Protection of legal work product: A comment on Carlton Cranes Ltd *v* Consolidated Hotels Ltd

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Professor Allen and his colleagues at Northwestern University have recently analysed the rules of confidentiality governing legal materials from a microeconomic perspective. The rules of confidentiality are controversial because their costs are obvious, although their benefits are not. Among the theoretical insights resulting from the economic analysis is a clarification of the benefits these rules may provide. In this article, Professor Allen applies the theoretical structure created by him and his colleagues to New Zealand law, represented by the Carlton Cranes *case. The author expresses his gratitude to colleague Mark Grady for his comments on a draft of this article.*

While in New Zealand recently at the invitation of the Law Commission and Victoria University of Wellington, I was asked how the recent theoretical developments concerning the attorney-client privilege and work product doctrine[1] would apply to *Carlton Cranes Ltd* v *Consolidated Hotels Ltd.*[2] I provide that analysis here. I first distinguish the attorney-client privilege from the work product doctrine. I then describe the relevant theoretical developments that analyse these rules from a microeconomic perspective, briefly with respect to the attorney-client privilege and in somewhat greater detail with respect to work product. Finally, after describing *Carlton Cranes*, I analyse it from the perspective of the deepened understanding of work product resulting from the recent theoretical advances. In doing so, I will criticise the approach in *Carlton Cranes*, although I should not be understood as being critical of Tompkins J, who authored the opinion. Tompkins J was striving to articulate and apply his best understanding of New Zealand law and its rationale, tasks which he performed admirably. My task, by contrast, is to analyse New Zealand law and its rationale as articulated by Tompkins J.

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1 Allen, Grady, Polsby, and Yashko "A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine" (1990) 19 J Legal Stud 359 (hereinafter, "A Positive Theory"); Allen and Hazelwood "Preserving the Confidentiality of Internal Corporate Investigation" (1987) 12 J Corp L 355; Kaplow and Shavell "Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability" (1989) 102 Harv LR 565; Bundy and Elhauge "Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation" (1991) 70 Calif LR 313.

2 [1988] 2 NZLR 555.

I THE ATTORNEY-CLIENT PRIVILEGE

In both the United States and New Zealand, there are two distinct rules of confidentiality protecting legal affairs.[3] One rule protects confidences of a client to an attorney made for the purpose of securing legal advice. A second rule extends a qualified privilege to the materials prepared by a lawyer in anticipation of litigation. In New Zealand, both rules are subsumed under the general label of legal professional privilege,[4] whereas in the United States the first of these rules is referred to as the attorney-client privilege, and the second as the work product doctrine. There is no significance to this difference in labelling, unless it obscures that the two rules are somewhat different. One advantage of the recent theoretical developments is that the difference between the two rules has been clarified.

There are, in the vocabulary of economics, two margins that the confidentiality rules are designed to expand. A client's expectations of confidentiality affect how much and what information to divulge to counsel. Without a confidentiality rule, the client will anticipate that disclosure to counsel will benefit the opponent, for without confidentiality, disclosure to one's counsel will often mean disclosure to one's adversary. The result of disclosure is to increase the costs of the party relative to the costs of the opponent, thus creating a disincentive to disclose. Confidentiality also affects the incentive structure of the lawyer. Prior to any investigation, a lawyer will not know whether good or bad information will turn up. If all information discovered must be disclosed, the possibility of some of that information being harmful will be a disincentive to investigate. We thus see that we are dealing with two different but related incentive structures. Accordingly, for ease of reference in the remainder of this article, I will employ the American terminology that distinguishes attorney-client privilege (henceforth "privilege") from the work product doctrine.

What is the justification for these two doctrines that emerges from the recent theoretical developments? In sum, it:[5]

> is that the attorney-client privilege and the word product doctrine offer two perspectives on a larger goal, which is to increase the amount of information about disputes available to courts and to work against the disincentives to the production of that information which would otherwise exist. In our legal system, lawyers are both

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3 There is a third requirement of confidentiality that generally mandates that a lawyer keep confidential any information in the lawyer's possession relevant to the representation of his clients. This rule exists to resolve an agency problem rather than an information problem, and thus is quite different from the rules discussed in the text. This requirement of confidentiality prohibits the lawyer from disclosing information when it might be in the lawyer's best interests to do so, whereas the attorney-client privilege and work product doctrine are means by which a lawyer may suppress information that the lawyer desires to suppress. For discussions, see C Wolfram *Modern Legal Ethics* (West Pub Co, St Paul, 1986) 299-301; Shavell "Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability and Protection of Confidentiality" (1988) 17 J Legal Stud 123.

4 Above n 2, 557.

5 "A Positive Theory", above n 1, 361-362.

> conduits of information from their clients to the courts and independent producers of information for the same audience. The attorney-client privilege takes the client's perspective and establishes the level of confidentiality needed to get the client to consult a lawyer and to divulge the optimum amount of information to him. The work product doctrine then takes the attorney's perspective and provides the level of confidentiality needed to induce the attorney to perform the optimal amount of legal investigation.

Whether these effects are socially desirable is a difficult and controversial matter.[6] The privilege has been attacked on a number of grounds. Edmund Morgan argued that if a client is called as a witness and:[7]

> told his lawyer the truth, he must now tell the same thing from the witness box. If he told his lawyer a lie and sticks to it, he will tell the same story at the trial or hearing. If he told his lawyer the truth and tells a lie, why should he be protected from exposure? Is the privilege retained in order to protect perjurors? How can that either directly or indirectly further the administration of justice?

Morgan's argument echoed Bentham's recently reconstructed in economic terms by Shavell and Kaplow,[8] that "to the man who, having no guilt to disclose, has disclosed none to his lawyer, nothing could be of greater advantage than that this should appear; as it naturally would if the lawyer were subject to examination".[9]

Both Morgan and Bentham could only see the costs of the privilege, and they are certainly right that the suppression of useful information increases costs. They failed to see that those costs may bring benefits. Perhaps their failure to see this came from viewing the legal system as primarily involving claims and denials. The paradigm case to them appears to be of the sort: "You did it. No, I did not." In such a system, they would be right that the privilege does harm with no compensating benefits. If, for example, the question is simply the colour of the traffic light when the car was in the intersection, no obvious benefits result from the privilege. Everyone knows what the relevant issues are and what information is harmful and helpful. In that world, the primary effect of a privilege would be to encourage perjury. Lawyers would be counterproductive filters on the disclosure of truth.

But the legal system is not primarily one of charge and denial; rather, it is one involving contingent claims, and herein lies the major contribution of the recent theoretical developments concerning the privilege. Establishing the colour of the traffic light at the relevant time may not establish liability. Even if that fact establishes the

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6 In addition to the references listed above at n 1, see Easterbrook "Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information" [1981] Sup Ct R 309; Thornburg "Rethinking Work Product" (1992) 77 Va LR 1515; Allen "Work Product Revisited: A Comment on Rethinking Work Product" (1992) 77 Va LR 949; Zacharias "Rethinking Confidentiality" (1989) 74 Iowa LR 351.

7 American Law Institute *Model Code of Evidence* (Foreword) (Philadelphia, 1942) 25.

8 See Kaplow and Shavell, above n 1.

9 J Bentham *The Rationale of Evidence* in *The Complete Works of Jeremy Bentham* Vol 7, bk 9, pt 4, ch 5 (Bowring ed, 1827) 474 ff.

defendant's negligence, the defendant can always rely on contributory negligence. But that, too, will not necessarily resolve the issue, for the plaintiff always has open the possibility of responding with last clear chance. We thus see that much litigation involves contingent claims in the sense that they often depend for their validity upon some other fact that, standing alone, harms rather than helps a litigant. Considered by itself, the fact that the light was red when the defendant entered the intersection is harmful to the defendant. Nevertheless, this harmful act is also the triggering mechanism for a claim of contributory negligence, which is helpful to the defendant.[10]

In a legal world involving contingent claims, the costs of the privilege can be justified by the compensating benefits, of which there are two. To continue with the car accident hypothetical, without a privilege, a defendant would be less inclined to admit that the light was red when he entered the intersection. As a result, a legitimate contingent claim such as contributory negligence may be neglected. Neglecting a contingent claim has two detrimental consequences. First, legal claims like contributory negligence have real world benefits by assisting in properly allocating the costs of accidents (and thus helping to reduce those costs), and those benefits are lost if the claims are not adjudicated. Second, every time a defendant fails to disclose the truth to counsel, truth suffers, often resulting in more perjury in the system. With a privilege, both points are reversed. A privilege creates an incentive to disclose to the lawyer. Disclosure in turn allows the lawyer to fashion the litigation properly over the appropriate contingent claims, thus advancing the social value of those claims and actually reducing the amount of perjury in the system as a whole.

The contingent claims argument, and how well it competes with other justifications for and criticisms of the privilege, deserves a more extended analysis than I can provide here.[11] My task here is simply to identify the justification for the privilege in order to distinguish it clearly from the work product doctrine, to which I will now turn. The important point is that the justification for the privilege emerges from a reconstituted view of the nature of litigation driven by microeconomic theory, and the implications of that view for behavioural incentives in the world of activities, such as driving, that the law regulates.[12] The incentives are the client's, unlike work product, where the relevant incentives are primarily the lawyer's.[13]

II THE WORK PRODUCT DOCTRINE

The justification for the work product doctrine has proved equally elusive and controversial as that for the privilege. Much of the commentary on the doctrine is critical. As with the privilege, most commentators argue that the doctrine imposes costs without compensating benefits. Once more an economic approach articulates the

10 See "A Positive Theory", above n 1, for an elaboration.

11 See "A Positive Theory", above n 1.

12 The major defender of the privilege has been Wigmore. The difficulty with his defence is that it neglected the relevant behavioural incentives. See "A Positive Theory", above n 1, 371-372.

13 The incentives are the client's with respect to work product only to the extent the client may be financing the lawyer's time.

benefits of the doctrine. In doing so, the economic argument clarifies the differences between work product and the privilege.

In the English speaking world, the work product doctrine, roughly analogous to old English practice, had its modern rebirth in *Hickman* v *Taylor*,[14] where the Supreme Court of the United States found there to be a qualified immunity from discovery for work produced in anticipation of litigation. The plaintiff's attorney requested copies of witnesses' statements obtained by defence counsel. The Court argued that these materials should not be turned over absent hardship, for the plaintiff could just as easily obtain similar statements from the witnesses themselves. The Court also argued that a contrary rule would inadequately protect the privacy of lawyers, and that "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial."[15]

The commentators uniformly have been unable to explain this doctrine, the difficulty again being that its costs are obvious but its benefits are not. The costs result from the suppression of information. While it is true that the plaintiff in *Hickman* could obtain the statements himself, why should he be put to that cost when it simply duplicates the cost already borne by the defendant? Would not total costs be less if the defendant simply turned over the information? Moreover, are not there already plenty of incentives for a lawyer to investigate and prepare the case, so that no service is left to be done by the work product doctrine? This is the analytical problem that has exasperated the commentators. For example, Professor Kevin Clermont, a leading proceduralist in the United States, after a thorough review of the doctrine and its commentary, wrote: "As proof of [the] difficulty [of justifying the work product doctrine], I note - without insult by citation - the serious shortcomings of almost all of that commentary."[16]

The only substantial explanation for work product in the literature is Judge Frank Easterbrook's argument that the doctrine creates a property rights regime analogous to the protection of intellectual property in general, and to copyright in particular.[17] In his view, work product is protected just as is the creative effort of artists in order to stimulate the optimal production of legal information. Without copyright protection, the argument runs, too few novels would be written, and without work product, too little legal information would be created. While creative and insightful, Judge Easterbrook's argument is clearly wrong. Under the copyright theory, legal creativity would be protected, just as artistic creativity is protected under the law today. But the cases do not bear this out, as the *Hickman* case well demonstrates. There was nothing, literally nothing, creative about interviewing the witnesses in that case; interviewing the witnesses is what the most uncreative lawyer would do. Thus, were the copyright theory correct, the decision in *Hickman* would have been the opposite of what was actually decided.

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14 329 US 495 (1947).

15 Above n 14, 511.

16 Clermont "Surveying Work Product" (1983) 68 Corn LR 755.

17 Easterbrook, above n 6.

Easterbrook's error lies in failing to see that the protection of inspiration is a subset of the larger set actually being protected. The larger set is simple diligence. Why protect diligence? Because legal investigations occur under what is known as a condition of joint production. Prior to any investigation, a lawyer will not know what the investigation will produce. It may produce useful or harmful information. If the investigation turns up useful facts that must be disclosed, the investigation will have assisted the opposition by lowering its costs of obtaining those facts. Ex ante, then, there is a disincentive to investigate. The work product reduces this disincentive. Allowing an attorney to keep work product confidential decreases costs relative to the opponent's cost of investigation. Accordingly, one would predict that work product protection would increase the amount of investigation done at the margin. This theory, unlike Easterbrook's, easily explains *Hickman*, and many other cases.[18] Although there was no inspiration in *Hickman*, there was perspiration - investigation was occurring under a joint production condition. In order to create the incentives for optimal investigation, the Court protected the results of the investigation.

The work product doctrine should not be viewed as a traditional privilege, however, because traditional privileges are absolute. Rather, it should be viewed as a qualified privilege that can be overridden when the cost of duplicative efforts by the opposition exceeds the value of further information likely to be produced. This is in fact true of the doctrine in the United States, which lends considerable force to the power of the argument.[19] As I discuss below, it is also a problem with the *Carlton Cranes* case.

Before analysing *Carlton Cranes*, though, one last point must be addressed. What of the conventional criticism of the work product doctrine that legal investigation would occur in its absence? Our economic argument has recently been criticised by Professor Elizabeth Thornburg on this ground. In discussing the economic theory, Professor Thornburg asserts that it "depends on ... unverified assumptions about adequate trial preparation" and "is very much like the traditional argument that work product immunity is necessary to encourage attorney diligence."[20] This is wrong. Professor Thornburg correctly reads the conventional defenders of work product to argue that without work product there would be no investigation at all, and that, in her words, work product "encourages the most complete possible investigation".[21] Between these two extremes, however, she does not address the scale of investigations that would be done with or without work product; she does not, in other words, address the marginal point that distinguishes the economic theory from traditional thought about work product.

For example, Professor Thornburg argues that "work product cannot provide an incentive for the litigant to go forward with a totally thorough investigation into both harmful and helpful facts any more than the adversary system itself can encourage such investigation".[22] Similarly, she argues that "[e]ven if work product were discoverable,

18 See "A Positive Theory", above n 1.
19 "A Positive Theory", above n 1, 393-394.
20 Thornburg, above n 6, 1545, 1546-1547.
21 Above n 6, 1526.
22 Above n 6, 1528.

litigants and their attorneys still would investigate the facts of their cases because there is no clear line between learning helpful facts and harmful facts.... Although they would prefer to carry on these activities in secret, they would not stop if the secrecy is removed because there simply are too many forces that require such activities".[23]

Whatever the truth of these points, they are irrelevant to the economic argument concerning work product. The economic argument is not that work product is necessary for there to be investigations, but that through it the courts are attempting to encourage a more optimal amount of investigation. An important word here, of course, is "optimal". The argument is not that work product is necessary to create incentives for a "totally thorough" or "the most complete investigation". The argument instead is that the doctrine is designed to create incentives for the optimal investment in investigation. The argument, in turn, is premised upon the simple intuition that people are less likely to do things which are likely to hurt them more than they are to do things which are likely to hurt them less.[24] This discussion of Professor Thornburg's argument leads directly to a discussion of *Carlton Cranes*, for New Zealand law also appears to neglect the marginal effect of confidentiality.

III CARLTON CRANES LTD V CONSOLIDATED HOTELS LTD

Carlton Cranes involved a collision between a crane and a car. This litigation arose over plaintiff's efforts to obtain certain reports concerning the accident that had been prepared on instructions from the appellant's insurers. Defendants claimed litigation privilege - work product in my terminology.[25] The basis for the claim, according to the Court, was the testimony of:[26]

> Mr Kay, [the claims manager who], . . . disposed that the circumstances relating to the accident were such that it was immediately apparent to him that a claim or claims might be made against the first appellant in respect of such accident, by, or on behalf of the owners of the vehicles which were damaged in it. He said that it was for that reason that he commissioned the assessors to investigate the circumstances relating to and the cause of the accident. He intended that, if the reports showed that the accident was not caused by any negligence or want of care on the part of the appellant, then, in the event of a claim or claims being made, liability would be denied and litigation was likely to ensue. His intention was that in the event of such litigation, all reports prepared by the assessor should be placed in the hands of Commercial Union's legal advisers, with a view to their advising Commercial Union whether or not such litigation ought to be defended. It was further intended, that in the event of

23 Above n 6, 1530.

24 For an elaboration of this argument, see Allen "Work Product Revisited: A Comment on Rethinking Work Product" [1992] 77 Va LR 949. See also, Thornburg "Work Product Rejected: A Reply to Professor Allen" [1992] 77 Va LR 957.

25 One cannot tell from the case if the investigation was done by lawyers, but the Court rightly ignored that point. The investigation clearly was done with legal implications in mind. A holding that work product could only be claimed if the actual investigation was done by a lawyer would merely shift the work from non-lawyers to lawyers, thus increasing costs for no legitimate purpose.

26 [1988] 2 NZLR 562.

> any claim being litigated, the report would be made available to the solicitors for their use in connection with the litigation.

According to Tompkins J, under New Zealand law two criteria must be met for material to receive work product protection: "First, the document must have come into existence when litigation is in progress or reasonably apprehended. That situation must be in existence at the time that the document was created. Secondly, the dominant purpose of its preparation must be to enable the legal adviser to conduct or advise regarding litigation."[27] Tompkins J concluded that the reports were not privileged under New Zealand law, because neither criteria was satisfied.

The first criteria was not satisfied, according to the Court, because, at the time the reports were created, litigation was not reasonably anticipated. This was so primarily because the insurance company "had very little detail of the accident".[28] With impoverished knowledge, litigation might have been possible, but could not be said to be reasonably anticipated, even though a claim upon the insurance company was obviously anticipated. After all, the insurance company might just decide to pay the claim rather than decline and risk litigation.

However true to New Zealand law this conclusion is, it is exactly backwards so far as the economic explanation for work product is concerned. Note first the curious meaning of the phrase "reasonably anticipated." One would think that one "reasonably anticipates" anything with a reasonably high probability of its occurrence. Suppose, for example, that the weather report says there is a forty per cent chance of rain. We would think someone foolish who took some significant act that would be seriously disadvantaged by rain, such as planning an outdoor wedding during the season when it rains forty per cent of the time. This is not, though, the meaning of the phrase employed by Tompkins J, who interprets "reasonably anticipates" to mean certainty under New Zealand law. One apparently can "reasonably anticipate litigation" only after one is already in it. Indeed, in a case relied upon by Tompkins J, protection was not granted on this ground even after plaintiff had filed suit, because there was still time for the defendant to decide not to defend.[29] This, of course, will always be true, leading to the remarkable conclusion that protection should never be granted. Even after a defendant has decided provisionally to defend, he can always change his mind; indeed, he can always change his mind up to the time of verdict.

As Tompkins J interprets New Zealand law, then, the ambiguity surrounding the future was a reason to deny confidentiality. In fact, though, it is a strong reason to grant it. The disincentive to investigate is particularly strong when parties are ignorant of what their investigation will turn up, if it is also true that any damaging information will have to be disclosed to their opponents. The justification for work product is the offsetting of just incentives, and so as I say, New Zealand law has it backwards.

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27 Above n 26, 557.
28 Above n 26.
29 Above n 26, 558.

The gulf between New Zealand law and the theory of work product is captured by what appears to be an innocuous passage in the opinion describing the reports in question. After the description, Tompkins J remarks: "There is in my view, nothing to distinguish these reports ... from the routine-type reports commonly prepared by loss adjusters for an insurance company following a motor accident."[30] The Judge's point is that the nature of these reports demonstrates that confidentiality is not in order here. The deeper point, though, is again the opposite of that made by Tompkins J. He viewed these reports ex post the investigation, but incentives operate ex ante. The appropriate question to ask is not what the investigation actually turned up, but instead what the investigator's incentives are before he investigates. By failing to ask that question, New Zealand law tells insurance companies that they investigate at their own risk. It is difficult to see how that will not encourage less thorough investigations. Only if New Zealand insurance companies are altruistic rather than profit motivated would that be so, a condition I doubt persists anywhere in the world, including New Zealand. Arguing to the contrary would be analogous to arguing that the price of New Zealand wool does not affect its consumption. That would be unconvincing, of course, just as an analogous argument about insurance companies would be.

Moreover, Tompkins J's argument proves too much, for under it there would never be a reason to protect work product, even if litigation were anticipated. If the thoroughness of investigations by insurance companies will not be affected by the behavioural incentives I have been discussing, a point which lies at the heart of this case's explication of New Zealand law, why would the behavioural incentives of lawyers be affected by them? In other words, if recognising that the fruits of any investigation will have to be turned over to one's adversaries will not inhibit insurance companies, why would it inhibit lawyers? If confidentiality ought not to be provided here, it should not be provided to lawyers, either, save only if lawyers are a less magnanimous lot than insurance companies. Perhaps that is so, but we must not overlook that insurance companies are putting their own money at risk, but the lawyers are not. Consequently, if anything there is less reason to believe that confidentiality is needed for the investigations of lawyers than for the investigations of insurance companies that might lead to litigation. So, once more, this case has the relevant principles exactly backwards.

What I have said about the requirement of "reasonable anticipation" essentially disposes of the second criterion under New Zealand law that the "dominant purpose" of the reports be to assist the lawyer in litigation. In brief, nothing rests upon the "dominant purpose" of the reports. Rather, we have a complex incentive structure that can be affected by providing confidentiality. Providing greater confidentiality provides greater incentive. The complexity lies in determining the point at which the likely result of further confidentiality is to encourage too much investment in legal investigation. As confidentiality is extended, at some point the cost of duplicative investigation will exceed the value of new information obtained by that investigation, which is the point at which work product protection should cease. To determine that point requires recourse to such matters as whether litigation is reasonably anticipated and the purpose of an investigation, but to correctly answer the question, these

30 Above n 26, 562.

variables must be treated as continuous rather than noncontinuous. Another difficulty with the *Carlton Cranes* approach is that its categorical structure forbids treating such matters as continuous variables (as the probability of litigation increases and the reason for the investigation increasingly is preparation for litigation, confidentiality is more justified) and requires instead that they be treated as concrete entities that either do or do not exist to certainty (confidentiality only if litigation is already occurring and the dominant purpose of an investigation is to assist it). Thus, the decision to provide confidentiality will be made based on the formal structure of the categories rather than on whether providing confidentiality leads to the optimal production of information. Consequently, the *Carlton Cranes* approach will approximate socially optimal conditions only by chance.[31]

The secret to work product, or as it is called in New Zealand, the legal professional privilege, lies in a clear view of the relevant incentives, and how they can be affected, of real human beings. Cases like *Carlton Cranes* are likely to decrease the total amount of information that is created in New Zealand concerning legal affairs. Even if the courts do not view these problems ex ante, people and institutions with money on the line will. Two fairly safe predictions can thus be made of the consequences of New Zealand law. First, because New Zealand law discourages the creation of information concerning legal affairs, more legal errors will be made than are optimal, thus compromising justice. Secondly, New Zealand law contains a perverse incentive for creation of methods of investigation having the least risk of harm to the investigators (for example, investigate later than than earlier to decrease the risk of disclosure). Regretably, I doubt that such methods are likely to approximate optimal conditions, which means that resources will be diverted from more to less socially useful functions. To be sure, this conclusion simply recognises that New Zealand law may not be designed for the efficient production of something else, although it is difficult to imagine what that might be - especially so since the primary competitor to information, justice, is surely determined by information.

31 Perhaps, in other words, the categorical approach and the marginal approach just happened by chance to intersect in the case. That is possible but unlikely, and of course equally unlikely in any other case in which the categorical approach is applied.