AN EVIDENTIAL PRIVILEGE FOR PRIEST-PENITENT COMMUNICATIONS

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I. THE PRESENT LAW IN ENGLAND AND WALES

If a person has been duly sworn as a witness in a judicial proceeding, he must answer any relevant question put to him. If he does not do so, he risks being held by the judge to be in contempt of court and punished by being imprisoned or fined. The fact that the witness finds it repugnant to his sense of honour to give an answer which will break a confidence reposed in him by someone else does not excuse him from his duty. The public interest in the disclosure of all matters relevant to a judicial proceeding is regarded as so important that it prevails over any considerations of private honour between individuals. It is simply no answer for a witness to say 'I was told this in confidence by a person who trusted me to keep his confidence'. This general attitude of English law has obvious and unwelcome implications for clergymen. A priest or clergyman will in the course of his ministry often receive private information from members of his flock, which his priestly duty requires him to keep secret. He might well be obliged to choose between disregarding his priestly duty or suffering legal penalties, which may be severe. Moreover, the prospect of having to submit him to this invidious choice will be repugnant to the judge; and the fact of such a choice being put, and of the clergyman being sent to gaol for doing his duty, is bound to cause dismay in large sections of the public. The possibility of this conflict of church and state actually happening is extremely small, but the fact that it exists at all is dismaying to many persons.

There are particular cases where a witness may with impunity refuse to answer a question put to him. The matter may be covered by a privilege, belonging either to the witness or some other person. Where such a privilege exists, the law holds that the interest involved in non-disclosure of the matter is so important that it outweighs the public interest in having all relevant evidence made available at a judicial trial. In such a case, the witness is either excused, or positively prohibited, from answering. A well-known example is the privilege against self-incrimination; if the answer may tend to expose the witness or his spouse to any criminal charge of penalty, he may refuse to answer[1]. The 'public' interest behind this privilege is in securing fairness to witnesses; it has been felt to be unfair that a witness should have to choose between answering truthfully and going to gaol for what emerges, answering untruthfully and going to gaol for perjury, or refusing to answer and going to gaol for contempt of court.

Another well-known privilege is the client/lawyer privilege. Communications between client and lawyer need not be revealed by the client and cannot be revealed by the lawyer without the client's consent. Since this privilege protects confidential communications it might seem that preserving the sanctity of

1. See *Phipson on Evidence*, 14 ed (1990) Chap 20, Sect 4.

confidences is a public interest which the law will protect. But this is not so; although in other contexts and by other means the law will protect confidences,[2] in the matter of giving evidence, confidentiality as such is never enough to outweigh the public interest in full disclosure.[3] However, (what is a different thing), if a public interest which *is* recognised as weighty enough requires for its vindication the protection of confidences, they will be protected. This is the explanation of client/lawyer privilege. Its *raison d'être* is that our adversarial system of trial requires for its efficient working a completely briefed lawyer on each side of the question; complete briefing is unlikely unless the client knows that his secrets are safe with his lawyer, not only in the matter in hand, but for all time.[4]

Mindful of the paramount importance of full disclosure, the judges have always refused to extend the number of relationships which may be protected by non-disclosure of confidential communications passing between the parties to them. They have allowed no privilege to communications with doctors, probation officers, agents, stewards, accountants,[5] clerks, confidential friends, bankers or journalists by their patients, clients, principals or sources.[6] Parliament created privileges for communications to patent agents[7] (in civil cases) and journalists.[8] Patent agents were identified with lawyers in pending or contemplated patent proceedings, and the public interest in the protection of journalists' sources was regarded by Parliament as important enough to override that of full disclosure. But the judges never moved from their position that no relationship other than that of client and lawyer was sufficiently weighty to be protected by non-disclosure of communications.

1. NO LEGAL PRIVILEGE

As for the relationship of spiritual adviser and confider (what for shortness will be described as the priest/penitent relationship),[9] there is a paucity of clear authority on the matter, but such as there is is against the existence of any privilege,[10] as is the almost unanimous opinion of text

2. See, generally, Gurry, *Breach of Confidence*, 1984.
3. *Alfred Crompton Amusement Machines v Customs & Excise Commissioners* (No 2) [1974] A.C.405, 433, 434, (H.L.); *D. v N.S.P.C.C.* [1978] A.C.171, 218, 230, 237, 242; and see Wigmore *on Evidence* (McNaughton Revision 1961), Vol VIII para 2285.
4. *D. v N.S.P.C.C., supra, per* Lord Simon at p.231.
5. See Cross *on Evidence* (1990 Cross & Tapper) p. 446.
6. *D. v N.S.P.C.C., supra; British Steel Corporation v Granada TV* [1981] A.C.1096 (H.L.)
7. Civil Evidence Act 1968, S.15.
8. Contempt of Court Act 1981, S.10.
9. Except as a convenient shorthand, this expression is of course inadequate, in failing to cover relationships other than that between a confessor and a penitent making to him a sacramental confession under the discipline imposed on both parties by their church. The discussion following will cover other less strictly defined relationships between clergyman and layman, and a wider range of statements than those made in the course of a sacramental confession.
10. *Wheeler v Le Marchant* (1881) 17 Ch, D 675, 681 (Jessel M.R.); *Normanshaw v Normanshaw* (1893) 69 L.T. 468 (Jeune P.); *McTaggart v McTaggart* [1949] P. 94, 97 (Denning M.R.); *Goddard v Nationwide Building Society* [1987] Q.B. 670, 685 (Nourse L.J. Consistent with these *dicta* at Court of Appeal level, there is the decision in *Pais v Pais* [1971] P. 119 (Baker J.). To the contrary, there are (equivocal) trial rulings in favour of the privilege in *R. v Griffin* (1853) 6 Cox 219 and *R. v Hay* (1860) 2 F & F 4. An exhaustive account of the English and Irish cases will be found in in Bursell '*The Seal of the Confessional*' (1990) 2 Ecc.L.J. 84, 87-97. In the Irish case of *Cook v Carroll* [1945] Ir.R. 517, 519-521, it was said that there was a privilege (belonging to the priest, not the penitent), but it was acknowledged that English judicial opinion was uniformly against its existence. Courts in other common law jurisdictions, after thorough review of the English position, have concluded that, in the absence of statute, no privilege exists: see *R. v. Church of Scientology of Toronto & Zaharia* (1987) 31 C.C.C. (3rd) 449; *R. v Gruenke* (1991) 67 C.C.C. (3rd) 289 (Canada) and *Mullen v U.S.* 263 F. (2nd) (1958) (District of Columbia).

writers[11] and official reports[12] A cogent argument against the existence of any common law privilege respecting Catholic priests is that of Stephen,[13] who makes the point that whatever may have been the position before the English Reformation, evidence law did not exist at that time, and the later era when it grew up was one in which it was most unlikely that the privilege would be granted. Nor did the various 18th and 19th century statutes removing Catholic disabilities grant or revive any privilege; they merely removed disabilities.[14] As to refusal by Anglican clergymen to break the seal of the confessional, it has been argued that this is founded, not on evidentiary privilege, but on a legal duty of silence imposed by the substantive law (the ecclesiastical law, which being part of the law of England must be applied in English secular courts).[15] Whatever the theoretical merits of this argument, which is founded on the statutes passed soon after the Reformation, the absence of any mention of it in any decision, or in any of the *obiter* statements in recent times denying the existence of any privilege, makes it safe to say that it would not be accepted at the present day. The matter is part of the common law, and if stating any common law rule amounts to prophesying what the Courts will do in actual practice, it may be confidently stated that there is no privilege in England and Wales for statements made in the course of a priest/penitent relationship.

2. PROTECTION ON DISCRETION

Moreover it is quite unlikely that a judge is able to protect a reluctant witness by discretion, that is to say, that he can lawfully say 'Although you have *no privilege and although a party insists on your being made to answer, I think it* will do more harm than good for you to be made to answer, so I decline to make you do so'.

A discretion, in the strict sense of the word, is involved where a judge, having found that a rule covers the case before him, nevertheless decides that it is not to be followed in the case. In a looser sense of the word, 'discretion' is also used where the judge is required to follow a rule if he finds that it applies (and is not able to disapply it), but where he is given considerable freedom in deciding whether it applies at all. Whether it applies or not depends on the judge weighing various factors against each other and how much weight he gives each factor and how he makes his mind up is largely for him.

(a) *Civil trials.* In civil cases, there are places where the judge has a discretion, in either the stricter or the looser sense, to exclude evidence although there is no legal privilege under which it may be withheld. The first relates to pre-trial

11. Stephen, *Digest of the Law of Evidence,* 12 ed (1948) p.220; Cross *on Evidence* (1990, Cross & Tapper) p.447; Phipson *on Evidence,* 14 ed (1990) para. 20-13; Halsbury's *Laws of England* (Hailsham ed 1976) Vol 17, para. 237; Wigmore *on Evidence* (McNaughton Revision 1961) Vol VIII, para 2394; McNicol, *Law of Privilege* (1992) p. 324; Robilliard, *Religion and the Law* (1984), p. 122; Nokes, 'Professional Privilege' (1950) 66 L.Q.R. 88, 100.
12. Law Reform Committee, 16th Report *(Privilege in Civil Proceedings* (1967), Cmnd 3472, para 46; Criminal Law Revision Committee, 11th Report *(Evidence: General* 1972) Cmnd. 4991, para 272; Australian Law Reform Commission, (hereafter A.L.R.C.) Report No 26 (Interim) *(Evidence* 1985) Vol 2 para. 205.
13. *Op.cit.,* f.n.11.
14. See Nokes, *op.cit.,* f.n.11.
15. Bursell, *op.cit.,* f.n.10, 108, 109. See also Moore's *Introduction to English Canon Law, 2 ed. (1985 E. Garth Moore & Timothy Briden) 100.*

discovery of documents[16] held by one side, so that the other side may inspect and take copies of them. If the party against whom discovery is sought has a legal privilege to prevent them from being disclosed in court, he will be able to prevent them from being disclosed at the pre-trial stage. But if he does not have such a privilege, that does not mean that he will necessarily be ordered to disclose them. The judge has a discretion whether to order discovery, although in any event the party will have to produce them at the actual trial, if he is subpoenaed to do so. A second case is where disclosure is resisted on the ground of public interest immunity, i.e. that national safety or the due working of the public service will be impaired by disclosure. Here it is well settled that before deciding whether the claim is well-founded the judge must privately inspect the documents (or the witness's proof of his expected oral evidence) and, weighing various factors, decide whether the public interest in disclosure is outweighed by the need to protect national safety or the public service.[17] An auricular confession to a priest is not likely to be in a document, or to involve national safety or the due working of the public service,[18] so these discretions will not be in point. However their existence cannot safely be forgotten, because many of the larger and more generous utterances about discretion as to privilege are found in cases where discovery and/or public interest protection was involved.[19] They have no obvious force in a case where a priest/penitent confession is sought to be revealed.

Where neither discovery nor public interest is involved, it is by no means established whether there is any discretion in a civil court to refuse to order disclosure, in the absence of some legal privilege. The Law Reform Committee, in its 16th Report,[20] offered an opinion that the modern policy of the common law is to 'limit to a minimum the categories of privileges which a person has an absolute right to claim, but to accord to the judge a wide discretion to permit a witness . . . to refuse to disclose information where disclosure would be in breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed'.

However the Criminal Law Revision Committee, in its 11th Report,[21] expressed doubts as to whether the statements relied on by the Law Reform Committee (in two earlier cases of journalists claiming privilege to protect their sources),[22] 'if they are right for civil proceedings, have any general application to criminal proceedings'. And although in *D. v N.S.P.C.C.*,[23] Lord Hailsham was sure that the Law Reform Committee's remarks represented current practice,[24] the opposite view was taken by Lords Edmund-Davies and Simon of Glaisdale. Lord Edmund-Davies, dealing with the argument that nowadays it is not only

16. Rules of Supreme Court, Order 24: see *Science Research Council v Nasse* [1980] A.C.1028 (H.L.).
17. *Conway v Rimmer* [1968] A.C.910 (H.L.); *Burmah Oil v Bank of England* [1980] A.C.1090 (H.L.).
18. Perhaps if he were a prison chaplain, the Home Secretary might claim public interest immunity in respect of statements made to him by prisoners.
19. E.g. *British Steel v Granada Television* [1991] A.C.1096.
20. *Privilege in Civil Proceedings* (1967) Cmnd, 3472, para 1.
21. *Evidence (General)* (1972) Cmnd. 4991, para. 275.
22. *A-G v Clough* [1963] 1 Q.B.773; *A-G v Mulholland* [1963] 2 Q.B. 477.
23. [1978] A.C. 171.
24. At p.227G. Lord Kilbrandon merely stated that he concurred with Lord Hailsham's speech; Lord Diplock, in a reasoned speech, did not advert to the matter.

lawyers who are excused from answering, said,[25] 'I believe the law to be quite otherwise . . . The law applicable to all civil actions like the present may be thus stated: (1) In civil proceedings, a judge has no discretion, simply because what is contemplated is the disclosure of information which has passed between persons in a confidential relationship . . . to direct a party to that relationship that he need not disclose that information even though its disclosure is (a) relevant to and (b) necessary for the attainment of justice in the particular case. If (a) and (b) are established, the doctor or priest must be directed to answer if despite the strong dissuasion of the judge, the advocate persists in seeking disclosure'.[26]

Lord Simon, who confessed to feeling some temerity in differing from the view of the Law Reform Committee, felt bound to express his reservations. The matter was not one of discretion but one of law.[27] 'I think that the true position is that the judge may not only rule as a matter of law or practice on the admissibility of the evidence, but can also exercise a considerable moral authority on the course of the trial. For example, in the situations envisaged the judge is likely to say to counsel: 'You see that the witness feels he ought not in conscience to answer the question. Do you really press it in the circumstances – on the one hand, the relevance of the evidence; on the other, the nature of the ethical or professional inhibition. Often indeed such a witness will merely require a little gentle guidance from the judge to overcome his reluctance. I have never myself known this procedure to fail to resolve the situation acceptably. But it is far from the exercise of a formal discretion. And if it comes to the forensic crunch . . . it must be law, not discretion, which is in command.' He goes on to concede that the law he has expounded may need altering, and notes that it has been found expedient in some jurisdictions to modify the common law rule of disclosure by giving statutory immunity to, for example, doctors or priests.[28]

(b) *Criminal Trials.* In a criminal trial, the only case which can arise in practice of an attempt to break the seal of the confessional is where the Crown wish to prove an admission of guilt by an accused person made in the course of a confession to a priest. That is not very likely anyway because the Crown will not know of the existence of the incriminating statement. But other theoretically possible cases of attempts e.g., to get a priest to depose to the confession of another person, X, in order to to show that X and not the accused committed the crime, can be ignored; they will be frustrated by the rule against hearsay.[29]

25. At pp 244H, 245B.
26. He continued: '(II) But where (i) a confidential relationship exists . . . *and* (ii) disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a refusal to disclose relevant evidence provided it considers that, on balance, the public interest would be better served by excluding such evidence', but following passages make clear that the public interest he is referring to is that protected by public interest immunity. The case itself was concerned with public interest immunity. See also Lord Simon at p. 240, who states categorically that 'weighing' is confined to claims for public interest immunity.
27. At p. 239 B-H.
28. At p. 240B.
29. However, since no hearsay would be involved if X himself gave evidence, he could be asked if he had not made such a confession to a priest. There would no question of protecting X from answering by discretion; the need to place no barriers in the way of evidence which materially helps to avoid an unjust conviction, which is strong enough to override even established privileges (see *Marks v Beyfus* (1890) 25 Q.B.D. 494; *R v Barton* [1973] 1 W.L.R. 115), would be decisive in favour of the defence. If X denied making the confession, the priest could be called to contradict him: Criminal Procedure Act 1865, SS 3, 4. The priest would not be protected from answering for the same reason. The priest's evidence would serve only to depreciate X's credit as a witness; being hearsay, it has no bearing on the accused's guilt: *R. v White* (1922) 12 Cr. App. R 60; *R. v Golder* [1960] 3 All E.R. 457.

As to a confession of guilt by an accused, there has long been a discretion to exclude such even if legally admissible. This has been confirmed by S. 82(3) Police and Criminal Evidence Act 1984: 'Nothing in this Part of the Act shall prejudice any power of a court to exclude evidence (whether by preventing questions being put or otherwise) at its discretion'. This discretion, thought by some to be wide-ranging, was severely delimited by the House of Lords in *R. v Sang,*[30] which however confirmed that it did cover confessions. It was not altered or widened by the Act of 1984, but was overtaken and overlapped by a new more general discretion introduced by S. 78(1): 'In any [criminal] proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. Neither the limited discretion as to confessions preserved by S. 82(3), nor the wider discretion created by S. 78 is apt to cover the case we are discussing.

The limited discretion on confessions was used to exclude confessions which were technically voluntary,[31] but which were obtained in circumstances which amounted to unfairness or which cast doubt on their reliability or were a breach of what was regarded as appropriate treatment of a suspect in custody.[32] There is no case reported in the books in which the discretion was used to excuse a priest (or anyone else) from answering a relevant question on the ground that the answer would breach confidence. The oft-cited *dictum* of Best C. J. in *Broad v Pitt,*[33] 'I for one will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence', is not such a case. The remark was *obiter,* being said in a civil case concerning an attorney's evidence, and by its terms ('I will *never* compel . . .') sounds more like an acknowledgement of a privilege (in the clergyman, not the penitent), rather than a discretion to be exercised on a case by case basis. But Best C. J. could not have meant that it was a privilege he was referring to, since in the sentence immediately preceding the quoted *dictum,* he acknowledged that 'the privilege does not apply to clergymen, since the decision the other day in the case of *Gilham.*[34] The only Best C. J.'s *dictum* can be explained or supported is as a statement of his practice of applying *persuasion* to the party seeking the answer, as to which see below.

30. [1980] A.C. 402.
31. The common law definition of involuntariness was exceedingly narrow and technical: see *Ibrahim v R.* [1914] A.C. 599.
32. The way in which the discretion was to be exercised was before the passing of Police & Criminal Evidence Act 1984 codified in what were described as the Judges Rules.
33. (1828) 3 Car. & P. 518.
34. *R. v Gilham* (1828) 1 Moo. 186, a decision of the Court for Crown Cases Reserved, did *not* decide that priests have no privilege, but that religious exhortations by a priest to confess sins, even though prolongued, were not 'inducements' of the sort which before the Act of 1984 rendered a confession 'involuntary' and therefore inadmissible. *Gilham* is indeed strong authority *sub silentio* against the discretion to disallow evidence which breaks the seal. The prisoner, accused of murder, had private conversations with the gaol chaplain lasting over several days, and the clergyman gave lengthy evidence of how his strong exhortations at length produced a confession of the sin of murder. The reported judgment of a strong court was a one-line holding that the confession was rightly received at the trial. However, the elaborate and wide-ranging arguments of counsel on both sides made no mention of any discretion in the judge to disallow the chaplain's evidence, but concentrated on the legal position. If there were such a discretion, the case was pre-eminently one where it would have been exercised, or at least mentioned. It may be added that both counsel discussed an earlier unreported case, *(Redford* 1823), where Best C.J. expressed his strong disapproval of proposed evidence by a priest and 'as the evidence was not wanted by the Crown, it was not pressed and the prisoner was convicted without it': 1 Moo. 202.

The more general discretion in S. 78 covers any evidence which the Crown proposes to use, but it, too, so far as it relates to confessions,[35] is in general used to see that the accused is properly treated in custody or that his confession is safe to use.[36] By S. 76, if a confession is obtained by oppression or in consequence of anything said or done which was likely to render any confession by him unreliable, it is completely inadmissible; but otherwise it is admissible. The Court of Appeal have approved the use of the discretion in S. 78 to exclude confessions of doubtful reliability which do not fall within the words of S. 76, e.g. where a confession is spontaneous, not the result of anything said or done, but is nevertheless of dubious strength.[37] Moreover, the Codes of Practice made under the Act prescribe various rights for a suspect in custody, e.g. to have a lawyer. The Act provides no penalty for breach of these Code rights, but in appropriate cases, the discretion in S. 78 is used to rule out the resultant confession, although the irregularity does *not* amount to oppression or anything said or done rendering it unreliable. However, the general tenor of the cases under S. 78 is that, in the absence of breach of the accused's rights, or weak probative force, the way in which a confession was got (e.g. via a penitential confession) is beside the point. The matter is not wholly free from doubt, but it would be surprising if the judges ever used it to rule out a priest's evidence of a confession.

3. ALTERNATIVES

Since there is no privilege for priest/penitent communications as such and they are not protectable on discretion, are there any other legal privileges or immunities which might be brought to bear? It has occasionally been suggested that the priest ought to be able to rely on the privilege against self-incrimination, at any rate if he belongs to a church which will punish him for violating the seal of the confessional. This suggestion is misconceived: that privilege excuses a witness from answering if the answer will, by what it reveals, expose the witness to a criminal charge or penalty.[38] The sequel which a priest might fear on breaking the seal is probably not a criminal charge or penalty and in any event is not in respect of the facts which he reveals, but in respect of the act of revelation itself. It has also been suggested[39] that if a penitent is obliged by the discipline of his church to confess his sins, using the confession against him in a court is tantamount to demanding self-incrimination by him. The argument is that the priest is in effect an agent of the prosecution authorities, in that the penitent is obliged by his church to confess to the priest, who is obliged by law to repeat the confession in court. This view may strengthen the case for the creation of a statutory privilege for priest/penitent communications, but as an argument for a privilege under the present law it is without merit. The

35. There is also the case where technically admissible Crown evidence of any sort (not necessarily a confession) has a prejudicial effect which greatly outweighs its probative force. This too was a common law discretion confirmed in *R. v Sang*. The enactment of S. 78 was in order to put this discretion on a statutory footing, but it probably survives under S. 82(3) anyway. This case for using the discretion is not likely to arise with a priest's evidence of a penitential confession. If it did arise, exclusion would be because of the confession's prejudicial effect, not because of the relationship between the parties to it.
36. See, generally, Birch, 'The Pace Hots Up' [1989] Crim. L.R.95; Cross *on Evidence, op. cit.*, f.n.4, p.191.
37. See *R. v Goldenberg* (1989) 88 Cr. App. R. 285.
38. *R. v Boyes* (1861) 1 B & S 311. See also Civil Evidence Act 1968, s. 14.
39. Doyle, 'Religious Freedom and Canadian Church Privileges' (1984) 26 J. Church & State, 293, 296.

privilege against self-incrimination merely removes the penalty of contempt of court from a witness who refuses to answer because what will be revealed may expose *him* (or his spouse) to a criminal charge. It has no application where the witness's answer may expose *another* to a criminal charge. It is no more than an argument that the evidence of the priest should be excluded on discretion, which argument would almost certainly fail.[40]

There is a doctrine[41] whereby, if parties to a dispute use a third person as mediator in a *bona fide* attempt to settle their dispute without recourse to litigation, the mediator is not allowed to give evidence of what was said to him by either of them without the consent of both parties.[42] A clergyman may be, indeed often is, such a mediator, and if so the privilege attaches just as in the case of any other mediator, be he marriage counsellor, probation officer or mutual friend. But his position as 'confessor' to one or other of the parties confers no special status on him in this matter.[43] He is only a mediator, and statements to him, as with all other mediators, must be in the course of a genuine attempt to resolve the dispute between the parties, a condition unlikely to be met by a penitential confession.

4. PALLIATIVES

If no other privilege is involved the priest must answer fully or risk the consequences. There are some palliatives to this stark position, but they are no more than palliatives. As the passage quoted from Lord Simon's speech in *D. v N.S.P.C.C.*[44] makes clear, the judge may apply moral persuasion to the party seeking disclosure in the hope that he might not insist, and also to the witness in the hope that he might be persuaded to answer. Lord Simon says that he has never known this procedure to fail to resolve matters acceptably, but as the resolution is in at least some cases by reason of the witness compromising his priestly duty, to that extent the existence of the power to persuade is no comfort to those who object to the absence of privilege. And if both questioner and witness remain obdurate, it is always the witness who 'loses', i.e. he must be ordered to answer.

However it is not contempt to fail to answer unless the expected evidence is not only relevant but also "necessary to the attainment of justice" (according to Lord Edmund-Davies)[45] or 'serving some useful purpose' (according to Lord Donovan in *A-G v Mulholland).*[46] But it is not often that a judge will be able to rule that the priest's evidence is not 'necessary' or 'serving some useful purpose'. In *A-G v Lundin,*[47] where a journalist (in the days when journalists had no privilege) was held not to be in contempt by refusing to name his source although ordered to do so, the expected answer was to form part of a chain of evidence which had already broken because of a failure to establish other links in it. That sort of complete inutility must be very rare indeed. The case of duplicated

40. If the penitent was not a party to the proceedings, the priest's evidence would be hearsay. If he were a party to civil proceedings and the evidence was relevant and necessary, there are no grounds for expecting discretion to be used to exclude it. If he were the accused in a criminal case, the discretion as to confessions by accused persons, and the general discretion under S. 78 Police & Crown Evidence Act 1984 as to unfair evidence by the Crown would be relevant but, as discussed above, would not be invoked. See *ante,* f.n. 31-37 and associated text.
41. See Cross *on Evidence,* p.454. It is usually regarded as part of the 'Without Prejudice' privilege attaching to communications between disputing parties, but in *D. v N.S.P.C.C.* [1978] 171, 236-237, Lord Simon treats it as an independent and recently developed doctrine.
42. *McTaggart v McTaggart* [1949] p. 94.
43. *Pais v Pais* [1971] p. 119.
44. *Ante,* at f.n. 27 and associated text.
45. *Ante,* at f.n. 25 and associated text.
46. [1963] 2 Q.B. 477, 492.
47. (1981) 75 Cr.App.R. 90.

evidence, where the sought-for evidence is superflous because the fact has been the subject of other evidence, will be less rare, but still not at all common. After all, the party calling the priest and insisting on his answering will think it is necessary, and it is not easy for him to be gainsaid, by the judge or anyone else. So although the expressions 'necessary to the attainment of justice' and 'serving some useful purpose' are vague enough and sufficiently matters of impression to render a decision on the point almost indistinguishable from the exercise of a discretion, the occasions when lack of necessity or lack of useful purpose will excuse a priest from answering must be so exceedingly few and far between that the matter cannot be regarded as more than a formal palliative, stated in the books but of no practical importance.

It is said[48] that the witness need not answer until ordered to do so by the judge, and the order may be on terms, i.e. subject to such conditions as the judge is his discretion sees fit to impose. The first part of this is a truism, the only significance of which is that the judge must involve himself in the process and consider whether the expected answer is relevant and necessary to the attainment of justice. However, as we have seen, the answer in almost any conceivable case will be that it is necessary. As to the imposition of terms, the cases where this was said were cases on discovery,[49] or concerning medical reports in proceedings in adoption,[50] or wardship,[51] or under the Mental Deficiency Act;[52] and it by no means follows that in an ordinary case the court can impose terms. Moreover, the terms commonly imposed – that the other party make no use of the answer except in the present litigation, or that the names of third parties mentioned in the statement be suppressed, or that disclosure be limited to the parties' lawyers – would be inappropriate and anyway of no comfort to a priest ordered to disregard his priestly duty of confidence owed to the penitent.

5. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A discussion of the present position might be thought incomplete without a mention of the European Convention on Human Rights,[53] to which this country is a signatory. Article 9(1) provides that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to manifest his religion or beliefs in worship, teaching, practice and observance. A similar provision in the Canadian Charter of Rights and Freedoms[54] has been used in Canadian courts to give fresh impetus to the development of the law of evidentiary privileges, particularly concerning a priest/penitent privilege. The Canadian Charter is contained in an Act of the Federal Parliament which is directly binding on Canadian courts. The European Convention is not a direct source of law in England, although it has been accepted that the obligations imposed by it on this country are relevant sources of public policy where the common law is uncertain.[55] Since the common law on priest/penitent privilege is, it is submitted, not

48. Cross *on Evidence*, p. 446.
49. *Chantrey Martin & Co v Martin* [1953] 2 Q.B.286 (C.A.); *Campbell v Tameside M.B.C.* [1982] Q.B.1065 (C.A.); *Church of Scientology of California v D.H.S.S.* [1979] 3 All E.R. 97 (C.A.)
50. *Re M* [1973] Q.B.108 (C.A.)
51. *Official Solicitor v K.* [1965] A.C.201 (H.L.).
52. *R. v St.Lawrence's Hospital Statutory Visitors* [1952] 2 All E.R. 766 (D.C.).
53. 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.
54. Constitution Act 1982, Part I: The Canadian Charter of Rights and Freedoms. See *post*, f.n. 111 and associated text.
55. *R. v Chief Metropolitan Magistrate, ex parte Choudhury* [1991] 1 Q.B. 429; [1991] 1 All E.R. 306, (D.C.); *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All E.R. 1011 (H.L.).

uncertain, it unlikely that the Convention will influence English Courts to follow the Canadian path, which will be discussed later.[56] Whether the European Court of Justice could be persuaded, by direct application to it by a person affected by the absence of any privilege in English law, to follow that path, is highly doubtful.[57] But in any event, as the Canadian experience shows, it could provide no instant solution, and it would only be by slow and gradual steps that an effective protection for priest/penitent communications generally could be built up.

To sum up Part I of this article, there is no privilege for communications between priest and penitent, there is no power to protect such communications on discretion, and this position is not affected by any effective palliatives.

II. POSSIBLE REFORM

In *D. v N.S.P.C.C.*,[58] Lord Simon conceded that the law he had just expounded might need altering, so as to create a priest/penitent privilege, as had been done in some foreign jurisdictions. In this country, law reform bodies have declined to recommend such an alteration. The Law Reform Committee, as to civil cases, regarded the problem as being of no practical importance, although it must be remembered that they assumed that the judge had a discretion in cases involving some ethical or moral value which the law ought to protect.[59] As to criminal cases, the Criminal Law Revision Committee's main reason for declining to recommend the creation of a privilege was that there should be no restriction on a party's power to compel a witness to give any relevant information, unless there is some countervailing policy reason, and on this, in their view, no arguments are strong enough. They felt that even if there is no discretion to prevent the compelling of a priest's evidence, any serious difficulties can be avoided anyway by the courts and the prosecuting authorities.[60] And the Australian Law Reform Commission, with its President entering a Note of Dissent, thought that the difficulties involved in creating a formal privilege were great enough to prevent them recommending such.[61] In Canada, the Provincial/Federal Task Force on Uniform Rules of Evidence,[62] also thought enactment of a privilege was not justified. Both of these latter bodies preferred a more flexible approach; the former proposed a wide ranging discretion covering many classes of confidential relationship;[63] the latter thought that the judges could and should extend the common law of privilege in appropriate cases.

However, notwithstanding this discouraging response from official bodies charged with the duty of pondering the matter, it appears that political pressure in favour of altering the common law can often be effectively mobilised. Overseas jurisdictions have not been slow to provide a statutory privilege for priest/penitent communications.[64] In addition, in Eire, a common law privilege

56. *Post*, Section 11.
57. Most the cases on evidentiary matters concern Article 6, which requires a fair trial. They are not directly in point, but they show a reluctance to interfere with a state's evidence rules unless a fair trial has manifestly been prevented thereby. See, generally, Craig Osborne '*Hearsay and the European Court of Human Rights*' [1993] Crim. L.R. 255.
58. *Ante*, at f.n. 28 and associated text.
59. *Op.cit.*, f.n.12, paras 1, 47.
60. *Op.cit.*, f.n.12, paras 272-274.
61. *Op.cit.*, f.n.12, paras 201, 205.
62. (1982) Report, pp. 421-422. This was before the enactment of the Canadian Charter of Rights and Freedoms.
63. See *post*, at f.n. 108 and corresponding text.
64. See *post*, at f.n. 90 and corresponding text.

has been recognised,[65] and in Canada, the enactment in 1985 of section 2(a)[66] of the Canadian Charter of Rights and Freedoms has provided a new impetus to the continuing development of evidentiary privileges to include protection on a case by case basis of priest/penitent communications. On this see *post,* Section 11.

6. ARGUMENTS

On the question of whether such a privilege should be created here, there is no shortage, on either side of the question, of weighty arguments from principle. or of arguments rooted in practical considerations. A few of them will be canvassed here.

The defenders of the *status quo* pray in aid the deep-seated public interest in ensuring that in litigation all relevant evidence be produced. It is necessary, if dispute resolution through the Courts is to maintain public confidence, that decisions be founded on as complete an exposure of the facts as is practicable. Moreover, a private injustice is done to an individual litigant who is denied the use of evidence which is available to him. Such a denial will at least make it more difficult, and perhaps more expensive, for him to establish his case, and in some, perhaps many, instances will result in his not being able to establish a just case and so being subjected to an unjust adverse decision. While there are instances where the importance of some public interest requires of him such a subjection, without any redress, the occasions where this happens must be kept to a minimum and limited to cases where the countervailing public interest is truly an important one. The public interest in the confidentiality of priest/penitent communications is not important enough to justify a breach of the principle of full disclosure, as is demonstrated by the fact that the *status quo,* which has existed for a very long time, has not thrown up any significant problems in practice.

The proponents of a privilege reply that, while the public interest in full disclosure is undoubtedly important, it is not paramount, and has had to yield to other public interests which are recognised as more important either by the common law, e.g. public safety, or by Parliament, e.g. the protection of journalists' sources. A priest/penitent privilege would serve an interest important enough to justify a breach of the principle of full disclosure. Whatever may have been the position in former times, religious tolerance is now a universally accepted feature of our society, and it is part of a citizen's freedom of religion to enjoy absolute confidentiality for his religious confessions. Any state whose subjects are guaranteed, or enjoy by custom, religious freedom ought to support this confidentiality. It is integral to the free exercise of religion that clergymen should be able to advise and console those who have fallen by the wayside and to promote repentance; that could not be fully carried out if it were accepted that members of the clergy could be obliged to give evidence of confidential communications they have received from persons consulting them for spiritual purposes.[67] To deny that enjoyment violates the penitent's free exercise of his religion, and requiring disclosure from

65. *Cook v Carroll* [1945] Ir. R. 517.
66. Guaranteeing freedom of religion, and also s.27 (general statement on interpretation of the Charter).
67. For an eloquent putting of this argument, see the Note of Dissent by the President of the A. L. R. C. (O'Connor J.): Report, *ante,* f.n.12.

the priest violates *his* free exercise.[68] To this it is replied that the argument is extravagant. The absence of a legal privilege does not significantly inhibit anyone from exercising his religion. It cannot be supposed (and is certainly not demonstrated by particular instances), that anyone is deterred from adhering to a particular religion or observing its practices by the absence of the claimed privilege; or even that any clergyman will fail in his duty of confidentiality merely because he is ordered to breach that duty by a judge. Indeed it is often said by church representatives that no clergyman would obey such an order. The likelihood of anyone being put to the test is anyway minimal in that, necessarily, no third party will know of the confession.

Critics of the common law's failure to allow a privilege are not deterred by the infrequency[69] of the occasions when it is needed. Religious tolerance, they say, is characterised by an entire absence of direct conflict between Church and State; the impression of such direct conflict is given whenever a judge coerces a clergyman with a view to making him breach his religious duty. The reported fact of such coercion cannot fail to make adherents of the church feel that they are being oppressed. With even greater force can that be said of the spectacle of actual punishment of a recalcitrant minister. The presence in a country's gaols, even if only on very rare occasions, of a religious martyr speaks loudly of persecution, not tolerance.

It may be said that it is only some churches which face this 'persecution' – only those which by their discipline enjoin and enforce a duty of confidentiality. This difference between churches fuels arguments on both sides of the question. The affected religionists complain that under the present law they, uniquely among religionists, are singled out for official coercion, which could only be avoided by their church abandoning cherished tenets. On the other side, it is argued that taking account of their grievance would be uniquely to favour such churches. Adherents and ministers of other churches would not enjoy the privilege, and could only do by altering their rules. However, confining the argument so narrowly is misguided and unhelpful. It is never seriously suggested that any statutory privilege must be confined to those confessions which are mandatory and disclosure of which is inevitably followed by severe punishment of the priest.[70] Certainly the argument from 'persecution' is strongest as to churches

68. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege – The Application of the Religion Clauses* (1967) 29 U. of Pittsburgh L.R. 27, 51.

69. It is by no means clear how infrequently these occasions do arise, because they arise at first instance trials, which are unlikely to be reported or appealed. If a non-party witness is *persuaded* to answer, that is no grounds for appeal by a party. It may be that that is the case if the non-party witness is *obliged* to answer, although if the privilege belongs not to the witness but to a party, it might be different. The question of to whom a priest/penitent privilege belongs has not been settled, since the very existence of the privilege is denied by the common law, but it is usually said to belong to the priest. Foreign jurisdictions have placed it variously in the priest: *Cook v Carroll, supra;* in the penitent: (U.S) Model Rule 219, *post* f.n. 106; both parties: A.L.R.C. Draft S.109, post f.n. 107 and associated text.

70. None of the U.S. privilege statutes require a 'priest' or a clergyman empowered to grant absolution: see Rees, *Confidential Communications to the Clergy,* (1963) 24 Ohio State L.J. 55, 56, although most refer to the discipline enjoined by the church, *post* f.n. 94 and 106. (Model Rule 219). According to Reese, p. 58, none of the statutes creating a privilege since the Model Rule was published have adopted the Rule exactly but have made the privilege wider in respect of the person to whom the confession is made. Canadian courts have refused to discriminate between formal and informal confessions: *post* f.n. 113 Arguments are sometimes accepted for confining the privilege quite narrowly, but they are directed to prevent 'jumped up' or 'pseudo' churches leaping onto a band waggon. These arguments are not without their own difficulties, but they are less acute than those raised by crude dicrimination between 'confessional' and other churches.

with strict rules against disclosure of confessions, but it is not without considerable force in the case of other denominations.[71] Does a minister of one of such other denominations not feel equally coerced as his opposite number in a confessional religion? It is the dictates of the conscience of both which requires their recalcitrance; it is the conscience of both which is violated by judicial force.[72]

Moreover, there is an equally strong argument in favour of privilege which is founded on *public* good. Granting the privilege benefits all the citizens in a state in that the public good is served by arrangements which promote repentance in and admonishment of wrongdoers,[73] which arrangements are furthered by the privilege. This argument does not base itself narrowly on sacramental confessions only.

Mention might be made of one argument which is sometimes advanced by proponents of a privilege which, on examination, turns out to be founded on a fallacious view of the present law. This is that the present law of priest/penitent privilege is inconsistent with the usual benign spirit which infuses our procedural law, under which the state is expected to prove transgressions against a subject without help from the subject himself, and a witness is not to be put in the impossible position wherein he will suffer penalties whatever he says or does not say in the witness box. As has been seen,[74] neither priest or penitent can under the present law invoke the privilege against self-incrimination; but the fact that the law says that there is no compulsory self-incrimination of which it will take account does not alter the reality of the situation. The reality is that a penitent is obliged by his faith to confess to one who is obliged to reveal his confession to the state; and a priest is coerced by the state to do something which will expose him to the censure of both the church of which he is a member and of his own conscience. However, it cannot with justice be said that the present absence of protection of penitent or priest is at all inconsistent with the law's general attitude to people being tried or examined in court.

As to the penitent's position, the priest is in no realistic sense the agent of the state. Moreover it is not usually the priest who is obliging the penitent to confess. The pressure comes from the rules of a non-state organisation which the penitent regards as binding on him, or from the promptings of his own conscience

71. As is well known the Catholic Church positively requires confession from the faithful and regards breach of the seal as an excommunication matter. See Canons 983, 988, 1338. The Church of England permits private confession and allows for absolution to be granted: see Canon B29 of Canons of the Church of England, 4 ed 1986, and still has extant Canon 113 of 1604 prohibiting on pain of 'irregularity' revelation of a confessed 'crime or offence'. According to Bursell, *op.cit.* f.n. 10, p 108 *any* revelation would be followed by prosecution in an eccelesiastical court. Of the other churches, some require an express vow of secrecy on ordination, some do not; some have sacramental confession, some do not; some provide for absolution on confession, some do not; but it is needless to go into the precise differences between them because all would regard disclosure as attracting disciplinary measures or at least a questioning of the minister's fitness for his duties. See A.L.R.C. Report *ante*, f.n.12, para 204.

72. Evidence taken by commissions of enquiry suggests that all clergymen, irrespective of denomination, would refuse to give evidence of confidential communications, and would go to gaol rather than do so; see e.g. A.L.R.C. Report para 208. Nor does the confessant worry about the precise position between the minister and his church. As O'Connor J., dissenting from the conclusions of that report, points out: 'A member of a church which does not have sacramental confession may well regard the confidentiality of a 'heart-to-heart' talk with a pastor as meriting no less protection than a sacramental confession' (Para 210). He suggests that any statutory privilege should be for a communication by a person making a confession in accordance with his religion *or* seeking spiritual comfort or advice: *Ibid* Appendix A, 3.

73. See Doyle, *op.cit.* f.n. 39, p.295.

74. *Ante*, Section 3.

or the hope of absolution. The law's usual benignity is confined to not using an out-of-court confession if it was produced by oppression or in circumstances which cast doubt on its reliability, or if its use will render the trial unfair. None of these reasons for exclusion are applicable to a confession to a priest. Oppression means some wrongful, unconscionable, use of power by an agent of the state.[75] It does not cover persuasion by others, such as friends, relatives or employers, unless that persuasion will result in unreliability or unfairness at the trial. The circumstances of a spiritual confession are typically not such as to cast doubt on its reliability, and as to the use of the confession making the proceedings unfair, the age old attitude of the law, tinkered with in 1986 but not materially changed,[76] is that if there is no breach of the accused's rights, no potential unreliability and no prejudicial effect disproportionate to the confession's logical persuasiveness, the way in which the confession came to be made is no concern of the court of trial.

As to the priest in the witness box being forced to choose between ecclesiastical and legal censure, the only dilemma which the law has ever allowed any witness to avoid by claiming privilege is that of having to choose between different legal penalties. It has never taken account of any other possible detriment. Even the risk of physical harm if the witness answers the question put to him has never been an excuse for not answering. The authorities might offer anonymity or physical protection, but that is a different matter. Many a victim of assault has been punished for failing to give evidence against his (or more usually her) assailant; many an informant has been deterred by judicial threat from changing his mind and 'clamming up' in the box. The law will not allow the censure of third parties to excuse a witness's failure to co-operate.[77] Nor has the censure of a witness's own conscience ever been taken account of. The fact that he regrets having to bear evidence against another has always been nothing to the point.

It seems that both priest and penitent are treated by the present law exactly as other persons in comparable positions are treated. Perhaps they ought not to be so treated, but inconsistency with the law's general attitude to persons who have revealed transgressions or who are inhibited from bearing witness against another is no argument for changing the position of priest and penitent.

What all the controversy comes down to is one question – is the maintenance of the relationship of confider and religious confidant a sufficiently important public interest to outweigh the undoubted public interest in full disclosure of all material evidence in litigation? Other arguments are subsidiary to this, e.g. that the use of a privilege will cause injustice to the other party to the litigation, that creating a privilege will discriminate against non-religious confidants, that it will anyway have to limited in such a way as to discriminate against some religious confidants. The question is, bearing in mind these and other arguments on both sides of the question, does society wish to foster the pastoral relationship by

75. See *R. v Fulling* [1987] 2 All E.R. 65, 69, where the Court of Appeal had recourse to the OED: 'Exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors etc; the imposition of unreasonable or unjust burdens'.
76. See *ante*, Section 2(b).
77. Such threats or censure are contempt of court, and perhaps the offence of perverting the course of justice. Theoretically, but only theoretically, the ecclesiastical authorities could find themselves at risk of prosecution.

protecting from disclosure communications made in the course of it? If it does not, that should be the end of the matter. If it does, it must then face the practical difficulties of definition; – what kinds of confession of what kinds of misdeed made by what kinds of confessant to what kinds of minister of what kinds of church are to be protected? By deciding to create the privilege, the legislature will have decided that the difficulties are not unsurmountable. But undoubtedly they will be troublesome and give rise to much anxious thought. This has led some[78] to propose a *via media* which is thought to offer a simple way out of the thicket of difficulties, and that is to give the courts a discretion to allow protection for only those confessional statements which, in any particular case, are thought to be worthy. It will be argued that this is no solution at all and must be entirely avoided.

As to the one great question, no answer advanced here or anywhere else will ever conclude the matter for every one, but the proponents of a privilege may pray in aid the powerful opinion of Wigmore.

7. WIGMORE'S PROPOSITIONS

That great American jurist, in a passage which has been quoted or referred to on numberless occasions in United States and Canadian courts, proposes four fundamental conditions which in his view must be satisfied before the law should recognise any privilege as an exception to the otherwise universal rule of full disclosure. They are;[79]

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

After recognising that the priest/penitent privilege cannot be said to have been recognised by the common law in England or in the United States,[80] he tests the claim for such a privilege against his four canons. He concludes that on the whole they are satisfied as to penitential confessions which are guaranteed secrecy by the discipline of the church, and as to such communications the privilege has adequate grounds for recognition.[81] But confessions which do not have this guarantee of secrecy in his view deserve no privilege.

Wigmore's conclusion, and the four tests leading him to make it, have been used to 'revive' the privilege after the later common law in England and elsewhere had (as it was said) allowed it to die. In *Cook v Carroll*,[82] Duffy J., in the High Court in Eire, was concerned in a seduction case with sacramental

78. Doyle, *op.cit*, f.n.39; A.L.R.C., *ante*, f.n.12; Provincial/Federal Task Force on Uniform Rules of Evidence, *ante*, f.n. 62.
79. *Op.cit, ante*, f.n.11, Vol VIII, para. 2285.
80. Para. 2394.
81. Para. 2396.
82. [1945] Ir.R. 515.

confessions to their parish priest by the man and the woman involved. He deplored the neglect by English courts of a privilege existing before the Reformation. Referring to Eire, he said,[83] 'In a state where nine out of ten citizens are Catholic, and on a matter closely touching the religious outlook of the people, it would be intolerable that the common law, as expounded after the Reformation in a Protestant land, should be taken to bind a nation which persistently repudiated the Reformation as a heresy . . . In order to ascertain the true juristic principle, on which our own Law Reports are silent, I shall resort to Wigmore's monumental work' He did so, and held that as to the particular relation he was concerned with (an Irish parish priest towards two of his parishioners) the Wigmore conditions were satisfied.

In *Mullen v U.S.*,[84] in the Court of Appeals for the District of Columbia, the appeal concerned a mother who, on her prosecution for maltreating her children, had called her minister as a character witness. When she then testified, denying that she had chained her children, the trial judge recalled the minister, who testified that in a confession to him she had admitted chaining the children. On appeal, it was held this testimony ought not to have been admitted. Fahy J. admitted that any privilege existing in earlier times had been abandoned. However he noted that federal courts (such as the trial court was)[85] were governed by Federal Rules of Criminal Procedure (1948), authorised by Congress, Rule 26 of which provided: 'The admissibility of evidence and the competency and privileges of witnesses shall be governed . . . by the principles of the common law *as they may be interpreted by the courts of the United States in the light of reason and experience*'.[86] 'Where reason and experience call for recognition of a privilege. . . the dead hand of the common law will not restrain such recognition'.[87] As to whether reason and experience did call for recognition of a priest/penitent privilege. Fahy J. applied Wigmore's opinion that the privilege satisfied his test, and added that it would be no service to the common law to perpetuate in its name a rule of evidence inconsistent with the four guiding rules which were basic to the common law. 'In our own time, with the climate of religious freedom, there remains no barrier to adoption by the federal courts of a rule on this subject dictated by sound social policy'. Sound policy in his view conceded the privilege sought.

In both of these cases, the Court seized on some factor not present in England: the overwhelmingly Catholic population of Eire, the Federal Rules requiring the input of reason and experience into the interpretation of common law. It is in the last degree unlikely the English courts would at this late stage adopt Wigmore's opinion of the suitability of priest/penitent communications for special protection by privilege, to the extent of ignoring earlier English opinion that no such privilege exists. However, Wigmore's opinion is surely entitled to great weight if and when Parliament debates the wisdom of creating a statutory privilege.

83. At p.519.
84. 263 F.2nd 275 (1958).
85. Because of the peculiar position of the District of Columbia, a matter which would normally be tried in a state court was triable in a federal court.
86. Emphasis supplied.
87. At p.279.

It must be added that Wigmore's four-fold test has also been used in Canada, but in a different way. The whole law of privilege has, under the influence of the Canadian Charter of Rights and Freedoms, been held to be capable of development on a case by case basis, using the four principles as guidance for that development. This will be dealt with later.[88]

8. STRATEGIES FOR REFORM

A large number of jurisdictions have enacted a priest/penitent privilege in one form or another, and none has ever had cause to abolish the privilege once created. This shows two things. One is that the idea of protecting communications to spiritual advisers strikes a chord of sympathy among ordinary voters and lawgivers, for the communities which have passed such laws are by no means all strongly Catholic in make-up, or even strongly in favour of religion generally. The second thing shown by this tide of unrepealed legislation is that the privilege causes no undue difficulties for litigation generally or prosecuting authorities in particular.

However there is one difficulty which has appeared wherever the privilege is found, namely the problem of determining its ambit. The wider the privilege, the greater the breach of the public interest in full disclosure; the greater the danger of including denominations, such as Christian Science, whose extremely wide notion of priesthood would strain the bounds of public toleration in the matter of privilege, and of including unmeritorious organisations which arrogate to themselves the title of 'Church'; and the greater the danger of a cloak being thrown over communications which are far removed from the accepted notion of a person seeking religious comfort or absolution. In short, the greater the danger of abuse. The narrower the privilege, the greater the discrimination between religionists. Indeed discrimination is unavoidable between religionists and non-religionists, and between spiritual and other advisers, however widely the privilege is drawn; and that is an argument against any privilege at all in this area. But if that discrimination in favour of religion is swallowed, as it has been by the legislatures which have been moved to enact a privilege, a discrimination between religions is much harder to swallow, especially in any society which sets its face against official encouragement of one, or some, religions as against others.

Two broad strategies are available to lawgivers providing a privilege in this area. One is to put in place a 'legal' (sometimes called a 'class') privilege which can be claimed in any particular case if the pre-ordained conditions are met, and which cannot be claimed if those conditions are not met. The other is to require the Courts to deal with claims to privilege on a 'case by case' basis inside some very broadly defined area or, what comes to nearly the same thing, to give a court a discretion to allow a privilege in some particular case if it seems appropriate to do so. No witness has a right to a privilege, but if the case comes within the very broad area over which the judicial power is allowed to roam, he may hope that on consideration of the precise circumstances of the particular case, the judge may allow him to remain silent.

It is apparent that, for a legislature, difficulties of definition, and of avoiding discrimination, loom larger if it decides on a 'legal' privilege. Never-

88. *Post, at f.n. 113 and corresponding text.*

theless, as will be seen,[89] there are arguments for preferring this to the case by case strategy.

9. A LEGAL PRIVILEGE: THE AMERICAN EXPERIENCE

To date, when legislatures have been moved to interfere in this area, they have created a legal privilege. All fifty states of the United States, the provinces of Newfoundland and Quebec in Canada, and the states of New South Wales, Victoria and Tasmania, and the Northern Territory, in Australia, have provisions, of varying width, of this sort. The difficulties involved in this way of proceeding may be shown by a brief account of the position in the United States.[90]

Without the benefit of any privilege statute, but basing on the guarantee of free exercise of religious profession and worship in the New York Constitution of 1777, Article XXXVIII,[91] early cases in that state held that a privilege existed for a confession to a Roman Catholic priest,[92] but not to a confession to a Protestant minister, on the ground that the latter's church did not require confession as part of its discipline.[93] In 1828,the first priest/penitent statute was enacted in New York, removing this distinction, and since then all fifty states have followed suit. A typical statute, adopted in substantially similar language in twenty-two states[94] provides:

> A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

This wording has obvious limitations in the matters of the class of person to whom the confession is made, the class of person making the confession, and the kind of confession made. Many statutes make extensions in these matters, e.g. in the matter of the class of person receiving the confession, by mentioning, in addition to 'priest or clergyman', some of the following: 'rabbi', 'religious practitioner', 'practitioner of Christian Science', 'person authorised to perform similar functions to those of a priest' or 'an ordained person'.[95]

Some statutes are very wide indeed,[96] but the wider the statutory wording, the more restrictive the interpretation by state courts mindful of the need to prevent abuse. Stoyles,[97] after surveying the area, concludes that 'the total application of these numerous conditions, requirements and limitations has enabled and will enable or require state legislatures and courts to limit extremely the use of the priest/penitent privilege. Apparently in many cases only formal required

89. Post, Section 12.
90. In Australia, the tensions inherent in this approach are reflected in the differing provisions in the various state enactments and proposals and in the reports of debates in the various Parliaments. See McNicol, op cit, pp 331-337.
91. Later creations of a statutory privilege were inspired by a similar guarantee in the 1st Amendment to the U.S. Constitution. See below, f.n.98.
92. *People v Phillips and Wife* (1813) 1 West L.J.109.
93. *People v Smith* (1817) 1 Am. St. Tr. 779.
94. See Reese, *op.cit.* f.n.70, at p.62.
95. *Ibid.*, pp.64-74. Some additions, presumably designed to prevent abuse, are restrictive rather than expansive, e.g., 'of an established church' and 'of 21 years of age or over'.
96. See, e.g., Minnoesota, in Reese. op.cit. p.62.
97. *Op.cit.* f.n. 68, p.63.

sacramental confessions of the Catholic Churches would be privileged'. He speculates that the restricted ambit of the typical privilege will one day be held to violate the constitutional embargo in the 1st Amendment on the establishment of religion.[98] The argument is that the conditions which must be complied with for a successful claim to the privilege in effect favour some religions and tend to their encouragement by the state.[99] There are some statutes which are considerably broader in scope than the typical ones. They are applauded by Reese, who says they have given rise to no difficulties in the way of abuse,[100] and who indeed urges that the privilege should be widened further than any state has yet gone to cover non-ordained agents of the clergy such as marriage counsellors.[101] But it is Stoyles' view that however widely the privilege is drawn it would still be an unconstitutional establishment of religion,[102] in that it would favour religious adherents over other citizens. That same discrimination may be held to breach the 'equal protection of the laws' guarantee in the 14th Amendment[103] and possibly the requirements of due process of law in the 5th Amendment.[104] As far as the Supreme Court is concerned, the existence of the statutory privilege was taken for granted in *Trammel v U.S.*,[105] but the Court has never been squarely faced with the question of the constitutionality of the typical privilege statute. Such constitutional worries would not arise in this country, but their existence serves to highlight drawbacks in a priest/penitent privilege which would found political arguments against its institution.

A statute creating a legal privilege would need to be long and elaborate to take account of at least some of those arguments,[106] but however long and elaborate it would not meet one argument which is raised against any legal

98. 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'. As has been frequently pointed out, the two limbs of this Article appear to be to some extent in opposition. Measures (such as a priest/penitent privilege) designed to implement the spirit behind the second limb may well be said to favour, i.e. tend to establish, religion and so breach the first limb.
99. *Op. cit.*, p. 60.
100. Reese, *op.cit*, p.63.
101. *Ibid.* p.86.
102. Stoyles, p.61. Reese raises the question but does not answer it; *op.cit.* p.88.
103. Stoyles, p.56. See also Reese, at p.87, who appears to take the same view.
104. Stoyles, p.57, And see Imwinkelreid, *The Liberalization of American Criminal Evidence Law,* [1990] Crim. L.R.790, who postulates that *any* evidentiary privilege working *against* an accused in a criminal trial is likely to be struck down for breach of his right under the 6th Amendment to have compulsory process for obtaining evidence in his favour; citing on medical privilege, *State v Hembd* 305 Minn 120 (1975) and *State v Trammel* 231 Neb 137 (1989).
105. 445 U.S. 40 (1980) 63 Law Ed. 2nd. 186, 195. The case concerned marital privilege. In confining that privilege's width, Burger C.J. compared it with other privileges, including the priest/penitent privilege.
106. See, e.g. American Law Institute: Model Code of Evidence (1942) Rule 219:
(1) As used in this rule, (a) 'priest' means a priest, clergyman, minister of the gospel or other officer of a church or of a religious denomination or organisation, who in the course of its discipline or practice is authorised or accustomed to hear, and has a duty to keep secret, penitential communications made by members of his church, denomination or organisation; (b) 'penitent' means a member of a church or religious denomination or organisation who has made a penitential communication to a priest thereof; (c) 'penitential communication' means a confession of culpable conduct made secretly and in confidence by the penitent to a priest in the course of discipline or practice of the church or religious denomination or organisation of which the penitent is a member.
(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that (a) the communication was a penitential communication and (b) the witness is the penitent or the priest and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent.

privilege, namely its automatic operation. There is a certain crudity in this operation; if the pre-ordained conditions are met, the privilege is allowed; if they are not, it is not allowed. No account is taken of the facts constituting the background of the claim, except in so far as they may demonstrate that the conditions are or are not met. To take examples, if the person to whom the communication was made does not come within the designated class of confidants, it makes no difference what degree of spiritual comfort or what guarantees of absolute confidentiality were offered by him to the confider; if the confidence does satisfy the statutory conditions, it makes no difference how vital the evidence may be to the other party to the litigation or how important, from society's point of view, may be the correct disposal of that litigation, or that class of litigation. In a criminal trial, it makes no difference whether the charge is murder or riding of a bicycle at night without lights. Let the legislators' refining of the ambit of the privilege be never so sophisticated, it is a crude sieve that they will have created.

10. A 'CASE BY CASE' APPROACH

There appear to be some attractions in requiring the Court to take account of all the relevant circumstances, to weigh up the parties' needs, the public's needs, the precise impact of a decision one way or the other on the adherents of the particular church involved, on the adherents of other churches, and on adherents of none. This mode of proceeding is tried and tested in the cases of claims for public interest immunity. In such cases, the judge is required to weigh the claims of the particular litigants and the needs of the public in the correct disposal of litigation generally against the possible damage to the public safety or the effectiveness of public administration which will be caused by the disclosure of either the particular communication involved or of any of the class of communications to which that particular communication belongs.[107]

The Australian Law Reform Commission felt that the difficulties involved in creating a legal privilege were great enough to prevent their recommending such. Instead they proposed a general discretion exercisable whenever a party to a confidential communication is under an obligation (whether legal, ethical or moral) not to disclose it. This would enable the law to offer, in appropriate cases, protection for spiritual confessions other than sacramental ones, and also for statements to other confidential advisers, such as doctors, psychotherapists, social workers and journalists. It would also enable the law to specify the matters to be taken into account in deciding whether or not to provide protection for a witness. The Commission's draft section 109 provides in part:[108]

(1) Where, on the application of a person who is an interested person in relation to a confidential communication or a confidential record, the court finds that, if evidence of the communication or record were to be adduced in the proceeding, the likelihood of -

(a) harm to an interested person;

(b) harm to the relationship in the course of which the communication was made or the confidential record prepared; or

(c) harm to relationships of the kind concerned, together with the extent of that harm, outweigh the desirability of admitting the evidence, the court may direct that the evidence not be adduced.

107. See *ante*, f.n.17.

108. Subsections 3 and 4 exclude statements made in furtherance of fraud or crime.

(2) For the purposes of subsection (1), the matters that the court shall take into account include –
(a) the importance of the evidence in the proceeding;
(b) if the proceeding is a criminal proceeding – whether the evidence is adduced by the defendant or the prosecutor;
(c) the extent, if any, to which the contents of the communication or document have been disclosed;
(d) whether an interested person has consented to the evidence being adduced;
(e) the nature of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding; and
(f) any means available to limit publication of the evidence.

(5) In this section, 'interested person', in relation to a confidential communication or a confidential record, means a person by whom, about whom or on whose behalf the communication was made or the record prepared.

In considering the worth of this approach, some drawbacks must be mentioned at the outset. It is plain that it will not secure the principal benefit hoped for by the institution of a priest/penitent privilege, namely the fostering of a system allowing ministers to advise and console and admonish wrongdoers. Such a system is not only integral to the free exercise of religion, but in addition serves a wider public good in promoting repentance among wrongdoers. But that fostering will not happen unless the person making the confession can be sure that his communication will be respected in future legal proceedings. He cannot be sure, if his confidence may or may not be respected depending on the view of some judge. Moreover, it is easier for a judge, if persuasion fails, to follow a rule of law, rather than have to bear a personal responsibility for deciding that this particular witness must be coerced into revealing secrets. This personal decision may lay the judge open to the reproach of discriminating against a particular denomination, for it must be noted that the case by case strategy does not, as some of its advocates claim, purge the law's arrangements of discrimination between sects; it merely shifts it from the legislature to the judiciary, either the judge at the trial or, if guidelines are be laid down at appeal level, the judges generally.

11. THE CANADIAN EXPERIENCE

Before evaluating the worth of this mode of proceeding, it is useful to consider the Canadian position. In that country before 1982, although two provinces had legal privilege statutes in this area,[109] there was no Dominion-wide statute, no official proposal for one,[110] and no common law privilege for priest/penitent communications. However that year saw the passing of the Constitution Act, Part I of which is the Canadian Charter of Rights and Freedoms. After a Preamble stating 'Whereas Canada is founded upon principles that recognise the supremacy of God and the rule of law', Section 2 provides:

> 'Everyone has the following freedoms:
> (a) Freedom of conscience and religion'

and Section 21 provides:

> 'This Charter shall be interpreted in a manner consistent with the presentation and enhancement of the multicultural heritage of Canadians'.

109. Quebec and Newfoundland.
110. See, *ante*, f.n.62.

The enactment of this fundamental right was soon held to have implications for priest/penitent privilege claims. It was held that such were strengthened by the value put on religious freedom by the Charter, and that the restrictive attitude to privilege found in the common law would have to be relaxed.[111] The leading case is now that of the Supreme Court in *R. v Gruenke*,[112] which arose out of a trial for murder. G, a 22 year old women, was said to have assisted her boyfriend F in planning and committing the murder of B by battering him in his car. The defence was that F killed B in defending G, and G had nothing to do with B's death. G, who had convinced herself that she had leukemia, had begun attending the Victorious Faith Centre (a 'born-again' Christian church) in the hope of receiving both physical and emotional healing. The church pastor assigned a counsellor to work with the appellant. The evidence of both the pastor and the counsellor was admitted at the trial, and was to the effect that she had admitted to them involvement in the crime in the way alleged by the Crown. She was convicted and appealed, ultimately to the Supreme Court.

Lamer C.J.C. (with whom six members of the Court concurred) held that there was no class privilege at common law for priest/penitent communications; and moreover that the value of freedom of religion embodied in Section 2(a) of the Charter did not require recognition in the form of a class privilege; exclusion on a case by case basis on the Wigmore criteria would be sufficient.[113] The freedom in Section 2(a) was not absolute. Moreover in view of section 27 which refers to the multicultural heritage of Canadians, the case by case analysis must begin with a non-denominational approach. The fact that the communication was not a formal confession to an ordained priest would not necessarily bar a privilege. He then applied the criteria and quickly concluded that the communications did not satisfy the first criterion, that they originate in a confidence that they would not be disclosed. The pastor and the counsellor were unclear whether they were expected to keep confidential what G told them about the murder; and G, when she spoke to the counsellor, had already resolved to turn herself in and take the blame. Her appeal was dismissed. L'Heureux-Dubé J. (with whom Gonthier J. concurred), agreed in the result of the appeal but she held that a class privilege was involved.

A chief interest in this case lies in the discussion it contains of the difference between a legal or class privilege and a case by case privilege. A class privilege, according to Lamer C.J.C.,[114] was one where there was a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits the class), unless the party urging admission can show why the communication should not be privileged. Such communications are excluded because there are overriding policy reasons to exclude them; a prime example is solicitor/client communications. A case by case privilege is one where the *prima facie* presumption is that the communication is admissible, i.e. is not privileged. The Wigmore criteria are used for determining whether a particular communication in a

111. *R. v Church of Scientology of Toronto and Zaharia* (1987) 31 C.C.C. (3rd) 449 (a case on seizure under warrant of a church's confidential files). See also *R. v Big M Drug Mart Ltd* (1985) 18 D.L.R. (4th) 321, where a statute prohibiting Sunday trading was held to violate the religious freedom of non-Christians.
112. (1991) 67 C.C.C. (3rd) 289.
113. At p.305. The case by case approach for recognition of evidentiary privileges using Wigmore's criteria was first accepted in *Slavutych v Baker* (1975) 55 D.L.R. (3rd) 224. which did not concern a priest/penitent claim; and after the Charter, by *R. v Church of Scientology, supra*, which did concern such a claim. These cases were followed by the Supreme Court in *R. v Gruenke*.
114. *R. v Gruenke*, at p.303.

particular case should not be admitted. The party who claims the privilege must satisfy all four criteria; none of them is presumed to exist. L'Heureux-Dube J.[115] considered that the spirit of the Charter, and the goal of certainty in the law, required a class privilege for priest/penitent communications. But that did not mean that every such communication would be protected. 'The creation of the category simply acknowledges that our society recognises that the relationship should be fostered, and that the disclosure of communications will generally do more harm than good. Accordingly, the pastor/penitent relationship answers the third and fourth legs of the Wigmore test. But in any given case, the specific nature of the relationship must be examined to ensure it fits the category. Furthermore, the extent of the privilege will still be determined in accordance with the first and second legs of Wigmore's test'.

The differences between these two approaches may be summarised as follows. Wherever there is a claim that a communication be privileged because it is one made between penitent and priest, on either approach it must first be shown that the relationship fits within the class, i.e. that the confidant was a clergyman and the maker of the communication was communicating with him as such (according to L'Heureux-Dubé J, the communication must have been intended to be of a religious or spiritual nature).[116] If that is shown, the case by case approach will allow and require the claimant to embark on the task of satisfying all four of Wigmore's criteria; the class privilege approach will presume in his favour the 3rd and 4th criteria (i.e. that the relation is one which must be sedulously fostered, and the harm done to the relation by disclosure would be greater than the benefit gained for the correct disposal of the litigation), but he must still establish criteria 1 and 2 (the communication must originate in a confidence that it will not be disclosed, and confidentiality for the communication must be essential for the maintenance of the relationship).

The effective position in Canada is as though a one-line statute has enacted that a Court may in a suitable case allow a claim for priest/penitent privilege, without giving any indication of what might be a suitable case, beyond indicating that the matter must be judged in a manner consistent with the multicultural heritage of Canadians. This leaves a long and arduous task on a succession of claimants and courts to work out a reasonably clear and certain body of law on the matter. The Courts have made a good beginning in quickly establishing a framework governing the search for 'suitable cases', by providing that Wigmore's criteria are to be consulted. But that framework is so open-textured that it will take many years for it to be fleshed out sufficiently for anyone to be able to prophesy which statements will and which will not be protected. All that the statute has done is to allow a claimant to embark on the heavy task of showing that the criteria are satisfied in his case. On the majority view, nothing is presumed in his favour – not even that the relationship (by which is meant, the relationship between this penitent and this priest) is one to be sedulously fostered, nor that the harm done by disclosure will outweigh the harm to the litigation process by protection. The L'Heureux-Dubé approach at least moves these matters on by presuming that the priest/penitent relation is in general one to be fostered, and that in

115. At p.321-322.
116. At p.322.

general disclosure will do more harm than good; but that approach was not accepted by the majority in *R. v Gruenke,* and anyway still leaves a lot to be established. The burden will be heavy on any claimant, and also on the judge, since often the trial of the claim will turn into a trial of strength between opposing idealogies, and the resolution of the question will lay the judge open to the reproach of discrimination.

An example of the heavy task facing a judge required to consider all the facts of a case against the four Wigmore criteria is provided by the ruling of Campbell J in *R. v Medina.*[117] Campbell J confessed to the difficulty facing him in defining the protected zone of religion in the face of the onus on a claimant to present facts establishing the privilege, particularly where, as in the instant case, the communication appeared to have a dual purpose – a religious purpose combined with a secular purpose. (The claimant, after admitting murder to the pastor, had asked for help in escaping). On the first criterion, he formulated no less than four tests for evaluating whether the communication originated in a confidence that it would not be disclosed. On the second criterion, after examining the facts, he concluded that confidentiality was not essential to the full and satisfactory maintenance of the relationship between the claimant and the pastor. Although, on the third criterion, Campbell J thought that Section 2(b) of the Charter authoritatively determined that the relationship of pastoral counselling is one which ought to be fostered, he also held that there was no community interest in protecting statements made for the purpose of escape from justice. On the balancing of harms (the fourth criterion), he gave weight to the interests of the pastor's congregation, and to the pastor's fear (which was supported by a denominational leader) that his giving evidence would be regarded as a breach of confidence and would do serious harm to the religious practices of the congregation and to his personal ministry. He took into account the view of Wigmore and Bentham that the long term harm done by disclosure to penitential relationships generally would outweigh the harm done by protection. Nevertheless he held that since (in his view) the overriding purpose of the communication was flight, the injury to the administration of justice by protection outweighed the harm done to the church by compulsory disclosure. He held that none of the criteria were satisfied and admitted the statement. Although his judgment, which has been welcomed as helpful,[118] is perhaps more elaborate than the facts of the case required (since failure to meet any one of the criteria would have concluded the matter), it is an indication of what will be needed in cases less open and shut than *R. v Medina.*[119]

12. LEGAL PRIVILEGE TO BE PREFERRED

No doubt, as case law builds up, the case by case analysis will become less open-textured; the discretion in a judge will become a structured one. The kind of communications (purely or partially intended for spiritual comfort?) between confessant (parishioner? member of congregation? penitent?) and confidant (beneficed? ordained? clergyman, counsellor designated by him?) which

117. [1988] 6 W.C.B. (2nd) 358.
118. See H.R. Stuart Ryan, *Obligation of the Clergy not to Reveal Confidential Information,* Jo. of The Church Law Association of Canada, 1993, Vol 1 No 2, p.24; and *R. v Gruenke, supra,* at p.323. (L'Heureux-Dubé J).
119. It is perhaps a pity that *R. v Gruenke* was also an open and shut case, causing the majority to stop short after holding that the first criterion was not satisfied.

will be protected, will become settled. The types of litigated questions where the public interest in disclosure outweighs the need for protection will become known. For some time there will remain doubt as to whether disclosure of e.g. murder, or child abuse, should be protected. Although in *R. v Spence*[120] an elaborate *voir dire* ruling by Wedge J ended in a confession of murder to a prison chaplain being protected, that ruling will surely not settle the matter for the future. In *R. v Medina,*[121] Campbell J, in assessing the balance of harms, took into account that murder is one of the most serious crimes known to the law. In *R. v Ryan,*[122] the Nova Scotia Court of Appeal, in applying the Wigmore 4th criterion to a claim to protect social workers' files in a charge of sexual assault, held that so great is society's interest in the 'correct disposal of litigation' in charges such those being tried that it was inappropriate for the trial judge to imprint the claim of privilege upon the files.[123]

Eventually, with luck, a body of law will be produced which will resemble a carefully drafted statutory class privilege. How ample this body of law will be will depend upon the continued willingness of the judges to give effect to the imperfectly expressed legislative desire (in S.2(b) of the Charter) to promote freedom of religion, by means of protecting pastoral communications from disclosure in court. It is moreover likely that the completed edifice will owe less to a steady focussing on fundamental questions and more to a regard for the exigencies of particular cases. As L'Heureux-Dubé J. pointed out in *R. v Gruenke,*[124] 'An *ad hoc* approach to privilege may overshadow the long term interest which the recognition of a religious privilege seeks to preserve'. The danger in this approach is its tendency to focus on the palpable need for evidence in the individual case and to neglect more intangible and long term interests.[125] It is surely preferable to settle in advance how far these intangible interests are to be upheld, and a class privilege will do that in its wording, which will be selected, after public debate, by elected legislators.

It is clear that when Wigmore laid out his criteria, he was formulating general tests to enable society to decide whether a legal privilege for *any* class of communication was justified as a matter of policy. He was not laying down tests to be applied in any particular case to determine whether a particular communication should be protected. If the tests were satisfied, as in his opinion they were in the case of priest/penitent communications, it would be good policy for the law to protect all communications in that class (and if not, not). If the policy were adopted, either by the legislature or, in jurisdictions where such is possible, by the judge,[126] it would not be for the claimant to do more than establish that his communication was truly in that class. If the pastoral relationship is to be fostered, it is not fostered by leaving matters to be settled *post factum.* It is small use declaring to members of religious communities in general that 'your confession to a priest *may* be protected from disclosure in court if a judge decides that your church

120. Unreported, set out in J of the Church Law Association of Canada 1993, Vol 1 No 2, 143.
121. *Supra,* f.n.117.
122. [1991] N.S.J. No. 468.
123. All Canadian provinces make it an offence for a clergyman to fail to report to the authorities information relating to child abuse. Although these statutes do not require the giving of evidence in court, it would be difficult to argue (if the statutes survive a challenge under Section 2(a) of the Charter, as they probably will) that the harm done by disclosure of the matter in evidence outweighs the harm done to the litigation process by protection.
124. (1991) 67 C.C.C. (3rd) 289, at p.321.
125. Mitchell, *'Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion'* (1987) 71 Minn.L.R. 723, 767-8.
126. As happened in Eire and District of Colombia, see *ante,* Section 7.

is one characterised by a relation which we will foster, and if the litigation is not so serious that its correct disposal cannot be risked by protection'. That, as L'Heureux-Dubé J. noted,[127] would result in a chilling effect on the relationship between clergy and parishioners. In short, society must make up its mind about these large matters in advance. The statute which embodies society's decision, assuming that is positive, would also be expected to settle less fundamental questions which arise. For example, a 'doubtful' communication between confidor and pastor would be settled, not laboriously by appeal to Wigmore 1st and 2nd principles, but easily and quickly by reference to a laid down definition of 'penitential communication', as in the Model Code of Evidence, Rule 219.[128]

The Canadian courts cannot be faulted for using Wigmore's criteria in a way he did not contemplate. The case by case approach is inevitable given the paucity of the statutory base upon which they have to work – in effect a one-line statute allowing judges in appropriate cases to protect some priest/penitent communications.[129] Nor is the Canadian legislature to be criticised for that paucity; the statute was not designed with privilege in mind. However for a statute avowedly concerned with privileged communications to proceed in this way can be criticised as quite inadequate. In effect that is the way in which the statute proposed by the Australian Law Reform Commission proceeds.[130] The draft section 109 of their Evidence Bill uses a greater number of words, but it is no more effective than a 'one-liner'. Apart from making it clear that the Court is not (as it was at common law) wholly powerless to protect confidential communications in general, the statute leaves everything to be established, and, moreover, to be established by the person claiming protection.[131] The crucial balance of harms which the Court must strike under subsection 1 begs all the key questions, which are not answered merely by providing in subsection 2 a list of matters which the Court must take into account. For example, one matter to be taken into account is the nature of the relevant offence. This does no more than obscurely indicate that communications concerning some offences may *not* be protected, thereby precluding any argument such as that of L'Heureux-Dubé J. that the initial statutory intention settles the matter in respect of all offences. It would preclude that argument even if the section was exclusively concerned with priest/penitent communications. *A fortiori,* where, as drafted, the section comprehends all confidential communications and records. As drafted, the section could even be operated by Courts as protecting no priest/penitent communications at all, but only those with 'modern' confidants such as doctors, psychotherapists and journalists.

To do anything effective at all, the legislature must make up its mind. If it holds, like Wigmore as to penitential relationships, that the pastoral relationship is worth fostering, and that the long term health of that relationship needs

127. (1991) 67 C.C.C. (3rd) 289, at p.322. It is useful to compare the client/lawyer privilege. This would be quite useless if it were not a legal privilege. Its utility rests completely on the fact that everyone knows that he can speak freely to his lawyer.
128. *Ante,* f.n.106.
129. Intervention by the European Court of Human Rights, should that ever happen, would be similarly limited by the generality of Article 9 of the European Convention on Human Rights. See *ante,* f.n. 53 and associated text.
130. *Ante,* f.n.108 and associated text.
131. S.109(1) begins 'Where on the application of a person who is an interested person, the court finds . . .'

protection for confidential statements to pastors, it ought to say that such statements, with such exceptions as it thinks necessary (e.g. confessions of murder), are to be protected. If it holds that the protection of that relationship is not sufficiently important to breach the rule of full disclosure of evidence, it has no business to be legislating at all on the subject.[132]

It is not an acceptable standpoint to take the view that while some statements in the field may deserve protection, it is too difficult to construct a rule which covers precisely all the cases which are thought to be worthy of inclusion and excludes all cases thought unworthy. It is *not* difficult to construct a rule which caters very substantially for what society is presumed to wish in the matter; indeed there are numerous precedents from all over the common law world. It is unacceptably faint-hearted to baulk at passing a law because it will inevitably have some sharp edges, some distinctions which are unpleasing to severely rational persons. If draftsmen decide to except confessions of murder, and then fall to agonising about confessions of attempted murder, that is no reason for throwing up of hands and giving up of the whole exercise. That is to make the best the enemy of the good. Certainly if hands *are* thrown up and the attempt to draw lines is abandoned, it is not an acceptable alternative to drawing of lines by statute to leave it to the judge. He will have the same difficulty in drawing those lines, and will not have the authority of Parliament to help him in his difficulty.

132. Compare Wigmore's view of statements which are not guaranteed secrecy by church discipline, that they cannot be privileged. Para. 2396.