a Claim to the Ad Hoc Privilege be Made?

Section 35(3) provides for the perceived need to allow the issue of admissibility, based on an application for the exercise of the discretion, to be determined before trial.[13] However the Committee conceded that disposition of the application may not occur until the trial proper, as the significance of the evidence may be unable to be assessed out of context.[14]

1. In whom is the privilege vested by the exercise of the discretion?

An application may be made by any party or by the witness concerned. This raises the question of the precise nature of the privilege. Is it testimonial, belonging to the witness being asked to disclose? Or does it rather reside in the confidant, who may then seek to disable the witness from recounting or producing the confidential communication to the court?

11 While the structure of the section changed between the Report and the legislative enactment, "confidant" appeared in the Committee's draft version of the section.

12 "Confidant" has been defined, for example, as "a person entrusted with the knowledge of one's private affairs", *New Shorter Oxford English Dictionary*, 1993.

13 See above note 10, 74.

14 Idem. This occurred, for example, in *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43.

The question has been answered in *R v Howse*[15] where the accused, charged with murder, unsuccessfully claimed confessor-minister privilege in respect of phone calls to a pastor made after the homicide. The alternative application under s 35 was only faintly pursued and the Court of Appeal gave it short shrift, holding in the course of its refusal that s 35 was testimonial in nature. The section did not disable an otherwise willing witness on the initiative of a reluctant confidant (the factual basis of *R v Howse*). This was applied in *R v Nielson*[16] where Tompkins J adopted the words of Cooke J in *R v Howse*:[17] "[The section] does not authorise a direction that [the witness] refrain from disclosure, it goes only to whether he can be compelled to do so". That the privilege provides a shield for a witness and not a sword for the confidant has been reaffirmed in passing by the Court of Appeal in *R v Kiu*.[18]

2. Is s 35 available in interlocutory proceedings?

It might be submitted that the section is designed to operate only in relation to obligations cast upon a witness at the trial proper. The section threshold confers a discretion to "excuse a witness". Subsection (3) sets the timing of the application as running from before "the commencement of the hearing". Subsection (5) contains an extended definition of "Court", but even it seems directed to the substantive hearing with its reference to "power to compel the attendance of witnesses". It might be reasonable to infer that the intent of the section would not be served by applying the discretion in interlocutory proceedings.

That view was taken by Barker J in *Sutton v NZ Guardian Trust Co Ltd.*[19] While conceding that s 35(3) permitted a pre-trial application, his Honour held the section was not operative in relation to the process of discovery, being confined to applications to excuse witnesses or resist production of documents. However the Court of Appeal in *European Pacific Banking Corp v Television New Zealand Ltd*[20] took the opposite view. Comment upon the procedural ambit of the section arose in the context of an action for breach of confidence, involving a journalistic source.[21] Application had been made for an injunction restraining the defendant's use of confidential documents in a television programme. The plaintiff sought disclosure of the source of the documents. The defendants claimed confidentiality in response to the interrogatory and pleaded the defence of iniquity in relation to the substantive application; that is, that the public interest in broadcast of the content overrode that in maintaining confidentiality where a fraud, or unlawful or improper conduct is disclosed.

The Court of Appeal upheld disallowance of the interrogatories, seemingly because the case for disclosure of identity was not considered sufficiently strong.[22] The precise basis of the decision is not entirely clear[23]

15 See above note 6.
16 Unreported, Tompkins J, 23 November 1988, HC, T25/88.
17 See above note 6, 251.
18 [1990] 1 NZLR 340, 344.
19 Unreported, Barker J, 23 June 1986, HC, A 835/84.
20 [1994] 3 NZLR 43.
21 This is the first case on journalists, even though it is clear from the Reform Committee Report that s 35 was intended to operate in this context. See above note 10, 70.
22 See above note 20, 48. It is inferred that because the conduct of the trial proper would be likely to focus on the defence of iniquity, the identity of the source who provided the documents was not relevant to that issue. That is the reason the Court preferred to leave the issue of whether s 35 should be exercised to the trial judge, observing that: "If the plaintiffs

and the Court preferred to leave the weighing exercise to the trial judge. Nevertheless, the decision presented the opportunity to state that the exercise of the discretion may be appropriately sought at both interlocutory and full trial stages:[24]

> The Courts ... recognise that there is a legitimate public interest in protecting media sources from unnecessary revelation. In a breach of confidence case this can be weighed, together with other relevant considerations, both at the interlocutory stage and at trial. The general discretion conferred by the Evidence Amendment Act (No 2) 1980, s 35, applies at both stages.

3. Is identity of the confidant protectable per se?

The Committee specifically contemplated the use of s 35 to provide a shield for a journalist-witness, unwilling to disclose the identity of a source.[25] That ability to veil identity is assumed by the Court of Appeal in *European Pacific Banking Corp v Television New Zealand Ltd.*[26] Yet it can be argued that the statutory focus of protection is simply the disclosure itself.[27] Otherwise the mandatory weighing exercise to set the competing public interests would be meaningless, as it would require assessment in a vacuum.

The likely significance of the confidence (s 35(2)(a)) might be determined without disclosure of identity, but the remaining factors would seem to require it. Of course a court could be persuaded of the existence, in principle, of a "special relationship" between an unidentified confidant and the witness. But it might be difficult to qualitatively assess the "special" nature of the relationship or the confidence which sprang from it (s 35(2)(b)) in the absence of a factual basis.[28] The relative worth of the relationship may be influenced, if not by actual identity, at least by the status of the confidant in relation to the witness. Equally, it may not be meaningful to attempt to measure the likely effect of disclosure (s 35(2)(c)) unless the court turns its attention only to the deleterious effect upon other similar relationships. The effect upon the individual confidant (also contemplated by the section) may be impossible to assess in the absence of their identity being known.

Perhaps any uncertainty as to the use of s 35 to veil identity falls to be resolved by analogy. In relation to solicitor client privilege, the courts have been willing to treat the identity of a client as protectable. In *Rosenberg v*

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succeed on the iniquity issue, the likelihood of their obtaining an order for disclosure will no doubt be much increased". Idem.

23 The Court did comment that it was not based upon application of the "newspaper rule", which establishes that generally, in actions for defamation or slander of goods, news media will not be compelled to disclose sources at the pre-trial discovery. This is the effect of *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] I NZLR 163 which also establishes that the "rule" is not available at the trial proper. In *European Pacific Banking Corporation v Television New Zealand Ltd* itself the Court acknowledged no instance existed in which the rule had been extended to operate in a breach of confidence action and was clear that it was not prepared to do so in determining this appeal. See above note 20, 48.

24 Idem, per Cooke P. The judgment goes on to posit the iniquity defence as itself raising a barrier to an order for disclosure of the source, but makes no positive ruling on this basis.

25 The Report's ultimate rejection of a separate journalistic privilege in favour of the discretionary regime concentrates almost entirely upon disclosure of the identity of the source. See above note 10, 57-71.

26 See above note 20.

27 DL Mathieson, *Cross on Evidence* (5th edn, 1996) 294. Mathieson asserts protection might extend only to the content of the document supplied, rather than to the identity of the supplier.

28 "The test is in two parts. First there must be 'a relationship of a kind that would encourage the imparting of confidences' *and* 'that has a public interest element in it'. The first is necessarily fact dependent." Observed in *R v Lory (Ruling 8)* [1997] 1 NZLR 44, 48.

Jaine[29] execution of a search warrant to gain access to a solicitor's appointment diary was refused on the basis that the diary contained privileged information in the form of brief details of the need for advice. In proceedings to determine the validity of the warrant, the Court of Appeal left open the possibility that disclosure even of a client's name, if given in confidence, could be a breach of privilege.[30]

Logically solicitor-client privilege should not attach to client identity, since the privilege resides in the client. Surely the legal adviser must name the client in order to successfully assert the relationship of assistance and advice in which the claim is grounded? The open question of identity became the central issue in *Police v Mills*.[31] Blanchard J held that it is possible that a client's name will be privileged if four conditions exist: the client has disclosed the name in confidence; the solicitor is acting as a legal adviser; the client is not a party in litigation; the client is acting in the public interest or the client's identity would, in the circumstances, be incriminating information.

In relation to s 35, what might seem a specious exclusionary argument in relation to confidant identity is sustainable by retreating to the actual wording of the section. However it is likely that the court, if squarely confronted with argument upon the issue, will draw on its conceptual heritage in this other area of privilege and treat identity as necessarily embraced by the section's intent, if not its literal wording.

V. Section 35 and the Non-Disclosure Network - The Wider Net of Law About Confidence and the Forensic Process

The savings provision of s 35(4) ensures the discretionary grant does not derogate from other remedies available to protect a confidence. The legal advice relationship aside, when the issue of a confidential communication arises there may be several routes to resisting disclosure. A specific statutory head of relationship based privilege within the 1980 amendment may determine the claim. Alternatively, a provision in another statute may touch on the specific context or subject matter of the confidence and give it privileged status.[32] If no statutory provisions apply, there are two other routes to non-disclosure, apart from an application under s 35.

The first is the common law doctrine of public interest immunity, whereby the public interest in non-disclosure outweighs the public interest in ensuring that all relevant evidence is placed before the tribunal of fact. The second is the court's equitable power to restrain a breach of confidence if the information has a quality of confidence, was imparted in circumstances importing an obligation of confidence and its unauthorised use would be detrimental to the party who communicated it.

Both devices were traversed in *D v Hall*,[33] a case which exemplifies recognition of the range of bases for non-disclosure. A declaration was

29 [1983] NZLR 1.

30 Parliament has itself conceded that identity may be the subject of a claim to privilege per se. Section 24(2) of the Serious Fraud Office Act 1990 seems to accept the possibility of privilege for client identity and closes the option of claiming it in the context of a serious fraud investigation.

31 [1993] 2 NZLR 592. Ms Mills, a barrister and the owner of a vehicle involved in an incident, was served with a notice under s 67(1) Transport Act 1962 requiring her to give information as to the identity of the driver. The day after the incident a solicitor had received instructions from the male driver and instructed Ms Mills, who agreed to act. She asserted solicitor-client privilege in declining to answer the notice.

32 See above note 3.

33 [1984] 1 NZLR 727. (Also reported sub nom *Re A* (1984) 3 NZFLR 52.)

sought as to whether information received by a solicitor in confidence, while acting for a client, must be disclosed to the client. The natural mother of a child (adopted under a closed adoption arrangement) claimed access to the file of her solicitor which would have revealed the names of the adoptive parents, contrary to their wishes.[34] The court indicated, obiter, that, if asked, it would have restrained the breach of confidence or resorted to the public interest to avoid the hampering of the adoption process. Effectively the court was indicating awareness that it held within its remedial arsenal both the equitable jurisdiction and the common law concept of public interest immunity. Hillyer J likened the latter to s 35 of the 1980 Act, stating that it was "statutory recognition of the effect public interest may have on the disclosure of information received in confidence".[35]

The boundaries between the common law concept of public interest immunity and the ad hoc privilege of s 35 are not determined. The Court of Appeal in *R v Secord*[36] reflected the current judicial approach when it commented that s 35 "takes up the same theme" and observed that in the specific context of probation officer and client in that case:[37]

> [W]hile by virtue of subs (4) of s 35 it might be possible to claim confidentiality independent of the section, for all practical purposes the grounds for doing so are subsumed in it, and there is no advantage in looking beyond it, either for the claim or the adjudication upon it.

VI. THE PRIVILEGE IN ITS STATUTORY CONTEXT: THE "BACKSTOP" OPERATION OF THE DISCRETION

Section 35 can have evidential potential as a "backstop" where a communication fails to qualify for privileged status under a specific regime. The Court of Appeal was quick to assert this early in the life of the section in *R v Howse*:[38]

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

However the Court made it clear that the "backstop" effect could only occur where the witness was unwilling and it was the absence of this condition which obviated any necessity for the Court to rehearse the factors which would enliven the discretion. A claim to privilege arising from the medical relationship in *Pallin v Department of Social Welfare* provided the same Court some months later with the opportunity to underscore again the ability of s 35 to act as a second level filter.[39] Several applications have since been made in an attempt to persuade the court to set this evidential barrier,

34 This case was prior to the Adult Adoption Information Act 1985 (which provides a mechanism for natural parent-child contact). The child himself made contact with the mother during the proceedings, however the matter continued to disposition because the issue was one of concern to the legal profession as a whole.

35 See above note 33, 736 (62).

36 [1992] 3 NZLR 570.

37 Ibid, 573.

38 See above note 6, 251, per Cooke J.

39 [1983] NZLR 266, 269 per Cooke J: "Sections 32 and 33 ... together with s 35 ... constitute a comprehensive code as to doctor-and-patient privilege". Again the facts of the case were not considered to warrant exploration of precisely how the backstop regime would operate.

where a specific claim to privilege will prove unsuccessful and the witness is unwilling to disclose.

In *R v Nielson*[40] a claim to medical privilege under s 33 of the Evidence Amendment Act (No 2) 1980 was unavailable to prevent disclosure of a statement made by an accused, charged with kidnapping, during the course of his treatment by a medical practitioner. The statement concerned the time the accused had received a human bite, and would, if admitted, have significantly corroborated the complainant's account. A ruling was sought on behalf of the medical practitioner as to whether she could be excused on the basis of s 35. Tompkins J held the likely significance of the evidence was high in determining whether the accused was present (s 35(2)(a)). It was accepted without question that a "special relationship" existed from the clinical context and that the disclosure fell within it (s 35(2)(b)). The effect of disclosure was obviously an increased risk of conviction for the confidant-accused (s 35(2)(c)). Despite the comments of the Court of Appeal in *R v Howse* about the liberating potential of s 35 in relation to the particular privileges, Tompkins J thought it inappropriate to reset judicially the parameters of the limited protection Parliament had already chosen to give under medical privilege.[41]

However in *R v Rapana*,[42] the fact that section 35 was exercised in just this manner gives force to the case specific nature of the discretion. There an accused unsuccessfully claimed criminal medical privilege in relation to statements made during an informal psychiatric assessment. The nurse who had conducted the interview in the presence of a police officer could not be considered to fall within the extended definition of "registered medical practitioner" in s 33(4) as no course of treatment, required by the definition, had been commenced.

On the application under s 35 Thomas J found a "special relationship" on the basis that the accused perceived the nurse to be acting on behalf of the hospital. As a corollary, the communication was imparted in confidence in the expectation of use for assessment purposes. No explicit regard to the other mandatory factors (significance of the evidence or the effect of disclosure) is disclosed in the judgment. The discretion's exercise is grounded in the unfairness of evidential use of an interview conducted for a perceived clinical purpose. This regulation of police conduct via the exclusionary effect of s 35 is directly adverted to:[43]

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

R v Nielson and *R v Rapana* share a common acknowledgment of the value of the medical relationship and of confidences arising within that context. However each takes a different context permitted by s 35(2)(c) in which to weigh the competing public interest factors. In *R v Nielson* the

40 See above note 16.

41 In *Howse* itself the Court of Appeal saw the relationship between the specific privilege and the ad hoc regime operating together in the opposite fashion: "[T]he very existence of section 35 is a reason for not placing an unduly wide interpretation on section 31". See above note 6, 251.

42 [1995] 2 NZLR 381.

43 Ibid, 384.

"likely effect upon the confidant" was considered. In *R v Rapana* the effect of the breach on "any other person" inferentially is given real weight.[44] The decision can be viewed almost as an amplification of the exemption in s 33(3): medical privilege does not attach to court or other lawfully authorised examinations, but exclusion based on s 35 may apply to those informally conducted for clinical purposes which are then sought to be used for their evidential value.

Exercise of the discretion in *R v Nielson* would have undercut the purpose of s 33, which on its face is to provide very limited protection in criminal proceedings. The reluctance of Tompkins J to redraw its practical boundaries by use of the discretion is attributable to the desire to avoid such an outcome. The different result in *R v Rapana* can be reconciled to some degree, if that decision is regarded as driven by considerations of essential unfairness. Even so the decision illustrates the simple ability to avoid the exigencies of a specific privilege regime.

Briefly considered now is the use of s 35 to evade the restrictive parameters of the remaining specific privileges contained in the Evidence Amendment Act (No 2) 1980.

Marital privilege (s 29) does not apply to partner communications made to the witness-spouse before the formal status of husband and wife is attained. Section 35 could ensure congruence of protection of communications arising within a conjugal relationship, of which part was spent informally.[45] Nor does marital privilege protect a partner from testimonial compulsion in relation to communications within de facto or same-sex partnerships. Yet invasion of such informal relationships may wreak damage similar to that which is the perceived justification for testimonial privilege conferred upon the formally married. This analogy provides a natural starting point for an application under s 35, for the informal conjugal partnership is readily capable of characterisation as a "special relationship", quintessentially possessing confidence.[46]

In terms of the specific privilege of s 34 relating to the patent attorney relationship, Barker J in *Yves Saint Laurent Parfum v Louden Cosmetics Ltd*[47] adverted to the use of s 35 where the specific privilege would not condition disclosure. The comment is obiter and is grounded in the question of whether the specific privilege could be available to English trade mark and patent agents. Drawing the inference that s 34 is domestic in ambit, his Honour observed:[48]

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

The "backstop" effect is not confined to the privileges contained in the 1980 amendment. *Martin v Reid*[49] is an example of its operation in relation to

44 The judgment does not deal explicitly with each mandatory consideration.

45 Alternatively, an unwilling spouse may prefer to look instead to spousal non-compellability under s 5(6) Evidence Act 1908 for freedom from forced disclosure by avoiding witness status at the suit of the prosecution.

46 It may be submitted there will be problems establishing the indicia of such relationships on an evidential level. But given that the Court of Appeal in *R v Secord*, see above note 36, 574, indicated the "special relationship" may arise out of the *fact* of the confidence having been reposed in the witness, this may not be such a barrier.

47 Unreported, Barker J, 26 July 1995, HC, CL 55/93.

48 Ibid, 7.

49 (1985) 3 NZFLR 725.

the statutory privilege in s 18 of the Family Proceedings Act 1980.[50] The application to set aside a subpoena related to an interview between the claimant, a Family Court counselling coordinator, and the now defendant-mother in wardship proceedings. It concerned a request by the father that the mother of the child (then unborn) take part in a counselling session in relation to the child's future welfare. The specific privilege of s 18 could not apply, but successful resort was had to the ad hoc discretion. The significance of the evidence of the mother's alleged non cooperation was "slight" in relation to the merits of the case (s 35(2)(a)) and it had been stated in writing on official letterhead that the proposed discussion was to be confidential (s 35(2)(b)). Most persuasive for the judge was the factor which came into play under s 35(2)(c). The likely effect of the disclosure on the confidant or other persons would be essentially a loss of faith in the legal system:[51]

> ... I conclude without difficulty that the public interest in the preservation of confidence in and encouragement of use of the counselling system, which is an integral part of the workings of the Family Court, outweighs the public interest in having the evidence disclosed to the Court.

Section 35 does not render vacuous the protections in sections 29 to 34 of the 1980 amendment or the context sensitive privileges of, for example, the Family Proceedings Act 1980. These provisions still provide the primary route to non-disclosure. However where a confidence has its genesis in a legislatively addressed relationship or context and yet has fallen outside that protective regime, section 35 provides a vehicle by which the value of the confidence can be reset. The question is the same as for applications which are solely dependent upon the existence of section 35: whether the public interest is better served by the maintenance of confidentiality and the consequent withdrawal from the court of certain forensic capacity.

VII. The General Approach to s 35 as a Regime in its Own Right

R v Secord,[52] an appeal direct to the Court of Appeal from the District Court, contains some of the most general observations about the nature and scope of the discretion where it falls to be considered as a remedy of first impression. Secord was charged with benefit fraud on the basis of omitting to disclose she was living in a relationship in the nature of marriage. The prosecution sought to call a probation officer to whom she allegedly made admissions while being interviewed for a pre-sentence report about an unrelated matter. The officer declined to give evidence, claiming (inter alia) s 35. Because the probation officer had a duty to report to the court in the context of the sentencing process, the District Court took the view that the discretion was not available. Nor did it accept a claim to privilege could be sustained under the common law.[53]

50 Section 18 creates an absolute privilege in respect of any information, statement or admission disclosed or made to a counsellor exercising functions under Part II of the Act.

51 See above note 49, 728. Cf *M v M* (1988) 5 NZFLR 539 in which the District Court adverts in passing to the use of section 35 by persons to whom disclosures are made concerning sexual abuse of a child by his or her parent. Where the alleged offending is denied and no criminal proceedings ensue, later custody or access proceedings raise the difficult question of disclosure of those allegations and supporting evidence. The judge recognises (with some misgiving) that s 35 may be available to social workers, therapists, hospital workers, psychologists and psychiatrists.

52 See above note 36.

53 Under the common law the communication must be imparted on the understanding that it will not be disclosed. The District Court Judge felt that element could not be satisfied.

In relation to the threshold requirements (prior to the assessment of whether the public interest lies with relevance or non-disclosure) the Court of Appeal characterised the "special relationship" required by s 35 as one which "encourages the imparting of confidences and has a public interest element".[54] This acknowledges that it is not the section's intent to provide protection simply because a transaction was conducted in confidence. Nevertheless, a liberal view is taken of the way in which this public interest imbued relationship could arise, either through some "office or duty reposed in the confidant, or even perhaps by the very imparting of the confidence itself".[55]

The decision also gives a potentially wide sweep to the situations in which the section may be attracted, by ruling that a disclosure for a limited purpose does not necessarily destroy confidentiality for all other purposes.[56] In separating the context in which the confidence was made and that in which disclosure was sought, the Court reduced the apparently vitiating effect of the duty to disclose cast on the probation officer by the Criminal Justice Act 1985. The appellate approach focused upon whether disclosure in *this* proceeding would be a breach of confidence and seemed content on a positively answered basis to find the threshold requirements of "special relationship" and "confidence" met. Overturning the District Court's refusal to rule s 35 available, the Court of Appeal remitted the matter for the weighing exercise to be undertaken.[57]

Despite the open approach to the threshold requirements which give entry to s 35(2), the decision acknowledges the tension inherent in the weighing exercise which follows:[58]

> Section 35 is concerned with court proceedings. If the evidence is important to the determination of the issue, then it is likely that the public interest will favour disclosure; the more serious or important the issue, the more likely that is.

This is indicative of a judicial reluctance to allow s 35 to veil from scrutiny a confidence, the content of which is itself a fact in issue or highly relevant to a fact in issue. The obiter statement is perhaps only a recognition of the similar but somewhat differently couched consideration in s 35(2)(c) - "the likely effect of the disclosure on the confidant or any other person". But the observation may point to the more predictable outcome in cases where the privileged item is highly cogent.

VIII. RELATIONSHIPS OF CONFIDENCE - EXAMPLES OF APPLICATIONS UNDER S 35

Section 35 is intended to have a discursive sphere of operation. "Court" is given an extended definition in s 35(5) for the purposes of an application. It is also clear that the section is not to be approached on a class basis:[59]

Counsel for the accused relied principally on the common law, maintaining that reliance on appeal. But, as Hardie Boys J stated: "... [counsel] was disposed to accept that the relevant considerations are encapsulated in s 35". Idem, 572.

54 See above note 36, 574.

55 Idem. This echoes the approach to ministerial privilege (s 31) evidenced in *R v Howse*, in which the Court of Appeal indicated there need be no prior relationship between the minister and the confessor.

56 Idem.

57 While the case illustrates the wide nature of the contexts from which a claim might arise, the Court was careful to consider the practical effect of its decision on parole supervision work. It indicated the best course where a parolee might disclose offences was to refuse to promise confidentiality.

58 See above note 36, 575.

Decisions on applications of this nature cannot be made solely by reference to any occupational group. It is not possible to say, for example, that all communications of any type with a probation officer, a victim support officer, psychologist or other professional person, will always be excused because of the nature of the relationship. The section requires that in each case matters be examined which relate not only to the special relationship but also to the public interest in having the evidence disclosed to the Court in the particular case.

Discussion of the kinds of applications which have been made on the exercise of s 35 as a first recourse will nevertheless be relationship driven in order to impose some framework upon the domain.

1. Applications in criminal proceedings

(a) Accused and co-accused as confidant

The successful use of s 35 as a first level filter in criminal proceedings may be quite problematic. In *R v Adams*[60] the Crown wished to cross-examine an accused, Adams, about a discussion with a co-accused regarding management fees not accounted for in the company books. The Crown case was that these were wrongly taken in accord with a conspiracy to defraud. Adams indicated the discussion had occurred after the trial's commencement and within the court precincts. Objection under s 35 was taken by both Adams' counsel and counsel for the co-accused. Tompkins J held that a special relationship can arise from the status of co-accused and that information exchange for the purpose of a proper defence would be regarded by them as a confidence. Thus the entry point to s 35 was established.

In terms of the rehearsal of the first factor in s 35(2), it was accepted that the issue of non-accounting for management fees would be of considerable importance in the proceedings. However, his Honour characterised the nature of the special relationship existing between co-accused as "a good deal less significant" than other relationships which raise issues of confidentiality.[61] Tompkins J reasoned that in such contexts confidence is regarded as inherent, not a situation which necessarily exists between co-accused. In terms of the final factor to which weight must be given, the likely effect of the disclosure on the confidant or any other person was not a consideration of any "significance".[62] Therefore while a special relationship may be found to exist between co-accused within which confidences may be communicated, the balancing exercise may be more likely to be determined, as here, in favour of disclosure.

(b) Police officer and complainant as confidant

In *Police v Morgan*,[63] during the hearing of charges under the Transport Act 1962, the prosecution sought to call a police officer who had received

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59 *R v S* (1995) 13 CRNZ 637, 640.

60 Unreported, Tompkins J, 16 October 1992, HC, T 240/91.

61 Ibid, 4. Presumably by "significant" Tompkins J meant in terms of the public interest in protecting the integrity of its communicative boundaries. His Honour cited examples of relationships considered more fitting for the protective purview of the section: banker and customer, social worker and client.

62 As the proceedings were before a judge sitting without a jury, an exploration of the likely significance of the evidence via a voir dire was not conducted. This may explain the lack of assessment under s 35(2)(c).

63 [1993] DCR 746.

the defendant's complaint of assault against the arresting officer.[64] The evidence had the potential to reflect upon the credibility of the defendant (s 35(2)(c)). The application was grounded in the special relationship between the complainant and the police, under which some degree of privacy is an inherent part of the complaint procedure. Judge Barber was not prepared to draw the foundation analogy between the police officer-complainant relationship and those between confidants and "journalists, counsellors, school teachers and the like" sufficient to render it "special". Nor did the communication qualify as a "confidence".[65] The decision seems predicated on acceptance of the prosecution submission that where a complainant is also a defendant and the twin status arises from the same transaction, s 35 is not appropriate.[66]

There is a dilemma to be faced of course where a person enmeshed in the criminal justice system seeks to make a complaint arising from the same transaction. Yet the ruling appears to give no weight to the defence submission that public confidence in complaint procedures may well be damaged where what is contained in a statement made in respect of one procedure may be used against the confidant in another. The 'twin status' rationale (that defendant status overrides confidant status) is unconvincing. It does not sit well with the approach of the Court of Appeal in *R v Secord* which makes a clear separation of proceedings for the purposes of the s 35 privilege.[67] This is another example of the obvious tension between cogency and confidence.

(c) Psychologist and court ordered client as confidant

A similar twin status situation, but with a quite different result, is *R v S*.[68] Disclosures by the now complainant in the trial of her father for sexual offences and concerning her sexual abuse were made years before, during court ordered counselling as part of a sentence. The evidence of the psychologist, if given, would lay the foundation for the issue of prior inconsistent statements and for traversing the appropriateness of the interviewing techniques used to elicit the disclosures.

While Williamson J accepted the existence of a "special relationship" which it was in the public interest to protect as confidential, the public interest in relevant evidence being available was given the greater weight. Two factors underpinned the refusal to excuse the witness. First, credibility was the central issue in the trial; secondly, some details of the transaction were already in the hands of the defence, since the material had been made available to the police, with the complainant's consent. The fact that the disclosures had been made during a mandatory interview as a result of a sentencing order was not given any particular weight. Perhaps the difference between *R v Secord* and *R v S* lies in the fact that in both trials Secord bore the same status of defendant. In *R v S* the status of the person making the disclosure in a mandatory context changed in the second set of criminal proceedings from defendant to complainant. That may have brought into play more vigorously the public interest in allowing relevance to prevail.

64 Interestingly there is no reference in the case to the unwillingness of the witness to disclose, a necessary condition for exercise of the discretion.
65 See above note 63, 750.
66 Submissions of legal professional privilege and unfairly obtained evidence were also unsuccessful in attempting to exclude the statement.
67 See above note 36, 574.
68 See above note 59.

(d) Victim support officer and putative victim as confidant

The approach in *R v Bain*,[69] another twin status situation, accords more with *R v Secord*.[70] The application concerned the proposed evidence of a victim support officer who had spent time with the "victim" (the only surviving family member and now the accused) in the days immediately following the homicides and up until the time of arrest. The evidence would have referred to the times the officer met with the accused and his wider family, his demeanour during those times and the discussions concerning the funeral arrangements. Williamson J held the evidence to be of limited significance since it contained no admissions or other indications of guilt. The relationship between a victim support officer and a person being treated as a victim was acknowledged as "special", in that for it to be successful an element of confidence was necessary. Inferentially therefore both s 35(2)(a) and (c) were satisfied.

The Crown had submitted that an issue of confidentiality could not arise in relation to the alleged perpetrator, since they did not bear the status of victim. (This of course was to beg the very question at issue in the trial proper.) The trial judge felt that the important focus for the court was the context of the relationship at the time the observations and statements were made. The evidence of the officer on the voir dire disclosed that she had assured the family of confidence and there was no indication of any evidentiary ramifications of disclosures made in her presence. On that basis Williamson J ruled that the witness be excused. This approach seems consonant with the acceptance by the Court of Appeal in *R v Secord* that the disclosure context is vital in assessing an application under s 35. Williamson J is careful to ground the ruling in the context of the trial, explicitly stating that the decision should not be considered to establish a class of protected communications arising out of the role of victim support officer.[71] Clearly if the evidence had been more relevant (for example containing some partial admission), it would have been more difficult to resolve the balance in favour of non-disclosure.

(e) Counsellor and inmate as confidant

R v Lory (Ruling 8)[72] is a most recent example of the tension between cogency and confidence in the criminal arena. It concerned admissions made during a preliminary interview conducted by a counsellor with the accused, now charged with several murders as the result of fire setting. At the time of the interview the accused was a prison inmate and had disclosed sexual abuse to a social worker, who had requested the counsellor to act. Citing the test in *R v Secord*[73] Hammond J found that the preliminary nature of the interview was not a bar to reaching the threshold of the discretion:

> Quite apart from the actual form of the transaction, the inherent characteristics of even an embryonic relationship between a sexual abuse counsellor and the victim seemed to me in everyday language to properly qualify (to use the Court of Appeal's language) as being a "relationship of a kind that would encourage the imparting of confidences". And, to employ the Court of Appeal's formulation, there is a "public interest element" in services of that kind being available to victims.

69 Unreported, Williamson J, 22 May 1995, HC, T1/95.
70 See above note 36.
71 See above note 69, 6.
72 [1997] 1 NZLR 44.
73 See above note 36, 574.

In terms of the remaining factors in s 35(2), the statement was central to a fact in issue (identity of the arsonist) and the effect of disclosure on the confidant-accused was described as "shattering".[74] Nevertheless, Hammond J failed to find the balance lay with non-disclosure. While the relationship was ruled "special" despite its tentative and introductory nature, it was nonetheless considered to be at its "weakest point" at the time the admission was made.[75] This was given real weight and sits uneasily with the obiter comment by the Court of Appeal in *R v Secord* that the relationship may arise by virtue of the very imparting of the confidence. Such an approach in *R v Lory*, of testing the strength of the special relationship at the time of disclosure, must present a source of concern if it is widely adopted.

2. Applications in civil proceedings

(a) Employer and employee as confidant

Rankine v Attorney General[76] involved objection to the production of Security Intelligence Service documents on the twin grounds of public interest immunity and s 35. The claim was made in the context of an action arising from an alleged constructive dismissal of a female SIS officer because of a homosexual relationship with another officer. The plaintiff raised (inter alia) unfair discrimination, alleging that a male officer in the same situation had not been dismissed.[77] The file notes, internal Service memoranda, medical reports and correspondence concerned the male officer's interview with a psychiatrist, conducted at the request of the Director, and were relevant to the plaintiff's allegation of discriminatory treatment.

The approach rehearsed was that in *R v Secord* - a liberal attitude to the threshold requirements of "special relationship" and "confidence", bearing in mind the caveat about where the balance may ultimately lie if the evidence is highly relevant. The communications were not considered confidences, since Master Williams took the view that none of the communicators could have acted in the expectation that the contents would not be disclosed.[78] Nor was the Master prepared to find a "special relationship" arising, even from the communications per se. It therefore appears that while a ruling is made that the public interest in disclosure outweighs that in the preservation of confidences, the actual basis of the decision is that the threshold requirements of s 35(1) were simply not met. Discovery was ruled necessary in order for the plaintiff to undertake the comparison between treatment of her employment status and that of the other officer.

(b) Lessor and lessee (as mutual confidants)

In *Re Dickinson*[79] the application was made to resist disclosure of commercially sensitive information in the context of a contested rent review. Lease details, which were the subject of confidentiality undertakings

74 Hammond J at 52 indicated that the accused broke down during the voir dire at the possibility of disclosure of the contents of the interview, although his Honour expressed uncertainty about whether it was attributable to the prospect of the recounting of admissions or of details of the alleged sexual abuse. See above note 72, 42.

75 Idem.

76 (1992) 6 PRNZ 484.

77 The objection based on public interest immunity was disallowed on the basis that the documents concerned personal issues rather than matters of national security.

78 See above note 76, 494.

79 [1992] 2 NZLR 43.

between each lessor and lessee, were relevant to establish market rental levels. The Court of Appeal took the view that jurisdiction to set aside subpoenas might arise under s 35 or lie within the inherent jurisdiction of the court, based on abuse of process.[80] Both Cooke P and McKay J[81] indicated the remedies were based on the same principle of balancing the need to protect confidential information against the public interest in the Court having available relevant information. Here that interest was represented by the acknowledged difficulty in ascertaining genuine market rentals and the corollary that non-disclosure would therefore inhibit an accurate appreciation of the market. It was on this basis that the subpoenas were upheld, all three members of the Court appearing to determine the application on the basis of inherent jurisdiction.

(c) Journalist and source as confidant

European Pacific Banking Corporation v Television New Zealand Ltd[82] allowed the Court of Appeal to explore s 35 in the context of an action for breach of confidence, involving a journalistic source. The Reform Committee, in recommending the enactment of s 35, adverted specifically to the weighing exercise which would need to be undertaken in this context. The balance would lie between the need for information gathering not to be inhibited by fear of compelled disclosure and the danger of abuse of such a protective regime.[83] While the task was left to the trial judge, the decision presented the first opportunity to state judicially that the media context is an appropriate forum for the exercise of the discretion.

IX. Conclusion - Overview of the Discretion

Any attempt to synthesise the approach to s 35 risks ignoring its fundamental nature. The Courts are palpably aware of the cogency-confidence trade off inherent in the balancing exercise and it has been consistently stated that successful applications do not establish generic classes of protection.[84] Perhaps the most interesting issue is the variety of ways in which the court may rationalise a refusal to exercise the discretion.

1. Failing to find the factual basis of the special relationship established

R v Keogh[85] is a recent example of where the court may find the factual basis of the special relationship not made out. In the trial of the accused for alleged sexual abuse of his former partner's daughter, the Crown sought to lead evidence of an admission made to a sexual abuse counsellor. The disclosure was made during an interview instigated by the former partner which proceeded on the mistaken basis that the accused himself had been the subject of past sexual abuse. The Court of Appeal upheld the refusal to exercise the discretion, largely on the basis that the required special

80 Essentially the jurisdiction to set aside is based on the concept that the evidence the witness would give would be privileged or given in breach of confidence.

81 See above note 79, at 46, and 50 respectively.

82 [1994] 3 NZLR 43 This is the first case on journalists, even though it is clear from the Report of the Reform Committee that section 35 was intended to operate in this context. See above note 10, 70.

83 See above note 10, 69-72.

84 Eg *R v Secord*, see above note 36; *R v Rapana*, see above note 42; *R v Bain*, see above note 69.

85 Unreported, Henry, Keith and Barker JJ, 31 October 1996, Court of Appeal, CA 395/96.

relationship was "tenuous" at best and that the disclosure had occurred after the counsellor had indicated that the relationship could not proceed.[86] This theme of tenuousness was later echoed in the High Court decision of *R v Lory*.[87] There the preliminary nature of the interview did not disqualify the communication from protection, but the special relationship was described as "at its weakest" at the time of disclosure. That appeared to form the basis of the refusal to exercise the discretion.

It remains to be seen how these recent decisions can be reconciled with the earlier obiter statement of the Court of Appeal in *R v Secord* that the very fact of a confidence having been disclosed could be considered the genesis of the "special relationship".[88] It is probable that the Court of Appeal did not then have in mind a situation such as that in *R v Keogh*, where a person unsuccessfully attempts to form a "special relationship" with a professional and thereafter makes the disclosure. Nor does *R v Secord* provide any guidance on the "temporally tenuous" factor which is evident in both *R v Keogh* and *R v Lory* and which clearly influenced the outcome in both cases.

Certainly such a focus on the time of disclosure of the confidence does not sit comfortably with the approach to temporal issues within fixed evidentiary privilege regimes. For example, in order to claim ministerial privilege under s 31 of the 1980 amendment, it is not necessary to establish a previous spiritual relationship between the confessor and the minister in whom they have reposed a confession.[89] Characterising the integral strength of the relationship by reference to the time of the disclosure also sits somewhat uneasily with the more liberal approach to similar disclosures made during the preliminary or abortive stages of the solicitor-client relationship. The common law has long accepted that communications at the very outset of that legal professional relationship, or even where that relationship is not ultimately established, are nevertheless protectable by privilege.[90]

2. Restricting the operation of the section in terms of its factual bases

Another device is to restrict the factual bases upon which an application may be made, despite the apparently liberal approach to context in *R v Secord*. Two examples of this type of approach can be demonstrated.

In *Re Dickinson* McKay J expressed a passing reservation about whether s 35 could be properly claimed where there is a mutual agreement to keep confidentiality. His Honour took the view that the purpose of the section was not necessarily reflected in the factual basis of the application in that case:[91]

> The section appears to be more obviously directed to information received by one person from another in confidence. Here what is at issue is the detail of contractual arrangements made between parties who have mutually agreed to maintain confidence as to those arrangements.

86 The refusal to exercise also was supported by an element of what might be regarded as waiver under the more traditional privileges. The police obtained a written authority from the accused to seek information from the counsellor, who had advised the accused that if he gave such an authority the admissions would naturally be disclosed. Ibid, 2.

87 See above note 72, 42.

88 See above note 36. *Rankine v Attorney General is* another case in which the "special relationship" failed to be established and the fact of the communication was not of itself sufficient to remedy the defect. See above note 76.

89 *R v Howse*, see above note 6, 248.

90 *Minter v Priest* [1930] AC 558.

91 See above note 79, 50.

This brief comment is susceptible of interpretation. McKay J may be saying that s 35 was not intended to provide an evidentiary shield where parties exchanged promises to keep the contents of their commercial transaction confidential. If that is the basis of the observation then his Honour has a point. However if it was intended to raise the notion that section 35 is not an appropriate non-disclosure remedy where the parties have mutually turned their minds to the issue of confidentiality, then it is submitted that the comment is not well grounded.

When the Court of Appeal considered the ramifications of excusing a probation officer from giving evidence of client disclosures in *R v Secord*, it indicated the best future course was not to "promise" confidentiality.[92] That suggests s 35 is available where parties have explicitly turned their mind to the nature of the transaction. A similar view is implicit in *R v S*[93] where evidence was given that court ordered psychologists normally promised confidentiality to their clients. An application under s 35 was considered entirely appropriate, although unsuccessful on the merits. If section 35 were to be limited to situations where there was no mutual turning of minds to the question of confidentiality, its ambit would be considerably circumscribed. It is submitted that if that were the import of the obiter statement of McKay J in *Re Dickinson*, then it would need revisiting in the light of *R v Secord.*

A second way of confining *R v Secord* in effect, if not in principle, is evident from *R v Lory (Ruling 8)*[94] where Hammond J considered the availability of the discretion as rehearsed in *R v Secord* to be dependent on two conjunctive elements. The first and factually driven question is whether a relationship of confidence exists which would encourage the imparting of confidences. The second is whether that relationship possesses a public interest element. In relation to the first limb, the decision again raises the spectre of the need to revisit, on its merits, the obiter comment in *R v Secord* that the imparting of a confidence might itself generate the special relationship.[95] Hammond J also saw the second limb as susceptible of a narrow approach if a gloss is placed on "public interest element":[96]

> If it is meant as indicating something the law ought to recognise then the phrase is relatively uncontroversial. But if it is meant as indicating that the confidence must be transacted with somebody who holds some kind of public position (as for instance, a probation officer) then it narrows the scope of the section.

That speculation seems prompted by the observation of the Court of Appeal in *R v Secord* that the special relationship might arise "by virtue of an office or duty reposed in the *confidant*".[97] Thomas J in *R v Lory* approaches the section from the perspective of the recipient of the confidence, rather than its communicator (who, for the section to work, must be the "confidant" referred to by the Court of Appeal in *R v Secord*). But his Honour seems to be begging the same question: whether some formalistic approach to the link between confidant and the potential witness will be elevated to the status of a necessary condition of the special relationship. The judicial groundwork has now been laid for such a submission.

92 See above note 36.
93 See above note 68.
94 See above note 72.
95 See above note 36, 574.
96 See above note 72, 34.
97 See above note 36, 574. Emphasis added.

3. Devaluing the "special" nature of the relationship

This device posits a hierarchical valuation of confidential relationships. It was a factor in *R v Adams*[98] where Tompkins J took the view that while a relationship of confidence could exist between co-accused, it was not as "significant" as those which existed between banker and customer or social worker and client (where presumably the relationship inherently possesses an element of confidence). A similar approach was taken in *Police v Morgan*[99] where the police officer-complainant relationship was compared unfavourably with those of journalists, school teachers, counsellors and their respective confidants.

It is somewhat ironic to posit such a relativity of value. Clearly, a successful application does not establish a generic class of protection for the future.[100] But it appears that, paradoxically, a category approach may be a legitimate basis on which to deny relief.

4. Attacking the empirical basis which supports the rationale of the privilege

Opening the deeper issue of the public policy basis for the ad hoc privilege and asking whom it really protects is to do what cannot be done with the fixed privilege regime. This device is provocatively put by Hammond J in *R v Lory (Ruling 8)*:[101]

> Of course confidentiality counts. But it must be weighed against other aims and such matters as restitution and social justice. Regrettably all too often today assertions of privilege are made, not so much on a truly sustainable basis, as on the footing that such will extend the status of a "profession"; or, even more malignantly, operate as a protective device in case of claims against a professional.

These remarks echo the Law Commission's present resolve that the philosophical underpinning of the different evidentiary privileges be reopened and the empirical assumptions inherent in each rationale be tested.[102] *R v Lory* signals that this evaluative process is legitimately open to judicial adoption by virtue of the weighing exercise which must be conducted under s 35.

X. FINAL COMMENT

Despite the liberal approach by the Court of Appeal, both to the versatility of s 35 as a remedy[103] and to the context in which it might be claimed,[104] the courts at first instance have ruled more often in favour of disclosure. A number of ways in which the court can avoid exercise of the discretion have been rehearsed. Do these approaches render the setting of the competing public interests a fatuous exercise which effectively masks the indomitable pull of relevance?

Such a suggestion has been roundly rejected in *R v Dobson*,[105] somewhat ironically a case in which disclosure would have benefited the defence

98 See above note 60, 4.
99 See above note 63.
100 See above note 59.
101 See above note 72.
102 *Evidence Law: Privilege*, NZLC PP23.
103 See above note 6.
104 See above note 36.
105 Unreported, Hardie Boys, McKay and Blanchard JJ, 8 June 1995, Court of Appeal, CA 25/95.

position. There the Court of Appeal briefly explored the relationship between ad hoc privilege and s 25 of the New Zealand Bill of Rights Act 1990 which sets minimum standards of criminal procedure (including the right of the person charged to a fair hearing). The Court was firm in its view that the existence of s 25 neither swung the balance in favour of disclosure nor created a presumption which would displace the weighing exercise of section 35.[106]

This disclaiming of a mechanistic or presumptive stance (even where disclosure would benefit the defence) suggests that the weighing exercise must always be undertaken with full vigour in each context in which it is claimed. But the attraction of relevance will often be irresistible. Perhaps to allow it to be otherwise strikes at the heart of the function of the court as a place where justiciable issues are addressed:[107]

> Litigation is not a war, or even a game. It is designed to do real justice between opposing parties, and if the Court does not have all the relevant information, it cannot achieve this object.

106 Ibid, 8.

107 *Davies v Eli Lilly & Co* [1987] 1 WLR 428, 431, per Donaldson MR (quoted in *R v Lory (Ruling 8)*, see above note 72, 43).