LEGAL PROFESSIONAL PRIVILEGE AND THE 'COPY DOCUMENT CONUNDRUM'

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A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago

October 2009

Acknowledgments

Thank you to my supervisor Stephen Smith for your encouragement and guidance.

A huge thanks to my fellow tutors and honours students in Room 9N12
for your friendship and humour.

Thanks also to my friends and flatmates throughout my years at Otago University
for making my time here such a fantastic experience.

And to my family, especially Mum and Dad, for your endless love and encouragement.

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INTRODUCTION

The 'copy document conundrum' is best illustrated with a factual scenario:

> Bob has had business dealings with Mary. During the course of their dealings, Bob and Mary corresponded extensively through written letters. Mary ordered a significant amount of goods from Sally, purportedly on behalf of Bob. When Bob received the invoice for these goods, he refused to pay. He argued that he did not order the goods, nor were they ordered on his behalf with his authority. Nevertheless, Sally initiated an action against Bob to recover the price of the goods sold.
>
> The merit of Bob's defence – that he did not give authority for the purchase of the goods – depends on the terms of letters sent and received in his correspondence with Mary. Unfortunately, however, Bob did not preserve the letters he received, nor take copies of the letters he sent. So, for the purpose advising Bob on his best course of action and for use the proceedings Bob's legal adviser has gone to Mary directly and taken verbatim copies of the original correspondence (which she had luckily preserved).[1]

The common law position is that the original letters sent between Bob and Mary are pre-existing documents. As they were not created for a privileged purpose they cannot later attract privilege by being passed to a legal adviser for a privileged purpose.[2] Therefore, if the *original* letters had been obtained by Bob's legal adviser for the purposes of the proceedings, they would not attract privilege. On the other hand, if Bob was to *orally* communicate a summary of the content of the letters, or if he had memorised them and

[1] This scenario is adapted from *Chadwick v Bowman* (1886) 16 QBD 561 (*Chadwick*) which will be discussed in detail in Chapter Two.
[2] *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 (*Anderson*), *Waugh v British Railways Board* [1980] AC 521 (*Waugh*); *Ventouris v Mountain* [1991] 1 WLR 607, 616 (*Ventouris*); *Pearce v Foster* (1885) 15 QBD 114 (*Pearce*); *Baker v Campbell* (1983) 153 CLR 52 (*Baker*); *Waterford v Commonwealth* (1987) 163 CLR 54 (*Waterford*); *National Employer's Mutual General Insurance Association Ltd v Waind,* 141 C.L.R. 648 (*Waind*); *Guardian Royal Exchange Assurance of New Zealand v Stuart* [1985] NZLR 596 (*Stuart*).

was able to orally recite their exact content to his legal adviser for the purpose of the proceedings, such a communication would attract privilege.[3]

But what of the status of the *verbatim copies* created by Bob's legal adviser? Such copies have quite literally come into existence for a privileged purpose and thus should arguably attract privilege. On the other hand however, given the similarity of form and content between the copy letters and their non-privileged originals, it would be anomalous for the copies to attract greater privilege than the originals. Then again, if Bob was to orally recite the exact content of the original this would constitute a privileged communication, so why should a copy, likewise communicated for a privileged purpose, be treated any differently?

These conflicting arguments have resulted in the haphazard treatment of the privileged status of copy documents by courts throughout England, Canada, Australia and New Zealand. The issue has been plagued with conflicting principle and divergent authority, yet has been subject to little critical examination. While exploring the 'copy document conundrum' may seem like an obscure task, it raises important questions of substance and form, principle and convenience and the inherent tension of public interests underlying legal professional privilege.

Why would disclosure of a copy document be sought when the original from which it was created is a non-privileged document anyway? In the example above, there is nothing (in theory) to stop Sally from obtaining her own copies of the letters from Mary, or from Mary being required to produce the letters at trial. However, the original documents, while non-privileged, may be unavailable for some other reason. The original letters may have been destroyed, damaged or lost after Bob's copies had been created;[4] the correspondence could have been conducted electronically and the original documents may have been overwritten[5] or corrupted; the originals may be in a less useful form than a copy (for example if the correspondence had been carried out in Japanese and Bob had

[3] *Australian Federal Police v Propend Finance Pty Ltd* 188 CLR 501 (*Propend*), 543-544.
[4] *R v Board of Inland Revenue, ex p Goldberg* [1989] QB 267 (*Goldberg*).
[5] *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 (*Simunovich*).

translated the correspondence for the purposes of the proceedings);[6] or the originals may be in the hands of a third party who has become inaccessible for some reason.

Part One of this dissertation will provide a brief introduction to legal professional privilege. It will give a broad overview of the inherent tension of public interests underlying each branch of legal professional privilege and those underlying disclosure. It will summarise the core requirements of legal professional privilege and compulsory processes for disclosure where claims of privilege most frequently arise.

The judicial treatment of the 'copy document conundrum' by English, Canadian, Australian and New Zealand courts will be explored in Chapter Two. Four broad approaches can be distilled from this treatment. These approaches will be discussed in greater deal in Chapter Three. The foundations of each approach will be clarified and the merits of the approach assessed, both in terms of practical application and the theoretical merits of each approach. Given that the Evidence Act 2006 is now authoritative on the law of evidence in New Zealand, it will be considered whether sections 54 and 56 provide any guidance on the issue. Chapter Three will conclude with a suggested approach for New Zealand to the 'copy document conundrum'.

[6] *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* [2002] 1 WLR 479 (*Sumitomo*).

CHAPTER ONE:

LEGAL PROFESSIONAL PRIVILEGE

I. Introduction to legal professional privilege

Legal professional privilege at common law has two 'branches':[7] Legal advice privilege and litigation privilege. Broadly speaking, the Evidence Act 2006 encapsulates these respective branches. Section 54 establishes 'privilege for communications with legal advisers' which protects confidential communications between a person and a legal adviser made for the purpose of obtaining and giving legal services. Section 56 establishes 'privilege for preparatory materials for proceedings' which protects communications or information passing between a client and their lawyer and third parties if that communication or information was made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.

Legal professional privilege gives the holder of the privilege the right to resist disclosure of protected material in legal proceedings, even if that evidence is of critical relevance to the outcome of the proceedings.[8] Therefore there is an inherent tension between the public interests underlying each branch of legal professional privilege with those underlying disclosure. Legal professional privilege requires the restriction of access to certain material in order to facilitate effective representation; however this suppression of relevant evidence necessarily impairs the public interests underlying full disclosure.

[7] *Anderson* above n 2, at 658; *Waugh* above n 2, 541-542.
In *Blank v Canada (Minister of Justice)* 2006 SCC 39 (*Blank*) Fish J at [7] suggested that "[b]earing in mind their different scope, purpose and rationale, it would be preferable, in my view, to recognize that we are dealing here with distinct conceptual animals and not with two branches of the same tree".
[8] Section 53, Evidence Act 2006 determines the 'effect and protection of privilege'.

2. Public interests involved

A. Rationale underlying legal professional privilege

a) Legal advice privilege

Legal advice privilege protects the relationship between lawyer and client in order to facilitate the effective representation.

Law is a complex discipline which requires lay-people to be able to consult lawyers with specialised knowledge and skill in order to conduct their affairs. To enable lawyers to give comprehensive, well informed and accurate advice clients must be able to consult their legal advisors with candour.[9] A client must be able to "make a clean breast of it" [10] with the assurance that the information they disclose will not later be able to harm them. If a client was not assured of the confidence of their communications they may be reluctant to disclose the 'full truth' instead withholding information that they consider unfavourable or embarrassing. Worse still, they may be deterred from seeking professional assistance at all.[11]

This underlying justification is not beyond doubt;[12] however it is nevertheless the commonly accepted rationale justifying the existence of the privilege. As such, the privilege has been recognised as

> a fundamental condition on which the administration of justice as a whole rests. [It] is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider

[9] *Wheeler v Le Marchant* (1881) 17 Ch D 675 (*Wheeler*).
[10] *Anderson* above n 2, *per* Sir George Jessell MR at 649.
[11] *Greenough v Gaskell* (1833) 1 My & K 98, 103 (*Greenough*).
[12] It is arguable that in the absence of contemplated litigation a client will not be tempted to be less candid or hold back the whole truth. If litigation is not contemplated then there is very little possibility of the client's information ever being compulsorily disclosed: A Keane *The Modern Law of Evidence* (7th ed, Oxford University Press, 2008) 610-611.

> interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors.[13]

Thus the protection of the lawyer client relationship is very much part of the proper functioning of the adversary system.[14]

b) Litigation privilege

The justification for the litigation branch of legal professional privilege is arguably less 'fundamental' than that underlying legal advice privilege. Litigation privilege exists primarily to protect the gathering of evidence in order to prepare for proceedings.[15] The ability of lawyers to protect their preparations from disclosure is essential for the functioning of the adversary system:

> The adversary system depends for its effectiveness on giving opposing parties an incentive to get as much information as they can and to bring it to court if it helps them. But to get this information, there will inevitably be a "joint production" of both favourable and unfavourable material. A party who realises that the search is as likely to produce unfavourable as favourable information, and knows that the other side will have access to whatever is produced, has no incentive to make any enquiries at all. The most rational course is to do nothing and wait to see what the other side turns up. But the same holds true for the other side. Unless both sides have a privilege to withhold the unfavourable information they obtain, neither has sufficient incentive to investigate the case. The likely result is that the court system will not get sufficient information to decide cases fairly.[16]

Protection for communications between lawyer and client in the context of litigation also facilitates the disclosure of information which the client may consider unfavourable, but

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[13] *B v Auckland District Law Society* [2004] 1 NZLR 326 (*B v ADLS*) at para [37] adopting the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court ex p B* [1996] 1 AC 487 at 507 and 508 (with whom the rest of the House of Lords agreed). While this statement was in the context of 'legal professional privilege', it is clear that it is directed to the legal advice branch. See also *Baker* above n 2; *Lavalee v Canada (Attorney General)* [2002] 3 SCR 209 (*Lavalee*); and *Three Rivers District Council v Bank of England* [2005] 1 AC 610 (*Three Rivers)*.

[14] N Williams "Four Questions of Privilege: The Litigation Aspect of Legal Professional Privilege" (1990) 9 Civil Justice Quarterly 139, 141.

[15] *Evidence Law: Privilege* (NZLC PP23 1994), para [91].

[16] Ibid, para [97].

"for a skilled lawyer, [may] hold the key to some unexpected claim or defence for the client (a 'contingent claim')".[17]

The traditional view on the conduct of litigation was strictly adversarial. It held that as parties had no right to see their opponent's brief, and "as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief".[18] The lawyer's 'brief' encapsulates communications between either lawyer or client and a third party for use in litigation[19] and a lawyer's own documentary preparation.[20] It is the party's prerogative to determine how such materials were to be used and whether (or when) such materials will be disclosed.[21]

Protecting the lawyer's own documentary preparations from disclosure is particularly important as

> [i]t… reduces the risk of counsel's strategy being prematurely revealed to the other side and allows parties the flexibility to change their strategies as the proceedings progress without the fear of disclosure of obvious changes revealing weaknesses in their case.[22]

Therefore the proper preparation for litigation requires that "information be freely assembled, sifted and evaluated, and strategy be planned under the seal of confidence".[23]

The modern conduct of litigation has shifted towards more extensive disclosure. This is discussed further below with respect to the public interests underlying disclosure.

B. Rationale underlying disclosure

a) Disclosure of relevant information to the Court

[17] Ibid, para [51].
[18] *Anderson* above n 2, *per* James LJ at 656.
[19] For example witness statements: N Williams above n 14, 143.
[20] Such as "notes and writings that reflect the lawyer's mental impressions, conclusions and legal theories concerning the case": Ibid, 143
[21] Ibid, 144
[22] *Evidence Law: Privilege* above n 15, para [99].
[23] *Crisford v Haszard* [2000] 2 NZLR 729 (*Crisford*) [26].

It is important that decision makers have a full and accurate picture of the facts in order to come to a just decision. Denying access to all relevant documents may inhibit the fairness of the trial, and as such the bounds of the privilege ought to be confined within narrow limits according to the rationale underlying the privilege.

Should a dispute proceed to trial, disclosure facilitates a just and efficient resolution of matters by the court by securing the availability of evidence relevant to the issue and helping to eliminate false issues.[24]

As evidentiary privileges deprive the court of relevant evidence, compelling arguments are necessary to justify their existence and scope. Therefore the tendency of the modern law of evidence "has been to reduce both their number and scope".[25]

> We should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits, the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than suppression.[26]

b) Disclosure of relevant information to other parties

Litigation in common law jurisdictions was traditionally conducted in a vigorously adversarial manner. As such, the original common law position on disclosure between parties was that only the statement of claim and pleadings were exchanged.[27] However the conduct of litigation has evolved over the years with contemporary litigation characterised by extensive pre-trial discovery and other forms of compulsory disclosure.[28] New Zealand's High Court Rules

> express the social philosophy that, except where there is a valid claim to privilege, a party needs to have access to all documents relating to the case in order for justice to be done.[29]

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[24] N Williams above n 14, 140.
[25] C Tapper *Cross & Tapper on Evidence* (11th ed, Oxford University Press, 2007) 447, discussing the effect of evidentiary privileges generally.
[26] *Waugh* above n 2, *per* Lord Edmund-Davies at 543.
[27] C Tapper above n 25, 483.
[28] Ibid, 483.
[29] *Crisford* above n 23, *per* Richardson J at para [17].

Disclosure between parties allows each party to obtain a comprehensive picture of the relative strengths and weaknesses of their own and their opponent's case.[30] As such, disclosure discourages non-meritorious claims and facilitates settlement by allowing each party to accurately evaluate the strength of their opponent's case and determine the likelihood of success at trial.[31] Pre-trial disclosure also reduces the risk of prejudice caused by surprise at trial.[32]

The importance of disclosure was highlighted by Sir John Donaldson M.R. in considering the pivotal role of discovery in modern litigation:

> The right [to discover] is peculiar to the common law jurisdiction. In plain language, litigation in this country is conducted "cards face up on the table." Some people from other lands regard this as incomprehensible. "Why," they ask, "should I be expected to provide my opponent with a means of defeating me?" The answer, of course, is that 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.[33]

C. The inherent tension

As illustrated above, the interests underlying privilege conflict with those underlying disclosure. Privilege can "have the effect of enabling a party to suppress information that may be material to the issues in question",[34] while the interests underlying disclosure threaten the confidentiality of the lawyer-client relationship and preparations for litigation. As such, "the courts are inclined to limit the scope of the privilege"[35] so that it does not extend "beyond what necessity warrants".[36]

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[30] *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 2 All ER 504, 508-509 (*Mercer*).
[31] P Matthews and H Malek *Discovery* (Sweet & Maxwell, 1992), 4.
[32] N Williams above n 14, 140.
[33] *Davies v Ely Lilly & Co* (1987) 1 All ER 801, 804 (*Ely Lilly)*.
[34] M Hemsworth, "Claiming Legal Professional Privilege for Copied Documents" (1996) 15 C.J.Q. 323, 324.
[35] Ibid, 324.
[36] *Wheeler* above n 9, 682

3. Compulsory processes for disclosure

A. Civil proceedings

a) Discovery

Discovery is a two-way process of compulsory disclosure in civil proceedings whereby relevant information is sought by and from each party to an action.[37] Discovery is where claims of privilege most frequently arise.[38]

There are two stages in inter partes *documentary* discovery:

a) disclosure of the existence of relevant documents;[39] and

b) inspection (and copying) of such documents.[40]

At the first stage, a verified list is made of relevant documents in the control of the party giving discovery. This list includes documents that have been, but are no longer, in the control of the party giving discovery and documents that have not been in the control of the party giving discovery but are known by that part to relate to a matter in question in the proceeding, stating who has control of them.[41] The list must also indicate those

[37] Given our (largely) accusatorial system of justice, it is for the parties themselves to present facts found in support of their allegations. Naturally a party will be reluctant to disclose information harmful to his or her own case; therefore compulsory procedures are necessary to ensure disclosure: P Matthews and H Malek above n 31, 3.
[38] Alternatively they may arise in directions for trial or witness evidence: *Evidence Law: Privilege* above n 15, para [20].
[39] HCR 8.18 sets out the default terms of a discovery order: each party must make an affidavit of documents that lists the documents that are or have been in that party's control; and relate to a matter in question in the proceeding.
[40] HCR 8.33 provides for the inspection of listed documents while HCR 8.36 allows copies to be taken of documents produced for inspection under HCR 8.33.
[41] HCR 8.21.

documents for which there is an objection to production for inspection, such as privilege.[42]

Interrogatories are a *non-documentary* process of discovery where information not disclosed in documentary discovery may be revealed. Interrogatories are written questions where the interrogating party seeks information relevant to the matters of fact in question from the party served. A party may object to answer interrogatories on the basis of privilege.[43]

b) Other forms of compulsory disclosure

While discovery is generally concerned with disclosure by the parties to the dispute, there are similar procedures (other than non-party discovery[44]) by which non-parties can be required to disclose information or documents.[45]

A non-party may be required by subpoena to attend trial as a witness and testify (subpoena ad testificandum), or to produce documents (subpoena duces tecum).[46]

B. Criminal proceedings

a) Search warrants

[42] HCR 8.31 sets out the procedure for challenge on the basis of a privilege or confidentiality claim. When such an objection arises the Judge may "require the document under review to be produced to the Judge and inspect it for the purpose of deciding the validity of the claim."

[43] HCR 8.7(1)(c). For example, once proceedings are in existence or are reasonably contemplated, information ascertained for the purpose of such proceedings will be privileged. A party may also object to answer interrogatories if the interrogatory is vexatious or oppressive: HCR 8.7(1)(b).

[44] The Judge may order particular discovery against a *non-party* after proceedings have commenced: HCR 8.26. If a non-party is in control of a document or group of documents that would have had to be discovered if that person was a party to the proceeding, the Judge may order discovery provided they are "satisfied that the order is necessary at the time when the order is made": HCR 8.26(4).

[45] And "whilst not constituting discovery in the strict sense, nonetheless amount to much the same thing": P Matthews and H Malek above n 31, 65-66.

[46] HCR 9.52(1). Subpoena duces tecum differs from inter partes discovery in number of important ways: requires production of documents specifically identified, rather than listing or disclosing of their existence. It requires production at the trial, to the Court, rather than to either or both of the parties: P Matthews and H Malek above n 31, 72.
A subpoena may be obtained by any party, at any time after the filing of the statement of claim: HCR 8.1(1).

Claims of privilege will generally arise less frequently in the pre-trial process in criminal proceedings than in discovery in civil litigation. However, privilege may be asserted when a police warrant is executed which may affect privileged material.[47] Privilege has also been held to entitle a solicitor to withhold privileged material sought under a statutory demand for information and material concerning a taxpayer client.[48]

[47] A search warrant issued under section 198 of the Summary Proceedings Act 1957 cannot not authorise the seizure of material protected by legal professional privilege: *Rosenberg v Jaine* [1983] NZLR 1 (*Rosenberg*). See also *Director of the Serious Fraud Office v A Firm of Solicitors* [2006] 1 NZLR 586 (*DSFO*) where a search warrant was issued under the Serious Fraud Office Act 1990 and likewise limited by legal professional privilege.

[48] *CIR v West-Walker* [1954] NZLR 191 (*West-Walker*).

4. Legal professional privilege: elements and effect

A. Evidence Act 2006

a) Privilege for communications with legal advisers

Section 54 of the Act largely encapsulates legal advice privilege at common law.[49] Section 54 provides:

(1) A person who obtains professional legal services from a legal adviser[50] has a privilege in respect of any communication between the person and the legal adviser if the communication was -

(a) intended to be confidential; and

(b) made in the course of and for the purpose of –

(i) the person obtaining professional legal services from the legal adviser; or

(ii) the legal adviser giving such services to the person.

…

a) 'Communications'

[49] The Evidence Act 2006 is intended to operate as a code for the law of evidence in New Zealand which suggests that pre-existing common law is no longer relevant for proceedings conducted after 1 August 2007. However s 12 permits resort to common law where the Act is silent, or deals with the admission of particular evidence only in part, provided that to do so is consonant with the principles enunciated in s 10.

[50] 'Legal adviser' is defined in s 51(1). Reference of communication made also includes a reference to a communication made or received or an act carried out by an authorised representative person on the person's behalf: s 51(4). Although the term "authorized representative" is undefined, in the context of legal professional privilege, persons such as secretaries, law clerks, and legal executives are likely to have been envisaged: R Mahoney, E McDonald, S Optican and Y Tinsley *Evidence Act 2006: Act and Analysis* (Brookers Ltd, 2007) 217.

While ‘communication’ is not defined under the Act it was interpreted widely at common law.[51] This wide interpretation is likely to continue under the Act.[52]

Legal advice privilege does not protect facts observed by the legal adviser during the course of the lawyer client relationship,[53] nor does it prevent the drawing of inferences about the knowledge of a party, even if the source of that knowledge is a privileged communication.[54]

At common law, legal advice privilege was held to attach to drafts and working papers produced as part of the giving and receiving of legal advice[55] and also to documents characterised as ‘an adjunct to’ legal advice.[56] Privilege for such documents is justified on the basis that disclosure would reveal the content of privileged communications.

b) ‘Purpose’

At common law, the status of written communications was determined according to the purpose for which the document came into existence, rather than any subsequent purpose for which the document was obtained. Pre-existing documents will be discussed further in Chapters Two and Three.

c) ‘Intended to be confidential’

[51] For example in *Rosenberg* above n 14, where it was recognized that in certain circumstances a name could be a privileged communication.
[52] For example, in *R v Huang* (19/9/07, Rodney Hansen J, HC Auckland CRI-2005-004-21953) (*Huang*), decided soon after the Act came into force, the Court held that handwritten notes comprising an aide memoire for future representation attracted privilege. The notes were seized under search warrant and contained a detailed narrative of events and damaging admissions. Without analysing ‘communication’ as used in s 54 the Evidence Act 2006, Rodney Hansen J relied on pre-Act authority proceeding on the assumption that the term covered ‘intended communications’. There is nothing in the plain wording of the Act that permits this approach, unless one can extend the meaning of ‘communication’ to encompass ‘intended communications’.
[53] *Brown v Foster* (1857) 1 H & N 736 (*Brown*).
[54] *Adams on criminal law – Evidence* (Looseleaf) (Thomson Brookers, 2007) (Updated 28/9/09), ED20.09; C Tapper above n 25, 471.
[55] *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209 (*Kupe*).
[56] *Equiticorp Finance Group Ltd v Collett* (1991) 3 PRNZ 509 (*Equiticorp*).

Confidentiality is a necessary requirement for legal advice privilege.[57] Confidentiality of communications has been described as the 'core' of legal advice privilege.[58]

d) 'Professional legal services'

The communication must be made in the course of, and for the purpose of obtaining or giving 'professional legal services'.[59] This term is left undefined by the Act, however it encompasses more than legal *advice* – thus instructions to a legal adviser will clearly be covered.[60] The interface between 'legal' and broader 'commercial' type advice, which has been the source of judicial uncertainty at common law, is likely to continue under the Act.[61]

b) Privilege for preparatory materials for proceedings

Section 56 of the Act reflects litigation privilege at common law:

(1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the "proceeding").

(2) A person (the "party") who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of-

(a) a communication between the party and any other person:

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[57] Privilege is a concept distinct from confidentiality, however to attract privilege the communication must be confidential. Therefore all communications protected under s 54 are necessarily confidential ones, but not all confidential communications will be privileged.
[58] *Ventouris* above n 2, 611.
[59] s 54(1)(b) is drafted rather weakly, leaving it unclear when legal professional privilege begins and not providing whether it covers any legal type advice given by a lawyer, or more narrowly just advice by a lawyer or legal rights and liabilities. This was an unexplained change by the Select Committee as the equivalent section in the Evidence Bill made a request for professional legal services act as a trigger for the privilege: R Mahoney et al above n 50, 225-226.
[60] *Hart v Bankfield Farm Ltd* (21/5/08, French J, HC Timaru CIV-2008-476-72) (*Hart*), para [45].
[61] For example in *Balabel v Air India* [1988] 1 Ch 317 (*Balabel*). The House of Lords decision in *Three Rivers*, above n 13, held that the issue of whether the advice was 'legal' advice should be determined by focussing on whether the advice was in a 'relevant legal context' - which depends on whether it is reasonable for the client to consult the special professional knowledge and skill of a lawyer. *Three Rivers* was endorsed in NZ in *Commerce Commission v Bay of Plenty Electricity Ltd* (2006) 18 PRNZ 191 (*BOPE*).

(b) a communication between the party's legal adviser and any other person:

(c) information compiled or prepared by the party or the party's legal adviser:

(d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.

…

a) 'Communication or information'

Litigation privilege was originally formulated to protect the lawyer's brief.[62] As such, litigation privilege has never been restricted to 'communications'.[63]

b) 'Dominant purpose'

A mixed purpose is permissible, so long as the dominant purpose is for preparing for a proceeding or apprehended proceeding. The dominant purpose test is now the test used in New Zealand and throughout the Commonwealth.[64]

c) 'Proceeding or apprehended proceeding'

Section 4 defines 'proceeding' as: "a proceeding conducted by a court; and any interlocutory or other application to a court connected with that proceeding".[65] Therefore section 56 does not cover preparations made for a tribunal hearing.[66]

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[62] The lawyer's brief traditionally included documents that record communications between third persons and the lawyer or client, such as witness statements; and the lawyer's own documents in preparation for litigation, such as notes reflecting the lawyer's "mental impressions, conclusions and legal theories concerning the case": N Williams above n 14, 143

[63] At common law a communication from a third party which is prepared for the purpose of litigation, but is not actually received by the lawyer, was held to attract privilege: *Southwark Water Co v Quick* (1878) 3 QBD 315 (*Southwark*).

[64] *Waugh* above n 2 (England); *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA 67 (*Esso*) (Australia); *Edgar v Auld* (2000) 184 DLR 4th 747 (*Edgar*) (Canada); and *Stuart* above n 2 (New Zealand).

[65] 'Court' is defined as including the "Supreme Court, the Court of Appeal, the High Court, and any District Court": s 4(1) Evidence Act 2006.

[66] Mahoney et al above n 50, 229.

At common law if, on an objective assessment, a reasonable person would have regarded the commencement of litigation as probable, this was sufficient attract litigation privilege.[67]

d) Confidentiality not an express requirement

While confidentiality was a requirement for litigation privilege at common law, it is not an express requirement under section 56. For example, in the pre-Act case of *Crisford v Haszard*[68] one of the reasons that privilege was rejected due to a lack of confidentiality.[69] Similarly, in *Ophthalmological Society of New Zealand Inc v Commerce Commission*[70] the Court analysed the issue of waiver of litigation privilege in terms of whether confidentiality, as "the essence of privilege", had been lost.[71]

It is unclear whether confidentiality will continue to be required under section 56.

e) Third party documents

Protection from disclosure of communications with third parties provides a key distinction between the two branches of legal professional privilege.[72] Communications with third parties generally do not attract privilege unless litigation is contemplated.

f) Pre-existing material

The common law position was that documents, which are not created with a privileged purpose, cannot (generally) be cloaked with privilege simply by being passed to a legal adviser:

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[67] C*ommerce Commission v Caltex New Zealand Ltd & Ors* (HC, Auckland, 1998, CL 33-97, Fisher J) (*Caltex*).
A prospect of litigation cannot realistically arise until all the essential pieces of the factual jigsaw are assembled. Therefore it is important to distinguish between material created for the purpose of factual investigations and material created for proceedings: *Stuart* above n 2.
[68] Above n 2.
[69] In that case the recording of a conversation between the defendant and a friend concerning the impending litigation (at the suggestion of the plaintiff's lawyer) was not privileged the conversation between the defendant and friend was not confidential and the record added no confidentiality to the original non-privileged communication.
[70] [2003] 2 NZLR 145 (*Opthamological Society*).
[71] Ibid, [20]
[72] *Wheeler* above n 9.

> The location of the original document in the lawyer's hands does not turn an otherwise non-privileged document into a privileged one.[73]

The implications of the inclusion of 'information compiled' in section 56(2)(c) and (d) will be considered further in Chapter Three.

c) Effect and protection of privilege

Section 53 of the Act determines the effect and protection of a successful claim of privilege. The extent of protection depends on how the substantive section describes the privilege. Section 54 only covers 'communications' and thus the holder of the privilege will only have the right to refuse disclosure with respect to communications.[74] In comparison, section 56 covers both 'communications' and 'information' therefore the holder of the privilege has the right to refuse to disclose both communications and information.[75]

The holder of the privilege may also require that the legal adviser[76] not disclose the communication in a proceeding.[77] Should the privileged material fall into the hands of an unauthorised third party, the judge may order non-disclosure.[78]

Section 53(5) preserves the applicability of legal professional privilege outside the context of a 'proceeding'.[79]

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[73] *Cross on Evidence (NZ)* (Looseleaf) (LexisNexis) (Updated 01/09/09), EVA56.5(b).
[74] s 53(1)(a) Evidence Act 2006.
[75] s 53(1)(a) and (b) Evidence Act 2006. Both ss 54 and 56 also protect against disclosure of an opinion formed by a person that is based on the communication or information: s 53(1)(c).
[76] Or any other person who has come into possession of it with the authority of the person who has the privilege, in confidence and for purposes related to the circumstances that have given rise to the privilege: s 53(3)(a) and (b) Evidence Act 2006.
[77] s 53(3)(a) and (b) Evidence Act 2006.
[78] s 53(4) Evidence Act 2006. This is a substantial change from the common law where privilege was extended to third parties: *R v Uljee* [1982] 1 NZLR 561 (*Uljee*)
[79] The Evidence Act 2006 does not affect "the general law of legal professional privilege, so far as it applies to the determination of claims to that privilege that are made neither in the course of, nor for the purpose of, a proceeding". Therefore claims before tribunals and inquiries, or requests for disclosure by government or private agencies or organisations are still covered by the common law on legal professional privilege.

CHAPTER TWO:

THE 'COPY DOCUMENT CONUNDRUM'

1. Introduction

A. Pre-existing documents

A document may be created outside the legal context then submitted to a legal adviser for the purpose of legal advice or for use in litigation. However, such a pre-existing document cannot retrospectively be attributed with a privileged purpose. Rather privilege is determined according to the purpose for which the document was created, rather than any subsequent purpose for which it is obtained.[80] As Brett M.R. states:

> I do not think that, where documents are already in existence *aliunde*, the mere fact of their being handed to a solicitor for the purposes of the conduct of the action can create a privilege; but, where documents are brought into existence by a solicitor or through a solicitor for the purposes of consultation with such solicitor, with a view to his giving professional advice or to the conduct of an action, these are in the nature of professional communications, and are as such privileged.[81]

B. Copy documents

a) The 'copy document conundrum'

[80] See cases listed above at n 2. A limited exception to this is the rule in *Lyell v Kennedy* (1884) 27 Ch.D 1 which will be discussed in detail in Chapters Two and Three.
[81] *Pearce* above n 2, *per* Brett M.R. at 118-119.

Determining privileged status is not so straightforward where a non-privileged, pre-existing document is *copied* for the purpose of legal advice or for use in litigation. Such a copy has literally come into existence for a privileged purpose and therefore should arguably attract privilege. On the other hand, however, the copy is an exact reproduction of the non-privileged original; therefore it may seem contrary to commonsense to afford it greater protection than the original from which it was created. This is particularly so when the original is likely to be available anyway through discovery or other forms of compulsory disclosure.[82] But then again, an oral communication of the exact same information as contained in the pre-existing original attracts privilege, so why should a copy document be treated any differently? These are some of the conflicting arguments behind the conundrum of whether copies of non-privileged, pre-existing documents can attract privilege.

b) Why would a party be concerned with obtaining production of a copy document?

The original document, although non-privileged and thus at least theoretically available through discovery or other compulsory processes, may be unavailable or difficult to access for some reason. Examples from cases include situations where:

a. The original has been destroyed or misplaced and the only surviving evidence of that document is a copy which has been created for a privileged purpose;[83]

b. The original is a statement or deposition made to the police,[84] or other official body.[85] A copy of that original document was created by Party A for a privileged purpose. Party B is denied access (or faces delayed access) to the original document in the hands of the police or official body, therefore seeks access to Party A's copy;

[82] This is the basis of Lord Denning's influential obiter in *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223 at 244 (*Buttes Gas*).
[83] *Chadwick* above n 1.
[84] *Osborne v Sullivan* [1965] NZLR 1095 (*Osborne*).
[85] *The Palermo* (1883) 9 PD 6 (*The Palermo*).

c. The original is a document belonging to a third party (such as a hospital) and only one party to the action is granted access to that original;[86]

d. The original document (which is available to Party A) is written in a foreign language or shorthand and therefore will be less useful than a translated version which has been created by Party B for a privileged purpose;[87] or

e. The original document is an electronic document which has been corrupted or overwritten; therefore the only surviving evidence of that document is a copy which has been created for a privileged purpose.[88]

In such situations production of a copy document which has been created for a privileged purpose may be the only, (or the most accurate, reliable or efficient) way of providing evidence of the original document. As such, access to the copy document could be critical for the outcome of the case.

c) A vexed issue

Courts have struggled with the issue of whether copies of non-privileged, pre-existing original documents can attract privilege and have persistently delivered seemingly well reasoned judgments falling on 'both sides of the line'. Commentators have described the situation as "vexed",[89] "in a state of flux",[90] "unsettled"[91] and "rather complicated and… the subject of extensive criticism".[92]

As will be observed in the discussion below "the law has found difficulty in this area"[93] and thus "this subject has been bedevilled by divergent authority and conflicting

[86] *Watson v Cammell Laird & Co* [1959] 1 WLR 702 (*Watson*).
[87] *Marhua Corporation v Amaltal Corporation* 17 PRNZ 71 (*Marhua*); *Sumitomo* above n 6.
[88] *Simunovich* above n 5.
[89] A Ligertwood *Australian Evidence* (4th ed, Lexis Nexis, 2004) 291.
[90] P Matthews and H Malek above n 31, 169.
[91] M Tyler, E Little and S Clark, "Electronic Discovery Issues: Disclosure Requirements in Britain, Canada and Australia" (1998) 65 Def. Counsel J. 209, 215.
[92] B Thanki *The Law of Privilege* (Oxford University Press, 2006) 174.
[93] C Tapper, "Discovery in Modern Times: A Voyage Around the Common Law World" (1991) 67 Chi.-Kend L. Rev. 281, 224.

principle".[94] Such conflicts in authority and policy "have led to anomaly, technicality, and, as a direct result, uncertainty" not only in English law, but also "infect[ing] the younger jurisdictions in the Commonwealth".[95]

[94] C Tapper, "Discovery of Documents" (1991) 107 L.Q.R. 370, 371.
[95] Ibid.

2. Judicial treatment of copy documents: a haphazard approach

ENGLAND

A. *The Palermo*: the root cause of the problem

The inconsistent treatment of copies of pre-existing, non privileged documents began in 1883 with the English case of *The Palermo.*[96] While the decision has been the subject of criticism,[97] it has also been faithfully followed in subsequent English cases.[98]

The action in question arose from the collision of two vessels at sea: the *Rivoli* (the claimants) and the *Palermo* (the defendants). The Receiver of the Wreck and the Board of Trade had taken depositions of the master and crew of the *Rivoli*. The claimants' solicitors had been able to make copies of the depositions, but the Board of Trade had not permitted the defendants to do likewise. This refusal was apparently on a policy ground that copies of such depositions would not be provided unless the party seeking them had made similar depositions (which the master and crew of the *Palermo* had not done). The defendants therefore sought discovery of the copies in the hands of the claimants. Production was refused on the ground that the copies had been obtained by the claimant's solicitors for the purpose of the action concerned. Butt J considered that:

> The doctrine of disclosure has gone quite far enough. Here discovery is sought of copies of certain depositions, and these were obtained for the purposes of this action, and as the phrase is, "to form part of the brief." Therefore I think that they are privileged, and I shall

[96] Above n 85.
[97] In particularly from the English Court of Appeal; *Buttes Gas* above n 82, *Dubai Bank Ltd v Galadari* [1990] Ch 98 (*Galadari*); and *Ventouris* above n 2, as will be discussed further below.
[98] Including *Watson* above n 86; *Goldberg* above n 4.

> not inquire for what purpose the original depositions were taken, since it is the copies of which discovery is sought, and which were obtained for the purposes I have stated.[99]

This passage has been relied on by subsequent decisions as authority for the proposition that; if a copy is made with the requisite purpose it will attract privilege, even if the original does not. There is, however, a suggestion in *The Palermo* that the originals may have been protected from production anyway. It has therefore been argued that Butt J did not actually intend to draw a distinction between non-privileged originals and copies made for a privileged purpose.[100] This approach relies on Butt J's comment implying that the originals may have actually attracted some sort of public interest immunity:

> I think it undesirable that masters should be examined for these purposes, and then that what they have disclosed should be shewn to any one who desires to see it. I am not therefore disposed to go out of my way for the purpose of giving publicity to these documents.[101]

Given that Butt J's judgment occupies a mere half page it is difficult to glean much guidance on the true basis of the decision.

B. Narrowing the scope of *The Palermo*: a distinction based on the discoverable status of the original document

In the year following *The Palermo*, Butt J in *Land Corporation of Canada v Puleston*[102] refused to extend his own judgment to copied extracts taken by a party from their *own* documents.[103] *Chadwick v Bowman*[104] further restricted *The Palermo* principle holding

[99] *The Palermo* above n 85, *per* Butt J at 7, 8.
[100] See for example; A Zuckerman "Legal Professional Privilege and the Ascertainment of Truth" (1990) 53 Mod. L. Rev. 381, 383; M Hemsworth, above n 34, 329.
[101] *The Palermo* above n 85, 7.
[102] [1884] WN 1 (*Puleston*).
[103] The case was concerned with an action for a failed land acquisition. The Vice President of the plaintiff company had kept a diary of all that occurred in Canada. Extracts from the diary had been taken by the plaintiff's solicitors after the commencement for the action for the purpose of the litigation; however the original diary lost or mislaid. Therefore the defendants sought discovery of the extracts, while the plaintiff company claimed that the extracts were privileged. Production of the extracts was ordered.
[104] Above n 1.

that where the original document from which the copy was taken is discoverable from the party claiming privilege for the copy, the copy must be produced.[105]

The Court in *Watson v Cammell Laird & Co*[106] distinguished *Chadwick* and expressly followed *The Palermo*, holding that it was the purpose for the creation of the copy rather than the purpose for the creation of the original document that was determinative the status of the copy document. In *Watson* the claimant had been treated for meningitis at a hospital. The claimant initiated a personal injury action whereby he alleged his employers were responsible for his illness. The claimant's solicitors had gone to the hospital and, for the purpose of advising their client on the proposed action, taken copies of the hospital's original case notes prepared in their treatment of the claimant. The claim for production was rejected. The status of the original (and the fact that, as document in the hands of a third party, it may ultimately be produced at trial by appropriate means) did not determine the status of the copy. The determinative factor was that the copy came into existence for a privilege purpose.[107]

Lord Evershed M.R. distinguished *Chadwick* on the basis that the original hospital notes in *Watson* were not discoverable by the party claiming privilege for the copy as the copy had been taken while the original hospital notes were in the hands of a non-party (the hospital).[108]

[105] *Chadwick* was concerned with an action for the price of goods sold and work done. The merits of the defence depended on letters written to and received from third parties. The defendant had not kept the original letters he had received nor taken any copies of the letters he had sent. However the defendant's solicitor had, for the purposes of the action, obtained copies of the letters from the third parties involved. The defendant's objection to disclosure of these copies on the basis of litigation privilege was rejected by the Court on the basis that where an original document would have been discoverable in the hands of the party claiming privilege, a copy of that original, even if created for a privileged purpose, must be produced.
[106] *Watson* above n 86.
[107] Ibid, *per* Lord Evershed MR at 704.
[108] And the original hospital notes were not currently, and had never been, in the claimant's possession or control.

C. A 'commonsense' approach

Lord Denning in *Buttes Gas & Oil Co v Hammer (No 3)*[109] suggested that *The Palermo* and *Watson* were suspect and in need of reconsideration in light of *Waugh v British Railways Board*.[110] *Buttes Gas* was concerned with litigation for slander with the defendants claiming justification as a defence. Production was sought of documents and correspondence, including copy documents, which had been made for a privileged purpose from non-privileged, pre-existing documents.

Lord Denning's much quoted obiter dictum illustrates his absolute view rejecting privilege for copy documents:

> [A] word is necessary about copies… if the original is not privileged, a copy of it also is not privileged—even though it was made by a solicitor for the purpose of the litigation: see *Chadwick* v. *Bowman*. There are some cases which appear to give a privilege to copies on their own account, even when the originals are not privileged… But those cases are suspect… Since *Waugh's* case it is open to us to reconsider them. In my opinion, if the original is not privileged, neither is a copy made by the solicitor privileged. For this simple reason, that the original (not being privileged) can be brought into court under a subpoena duces tecum and put in evidence at the trial. By making the copy discoverable, we only give accelerated production to the document itself.[111]

The approach of Lord Denning in Buttes Gas has subsequently been described as "dictated by logic and commonsense".[112]

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[109] Above n 82.
[110] Above n 2. This case concerned with discovery of a 'Joint Inquiry Report'. The report had been created in response to a collision between two locomotives which had resulted in the death of a British Railways employee. In an action for negligence the claim of legal professional privilege for the report was rejected. The case held that a pre-existing document prepared for a non-privileged purpose does not obtain privilege simply because it was finally sent to a legal adviser.
[111] Above n 82, *per* Lord Denning at 244. (Citations omitted).
[112] *Propend* above n 3, *per* Gaudron J at 542.

D. Rejection of the 'commonsense' approach

Lord Denning's 'commonsense' approach was doubted by Watkins LJ in *R v Board of Inland Revenue, ex p Goldberg*[113] and Dillon LJ in *Dubai Bank Ltd v Galadari*[114] as not supported by principle or authority.

In *Goldberg*, Watkins LJ relied on *Watson* and *The Palermo*, holding that the copies were privileged because they came into existence for the purpose of obtaining legal advice. However, Dillon LJ in *Galadari* held *Golberg* to be wrongly decided on the basis that in *Goldberg* the originals from which the copies were taken would have been discoverable in the hands of the party claiming privilege. Thus, according to *Chadwick*, the copies should not have attracted privilege.[115]

Dillon LJ in *Galadari* (while only reluctantly recognising the binding status of *The Palermo* and *Watson)* clarified that the combined effect of *The Palermo*, *Chadwick* and *Watson* was that copy documents could only attract privilege if the original was never in the possession or control of the party claiming privilege for the copy.

Galadari was concerned with an order permitting the claimant's solicitors to inspect a copy of an affidavit held by the defendant's solicitors. This affidavit had been sworn by a

[113] Above n 4. In *Goldberg* the instructing solicitor had been in the possession of non-privileged, pre-existing documents for the purpose of giving their client tax advice. The prospect of litigation subsequently arose. The solicitor took copies of these original documents and supplied them to leading counsel for the purpose of the litigation. Following the creation of the copies the original documents had been misplaced, lost or destroyed. The Inspector of Taxes therefore sought discovery of the copy documents. Production was refused and privilege for the copy documents upheld.

[114] Above n 97. In *Buttes Gas* Lord Denning had purported to rely on *Chadwick* for his assertion that the status of the original determines that of the copy. However the decision in *Chadwick* was actually based on the fact that the original would have been discoverable in the hands of the client, whereas Lord Denning's statement above proposes the absolute position that copies cannot attract privilege, regardless of where the originals lie.
Similarly, while Lord Denning felt empowered by *Waugh* to depart from *The Palermo*, *Waugh* doesn't specifically consider the distinction between original and copy documents. Rather the decision focussed on whether an original, non-privileged document could attract privilege on the basis that it was later sent to a legal adviser. Therefore *Waugh* only provides support for Lord Denning's proposition if one does not distinguish between originals and copies at all.

[115] In *Goldberg* Watkins LJ had considered *Chadwick* as a case of a copy document made for a non-privileged purpose (i.e. the dominant purpose for the creation of the copy was as a replacement of the originals whose whereabouts were unknown, rather than for the dominant purpose of preparation of litigation). However, the Court of Appeal in *Galadari* rejected this interpretation, instead agreeing with the interpretation of *Chadwick* in *Watson* (i.e. that the copy was discoverable not because it lacked a privilege purpose, but rather because the original would have been discoverable in the hands of the party).

third party in previous proceedings which had involved the defendant. In the course of the previous proceedings the defendants had been provided with a copy of the affidavit (the 'original copy'). For the purposes of the proceedings in question, the defendants had sent their solicitor a copy of the affidavit. Importantly it was not known whether this copy was the 'original copy' or a further copy which had been made.

The claim for privilege failed on the facts as it was unclear whether a *further* copy had been made by the defendants for the purposes of the proceedings in question, or whether the 'original copy' had simply been forwarded on by the defendants to their solicitors. Dillon LJ commented that it was "incredible that the line of privilege should depend on such a fine distinction".[116]

Although the claim for privilege failed on the facts, the Court of Appeal went on to distinguish the action in question from *The Palermo* and *Watson* on the basis that the 'original copy' would have been discoverable in the hands of the defendant and therefore if a further copy had been made it could not attract privilege.[117]

E. The requirement of 'something more'

In *Ventouris v Mountain*,[118] Bingham LJ questioned the ability of copies of non-privileged originals to attract privilege *merely* by being copied for a privileged purpose.[119]

In a situation of mere verbatim copying, no distinction could be drawn between a pre-existing original and the identical copy taken from it. Thus the prior rule established in *The Palermo* "is of significance only if one concludes that no distinction can be drawn between the two".[120] Instead of drawing this distinction Bingham LJ suggested a general

[116] Above n 97, *per* Dillon LJ at 104.
[117] Ibid, 106.
[118] Above n 2. *Ventouris* was concerned with a dispute over an insurance claim. The case was not specifically concerned with copy documents per se; rather the issue was whether original non-privileged documents could attract privilege by being obtained by a legal adviser for the purpose of litigation.
[119] Ibid, 614.
[120] Ibid, *per* Bingham LJ at 614.

rule "that non-privileged documents do not, *without more*, acquire privilege, simply because they are copied by a solicitor for the purposes of an action".[121]

As *Watson* concerned a mere verbatim copy, "involv[ing] in itself no exercise of skill, properly so called",[122] the decision was not easily accommodated within the rule above. Bingham LJ considered the decision "ripe for authoritative consideration".[123]

Bingham LJ concluded:

> I can see no reason in principle why a pre-existing document obtained [i.e. by being copied verbatim] by a solicitor for purposes of litigation should be privileged from production and inspection, save perhaps in the *Lyell v Kennedy (No 3)* situation which, in an age of indiscriminate photocopying, cannot often occur.[124]

F. The '*Lyell v Kennedy* exception'

The status of mere verbatim copies of non-privileged documents as privileged communications remains contentious. There has however, been a long recognised exception where both pre-existing, non-privileged originals *and* copies can attract privilege in the hands of a legal adviser. This line of reasoning is commonly regarded as

[121] Ibid, *per* Bingham LJ at 616 (emphasis added). Bingham LJ (at 619) considers this proposition is likewise supported by *Galadari*.
In *Lubrizol Corporation v Esso Petroleum Ltd,* [1992] 1 WLR 957 (*Lubrizol*) Aldous J similarly held that no distinction could be made between original documents and copies made for the purpose of litigation, finding favour with Lord Denning's 'commonsense reasoning' in *Buttes Gas* (yet still recognising the *Lyell v Kennedy* exception). The facts of the case were somewhat unusual and Aldous J's decision can largely be explained as resulting from frustration at the lawyers in the case 'playing games' with the rules of privilege. The principle deducible from *Lubrizol* is that privilege will not attach to copy documents (even where the originals are not discoverable by the party claiming privilege) where the opposite party has a copy of the same document: "The law could not lead to such a stupid result": *per* Aldous J at 963.
[122] Above n 97, *per* Bingham LJ at 616
[123] Ibid, *per* Bingham LJ at 617.
[124] Ibid, *per* Bingham LJ at 621. The *Lyell v Kennedy* situation is discussed in detail below.

beginning with *Lyell v Kennedy*[125] and has been recognised consistently in subsequent cases.[126]

Lyell v Kennedy concerned a 'pedigree claim' regarding the rightful heir-at-law of an estate. For the purposes of the action, the defendant's solicitors had secured various copies of *publici juris* documents for which privilege was claimed.[127] The copies were held to attract privilege on the basis that

> they were obtained for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him to fully investigate a case for the purpose of instructing counsel if we required documents, although perhaps *publici juris* in themselves, to be produced, because the very fact of the solicitor having got copies of certain burial certificates, and having made copies of the inscription on certain tombstones and obtained photographs of certain houses, might shew what his view was as to the case of his client as regards the claim made against him.[128]

Therefore the primary reason for upholding the claim to privilege was not that the literal purpose for the creation of the copy documents, but rather that the collection of copy documents and photographs was

> made or obtained by the professional advisers of a party for his defence to the action, and is the result of the professional knowledge, research, and skill of those advisers [and] any disclosure of the copies and photographs might afford a clue to the view entertained by the solicitors of their client's case.[129]

The exercise of discretion and process of selection meant the collection was not simply a 'mere servile copying' of non-privileged documents, but rather it "represents the work of

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[125] Above n 80.
[126] Including *Galadari* above n 97, *Ventouris* above n 2; *Goldberg* above n 4; *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 (*Nickmar*) and *Vardas v South British Insurance* [1984] 2 NSWLR 652 (*Vardas*).
[127] Privilege cannot, *prima facie*, be claimed for *publici juris:* Above n 80, *per* Bowen LJ at 2.
[128] Ibid, *per* Cotton LJ at 26.
[129] Ibid, *per* Bowen LJ at 2.

the solicitor's mind" [130] and disclosure could not be given "without asking for the key to the labour which the solicitor has bestowed in obtaining them".[131]

a) Narrowing of the exception

Dubai Bank v Galadari (No 7)[132] applied the exception to a selection of copy documents a specifically identified as comprising 25 percent of the total discoverable documents. The case made no distinction between a selection made by a legal adviser from their own client's documents and a selection made from third party documents.[133] However *Sumitomo Corporation v Credit Lyonnais Rouse Ltd*[134] overruled *Galadari (No 7)* holding that the exception only applied to selections from third party documents.[135] In *Galadari* Dillon LJ held that the exception did not apply to a single photocopy document.[136]

b) The mere exercise of time and expense is insufficient

In *Lambert v Home*[137] the Court held that the act of attending an open court to take notes of the proceedings in anticipation of future proceedings did not satisfy the 'professional knowledge, research and skill' requirement of *Lyell v Kennedy:*[138]

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[130] Ibid, 12, as submitted by the defendant.
[131] Ibid, *per* Bowen LJ at 31.
[132] [1992] 1 W.L.R. 106 (*Galadari (No 7)).*
[133] Ibid. *Galadari (No. 7)* was concerned with an agreement for discovery of documents relating to an action. The parties were to disclose all documents then present in the United Kingdom relating to any matter in question in the action. All other documents, situated overseas at that time, were to be produced five months later. The problem arose when the defendants refused to produce United Kingdom copies of overseas documents at this earlier date. The plaintiffs wished to avoid the five months' delay in trial preparation, while the defendants objected to unnecessary duplication and claimed that the copies were privileged on the basis that "that disclosure of the selection of documents for copying would betray the trend of advice given by solicitor to client": *per* Morritt J at 108.
[134] Above n 6.
[135] "A gloss on the principle that a lawyer's advice is privileged from discovery should not result in the right of a party to refuse discovery of documentary evidence that was in the possession of that party before the selection was made…" Ibid, *per* Jonathan Parker LJ at 496, 497.
[136] Above n 97, 108.
[137] [1914] 3 KB 86 (*Lambert*).
[138] *Lambert* was concerned with a collision between a motor car and a taxi-cab. At issue was a transcript of shorthand notes of previous proceedings concerning an action between the respective drivers who had been involved in the collision. The notes, from which the transcript was taken, were made in anticipation of a future personal injury action by the injured cab passenger at the initiative of their lawyer. The judge in the previous proceeding had not taken any note of his decision; therefore the only evidence of what was

> This [contended] privilege is based upon reproduction by writing. In my opinion no such privilege exists… The document is not one which has been composed by the writer, or of which the writer is in any way the author. He has done nothing more than reproduce in a physical form that which came into existence in its relevant form when the witness spoke in the box. The writer is comparable to a gramophone or a photographic camera. The document as distinguished from its contents is not relevant. The writing itself is not available at all in evidence. It is nothing more than the proof of the shorthand writer.[139]

G. Translations

Sumitomo establishes that translations should be treated similarly to copy documents.[140] Translations and copies attract the same treatment on the basis that each directly reproduces the exact information contained in the original. Neither copying nor translation, as processes, introduce or subtract anything from the original.

> In particular, neither process in itself introduces any element of confidentiality which does not or did not exist in the original document. The fact that, unlike a copy, a translation is not a "replica" of the original document… does not seem to us to be a relevant distinction for present purposes.[141]

Therefore, according to authority on copy documents, the original non-translated documents had been in the possession or control of Sumitomo (thus were discoverable by Sumitomo) and as such, the translations were similarly discoverable.[142]

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decided was the short hand notes and resulting transcript. The majority rejected the claim of privilege for the transcript.

[139] Ibid, *per* Buckley LJ at 91. Channell J (at 94) did not agree with the majority and saw no difference between the present case and *Lyell v Kennedy*. The party was entitled to retain the benefit of their solicitor's foresight and, given that the transcript had only come into existence for the purposes of the litigation, privilege should attach.

[140] The documents in issue were English translations of foreign documents that had been translated for the purpose of litigation between a Japanese company and French bank.

[141] Above n 6, *per* Jonathan Parker LJ at [44].

[142] However, had the originals not been discoverable from the party claiming privilege then presumably the rule in *The Palermo* would have applied to make the copy documents privileged.

CANADA

A. State of flux

Canadian courts have likewise been plagued with uncertainty, with authority vacillating between:

a. the literal approach that a copy is made for a privileged purpose and thus should attract privilege;[143]

b. the absolute approach rejecting privilege for copy documents (as advocated by Lord Denning in *Buttes Gas);*[144] and

c. the 'something more' approach endorsing the *Lyell v Kennedy* exception.[145]

AUSTRALIA

A. Pre-*Propend* authority

Australia has also experienced a division of authorities on the issue of whether a copy of a non-privileged, pre-existing document can attract privilege[146] with "the balance of

[143] As followed by the Ontario Supreme Court in *Ottawa-Carleton (Regional Muncipality) v Consumers Gas Co.* (1989) 41 C.P.C. (2d) 93 (*Consumers Gas Co*).
[144] Including Craig J.A.'s dissent in the British Columbia Court of Appeal in *Hodgkinson v Simms and Waldman* (1988) 55 DLR (4th) 577 (*Hodgkinson*); the Manitoba Queen's Bench in *Polk, Di Giulian and Ray v Royal Trust Corporation of Canada* [1990] 1 W.W.R. 78 (*Polk*); and the majority of the Ontario Court of Appeal in *General Accident v Chursz* (1999) 45 O.R. (3d) 321 (*Chursz*).
[145] Including the majority of the British Columbia Court of Appeal in *Hodgkinson* above n 144; the Supreme Court of British Columbia in *British Columbia Building Corp v T & C, plc* (1995) 39 C.P.C.3d 313 (*BCBC); Doherty J.A.'s dissent in the Ontario Court of Appeal in *Chursz* above n 144; and the Supreme Court of Canada in *Blank* above n 7.
[146] "The decisions with respect to the status of copy documents are not uniform in their approach, perhaps because they consist mainly of first instance rulings on evidence or first instance decisions on applications for discovery": *Propend* above n 3, *per* Gaudron J at 541.

authority [favouring] the view that, if the original is not privileged, neither is a copy, even if it was made for the sole purpose of advice or use in litigation".[147]

B. The Approach of the High Court of Australia in *Australian Federal Police v Propend Finance Pty Ltd*

The question of whether copy documents can attract privilege in Australia was authoritatively determined in 1997 by the High Court of Australia in *Australian Federal Police v Propend Finance Pty Ltd.*[148]

The majority[149] held that privilege turns on the purpose for which the copy document was communicated rather than the purpose for the creation of the non-privileged, pre-existing original document. If a copy document is made for the purpose of legal advice or litigation, the copy will attract privilege. The minority[150] held that as a copy document does not convey any information different to that of the original it cannot be treated any differently to the original for the purpose of determining privileged status.

In *Propend* a company and their solicitors had been implicated in tax related offences. Certain non-privileged, pre-existing documents had been copied and given to the solicitors by their client either; solely for the purpose of obtaining legal advice in connection with their liability to pay tax, or solely for use in litigation in relation to that

[147] *Propend* above n 3, *per* McHugh J at 551. Cases accepting that copies can be privileged include: *Wade v Jackson's Transport Services Pty Ltd* [1979] Tas R 215 (*Wade*); *Kaye v Hulthen* [1981] Qd R 289 (*Kaye*); *McCaskill v Mirror Newspapers Ltd* [1984] 1 NSWLR 66 (*McCaskill*). Cases rejecting that copies can be privileged include: *Shaw v David Syme & Co* [1912] VLR 336 (*Shaw*); *Vardas* above n 126; *Nickmar* above n 126; *J N Taylor Holdings Ltd v Bond* [1991] SASC 3069 (*Bond*); *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 (*Roux*).

[148] Above n 3.

[149] When I discuss the majority I am referring specifically to the judgments of Gaudron, McHugh, Gummow and Kirby JJ. Although also concluding that copy documents could attract privilege, Brennan CJ took a literal approach focussing on the purpose for which the document was brought into existence (reminiscent of *The Palermo* type reasoning): "The test is anchored to the purpose for which the *document* was brought into existence… So, on a strictly logical application of the test, if a copy is made solely for the purpose of providing it to a legal adviser in order to obtain legal advice or for use in connection with apprehended litigation, the copy would be privileged": *per* Brennan CJ at 508 (my emphasis).

[150] The minority consisted of Toohey and Dawson JJ.

matter.[151] These copy documents were among documents seized from a lawyer's office under search warrant.[152]

a) The Reasoning of the Majority

Privilege turns on purpose

The majority emphasise that the purpose of legal professional privilege is to protect "*communication[s]* to and by the lawyer," not physical documents as such.[153] Therefore, regardless of the fact that a communication may take the *form* of a copy document and that the information contained in the copy document is the same as the original, the copy document may nevertheless constitute a privileged communication independent of the original.[154]

While some cases suggest that it is artificial or absurd to distinguish between an original document and its verbatim copy, it is necessary to make this distinction.[155] To focus on the similarity of form between the original and the copy document "is to miss the whole point" of the privilege - which is to protect communications rather than documents per se.[156] Advances in technology require not the narrowed approach that declines to distinguish between copies and originals, but rather a more flexible approach.[157]

[151] Other copy documents in question were one or more briefs to counsel to advise, the copies having been made by the lawyer for the purpose of obtaining legal advice.
[152] Pursuant to s 10 of the Crimes Act 1914. These documents were yet to be inspected by the police. The respondent company sought a declaration that the copy documents, (the originals of which were non-privileged), were privileged, and an order for their return. The copy documents had not been marked or annotated in any way so as to distinguish them from their originals.
[153] *Propend* above n 3, *per* Kirby J at 585 (my emphasis). Also see Gaudron J at 543 and McHugh J at 552.
[154] Ibid, *per* Gummow J at 571.
[155] Ibid. For discussion of cases suggesting that the distinction between original and copy is anomalous see Brennan CJ at 507; McHugh J at 550; and Kirby J at 586.
[156] Ibid, *per* McHugh J at 553.
[157] "Because of advances in information technology, compulsory process will now, increasingly, involve the multitude of material forms used in effecting communication: ranging from photocopies of original documents to audio/video tapes and computer software. Necessarily, the doctrine of legal professional privilege must adapt to a world in which these media are the stuff of disputes concerning criminal and civil obligations and the rights of clients": Ibid, *per* Kirby J at 585.

Admittedly there may be difficulties in ascertaining the purpose of the party in making the document.[158] However, in the absence of some compelling 'countervailing principle' the purpose test must be applied to copies, just as it is applied to conventional communication.[159] In considering whether such a countervailing principle exists, the majority focussed on the traditional rationale for legal professional privilege.

The rationale underlying legal professional privilege

Legal professional privilege exists to facilitate the administration of justice. Accompanying the trend towards increased pre-trial disclosure, there has been a tendency in Australia to narrowly define legal professional privilege. Privilege can frustrate access by the Court to evidence which is relevant to the matter in question.[160] Therefore there is an

> inherent tension in the doctrine of legal professional privilege: on the one hand, there is the need to protect the confidences of the client and, on the other, there is the public interest in parties to litigation having access to all relevant evidence.[161]

In the context of legal advice, privilege encourages full and frank disclosure by the client. Not recognising privilege for copy documents would risk breaching the confidentiality of client-lawyer communications. Clients would be discouraged from fully disclosing all facts to their lawyer which would impede "the provision of proper advice and effective representation".[162]

Denying privilege for copy documents in the context of litigation would impair lawyers' ability to effectively prepare and conduct their cases:

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[158] For example "[I]f there are two copies on a file, has one (and if so, which), or both, or neither been brought into existence for a privileged purpose?" Ibid, *per* Brennan CJ at 508.
[159] Ibid, 508.
[160] And thus "it has been suggested that a brake on the application of legal professional privilege is needed to prevent its operation bringing the law into 'disrepute' principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters" Ibid, *per* Kirby J at 581.
[161] Ibid, *per* McHugh J at 552, see also Kirby J at 581.
[162] Ibid, *per* Gaudron J, at 543.

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of its opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information.[163]

Parties may be tempted to use processes of compulsory disclosure for the purpose of sifting through their opposition's files and briefs, rather than using their own investigations to seek out original documents in the hands of third parties.[164]

Commonsense and the efficient administration of justice

Lord Denning's 'commonsense approach' in *Buttes Gas* was categorically rejected. The fact that it may be easier to obtain the copy from the solicitor is no reason to abrogate legal principle, particularly one as fundamental as legal professional privilege to the administration of justice.[165]

McHugh J acknowledges that

> [n]o doubt it seems contrary to commonsense that the law should give privilege to the copy of a document when it does not give it to the original. But in this area of law, as in other areas of law and life, commonsense turns out to be a misleading guide. This is because legal professional privilege turns on purpose, and no argument is needed to show that the purpose of a client or lawyer in making a copy document may be very different from the purpose of the person who created the original.[166]

If necessary, there are other forms of secondary evidence that may be tendered to show the content of the original document. Therefore "the according of legal professional privilege to a copy does not impair, although it does not hasten, the administration of

[163] Ibid, *per* Kirby J at 588.
[164] Ibid, per Gummow J at 571.
[165] Ibid. This point was emphasised by Gaudron J at 542, McHugh J at 552, Gummow J at 564 and Kirby J at 582, 583.
[166] Ibid, *per* McHugh J at 552, 553.

justice".[167] Nor does permitting privilege for copy documents result in trial by ambush or increase the temptation of document destruction. Where the original non-privileged document is in the hands of the party required to make discovery they must produce that original regardless of the status of any copy. If a copy was created for the purpose of document destruction, it would not satisfy the purpose element for privilege in the first place.[168]

The need for consistency across all forms of communication

The majority emphasised the need for consistency across forms of communications. If a client were to memorise a pre-existing, non-privileged document and orally recite it to their lawyer for a privileged purpose that oral communication would unequivocally attract privilege.[169] A written or oral summary would similarly attract privilege. Therefore it is inconsistent not to allow privilege for copy documents.[170]

> It would be artificial, absurd and anomalous if a client were forced to seek advice by oral communications, rote learning of documents or summaries, only or mainly, to avoid the peril that the provision of actual copy documents, and copies of like evidentiary material, would be susceptible to compulsory process. Far from reducing the argument for extending the privilege to copies because of technological developments, such advances make it essential that the law acknowledges their existence and that they need to be provided to lawyers in the course of a client's securing appropriate legal advice.[171]

The *Lyell v Kennedy* exception

The *Lyell v Kennedy* exception was doubted on the basis that "purpose not skill is the criterion for determining the claim" of legal professional privilege.[172] Legal professional privilege is not limited to protecting "the labour of the legal adviser by exercising skill

[167] Ibid, *per* Brennan CJ at 510. McHugh J, addressing the argument that forcing a party to obtain the information in its original form generates unnecessary delay or expense, suggests that if copies were denied privilege lawyers would be forced to summarise the contents of original documents in order to attract privilege, and therefore the expense of litigation would be even greater (at 555).
[168] Ibid, *per* McHugh J at 555.
[169] Ibid, *per* Gaudron J at 543-544.
[170] It is both more efficient and more accurate to provide a copy document to convey the information contained in an original document: Ibid, *per* Gaudron J at 543, 544.
[171] Ibid, *per* Kirby J at 587, 588.
[172] Ibid, *per* McHugh J at 554.

and knowledge in selective copying or production of summaries".[173] Given that the privilege belongs to the client, the privilege is similarly not "concerned merely to protect disclosure of litigation strategy or the line of reasoning of the legal adviser".[174]

b) The Reasoning of the Minority

The minority held that privilege does not attach to mere verbatim copies of non-privileged originals. Both Dawson and Toohey JJ clarify that privilege attaches to the information communicated in documents, rather than the document itself.[175]

> It is the contents of the document – the information which it communicates – that is the important thing. The copy distinguished from its contents is not important, for legal professional privilege attaches to the contents of a document rather than the document itself.[176]

Therefore, as a copy only conveys the same information as contained in the original, a copy cannot be treated any differently with respect to legal professional privilege.

The minority likewise doubted the reasoning in *Buttes Gas*, holding that the reason a copy document attracts no greater privilege than the original is more fundamental than Lord Denning's commonsense explanation.[177]

The minority accepted the *Lyell v Kennedy* exception on the basis that copying material in a selective way renders the copy "a communication of information which is different from or additional to the information conveyed by the original".[178] However in contemporary legal practice where "indiscriminate photocopying is the norm"

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[173] Ibid, *per* Gummow J at 570.
[174] Ibid, *per* Gummow J at 570.
[175] Ibid, *per* Dawson J at 525, 526, Toohey J at 525.
[176] Ibid, *per* Dawson J at 518.
[177] Ibid. Rather it is based on the interests of justice; the confidential relationship between lawyer and client is not impaired in requiring that relevant copy documents be produced "when production of the original might be compelled without any ground for objection": Dawson J at 520. Lord Denning's approach however focuses unduly on the document, where as it is the communication that is sought to be privileged: Toohey J at 528.
[178] Ibid, *per* Dawson J at 519.

determining whether there has been such professional skill or judgement in selecting the materials (so as to attract privilege) may be difficult.[179] Nevertheless,

> [i]t must be accepted that the exercise of professional skill in the assembly of material does not offer a very certain test but it is, I think, a necessary qualification to the general proposition that a copy document does not attract privilege if the original is not privileged.[180]

Although numerous cases have recognised the fundamental importance of legal professional privilege for the administration of justice, Toohey J also warns that there are also "a number of cases [that] have sounded a warning against widening the privilege lest the need for the courts to have access to all relevant documents should be unduly undermined".[181] Not allowing privilege to attach to copies "sets logical bounds to the privilege".[182]

NEW ZEALAND:

While New Zealand has in the past found favour with the literal approach of *The Palermo* and *Watson*,[183] the current approach appears to require 'something more' in order for copy documents to attract greater privilege than the non-privileged original from which they were created.

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[179] Ibid, *per* Toohey J at 529,530.
[180] Ibid, *per* Toohey J at 530.
[181] Ibid, *per* Toohey J at 527.
[182] Ibid, *per* Toohey J at 530.
[183] In *Osborne* above n 84, the plaintiff sought production of a copy of a police statement (which was clearly a third party document not discoverable by the defendant who was claiming privilege for their copy) made by the defendant concerning a motor vehicle accident. The clerk of the defendant's solicitor had gone to the police station and made the copy for the purpose of defending the action. Hardie Boys J relied on *Watson* holding that the copy document attracted privilege - indeed the only factual difference with *Watson* was the type of original document that was copied.

A. The 'something more' approach in New Zealand

In *Crisford v Haszard*[184] the New Zealand Court of Appeal followed the approach advocated in *Ventouris* that mere verbatim copies of non-privileged originals do not attract privilege as communications for a privileged purpose. In *Crisford* the document contended to attract privilege was a tape recording of a non-privileged conversation between the defendant and a third party. The conversation had been surreptitiously recorded at the suggestion of the plaintiff's solicitor for the purpose of use by the plaintiff in anticipated litigation.

While the Court recognised the recording was separate from the conversation,[185] the act of recording did not add anything to the content of the non-privileged conversation to warrant privilege attaching. There was nothing so as to attribute the recording with "the stamp of the plaintiff's agent's opinions and impressions of the conversation".[186] Simply recording a non-privileged conversation for a privileged purpose did not attract privilege and as such while the *Lyell v Kennedy* exception was recognised, it did not apply here.

B. Translations in New Zealand

Endorsing the reasoning in *Sumitomo,* the High Court in *Maruha Corporation v Amaltal Corporation*[187] held that generally "translations should be treated the same way as copies". A translation will generally have the same status with regard to privilege as the non-privileged original unless the *Lyell v Kennedy* exception applies (and, as established by *Sumitomo*, the selection is not from 'own-client' documents).[188]

[184] Above n 23.
[185] Ibid, *per* Richardson J at [20].
[186] Ibid, *per* Richardson J at [25].
[187] Above n 87. The plaintiffs sought discovery of translations of Japanese documents in the hands of the defendants. Production was resisted on the basis of litigation privilege.
[188] Ibid, *per* Priestly J at [11]. *Maruha* was however distinguished from *Sumitomo*: In *Marhua* the plaintiffs had previously made the foreign documents available to the defendants. Thus, in seeking discovery of the defendant's translations the plaintiffs were essentially seeking to benefit from the defendant's selection of which documents to translate. Translating some documents to the exclusion of others is an important aspect

C. Recent authority

The New Zealand Court of Appeal recently considered the privileged status of copy documents in *Simunovich Fisheries Ltd v Television New Zealand Ltd.*[189] That case was concerned with proceedings for defamation and malicious falsehood which arose out of the screening of the 'Assignment' programme by TVNZ. Discovery was sought of (about 15) copies of draft scripts which were held by TVNZ's solicitors, Simpson Grierson.[190] Successive scripts for the programme were prepared and each draft was sent to Simpson Grierson for advice. Changes were made to the script in accordance with the legal advice provided. To ensure that there was only one current script at any one time, TVNZ had the practice of over-writing every draft script for every programme, meaning that the only surviving copies were in the hands of Simpson Grierson.[191]

The Court considered whether copies of non-privilege originals could attract privilege on the "ground that they are communications passing between solicitor and client for the purpose of legal advice".[192] Relying on *Galadari* and *Ventouris* the Court held that

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of "document assessment methodology": *per* Priestly J at [23], [24]. Therefore disclosing the defendant's translations to the plaintiffs would give the plaintiff clues as to the defendant's litigation strategy.

[189] Above n 5. In the High Court *Simunovich Fisheries Ltd & Ors v Television New Zealand Ltd (TVNZ) & Ors (No 5)* (10/07/07, Allan J, HC Auckland, CIV-2004-404-003903), Allan J had held that the drafts were documents created with a dual purpose in mind: preparation of the programme itself and for submission for legal advice. In order to keep the balance between disclosure of relevant documents and the sanctity of privileged communications Allan J was prepared to draw a distinction between different copies of the script. The copies sent to Simpson Grierson attracted privilege as "they formed the basis of confidential communications between solicitor and client, and to require their production would, in my view, tend to reveal the content of privileged communications between them": *per* Allan J at [29].
Thus the decision allowed privilege for copies as communications prepared for a privileged purpose, while also holding the scripts were privileged due to the risk that disclosure of the scripts would, through successive changes, disclose privileged communications on the content of the scripts: *per* Allan J at [28].

[190] The scripts were clearly relevant to allegations of malice and ill-will.

[191] Above n 5, at [151], [152]

[192] Ibid *per* Miller J at [161]: An analogy was proposed by the respondent between the copy drafts and draft transaction documents which, it was contended, attracted privilege as a *class* of documents; draft transaction documents that were not created for the ultimate purpose of documenting the transaction had previously been held to be privileged: *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209. However the Court of Appeal held that draft transaction documents "may be privileged not because they form part of a class of documents prepared for the purpose of obtaining legal advice but because their disclosure would reveal the content of a privileged communication: *Dalleagles Pty Ltd v Australian*

> where an original document [is not privileged], a photocopy of it made for the purpose of obtaining legal advice does not attract privilege…it is necessary to look to the purpose for which a document was brought into existence, and not the purpose for which a copy was obtained.[193]

Disclosure of copy documents would not "diminish or destroy" the special confidential relationship between solicitor and client, therefore the interests of justice weighed against allowing privilege for copy documents.[194]

While recognising a divergence in Commonwealth authority the Court considered it an inappropriate occasion to consider whether to depart from the reasoning adopted in *Crisford*:[195]

> The privilege should be as narrow as its principle necessitates, meaning that copies of non-privileged documents sent to a lawyer are privileged only if their disclosure would reveal a privileged communication.[196]

Therefore, although the copy scripts could not attract privilege as communications in their own right, the Court of Appeal upheld the finding of Allan J in the High Court that disclosure of the copy draft would reveal the content of privileged advice. Changes made to the successive versions of the drafts would disclose privileged advice given by Simpson Grierson, therefore the drafts attracted privilege on that basis.[197]

Securities Commission (1991) 6 ACSR 498 at 506 (SC(WA))" and thereby reveal the solicitor's line of reasoning.

[193] Above n 5, *per* Miller J at [162]. The Court doesn't address the *Lyell v Kennedy* exception, however as *Galadari*, *Ventouris* and *Crisford* all accept the exception (and *Simunovich* relies on these cases) acceptance can be inferred.

[194] Ibid,[162].

[195] *Crisford* had essentially followed the reasoning of the English Court of Appeal in *Ventouris*. Although *Crisford* concerned litigation privilege, the principle applied equally to legal advice privilege: Ibid, [165].

[196] Ibid, *per* Miller J at [165].

[197] Ibid, [171].

D. An opportunity for authoritative direction

The most recent New Zealand decision on point is *Witcombe v Clerk of the House of Representatives.*[198] Mr Witcombe had been employed by the Clerk of the House of Representatives and claimed he had been unjustifiably disadvantaged in employment and unjustifiably constructively dismissed. He wished to rely on the contents of two preliminary draft employment investigation reports to support these claims.[199]

The two drafts were sent by the Clerk-Assistant to her legal advisers, the Crown Law Office, for advice.[200] The judgment proceeded on the basis that there were at least two copies of the draft reports, consisting of those sent to the Crown Law Office and further copies retained by the Office of the Clerk.[201] While the original draft reports did not attract privilege,[202] it was contentious whether the drafts sent to the Crown Law Office attracted legal advice privilege as communications for the purpose of obtaining professional legal services.[203]

"Not without some difficulty" Judge Colgan, relying on the High Court decision of *Simunovich*[204] concluded the defendant was entitled to claim privilege for the copies of the preliminary draft report that were sent to the Crown Law Office.[205]

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[198] EmpC WC17/08, WRC 12/06 26 September 2008 (*Witcombe*).
[199] The reports were relevant as "the contents of the preliminary draft reports may corroborate other evidence to be called for the plaintiff about the manner in which he was treated by the defendant": Ibid, at [27].
[200] Ibid, [23].
[201] Ibid, [21]. The judge does not mention whether the original/s or other copies were unavailable and if so on what grounds.
[202] The dominant purpose for the creation of the original draft reports was to record the investigator's findings and enable the Clerk to make decisions about the continuation of Mr Witcombe's employment: Ibid, [37], [38].
[203] The circumstances were distinguished from a situation where a draft agreement was prepared *by a solicitor* and enclosed with a letter giving advice to the client. In such a situation the draft agreement may be privileged as it was the legal adviser's document and was inextricably linked to the provision of legal advice. In contrast, the preliminary draft investigation report here was the *client's own* document, and thus not inextricably linked to the provision of legal advice: Ibid, [55].
[204] Ibid, [68]. The Employment Court in *Witcome* similarly relied on *AUAG Resources Ltd v Amax Goldmines New Zealand Ltd* (HC AK CL59/93 17 June 1994) (*AUAG*). However that case did not specifically consider the distinction between *verbatim* copies and their non-privileged originals as communications. Rather it simply recognises that where something extra has been added (such as annotation by the lawyer) this may warrant privilege attaching to the copy even though the original is not privileged (as denying privilege in such a circumstance would reveal privileged advice).

The Court of Appeal[206] has given leave to appeal on the following questions of law:

> (a) Did the Chief Judge misconstrue the test for litigation privilege and/or legal advice privilege?
>
> (b) Did the Chief Judge misapply the test in *Simunovich*?[207]

Therefore New Zealand is likely to receive authoritative direction on the issue of whether copies of non-privileged, pre-existing originals can attract privilege in the near future.

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[205] Ibid, [68].
[206] *Clerk of the House of Representatives v Witcombe* [2008] NZCA 538.
[207] Ibid, [3].

3. Summary of approaches

Broadly speaking, there are four broad approaches from which we can determine our future direction:

1. The ‘distinction’ approach based on whether the original from which the copy document was created is discoverable from the party claiming privilege for the copy;

2. The ‘commonsense’ approach which proposes the absolute position that copies of non-privileged documents cannot attract privilege;

3. The ‘something more’ approach which holds that privilege attaches content. Verbatim copies cannot attract privilege, rather there must be something more for a copy to attract privilege – such as the exercise of “professional knowledge, research and skill” by the legal adviser so that disclosure would reveal the “trend of advice” or “theory of the case”[208]; or

4. The approach of the majority *Propend* (hereafter the “*Propend* approach”) which focuses on consistency between forms and holds that a copy document can attract privilege provided it constitutes a communication to a legal adviser for a privileged purpose.

[208] *Lyell v Kennedy*, above n 80.

CHAPTER THREE:

WHERE TO FROM HERE?

1. Introduction

The Evidence Act 2006 is authoritative on the law of evidence in New Zealand. Section 12 establishes that where an evidential issue is not provided for, or dealt with only in part, it is permissible to have resort to the common law.[209] Therefore, this Chapter will first look to the Act for guidance on the 'copy document conundrum'. It will then go on to explore the practical and theoretical merits of each common law approach in light of the competing public interests underlying privilege and disclosure. This Chapter will conclude with a suggested approach for New Zealand.

Decisions at common law have generally proceeded on the basis that, with respect to the privileged status of copy documents, both branches of privilege were to be approached similarly.[210] While the issue has not received detailed academic consideration, several commentators have likewise suggested that the same approach should be taken to copy documents made for 'a privileged purpose' generally.[211] Therefore it is important to seek an approach which is equally applicable to both branches of privilege.

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[209] So long as doing so is consonant with the principles enunciated in s 10 which requires the interpretation of the common law to be consistent with promotion of the Act's purpose and principles. Section 6 provides that the purpose of the Act is to "help secure the just determination of proceedings by… [among others purposes] protecting rights of confidentiality and other important public interests; and avoiding unjustifiable expense and delay": s 6(d) and (e).

[210] Including *Propend* above n 3; *Simunovich* above n 5.

[211] C Hollander *Documentary Evidence* (9th ed, Sweet & Maxwell, 2006), 243, (footnote 28 to [12-10]): "Both [*The Palermo* and *Watson*] are litigation privilege cases but there is no reason why a different rule should apply to legal advice privilege]; B Thanki above n 92, 175, para [4.12]: "the rule is also acknowledged to apply to copies made for 'a privileged purpose' generally. In other words, it will also apply where the copy is made for the purposes of obtaining legal advice without there being any litigation in prospect."

2. Possible Solutions

A. The Evidence Act 2006

1. Privilege for communications with legal advisers

Section 54 of the Act encapsulates legal advice privilege at common law. It does not provide any guidance on whether copy documents can attract privilege.

The Court of Appeal decision of *Suminovich*[212] relied on *Crisford* as pre-Act authority on copy documents. The Court held that while *Crisford* was concerned with litigation privilege, "the principle [on copy documents] adopted by the Court applies equally to legal advice privilege".[213] *Crisford* adopted the 'something more' approach proposed in *Ventouris*.[214] Therefore although section 54 does not provide guidance on whether copy documents can attract privilege, early authority under the section favours the 'something more' approach.

2. Privilege for preparatory materials for proceedings

Section 56 covers what was litigation privilege at common law. While section 54 does not provide specific guidance on the copy document conundrum, there are several elements of section 56 which may help guide us to a solution.

a) Confidentiality

[212] Above n 5. *Simunovich* was decided in 2008 under the Evidence Act.
[213] Ibid, *per* Miller J at [165]
[214] See text accompanying n 186 above.

As mentioned in Chapter One, confidentiality was required to attract litigation privilege at common law.[215] There is no express requirement of confidentiality under section 56, which is in contrast to section 54 where it is a clear requirement. This may have implications for the argument at common law that copy documents can not attract privilege as there is nothing in the process of copying or translating of the documents that imports any element of confidentiality.[216] Where an original document was not a confidential communication, and the translation, transcript or copy does not add any element of confidentiality (such as a change in information or extra information added) the copy document can attract no greater privilege than the original.

It is unclear whether section 56 was intended to change the common law in this respect, or whether the absence of a confidentiality requirement was simply a legislative oversight.[217] Decisions under the Act have not specifically addressed whether or not confidentiality is still a requirement.[218] However, even if confidentiality *was* intended to be removed as an element, this does not resolve the problem of whether or not a mere verbatim copy document can even constitute a 'communication' for a privileged purpose. As will be discussed below, there are differing approaches as to whether a verbatim copy document is a communication separate from the original from which it was created.[219]

b) Section 56(2)(c) and (d): 'Information compiled'

Section 56(2)(c) and (d) establishes that privilege attaches to 'information compiled' by the party, or party's legal adviser, or by any other person at their request. It is the purpose for which the information was compiled that will determine privilege;[220] the information in question need not come into existence for a privileged purpose.

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[215] See text accompanying n 68 to n 71 above for discussion of the common law. In particular *Opthamological Society* and *Crisford* hold that confidentiality is an essential element.
[216] The requirement of confidentiality to attract litigation privilege was an important factor in the reasoning in *Sumitomo* (above n 6) and *Crisford* (above n 23).
[217] Law commission report 55 – meant to reflect the CL in *Stuart*. But that case focuses on the dominant purpose test rather than confidentiality…
[218] See n 68 and n 69 and accompanying text.
[219] The 'something more' approach holds that the communication with which privilege is concerned is the original recording of the material, where as the *Propend* approach allows privilege for copy documents on the basis that passing the copy document to the legal adviser is a communication.
[220] *Cross on Evidence (NZ)* (Looseleaf) (LexisNexis) (Updated 01/09/09), EVA56.5(b).

'Compiled' is not defined by the Act. There are several interpretations available:

Information 'compiled' may literally cover a non-discriminatory collection of information for the purpose of preparing for proceedings. However this interpretation gives rise to the risk of 'document dumping'. Clients may be tempted to gather up all unfavourable, non-privileged documents and place them in the possession of their legal adviser, ostensibly for the purpose of preparing for proceedings, so as to shield them from disclosure.

Another approach is to interpret 'compile' as implicitly requiring some sort of active arrangement. 'Compile' is defined by the Oxford English Dictionary[221] as "to make, compose, or construct (a written or printed work) *by arrangement* of materials collected from various sources".[222] Implicit in this definition is the exercise of some sort of judgment in composing the information, suggesting that *Lyell v Kennedy* type reasoning will be of continued relevance under the Act. As section 56(2)(c) and (d) cover 'information compiled' by (or at the request of) a party, the section would be extended beyond the traditional *Lyell v Kennedy* approach that requires the exercise of *professional* judgment and skill.

Section 56 was considered in *Reid v New Zealand Fire Service Commission,*[223] in which it was suggested that information which traditionally formed part of 'counsel's file' would now be protected under section 56(2)(c).[224] The issue in *Reid* was whether notes, created for the purpose of a proceeding, which recorded a non-privileged conversation could attract privilege.[225] Relying on the analogous case of *Crisford*, it was held that a

[221] With reference to a literary work, and the like.
[222] Emphasis added.
[223] 7/5/08, HRRT Decision No 8/2008; HRRT58/07 (*Reid*).
According to s 53(5) the Act "does not affect the general law governing legal professional privilege, so far as it applies to the determination of claims to that privilege that are made neither in the course of, *nor for the purpose* of, a proceeding" (emphasis added). Thus if the claim of privilege was for proceedings conducted in the Human Rights Review Tribunal, the common law would be authoritative. However, in *Reid*, although the appeal was to the Review Tribunal, determination of the claim was *for the purpose* of a proceeding under s 88A of the Judicature Act which had been conducted in the High Court. Therefore the Act still applied to the privilege claim.
[224] Ibid, [30].
[225] The material subject to the claim of privilege in *Reid* was notes taken by the defendant (Crown Law Office) which recorded non-privileged conversations between the plaintiff and several members of the Crown Law Office.

recording of a non-privileged conversation would only fail to attract privilege where "the creation of the record of a communication is truly only a mechanical process".[226] Whether the recording was more than "mechanical" will be a question of fact. The Tribunal concluded that the record in question had involved at least *some* "element of choice about what was recorded and how the record was expressed".[227] As such there was "sufficient exercise of skill, selection, effort and/or judgment to come within the rationale for legal professional privilege".[228]

Reid therefore suggests that *Lyell v Kennedy* type reasoning (requiring a 'more than mechanical process' of recording) will continue to guide our treatment of the 'copy document conundrum'.[229] This approach, requiring 'active arrangement', guards against 'document dumping', while also protecting against disclosure of strategies for anticipated litigation.

c) Section 56(2)(c) and (d): 'Information prepared'

'Information prepared' will cover conventional situations involving preparation of information for proceedings, such as a lawyer's own documentary preparations for trial. However, it may also literally cover documents which have been translated, transcribed or copied for the purpose of proceedings. Information 'prepared' is undefined by the Act, however according to the Oxford English Dictionary 'prepare' can mean "to bring into a suitable condition for some future action or purpose". Therefore 'information prepared' may protect information which has been altered in form but not in content for use in proceedings.[230]

It is again likely that pre-Act authority will be persuasive on the interpretation of 'prepared'. At common law, transcriptions and translations were to be treated in the same

[226] *Reid* above n 223, [33].
[227] Ibid, [34].
[228] Ibid, [34]. Although the extent of choice exercised by Crown law was not elaborated on.
[229] Although, as stated above, it will no longer be restricted to the skill of a *professional*.
[230] *Cross on Evidence (NZ)* above n 220, EVA56.5(b). For example, short hand notes or foreign documents may constitute information 'prepared' for litigation (even though the meaning of the information contained in the translated or transcribed document is identical to that in the non-privileged original).

way as copies[231] and (at least according to the 'something more' approach) mere verbatim copies of non-privileged originals could not attract privilege. It is therefore submitted that the interpretation of 'information prepared' will be determined by our broader approach to the scope of section 56 and the 'copy document conundrum'.

B. Common Law Approaches to Copy Documents

As neither section 54 nor section 56 provide conclusive guidance on the 'copy document conundrum', it is necessary to go on and consider the common law approaches the issue of whether copies of non-privileged originals can attract privilege. The following discussion will clarify the foundational understandings underpinning each approach and consider the practical and theoretical merits of the approach.

1. The 'distinction approach' based on the discoverable status of the original

a) The approach

The Palermo held that, on a straightforward application of the test for legal professional privilege, copy documents coming into existence for a privileged purpose can attract privilege.[232] The approach focuses on the *physical* creation of the document, regardless of the similarity of content or physical form with the non-privileged original.

However, as explained in Chapter Two, subsequent cases[233] have narrowed the scope of *The Palermo*, holding that the status of a copy document is to be determined according to:

[231] As established in *Sumitomo* above n 6, and endorsed in *Maruha* above n 87.
[232] *The Palermo* above n 85. Brennan CJ's approach in *Propend* above n 3, is reminiscent of this literal approach.
[233] *Chadwick* above n 1; *Puleston* above n 102.

a. the purpose for which the copy document was made; and

b. whether the pre-existing, non-privileged original is, or would have been,[234] discoverable from the party resisting the production of the copy.

It is only when the original is not discoverable from the party claiming privilege for the copy that the copy may attract privilege.

b) Merits of this approach

i. Practical considerations

The distinction under this approach has been described as "absurd and anomalous"[235], "confusing and often fine, not to say ridiculous".[236] It creates an impractical technicality whereby the status of the copy will depend on the exact circumstances of its creation, as well as the location of the original from which it was taken.[237]

Under the 'distinction approach' legal professional privilege may be used as a tactical tool or a mechanism through which lawyers attempt to 'play games' with their opponent.[238] A lawyer could say

> go and get me a copy of this document from a third party, the original of which, in my possession would be discoverable, but a copy of which, made for a privileged purpose, will be protected from disclosure by legal professional privilege.[239]

"[L]itigation is not a war or even a game"[240] therefore the prospect of privilege being treated so casually is a particularly disconcerting one.

The risk of document destruction arguably provides some justification of the distinction. Parties may be tempted to make a copy so as to attract privilege, then destroy or

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[234] Had the original not been destroyed or lost: *Chadwick* above n 1.
[235] For example see *Lubrizol* above n 121 *per* Aldous J at 961; *Bond* above n 147 *per* Debelle J at 31; *Nickmar* above n 126 *per* Wood J at 62.
[236] C Passmore *Privilege* (CLT Professional Publishing, 1998) 132.
[237] Ibid, 132; C Tapper, above n 94, 374-375.
[238] As was the concern of Aldous J in *Lubrizol* above n 121.
[239] *Shaw* above n 147, at 340-341.
[240] *Davies v Ely Lilly* above n 33, *per* Sir John Donaldson MR at 804.

'accidentally misplace' the original thereby avoiding disclosure of unfavourable information.[241] However, this concern has been dismissed as an insufficient justification for the distinction. Where a copy is made for the purpose of attracting privilege and then destroying the discoverable original, the purpose requirement for the copy to attract privilege would not be satisfied in the first place.[242]

ii. Theoretical considerations

Ordinarily, when determining whether a communication is privileged, there is no requirement (either at common law or under the Act) that the information contained in the communication not be otherwise discoverable from the party claiming privilege. It is therefore anomalous that this should be the decisive factor in a privilege claim for a copy document. Neither section 54 nor section 56 of the Act supports this distinction.

By making privilege contingent on the discoverability of other evidence, privilege is treated as a mere rule of evidence rather than a fundamental condition for the administration of justice for which it has been recognised.[243] Moreover, such an anomalous distinction can hardly inspire a client to "make a clean breast of it".[244] Nor does the 'distinction approach' facilitate preparations for trial. Denying access to a copy where the original is not discoverable by the party claiming privilege for the copy does not assist the gathering of evidence, rather it achieves the opposite result. The other party is forced to seek out the original in the hands of a third party, incurring additional

[241] For example, in *Goldberg* the Court allowed privilege for a copy document the original of which would have been discoverable in the hands of the client but which had "mysteriously disappeared" before trial. This was the very situation that the Court had been alert to in *Chadwick* if privilege was allowed for a copy of a discoverable original. *Galadari* held *Goldberg* to be wrongly decided - the copy shouldn't have attracted privilege as the original would have been discoverable had it not been misplaced or destroyed. Where the copy was made from a document *not* discoverable by the party resisting production of the copy (for example making a copy of a document while it is in the hands of the third party) then document destruction is less of a concern.

[242] The majority in *Propend* argued that if a copy was made with the purpose of attracting privilege and destroying the original it would not satisfy the sole purpose test: see text accompanying n 168 above. Likewise, the copy would have been made with dishonest purpose, therefore under s 67 of the Evidence Act 2006 the Judge would have the power to disallow the privilege: The judge may disallow privilege where "there is a prima facie case that the communication was made or received or information was compiled or prepared with a dishonest purpose…": s 67(1).

[243] See cases cited above n 13.

[244] *Anderson* above n 2, *per* Sir George Jessell MR at 649.

expense and wasting time, particularly as disclosure of the verbatim copy will reveal no more than the existence and content of the non-privileged original.

2. The 'commonsense' approach

a) The approach

Dismissing the 'distinction approach' for copy documents, Lord Denning in *Buttes Gas* suggested that there should be an absolute rule that copies of pre-existing, non-privileged originals can never attract privilege. The status of the original always dictates that of the copy because, even if the original is not discoverable, it will nevertheless be available through other compulsory processes such as subpoena duces tecum.[245]

b) Merits of the approach

i. Practical considerations

This approach has an initial commonsensical appeal, particularly where the lawyers involved appear to be playing games with privilege[246]. Where the original document will ultimately be available at trial, allowing access to the original at the pre-trial stage will "give accelerated production to the document itself".[247]

However granting absolute access to (arguably privileged) copies of non-privileged original documents is not the only way to give accelerated production of the content of a non-privileged original. Other forms of secondary evidence may serve the same function without derogating privilege.[248]

[245] Subpoena duces tecum compels production of documents by third parties.
[246] For example in *Lubrizol*, above n 121.
[247] *Buttes Gas* above n 82, *per* Lord Denning at 244.
[248] *Propend* above n 3, per Brennan CJ at 510. McHugh J (at 553), addressing the argument that forcing a party to obtain the information in its original form generates unnecessary delay or expense, suggests that if copies were denied privilege lawyers would be forced to summarise the contents of original documents in order to attract privilege, and therefore the expense of litigation would be even greater.

ii. Theoretical considerations

The 'commonsense' justification in *Buttes Gas* has been doubted as unsupported by principle or authority.[249] Commonsense has been labelled "a misleading guide" in this area of law.[250] The 'commonsense approach' treats privilege as a mere rule of evidence[251] based on convenience and accelerated production of other evidence, where as any decision on privilege must be based on the interests of justice and consideration of legal principle.[252]

An absolute denial privilege for all copies may encourage parties to litigation to empty their opponent's brief of copy documents so as to take advantage of their opponent's initiative and mental processes rather than using their own investigations to seek out original documents.[253] Most importantly however it also gives rise to the risk of revealing the lawyer's strategy for trial and theory of the case through disclosure of a selection or collection of copy documents.[254]

As with the 'distinction' approach, no qualification is made under either section 54 or section 56 supporting an approach based on the availability of the original document as evidence - whether from the party claiming privilege or from a third party. Also, an absolute rule against protection for copies would mean a copy would not be able to attract privilege even where it constituted 'information compiled' for the purpose of litigation, which would be in direct conflict with section 56(2)(c) and (d).

Also, the costs of obtaining access to the original may in fact be outweighed in terms of cost, by the expense incurred by forcing parties to summarise pre-existing documents to ensure their communications are protected from disclosure: *per* Gummow J at 570.

[249] Including *Goldberg* above n 4, *Galadari* above n 97 and *Ventouris* above n 2. Both the majority and minority in *Propend* above n 3, doubted the reasoning in *Buttes Gas* (although coming to different conclusions on the correct approach)

[250] *Propend* above n 3, *per* McHugh J at 552.

[251] Ibid, *per* Gaudron J 540.

[252] Ibid, *per* Kirby J at 592; Gummow J at 564; McHugh J at 552; Gaudron J at 542; Dawson J at 520; Toohey J at 528.

[253] Ibid, *per* Kirby J at 588; Brennan CJ at 509; Gummow J at 571.

[254] N Williams above n 14, 157

3. Conclusion on the 'distinction' and 'commonsense' approaches

It is submitted that neither the 'distinction approach' nor the 'commonsense approach' constitute a sufficiently convincing resolution to the copy document conundrum.

Both approaches treat legal professional privilege as a mere rule of evidence which can be derogated according to the availability of other evidence. As cautioned by Gaudron J in *Propend,* we must be wary of relying on decisions which were decided before legal professional privilege was recognised as a fundamental condition for the administration of justice.[255]

Nor are the practical merits of either approach particularly compelling. The 'distinction' approach has been labelled 'anomalous' and 'absurd' and gives rise to the risk of manipulation and impractical technicality. Lord Denning's approach, while providing an immediate commonsensical appeal, carries with it the risk of injustice where disclosure of copy documents will reveal a lawyer's trend of advice or view of the case.

Neither section 54 nor 56 of the Evidence Act support either of these approaches. It is therefore submitted that neither of these proposals constitute a persuasive solution to the 'copy document conundrum'. The real question therefore, is between the 'something more' approach and the *Propend* approach, as will be discussed below.

4. The requirement of 'something more'

a) The approach

This approach holds that *mere verbatim* copies of non-privileged original documents cannot attract greater privilege than the originals themselves. There must be 'something

[255] *Propend* above n 3, at 541. Decisions such as *Chadwick* above n 1, and *Buttes Gas* above n 82, upon which these approaches respectively rely, were decided before recognition of privilege as a fundamental condition upon which the administration of justice rests.

more' in the circumstances in which the copy was created, or added to the content of the copy, that warrants privilege attaching.[256]

The essence of this approach is that privilege attaches to the contents of the document rather than the document itself.[257] As such, it is the purpose for which the content of the communication was originally reduced into written form that determines the status of the communication.

Pre-existing documents can not attract privilege simply by being passed to a legal adviser for a privileged purpose[258] and therefore the verbatim copying of a pre-exiting document can not attract privilege.[259] There is no privilege in mere reproduction.[260]

i. The *Lyell v Kennedy* exception

Cases that recognise the *Lyell v Kennedy* exception, but reject privilege for mere verbatim copies, base their reasoning on the fact that the process of selecting or collecting copy documents (or pre-existing documents) conveys more than just the content of the original document.[261]

b) Merits of the Approach

i. Practical considerations

The practical application of the 'professional knowledge, research and skill' requirement of *Lyell v Kennedy* has been doubted as a "certain" or "workable" test of privilege.[262] It may give rise to fine distinctions and difficult questions regarding the degree and extent of skill exercised.[263] For example, in the trial judgment in *Kennedy v Lyell*[264] the

[256] Cases supporting this approach include *Ventouris* above n 2, and the minority in *Propend* above n 3.
[257] Propend, above n 3, *per* Dawson J at 518.
[258] See cases listed above n 2.
[259] M Hemsworth above n 34, 330.
[260] *Vardas* above n 126, *per* Clarke J at 660.
[261] *Propend* above n 3 *per* Dawson J at 519, Toohey J at 529,530. Likewise, the selective copying, compiling and collecting of *original* documents adds something more to the content of the non-privilege original document – the *Lyell v Kennedy* exception attaches to both originals and copies
[262] N Williams above n 14, 156.
[263] Ibid, 155.
[264] 23 Ch. D. 387, (CA, 1883) (*Kennedy v Lyell*).

statement that a graveyard contained the tomb of 'X' was held to be merely an observation of fact, while the statement that a graveyard contained the tomb of 'the said X' was a statement communicating a professionally formed opinion of law.[265]

The scope of the exception has been narrowed. The mere expenditure of time and expense is insufficient to attract the exception,[266] as is the verbatim copying of a single document or complete category of non-privileged documents.[267] A selection by a party from their own documents will not attract privilege.[268]

The exception has been predicted to become obsolete[269] in an era of "indiscriminate copying".[270] Huge numbers of documents may be copied in bulk, making it difficult or impossible to detect when there has been an adequate imposition of 'professional knowledge, research, and skill' to invoke the exception.[271]

ii. Theoretical considerations

However, while there are practical difficulties with the *Lyell v Kennedy* exception, it has, (according to the 'something more' approach) been recognised as a 'necessary exception' to the general rule that copies, like pre-existing documents cannot attract privilege.[272]

The *Lyell v Kennedy* exception protects against the premature disclosure a lawyer's litigation strategy and theory of the case. Even in an era of open preparation and

[265] Ibid, *per* Baggallay LJ at 402.
[266] *Lambert* above n 137.
[267] Ibid. See also C Tapper above n 93, 228.
[268] *Sumitomo* above n 6 (overruling *Galadari No. 7)* rather the exception will only apply where the selection or collection has been made from third party documents.
[269] C Hollander above n 211, 245.
[270] *Roux*above n 147, *per* Bryne J at 599. See also *Ventouris* above n 2, *per* Bingham LJ at 621.
[271] C Hollander above n 211, 245.
[272] There has been consistent judicial recognition of the exception, including: *Galadari* above n 97, *Ventouris* above n 2; *Goldberg* above n 4; *Nickmar* above n 126; *Vardas* above n 126 and the minority in *Propend* above n 3.
Commentators have similarly considered the *Lyell v Kennedy* exception to be a useful approach: See S Simpson, D Bailey and E Evans *Discovery and Interrogatories* (2nd ed, Butterworths, 1990) 186; B Thanki above 92, 178; C Passmore above 236, 141; E Comerton, "The Legal Professional Privilege in England Today: A Suggested New Approach" (1964) 15 N. Ir. Legal Q. 510) 519.

litigation,[273] it is necessary to protect lawyers' mental endeavours to ensure the effective functioning of the adversarial system.

Copies not forming part of a selection or compilation do not attract privilege. According to the '*Propend* approach' this inhibits the ability of the lawyer to freely investigate the matter in question.[274] However rejecting privilege for verbatim copies may be justified as striking an appropriate balance between the public interests underlying privilege with those underlying disclosure. As a verbatim copy will be unlikely to disclose anything more than the existence and content of the non-privileged original document, therefore suppression of the copy cannot be justified in light of the importance of securing the just and efficient determination of the issue.[275]

The *Lyell v Kennedy* exception is adaptable to modern litigation support systems where the original versions of documents are collated and converted to a common format.[276] Such documents would be treated as verbatim copies,[277] however the *Lyell v Kennedy* exception would protect situations where editing, changes in terminology, and removal of unnecessary detail has taken place through the exercise of professional legal skill and judgment.[278] While a purely mechanical exercise of making microfilm copies of non-privileged originals is unlikely to attract privilege, computer software and systems to retrieve such copies would be protected from disclosure by the *Lyell v Kennedy* exception.[279]

Modern copying technology and electronic documents result in multiple copies and print-outs which are indistinguishable from each other, both in terms of content and form.

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[273] Where the exchange of pleadings in contemporary proceedings arguably reveals the solicitor's line of argument to a greater extent that revelation of a selection or collection of pre-existing or copy documents: C Tapper above n 94, 375
[274] *Propend* above n 3, 571
[275] *Simunovich* above n 5, para [165].
[276] C Tapper, above n 93, 243-244.
[277] Tyler et al above n 91, 221.
[278] C Tapper, above n 93, 243-244
[279] As was held in *BCBC* above n 45. Where information is collated in 'relational databases' for a variety of general business purposes the information in the database is only entered once, but drawn on for multiple reasons. Thus if a particular collection of information is drawn on for the purpose of litigation, "it makes little sense to distinguish between the purpose of the information's being originally gathered, and the purpose of the litigation. In a sense the information has been gathered for any purpose which may require access to it…": C Tapper above n 93, 243-244.

When copying was achieved through carbon copying and other manual processes, original and copy documents were clearly distinguishable, however the "anonymity of modern technology has undermined the old distinction between originals and copies".[280]The most realistic approach therefore is to decline to draw a distinction between originals and copies, only allowing privilege where there is patently 'something more' in terms of composition to warrant privilege attaching.[281]

While the *Lyell v Kennedy* exception accommodates the lawyer's preparation for trial, it has been criticised as applying too narrowly due to the requirement of 'professional knowledge, research and skill'.[282] At common law the exception would not protect selections or collections made by the *client* for the purpose of litigation.

However, section 56(2)(c) and (d) resolve this criticism in the context of litigation privilege. Section 56 can be interpreted as supporting the extension of *Lyell v Kennedy* type protection to 'information compiled' by or at the request of the client. Therefore, if a party were to make their own selections or collection from pre-existing documents or copy documents, so as to create an actively arranged compilation for the purpose of preparing for a proceeding, this would attract protection.

It is submitted therefore that the 'something more' approach provides a comprehensive, realistic and principled approach to the treatment of copy documents within litigation privilege.

Legal professional privilege, however, is not limited merely to protect information and communications in a litigation context. *Legal advice* privilege exists to facilitate full

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[280] C Tapper above n 94, 371. This difficulty was illustrated by the factual challenge in *Galadari* where the party claiming privilege was unable to prove whether the documents for which privilege was claimed were originals or copy documents: C Tapper, above n 93, 243.

[281] It is noteworthy that the *Lyell v Kennedy* exception has been matched by the development of the 'selection and compilation doctrine' in the context of work product immunity in the United States: E Spiro and J Mogul, "Invoking the Selection and Compilation Doctrine" (April 2, 2009) *New York Law Journal* <http://find.galegroup.com/itx/start.do?prodId=LT&userGroupName=otago> accessed 27/07/09.
An exception based on protecting the mental endeavours of the lawyer is likewise reflected in Rule 26(b)(3) of the Federal Rules of Civil Procedure: "…the court shall protect against disclosure of the material impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation": M Tyler et al, above n 91, 217.

[282] N Williams above n 14, 155.

disclosure by clients to their legal advisers so that informed and accurate advice can be given. Section 54 provides no guidance on the 'copy document conundrum'.

Although mere verbatim copies are not privileged communications in their own right, at common law (under the 'something more' approach) mere verbatim copies could be protected where disclosure would reveal the content of a privileged communication.[283]

One such situation may arise where a verbatim copy constitutes an inseparable adjunct to a request for legal advice. The Court in *Duraphos International (N.Z.) Limited & Ravensdown Fertiliser Co-operative Limited v G.E. Tregenza Limited*[284] held that a copy of a draft document accompanying a letter from legal adviser to client attracted privilege on the basis not that it was a copy created for the purpose of legal advice, but that it was an inseparable adjunct to the provision of legal advice. Although *Duraphos* was a situation of lawyer-client communication, it may equally apply to client-lawyer communication where a copy of a pre-existing document is so interlinked with a request for legal advice that they cannot realistically be considered separately for the purpose of determining whether privilege applies. Another such situation may arise where the verbatim copy has been extensively annotated for the purpose of receiving advice so that it can no longer be regarded as a mere verbatim copy.[285]

As such, although mere verbatim copies cannot attract privilege as communications in their own right, there are several avenues under the 'something more' approach whereby copies can be protected where disclosure would risk revealing a privileged communication.

[283] As was the case in *Simunovich* above n 5 where Court of Appeal refused disclosure on the basis that the successive changes to the scripts would reveal the content of privileged communications. While this was a situation where the lawyer's advice needed to be protected. See also n 55 and n 56 and accompanying text.
[284] (HC Timaru, C.P. No. 78/88, 26 June 1998) (*Duraphos*). See also *Equiticorp* above n 56.
[285] *AUAG* above n 204, where again the case was concerned with lawyer-client communications, however the principle should apply equally to client-lawyer communications where a copy is annotated for the purpose of legal advice.

5. The Propend *approach*

a) The approach

The '*Propend* approach' holds that privilege attaches to the communication constituted by the copy document. That communication is separate and distinct to the existence of the original, regardless of the fact that it contains the same material. As such, if the copy is created with a privileged purpose, it will attract greater privilege than the original from which it was created.[286]

i. Consistency of forms

The need for consistency across different forms of communication is pivotal to the *Propend* approach.[287] A copy document is a communication different only in form from an oral communication of the exact content of a pre-existing original and as such denying privilege for copy documents unduly elevates form over substance.[288]

The *Propend* approach focuses on the client's conduct in giving the lawyer the copy document, rather than the recording of information in the original document as the 'communication'.[289] It is therefore the purpose for producing the "medium of communication (oral or copy) [that must be] a privileged purpose".[290]

ii. Pre-existing documents

[286] *Propend* above n 3, 571.
[287] See also above n 169 to n 171 and accompanying text for discussion of consistency of forms reasoning.
[288] *Propend* above n 3, 544.
[289] Ibid, *per* McHugh J at 554. In New Zealand, *Huang* suggests that a document created, but not actually passed to a legal adviser is nevertheless a 'communication' within the scope of legal advice privilege. The 'communication' that the majority in *Propend* were primarily concerned with was the actual transfer of the information contained in copy document to the lawyer. Therefore in terms of copy documents, if a client was to make a copy with the requisite purpose, but not actually pass the copy document to their lawyer it is doubtful whether disclosure of such a copy could reveal a privileged communication: C Beaton-Wells, "Case Note Commissioner, Australian Federal Police v Propend Finance" (1998) 24 Monash U. L. Rev. 210, 96-97.
[290] *Propend* above n 3, *per* Kirby J at 587.

In *Propend*, McHugh J strongly advocated the 'consistency of forms' approach above, going so far as to suggest that the communication of a *pre-existing* document for a privileged purpose will also attract privilege.[291]

Although the other members of the majority in *Propend* do not explicitly address whether pre-existing documents can attract privilege as well as copies, this is nevertheless a necessary consequence of the 'consistency of forms' reasoning. The focus on the communication of information, regardless of form, requires that a pre-existing document must also attract privilege if it constitutes a communication of information to a legal adviser for a privileged purpose.

McHugh J clarifies that a non-privileged original may only attract privilege in the hands of the lawyer. It is only then that disclosure of the document might risk revealing a privileged communication when coupled with the surrounding circumstances (i.e. that the document had been passed to the lawyer for the purpose of litigation or legal advice).[292] When a pre-existing document leaves the lawyer's custody it will no longer be able to reveal a privileged communication, rather it will simply revert back to having the status of pre-existing document outside the context of legal advice or litigation.[293]

Discovery of the pre-existing original, like any other pre-existing material, will still be required of the client if the original has been, but is no longer, in the control of the

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[291] Ibid, 553. As has been discussed previously, the proposition that a pre-existing original can attract privilege is controversial and goes against the current consensus in England, Canada, New Zealand and Australia. For cases holding that pre-existing documents do not attract privilege on being passed to a legal adviser see cases listed above n 2.

[292] Ibid, 553.

[293] "[S]ince the original document was not created solely for the purpose of obtaining legal advice or assistance, it would be stretching legal professional privilege too far to cloak the document with privilege merely because at some stage it was the subject of legal advice or assistance": *Propend* above n 3, *per* McHugh J 553.
American commentator Professor Rice also adopts which approach to pre-existing documents in the context of attorney client privilege. For a written communication to be protected by privilege on *its own accord*, the written communication, like other forms of communication it must have been created for a privileged purpose. The purpose requirement of privilege cannot be retroactively satisfied through the sending of the document to the lawyer, "otherwise, a client could immunise all documents simply by sending them to his legal counsel, who would screen the documents for potential legal problems". Pre-existing documents, as a piece of paper containing writing, are clearly not privileged before and after they are transferred to the legal adviser: P Rice, "Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-existing Documents, and the Source of the Facts Communicated" (1998-1999) 48 Am. U. L. Rev. 967. 989-992.

client.[294] Therefore the client will be obliged to retrieve the original from their legal adviser.[295]

Therefore, while pre-existing originals on the above reasoning can in theory attract privilege, they will in practice only be protected from disclosure where they are sought from the lawyer directly. For example where a search warrant is executed in the lawyer's office,[296] or in the context of litigation privilege where the pre-existing document constitutes the lawyer's own communications with third parties, or gathering of information for the purpose of preparation for proceedings and thus they have never been in the client's possession or control.

iii. The status of copy documents

The essential difference between a communication constituted by a pre-existing original and a copy document is that a copy is a written communication which has no existence outside of constituting a privileged communication. Therefore, even when in the hands of the client, disclosure of the copy document is necessarily disclosure of a privileged communication.

However, the *Propend* approach holds that privilege turns on purpose. Therefore if the copy document, as a medium of communication, was created for a privileged purpose it will attract privilege. This may seem like an absurd distinction to make in an era when copies can be such exact replicas of the original that they reveal nothing more than the existence of the original document itself. This will often be the case in an era of modern copying technology and electronic documents where each verbatim copy is indistinguishable from its original in terms of both content and form. [297]

b) Merits of the approach

i. Practical considerations

[294] HCR 8.21.
[295] P Rice above n 293, 995.
[296] As was the case in *Propend*.
[297] C Tapper above n 94, 371.

Practically speaking, the *Propend* approach involves a straightforward assessment of the purpose for which the copy document was created.[298] However, the approach has far reaching implications. Allowing privilege for verbatim copy documents which have been created for a privileged purpose (whether they are in the hands of the client or legal adviser) leads to the temptation of simply photocopying all relevant documents en masse and forcing the other side undergo the time consuming and expensive process of seeking out the original documents.

In civil proceedings, if the client were to gather up their unfavourable *original* documents and send them to their lawyer, these documents would still be discoverable from the client.[299] However, privilege may be manipulated so as to avoid the pre-existing document becoming discoverable by the client. This distinction is reminiscent of the much criticised 'distinction approach'.

In the criminal context, allowing privilege for original documents leads to the risk of 'document dumping'. Clients could send their incriminating documentation to their solicitor ostensibly for legal advice or preparation for litigation, and thus shield such documents from the risk of seizure by search warrant.[300]

ii. Theoretical considerations

The *Propend* approach promotes freedom for lawyers in investigating and preparing for proceedings. The approach alleviates concerns that if copy documents could not attract privilege lawyers may postpone research or be reluctant to reduce it to writing in order to

[298] Although, as recognised by Brennan CJ in *Propend* (at 503) there are inevitably difficulties in ascertaining the intention present in determining the purpose for creation of *any* communication. The straighforward application of this approach is particularly appealing when compared to the practical difficulties of determining whether there has been sufficient "professional skill, judgment and knowledge" to invoke the *Lyell v Kennedy* exception under the 'something more' approach.

[299] The client would be obliged to retrieve the documents from the legal adviser and produce them on discovery.

[300] R Mahoney, "Evidence" (1998) 1 New Zealand Law Review 53, 77. Although Brennan CJ advocated a qualification to the application of privilege for copies where privilege would frustrate the exercise of search warrants, this qualification was adopted by the rest of the majority, nor has it been followed in subsequent cases: R Desiatnik *Legal Professional Privilege in Australia* (2nd ed, Reed International Books Australia Pty Ltd trading as Lexis Nexis, 2005) 47. Distinguishing between civil and criminal proceedings and attempting to develop a different approach for each is not warranted by the wording of the Act, nor would it be practicable to give 'communication' two different meanings according to whether proceedings were in the civil or criminal context.

avoid the risk of premature disclosure to their opponent. This approach likewise deters lazy practices and the raiding of opponents' files.[301]

The *Propend* approach also arguably encourages confidence in the lawyer-client relationship and promotes full disclosure.[302] However, construing the scope of privilege so widely may unnecessarily inhibit disclosure. Disclosure of relevant evidence to the court allows the decision maker to come to an informed and just decision, while disclosure between parties promotes early settlement and the elimination of false issues.[303] Privilege should not be extended beyond what necessity warrants and where disclosure of the verbatim copy reveals no more than the existence and content of the pre-existing document, it is certainly arguable whether such extension is necessary.

The most fundamental challenge for this approach is that, when taken to its logical ends, the approach requires pre-existing documents to also attract privilege in the hands of the legal adviser. This proposition is controversial to the common understanding that pre-existing documents do not attract privilege simply by being handed to the legal adviser for a privileged purpose. There is extensive judicial opinion against such a proposition.[304]

6. Conclusion on the 'something more' and **Propend** *approaches: A solution for New Zealand*

As illustrated above, the task of determining whether a copy document can attract privilege is not as straightforward as it may first appear. Rather it is an issue plagued with conflicting principle and inconsistent authority. Limiting or extending the scope of privilege is a contested exercise and determination of the status of copy documents necessarily brings into play public interests underlying legal professional privilege and disclosure and other contested viewpoints on principle and convenience, substance and form.

[301] *Propend* above n 3, 588.
[302] Ibid, 543.
[303] N Williams above n 14, 140.
[304] For cases against such a proposition see above n 2.

The differing conceptions of what constitutes a 'communication' under the 'something more' and '*Propend'* approaches makes deciding between approaches a difficult task. Each approach is ultimately incompatible and conflicting and there is a limit to how far a particular conception of 'communication' can be challenged until it becomes an answer of 'it is because it just is'. Nevertheless, each approach may still be compared on its practical application, theoretical merits and implications in order to determine which approach will be most helpful in legal practice.

It is submitted that New Zealand should continue to follow the 'something more' approach. Although it is not problem-free, it provides the most useful account of when a copy (or pre-existing) document will attract privilege. It draws a balance between suppression and disclosure and is the approach best suited to accommodating the technological challenges facing modern legal practice.

The 'something more' approach has been favoured in New Zealand in recent years and also in early authority under the Evidence Act. Although the Evidence Act does not provide much guidance on the issue, section 56(2)(c) and (d) can be interpreted in accordance with the 'something more' approach. This interpretation would require that in order for pre-existing originals and copy documents to attract privilege they must be 'compiled' (by legal adviser, client or any other person at their direction) with a degree of 'active arrangement'.

While the *Lyell v Kennedy* exception has been criticised as providing an indeterminate test, section 56(2)(c) and (d) may ameliorate these difficulties. The requirement of 'active arrangement' is likely to be more straightforward in application. The 'more than mechanical' test in *Reid* is likewise an uncomplicated approach. Verbatim copies (not satisfying the *Lyell v Kennedy* exception) may still attract privilege under the 'something more' approach if disclosure would reveal the content of a privileged communication.[305] Copies can be protected if they are so intertwined with a privileged communication that

[305] As illustrated in *Simunovich* above n 5.

disclosure would reveal the content of the privileged communication,[306] or where they have been annotated so that they can no longer be considered a mere verbatim copy.[307]

The 'something more' approach is a necessary exception to the general rule that copies cannot attract privilege. It protects against premature disclosure of lawyers' mental endeavours while still requiring disclosure of mere verbatim copies (which would be unlikely to reveal anything more than the content and existence of the non-privileged original in any event). The 'something more' approach is adaptable to modern litigation systems and recognises the impracticality of distinguishing between originals and copies in the context of modern technology.

Although the *Propend* approach is compelling in many ways, it is not sufficiently meritorious to prompt a change of approach in New Zealand. It draws the scope of privilege too widely, unnecessarily suppressing relevant evidence at the expense of the efficient and just operation of the adversarial system. A particular difficulty with the approach is that it requires privilege not only for copy documents, but also for pre-existing documents when in the hands of a legal adviser. Such a move would also give rise to the risk of 'document dumping' and open the way for manipulation of privilege. While the decision is of high authority and from a closely comparable jurisdiction, New Zealand should not follow the *Propend* approach. To expand the coverage of privilege to mere verbatim copy documents is to extend privilege "beyond what necessity warrants".[308]

Returning now to the factual scenario with which the 'copy document conundrum' was introduced, the application of the 'something more' approach means privilege would not attach to the verbatim copy letters created by Bob's lawyer. Privilege attaches to the content of a communication, therefore it is the purpose for which the content of the communication was originally reduced into written form that determines privileged status. There is nothing 'more' either in the circumstances in which the copy letters were created, or added to the content of the letters, that warrants privilege attaching.

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[306] See *Durophos* above n 284.
[307] See *AUAG* above n 204.
[308] *Wheeler* above n 9, 682

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