ARTICLES

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CONFIDENTIAL MATERIAL: THE POSITION OF THE MEDIA

THE media and the courts have waged a constant battle in recent years over claims by media organisations to disclose or comment upon matters of "public interest". On a number of occasions, these disputes have involved secret or sensitive material, the issue for the courts being to determine whether a media defendant has infringed the right of another to maintain the confidentiality of that material. In this article we examine some aspects of the law involved in this type of litigation, of which the disputes over the book Spycatcher and the so-called "Westpac Letters" are important recent examples. The first part looks at some arguments available by way of defence for media organisations when injunctions to restrain disclosure of confidential information are sought against them. The second deals with a recent extension by the House of Lords to the law of contempt of court, purporting to render any injunction granted on confidentiality grounds effective against parties, including media organisations, not formally bound by the injunction.

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DEFENCES FOR THE MEDIA IN BREACH OF CONFIDENCE PROCEEDINGS

Where proceedings to restrain the use or disclosure of confidential information are instituted against those in the media, the context is usually that the defendants are accused of facilitating or even procuring someone else's breach of confidence.[1] There is no reason of course why a person who has communicated information in confidence to a journalist or reporter should not take action to prevent it being used for a purpose other than that for which it was initially confided. Typically though, the media defendant has not been a party to the original communication or acquisition from the plaintiff, but has nevertheless come into possession of the relevant material subsequently and is contemplating publication. Given the enormous capacity that most print and broadcasting organisations have to damage a plaintiff's economic, personal or political interests through the release of sensitive information, most litigation of this kind is directed primarily at the messenger, not the original source of the leak; indeed in many cases that source may as yet be unknown.

In general terms, a person or organisation in the media who acquires information as a result of another's breach of confidence is liable to be restrained from publishing it, just like any other third party, from the moment at which they know or ought reasonably to have known of its confidential nature.[2] In most instances of course the defendant is perfectly aware of the character of the material. Indeed they may actually have persuaded the original confidant to spill the beans, in which instance they may also be liable in the tort of contractual interference if, as is common, the confidant owed a contractual duty of secrecy (as an employee, for instance) to the plaintiff. However even if the defendant has been unaware of any breach, the mere

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1 As to the action for breach of confidence, see generally McKeough and Stewart, *Intellectual Property in Australia* (Butterworths, Sydney 1991) Chapters 2-4 (from which some of the material in this section of the article is taken); Gurry, *Breach of Confidence* (Oxford University Press, Oxford 1984); Dean, *Law of Trade Secrets* (Law Book Co, Sydney 1990).

2 *Argyll v Argyll* [1967] Ch 302; *Fraser v Evans* [1969] 1 QB 349; *G v Day* [1982] 1 NSWLR 24.

commencement of proceedings against them will suffice to give them notice and thus impose a duty of confidence.[3]

If the media defendant is to escape liability, or at least forestall the issue of an injunction to restrain publication, there are two arguments which may commonly be used: that the information has moved into the public domain and can therefore no longer be protected; and/or that a defence of justification can be established so as to excuse any breach occurring through publication.

The Public Domain Argument

It is a basic tenet of the law of confidentiality that information may only be protected to the extent that it has "the necessary quality of confidence about it, namely, it must not be something which is public property or public knowledge".[4] The plaintiff does not have to show that nobody else is aware of the information: it is enough that the material has a limited circulation and that "relative secrecy"[5] prevails. Difficulties arise, however, where the information, though initially secret, subsequently moves into the public domain.

The first question is to ascertain what constitutes "publication" for this purpose. As might be imagined, it is not always clear when information has or has not moved into the public domain. Three cases illustrate this point. In *G v Day* a journalist working for the Truth had discovered from the Corporate Affairs Commission the identity of the plaintiff, who had contacted the Commission to report a sighting of Frank Nugan, then believed (and indeed later confirmed) to have died some months earlier.[6] In restraining the paper from disclosing the plaintiff's identity, Yeldham J held that its confidentiality had not been lost by the broadcast of his name on two occasions on Channel 10's Sydney news service. The references were "transitory and brief",

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3 See, for example, *Talbot v General Television Corp Pty Ltd* [1980] VR 224.

4 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 326-328.

5 *Franchi v Franchi* [1967] RPC 149 at 153.

6 [1982] 1 NSWLR 24. See also *Falconer v Australian Broadcasting Corp* (1991) 22 IPR 205.

there was no record in permanent form available to the public and the name would mean nothing to anyone who did not already know the plaintiff. By contrast, in *Commonwealth v John Fairfax & Sons Ltd* Mason J rejected the Commonwealth's attempt to use the law of confidentiality to prevent the Sydney Morning Herald and the Age from publishing extracts from a book containing foreign and defence policy documents from the period 1968-1975.[7] One of the reasons given for the failure of this part of the claim (which did in fact succeed on the grounds of breach of copyright) was that not only had the initial ex parte injunction been too late to stop something over 60,000 copies of the papers going out with the first extract, but the book itself had already gone on sale, with copies being purchased by the US and Indonesian embassies; these two countries were those most affected by the documents in question. As Mason J put it:

> In other circumstances the circulation of about 100 copies of a book may not be enough to disentitle the possessor of confidential information from protection by injunction, but in this case it is likely that what is in the book will become known to an ever-widening group of people here and overseas, including foreign governments.[8]

As will be seen later, it was a similar effect that brought the British government undone in the Spycatcher litigation.

The third and most recent case is that involving the notorious "Westpac Letters", prepared by one of the bank's lawyers and detailing the scope of its potential liability as a result of the management of its foreign exchange loans, as well as what some saw as a cynical strategy to minimise the chances of litigation by aggrieved customers. When word of the letters began circulating, the bank obtained interim injunctions against various media organisations from the New South Wales Supreme Court. Matters came to a head when the Democrat politician Ian Gilfillan quoted extensively from the letters during a speech to the South Australian Legislative Council. The following day, portions of the letters were reproduced in an ACT edition of the Canberra Times. The letters also appeared in the left-wing newspaper

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7 (1980) 147 CLR 39.

8 At 54.

Tribune, copies of which went on sale outside the Supreme Court in Sydney. At this stage the Fairfax papers, the Canberra Times and the ABC renewed their efforts to have the injunctions lifted, arguing that the letters had passed into the public domain. Powell J rejected this argument, indicating that he was not persuaded that "the detail - as opposed to the general nature" of the information had become public.[9] Shortly afterwards Westpac made the letters available to the Senate's Select Parliamentary Committee on Banking, giving up on its attempt to preserve secrecy.

In reaching his decision, Powell J commented:

> [I]t is to be emphasised that to decide, at an interlocutory stage of proceedings, on applications brought on at very short notice, and on what is, more likely than not, inadequate, and incomplete, evidence, that the subject information has passed into the public domain is a decision not lightly to be made, and one which I would think would rarely be justified, if only because, if it were later to appear that one was in error, one would effectively have destroyed a plaintiff's cause of action before he had had an opportunity to have the validity of that claim tested on a final hearing.[10]

While this last point is well taken, it is difficult to agree with the finding. The judge was clearly correct in discounting the majority of the media debate over the letters, which had not disclosed any specific details. However two papers had published the letters and, as with *Commonwealth v Fairfax* and Spycatcher, once copies started circulating within the jurisdiction, no amount of injunctive orders could prevent them becoming known to a wider and wider audience. As far as the general public was concerned the cat was, or would soon be, out of the bag. Thus publication in the Canberra Times and the Tribune, no matter what other consequences might be involved (the judge indicated that the former was in contempt of court, as also might be the Herald and the ABC), could well have been enough to destroy the letters' secrecy.

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9 *Westpac Banking Corp v John Fairfax Group Pty Ltd* (1991) 19 IPR 513 at 525.

10 At 525.

More significant though was the fact that the material had been read into South Australian Hansard. Powell J deflected the claim by counsel for the Canberra Times that anyone publishing a fair report of these proceedings would have a complete immunity against any ensuing civil action or indeed against a charge of contempt, saying that "even if the submission were sound, the immunity would apply only within the territorial boundaries of South Australia".[11] The implicit suggestion that the immunity might not exist even within South Australia demonstrates an important point for journalists and media lawyers. Except where the issue is clearly resolved by statute or case-law (as in the case of defamation,[12] but not in the law governing breach of confidence), it is unsafe to assume that the qualified privilege for fair and accurate reports of parliamentary proceedings is co-extensive with the absolute privilege, stemming from the Bill of Rights 1689, accorded to members of parliament speaking in the course of parliamentary proceedings.[13] The media may well, in some circumstances, be liable to civil or criminal remedies even though the MP is not.

However whether or not such an immunity exists beyond that already recognised by the law of defamation, what Powell J appeared to ignore was that Gilfillan's speech had resulted in a permanent record of the information to which anyone, including the media, could now gain access. Any argument that members of the public might not bother to make use of this opportunity misses the point. As a matter of general principle, information has plainly passed into the public domain once it is accessible without significant delay; the fact, for instance, that most people do not drop in to patent offices on a regular basis to leaf through the latest inventions does not preclude information in a patent specification from being treated as having been published.[14]

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11 At 524.

12 See, for example, *Defamation Act* 1974 (NSW) s24.

13 This view is supported by a joint opinion of the then Commonwealth Attorney-General, Senator Gareth Evans, and Solicitor-General Gavan Griffiths QC, delivered in 1983 in relation to the disclosure in the South Australian Parliament of confidential matters arising during the Hope Royal Commission into ASIO.

14 See, for example, *O Mustad & Son v S Allcock & Co Ltd* [1963] 3 All ER 416; *Franchi v Franchi* [1967] RPC 149; *Secton Pty Ltd v Delawood Pty Ltd* (1991) 21 IPR 136.

Moreover there is no reason why media organisations should be treated differently from "the general public" in this respect and they plainly have both the means and the interest to access parliamentary records quickly.

If this argument is accepted, it means of course that no secret is absolutely safe in this country, since any parliamentarian may, if allowed to do so by the Speaker or President of the relevant chamber,[15] destroy confidentiality by using parliament to place information in the public domain. The problem is that it is difficult to see what other position should obtain, for the only alternative is the unpalatable one of having an unelected judiciary placing restrictions on the reporting or reproduction of parliamentary proceedings. We would certainly expect parliaments to regulate themselves in this regard and to ensure that, as far as possible, confidentiality and/or privacy is not wantonly disregarded. However if the notion of parliamentary privilege is to be maintained, the corollary must be that what is said under that privilege loses its secrecy.

If it is accepted that the plaintiff's information has indeed moved into the public domain, the next question is as to the effect of that publication on the plaintiff's claim for an injunction. In *Speed Seal Products Ltd v Paddington*[16] Fox LJ, in attempting to summarise the law on this point, distinguished between three situations. The first, and easiest, is where the publication is made by or with the consent of the plaintiff. This plainly has the effect of discharging any obligation of confidence, so that the defendant may publish with impunity.[17] Secondly, the information may be published by someone other than the plaintiff or defendant. According to Fox LJ, such a publication does not necessarily release the defendant. However this caution appears unwarranted.[18] So long as the information has been published

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15 This may well be a significant restraint. Prior to the Gilfillan speech, for example, Democrat Senator Paul McLean had been prevented from tabling the letters in the Senate by its president, Kerry Sibraa.

16 [1986] 1 All ER 91 at 94-95.

17 *Mustad v Allcock* [1963] 3 All ER 416; *Fractionated Cane Technology Ltd v Ruiz-Avila* (1988) 13 IPR 609.

18 Fox LJ was arguably placing too much weight in this regard on *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289: see McKeough

by someone else and so long as the defendant has not previously been using the information in an unauthorised manner, there is no conceivable sense in placing a continuing disability on the defendant in relation to information which everyone else is free to use.[19] Where no prior breach has been established, therefore, the obligation of confidence should be considered to lapse on publication.

This indeed was the position grudgingly arrived at by the House of Lords in the British chapter of the Spycatcher saga. It will be recalled that the British government went to extraordinary lengths to suppress publication of the memoirs of Peter Wright, a member of that country's security services who had come to live in Tasmania (and had thus escaped the reach of British official secrets legislation). The ensuing litigation in Australia, Britain, New Zealand and Hong Kong succeeded only in attracting considerable media attention and giving a wonderful boost to the worldwide sales of Spycatcher. The Australian action, where Wright and his publisher Heinemann were the defendants, ultimately foundered on the High Court's view that the British government was seeking to enforce a foreign public law: this was considered to be forbidden, a prohibition which could not be lifted by the Australian government's support for the claim.[20] Accordingly in no court was Wright's liability for breach of confidence authoritatively determined, since the various other actions all involved media defendants.

In Britain the government initially took action in June 1986 to restrain the Guardian and the Observer from reporting the early Australian proceedings and thereby disclosing allegations made by Wright against the British security services. The interlocutory injunctions obtained were ultimately discharged, but not until more than two years

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and Stewart, *Intellectual Property in Australia* para 307 (and especially n44).

19 *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402 at 408.

20 *Attorney-General (UK) v Heinemann Publishers Australia Ltd (No 2)* (1988) 165 CLR 30. Criticised by Mann, "*Spycatcher* in the High Court of Australia" (1988) 104 *LQR* 497. The New Zealand Court of Appeal agreed with the High Court's characterisation of the action, but considered that the "door could be unlocked" by the New Zealand government: *Attorney-General (UK) v Wellington Newspapers Ltd* [1988] 1 NZLR 129.

had elapsed and the matter had reached the House of Lords for a second time. The Thatcher government's nemesis, ironically, turned out to be the United States Constitution. No action was attempted in that country to restrain publication for the simple reason that it would almost certainly have failed: the First Amendment to the US Constitution appears to preclude any restraint on the publication of unclassified material relating to the security services.[21] With the publicity generated by the litigation elsewhere, US sales soared and "illicit" copies in turn started flooding into Britain. By October 1988 it was clear to the House that sufficient numbers were in circulation to have destroyed any secrecy and to render further restraint an exercise in futility.[22] Since neither the Observer nor the Guardian could be blamed for this situation, there was no reason to hold them to their obligations of confidentiality.

This position was not reached without a slanging match breaking out between the courts and the media in Britain, occasioned by an earlier attempt by the newspapers to lift the injunctions on precisely the same ground. At this stage the proceedings involved interlocutory relief and the courts, taking the admittedly peculiar view that an injunction might yet be granted against the newspapers at a final trial, quite logically (given that view) determined that preservation of the plaintiff's rights demanded that the interlocutory restraint remain in force.[23] As the matter progressed up to the House of Lords, the decisions drew savage criticism from the press, particularly the tabloids. By the time Lord Ackner in particular came to write his decision, he was seething:

> The press do not wish the public to exercise a sense of proportion. The case has therefore to be presented as open and shut, admitting of no possible argument, and of only one

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21 *United States v Marchetti* (1972) 466 F 2d 1309. See also, *Snepp v United States* (1980) 444 US 507, where an ex-CIA agent was enjoined, but only from breaching an agreement to submit material for prepublication clearance.

22 *Attorney-General (UK) v Guardian Newspapers Ltd (No 2)* [1988] 3 WLR 776.

23 *Attorney-General (UK) v Guardian Newspapers Ltd* [1987] 1 WLR 1248. See also *Attorney-General (UK) v Newspaper Publishing* [1988] Ch 333; *Attorney-General (UK) v Turnaround Distribution Ltd* [1989] FSR 169.

> decision - that favourable to the press. This one-sided reporting is an abuse of power and a depressing reflection of falling standards and values.
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> [In America] the courts, by virtue of the First Amendment, are, I understand, powerless to control the press. Fortunately, the press in this country is, as yet, not above the law, although like some other powerful organisations, they would like that to be so, that is, until they require the law's protection.[24]

In *Westpac v Fairfax* Powell J expressed not dissimilar sentiments in commenting on the "almost frantic, and, at times, self-righteous, attempts of the media, and others, to rob the plaintiff's documents of the confidentiality to which they are entitled" and in anticipating "the media heaping upon my head the scorn which was visited upon [the majority of the House of Lords] in *Attorney-General v Guardian Newspapers Ltd*".[25]

There is in a sense a dilemma for the media in this type of situation. In vigorously arguing for the public's "need to know" and in whipping up public opinion on the matter, they tend to create an environment in which confidentiality becomes much harder to maintain, thereby assisting the case against restraint. However it is hardly surprising if this creates judicial hostility: judges who feel as if they are being backed into a corner, like the majority in the interim Spycatcher proceedings, will only be human if their reaction is a stiffened resolve to show that they cannot be dictated to by the media.

Returning to the general issue of the effect of publication on obligations of confidentiality, the third and final category of case identified in Speed Seal occurs where it is the defendant who has, either alone or with others, deprived the information of secrecy. Here there is no question but that a breach of confidence has occurred. The only issue therefore is whether injunctive relief against further use by

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24 *Attorney-General v Guardian Newspapers* [1987] 1 WLR 1248 at 1305-1306. See also the comments of Lords Bridge and Oliver, each of whom dissented, as to the importance of a free press (at 1286, 1320-1321).

25 (1991) 19 IPR 513 at 525 and 526.

the defendant of the information is warranted, notwithstanding the publication, in order to protect the plaintiff's interests, or whether the plaintiff should instead be confined to seeking pecuniary relief through a claim for damages or an account of profits.[26] Where prior use of the information has unfairly given the defendant a competitive advantage over the plaintiff or over other innocent parties, no matter who was responsible for publication, the "springboard doctrine" requires that the defendant be deprived of that headstart by appropriately framed relief, usually in the form of a limited term injunction.[27] However the "springboard does not last for ever",[28] and in any event in most cases involving the media the question of a headstart does not arise. The damage to the plaintiff is normally done through publicity per se, not through any edge the defendant gets over its competitors. If there is no loss that remains to be suffered by the plaintiff, then it is hard to see what reason other than punishment there could be for restraining the defendant from further disclosure.[29]

Again, this was the view ultimately reached by the House of Lords in Spycatcher as far as the media was concerned. The issue arose with respect to the Sunday Times, which had published extracts from the book two days before its publication in the United States. It was held that although the publishers were liable to account for that portion of the profits made on the issues in question which could be attributed to the extracts, they were not liable to further restraint.[30] Interestingly, the judges refused to concede that either Wright or Heinemann would

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26 *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 WLR 776 at 809-813.

27 *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375 at 391-392; *British Franco Electric Pty Ltd v Dowling Plastics Pty Ltd* [1981] 1 NSWLR 448 at 451; *Aquaculture Corp v New Zealand Green Mussel Co Ltd* (1985) 5 IPR 353 at 384; McKeough and Stewart, *Intellectual Property in Australia* paras 309, 325.

28 *Potters-Ballotini Ltd v Weston-Baker* [1977] RPC 202 at 206-207. For recent illustrations of this point, see *Titan Group Pty Ltd v Steriline Manufacturing Pty Ltd* (1990) 19 IPR 353; *Secton v Delawood* (1991) 21 IPR 136.

29 See also *Concept Television Productions Pty Ltd v Australian Broadcasting Corporation* (1988) 12 IPR 129.

30 *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 WLR 776. See also *Attorney-General v Wellington Newspapers* [1988] 1 NZLR 129.

have been in the same position, even if it could have been shown (as both Powell J and Kirby P in Australia held to be the case[31]) that the bulk of the material in Spycatcher could be found in earlier books and documentaries whose publication had been tacitly approved by the government. Wright was said to be under a "lifelong" duty of confidence, so that the public interest would inevitably weigh against any publication by him or by his successors in title, no matter how innocuous or public the material.[32] This view is very difficult to support, especially given the fact that the House of Lords otherwise rejected the government's principal argument, that suppression of publication was necessary to encourage other security service members not to follow suit. The outrageously vindictive references to the "treacherous" Wright - who was, after all, not represented before the English courts - leave the impression that punishment rather than protection was uppermost in the minds of most of the judges who heard the case.

Nevertheless the notion of a duty of confidence which survives publication can also be found in the earlier decision of the English Court of Appeal in *Schering Chemicals Ltd v Falkman*.[33] The defendants were restrained from broadcasting a documentary on the controversy surrounding a drug manufactured by the plaintiff. Their "breach of confidence" lay in using information obtained by two of them while acting as media consultants for the plaintiff. While this information was not secret, having previously been published in newspaper reports, its inclusion in the documentary, even if fairly handled, would have revived the controversy and created bad publicity for the plaintiff, precisely the things that the plaintiff had sought to avoid in engaging the defendants. What the court did in effect was to

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31 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341 at 374-379; (1987) 75 ALR 353 at 421-430. The Australian judges of course had the advantage of hearing evidence on this point, rather than relying, as their British counterparts appeared to do, on untested assertions.

32 *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 WLR 776 at 785-786, 791, 796-797, 817. See also *Lord Advocate v Scotsman Publications Ltd* [1989] 2 All ER 852; Birks, "A Lifelong Obligation of Confidence" (1989) 105 *LQR* 501.

33 [1981] 2 All ER 321. See also *Attorney-General v Heinemann* (1987) 75 ALR 353 at 432-433.

imply in the particular circumstances a duty, similar to an employee's duty of faithful service, not to use any information to the plaintiff's detriment. The stringency of this duty can be explained as resting on the particular circumstances, just as the judges hearing the Spycatcher case in England appeared to believe that the sensitive nature of security service work demanded permanent silence from Wright, no matter what his allegations.

In any event, the comments of Shaw LJ in *Schering* throw up a wider issue. Of the argument that the information here had passed into the public domain, he said:

> It is an argument which at best is cynical; some might regard it as specious. Even in the commercial field, ethics and good faith are not to be regarded as merely opportunist or expedient. In any case, though facts may be widely known, they are not ever present in the minds of the public. To extend the knowledge or to revive the recollection of matters which may be detrimental or prejudicial to the interests of some person or organisation is not to be condoned because the facts are already known to some and linger in the memories of others.[34]

This passage was cited with approval by Street CJ in *David Syme & Co Ltd v General Motors-Holden's Ltd*, where an interlocutory injunction was issued to restrain the Age from publishing secret details of a new GMH car, despite the newspaper's claim that the material had previously been published in Japan.[35]

The notion that restraint should still be possible when further publication would cause even more people to gain access to, think about or talk about the hitherto confidential information is not without its merits. After all, if it can be said that each publication will inflict more detriment upon the plaintiff, is that not reason enough to prevent the defendant from compounding the original wrong? However this only makes sense where the defendant is the sole major source of public information or comment. Where there are others who become

34 *Schering* at 338.
35 [1984] 2 NSWLR 294 at 299.

free to reproduce or discuss the matter after the initial publication, as would undoubtedly be the case if they had nothing to do with that publication, it would seem absurd to maintain a blanket ban on the original offender. In the media context where, as noted earlier, the springboard doctrine will find little application, the dangers that such a punitive approach would create for freedom of speech and of comment outweigh any consideration of sparing the plaintiff from further anguish. Beyond cases like Schering, where a special commitment of loyalty can be inferred to justify restraint, the plaintiff should in principle be left to seek pecuniary relief alone.

The Defence of Justification

The principle is firmly established that liability for breach of confidence may be avoided where it can be established that the defendant has "just cause or excuse"[36] for disclosing the information in question. However differences have emerged as to the scope of this defence. The traditional formulation derives from the assertion of Wood V-C in *Gartside v Outram* that "there is no confidence as to the disclosure of iniquity"[37] and emphasises the need for the information to reveal some kind of wrongdoing on the part of the plaintiff. Although initially believed to be limited to evidence of crimes or fraud, a broader interpretation of "iniquity" has prevailed since the English Court of Appeal decision in *Initial Services Ltd v Putterill.*[38] It now appears that the term should be taken to include "any misconduct of such a nature that it ought in the public interest to be disclosed".[39] However even in this expanded version, many courts have struggled with the idea that misconduct alone should warrant disclosure. Some, for instance, have suggested that information which concerns matters "medically dangerous" to the public would normally fall within the iniquity principle.[40] In *Commonwealth v John Fairfax*

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36 *Fraser v Evans* [1969] 1 QB 349 at 362.

37 (1856) 26 LJ Ch 113 at 114.

38 [1968] 1 QB 396.

39 At 405; *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 at 1169; *A v Hayden (No 2)* (1984) 156 CLR 532 at 545.

40 See, for example, *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 260; *Church of Scientology of California v Kaufman (No 2)* [1973] RPC 635;

Mason J considered that the principle "makes legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm".[41]

The obvious and logical extension of the iniquity rule to matters of public danger has led a number of English courts in recent times effectively to dispense with the need to identify misconduct at all. These courts have instead adopted the broader proposition that disclosure should not be enjoined whenever the public interest in publication outweighs the public interest in confidentiality. The leading case is *Lion Laboratories Ltd v Evans*,[42] in which a firm failed to have two former employees restrained from disclosing to the press information concerning the Intoximeter, a device manufactured by the firm and used by the British police for breathtesting drivers to determine their level of alcoholic intoxication. The information was to the effect that government tests had revealed the device to be unreliable. In light of the possible danger of motorists being wrongly convicted and of the public controversy over the device aroused by previous media reports, the Court of Appeal considered that the public interest lay in these matters being openly debated.

Whether such a balancing approach is also called for in this country is not at present clear. Some judges have rejected it in favour of the iniquity principle;[43] others have embraced it.[44] In the long term,

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David Syme & Co Ltd v General Motors-Holden's Ltd [1984] 2 NSWLR 294 at 298.

41 (1980) 147 CLR 39 at 57.

42 [1984] 2 All ER 417. See also *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 WLR 776 at 794, 807; *X v Y* [1988] 2 All ER 648; *W v Egdell* [1990] 2 WLR 471; *Marcel v Commissioner of Police of the Metropolis* (1990) 20 IPR 532 at 541.

43 *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31 at 56; *David Syme v General Motors-Holden's* [1984] 2 NSWLR 294 at 305-306; *Attorney-General v Heinemann* (1987) 8 NSWLR 341 at 381-383; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428 at 445-450.

44 *David Syme v GMH* [1984] 2 NSWLR 294 at 309-310; *Attorney-General v Heinemann* (1987) 75 ALR 353 at 434; *Westpac v Fairfax* (1991) 19 IPR 513 at 525.

however, it seems likely to gain acceptance, particularly since it is really only taking the present conception of "iniquity" (that is, misconduct and/or public danger) to its logical conclusion. Moreover, the notion of balancing interests for and against publication is already well established in two closely related contexts. One is that of discovery of confidential documents for the purpose of litigation.[45] The other arises when action is taken to protect information about the government or public institutions. Here the burden of proof is reversed and it is the plaintiff who must establish a public interest in non-disclosure,[46] an important advantage for those wishing to scrutinise and maintain checks on government activities.

Whatever the outcome of this debate, a number of points need to be stressed in connection with the defence of justification, particularly where a media defendant is arguing in favour of publication. The first is that a distinction must be drawn between matters that ought to be disclosed in the public interest and those which are merely of interest to the public, in the sense that many people would like to know them.

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45 See, for example, *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171. Journalists in the witness-box have no basis at common law for arguing that the public interest in preserving the confidentiality of sources outweighs the interests of justice in the case in question. The only relevant question is whether disclosure of the source is genuinely necessary for the litigation: see, for example, *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73; *British Steel v Granada* [1981] AC 1096; *John Fairfax & Sons Ltd v Cojuangco* (1988) 62 ALJR 640; Walker, "Compelling Journalists to Identify Their Sources: 'The Newspaper Rule' and 'Necessity'" (1991) 14 *UNSWLJ* 302. However the recent jailing of a Brisbane journalist for contempt after he had refused to comply with a court order to reveal a source has led the Queensland Government to propose that journalists be given at least limited statutory protection: Robbins, "Goss moves to protect journalists" *The Australian*, 25 March 1992, p1. See also, *Contempt of Court Act* 1981 (UK) s10; *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 WLR 1000.

46 *Attorney-General (UK) v Jonathan Cape Ltd* [1976] QB 752; *Commonwealth v Fairfax* (1980) 147 CLR 39. Where the information in question is of a commercial character, pertaining to some trading operation of the agency involved, it may be that the claim for protection should be decided on ordinary principles, with any question of public interest being for the defendant to establish: see *Attorney-General v Heinemann* (1987) 75 ALR 353 at 364-365 and also *British Steel v Granada* [1981] AC 1096.

Quite clearly a defendant can only seek to reveal the former.[47] From this perspective, it is difficult to support some English decisions which suggest that secrets relating to the personal affairs of celebrities ought to be disclosed merely in order to "set the record straight" and to counter impressions created by their publicity machines.[48] Secondly, it has been said that the public interest approach could not be taken so far as to authorise the publication of confidential information relating to something of clear benefit to the public:[49] though it is difficult to see why this should not be permitted. Certainly if a media outlet wanted to disclose, for instance, that a drug company was sitting on a cure for cancer because it desired to maximise its profits through a delayed release onto the market, the arguments in favour of disclosure would seem powerful.

Media defendants must also run the gauntlet of the principle that in order to be justified, disclosure must be to the "proper authorities".[50] Who these are will depend on the nature and significance of the information. Prima facie, wrongdoing or matters of public danger should be disclosed not to the media or to the public, but to the appropriate official or semi-official bodies: the police in the case of criminal conduct,[51] public health authorities in instances of medical danger,[52] and so on. Where this is the case, media organisations are forced into that most excruciating of situations: to be expected to act in a public-spirited fashion, but without getting any mileage or profit

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47 *British Steel v Granada* [1981] AC 1096 at 1168; *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417 at 423; *David Syme v General Motors-Holden's* [1984] 2 NSWLR 294.

48 See, for example, *Woodward v Hutchins* [1977] 2 All ER 751; *Khashoggi v Smith* (1980) 124 Sol Jo 149. See also *Church of Scientology of California v Kaufman (No 2)* [1973] RPC 635.

49 *Church of Scientology v Kaufman (No 2)* [1973] RPC 635 at 649.

50 *Initial Services v Putterill* [1968] 1 QB 396 at 405-406; *Attorney-General v Heinemann* (1987) 8 NSWLR 341 at 380-381. It would seem that the proper recipient must in turn be regarded as coming under a duty not to use the information other than to take proper steps to deal with the situation: *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 74 ALR 428 at 430.

51 See, for example, *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408.

52 See, for example, *Duncan v Medical Practitioners Committee* [1986] 1 NZLR 513.

from the story. Investigative journalism, after all, is not funded entirely out of a sense of moral commitment to the welfare of the community.

Occasionally, however, a court may decide that wider disclosure to the general public is in fact appropriate. In Lion Laboratories, for instance, the Court of Appeal considered that, given on the one hand the government's unbending public support for the Intoximeter, and on the other the mounting disquiet about its reliability, it was appropriate for the employees' fears to be aired through the media. This and similar cases raise the larger issue of the role of the media in bringing to light in the name of the public interest information which others, including public authorities, desire to be kept secret. In *Schering* Lord Denning MR, citing Blackstone and the First Amendment-inspired resistance of American courts to "prior restraint", stressed the importance of a free press and called for that freedom "not to be restricted on the ground of breach of confidence unless there is a 'pressing social need' for such restraint".[53] Templeman LJ's tart rejoinder to this was that "[t]he press is not above the law ... The times of Blackstone are not relevant to the times of Mr Murdoch".[54] The position was perhaps best summed up by Sir John Donaldson MR:

> The media, to use a term which comprises not only the newspapers but also television and radio, are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the views of minorities, they perform an invaluable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always.[55]

Something also worth noting in this connection is the recent proposal by Queensland's Electoral and Administrative Review Commission (EARC) of a statute which would protect those seeking to "blow the

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53 [1981] 2 All ER 321 at 330-335. See also *Attorney-General v Heinemann* (1987) 75 ALR 353 at 433.

54 *Scherinng* at 347.

55 *Francome v Mirror Group* [1984] 2 All ER 408 at 413.

whistle" on illegal and improper conduct in both the public and private sectors in that State.[56] The legislation would not only recognise a right of disclosure but also provide the whistleblower with protection from retaliation or harassment. However it would not protect a person disclosing information to the media rather than the "proper authorities" unless it was a "matter of serious, specific and imminent danger to the health or safety of the public".[57] Strangely, the Commission's report does not indicate whether its proposed statute is intended to override the common law altogether by codifying the circumstances in which an obligation of confidence may be disregarded in the public interest. While the tone of the Commission's otherwise well directed criticisms of the common law and its uncertainties might suggest such an intention, clause 9 of the Commission's draft Bill speaks only of "the various kinds of disclosures that may be made under this Act". This would presumably enable a media defendant seeking to disclose information falling outside the "health and safety" category to continue to assert the common law defence. Even so, the Commission's approach can be questioned for failing to recognise a wider role for the media under its new scheme. In the course of its submission to the Queensland House of Assembly's Parliamentary Committee for Electoral and Administrative Review, which unanimously approved the Commission's proposals,[58] the Queensland Branch of the Australian Journalists' Association made this telling point:

> It is ironic that the entire Fitzgerald process, including EARC and your Parliamentary Committee, owes its

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56 Queensland, Electoral and Administrative Review Commission, *The Protection of Whistleblowers* (1991).

57 At paras 5.72-5.81, 6.107-6.115. The other recommended categories of information which may be the subject of a public interest disclosure, though only to the proper authorities, are those involving the commission of a statutory offence; a substantial and specific danger to public health or safety or to the environment; official misconduct under the *Criminal Justice Act* 1989 (Qld); misconduct by a public official which is punishable as a disciplinary breach; or negligent, incompetent or inefficient management by a public official resulting or likely to result in a substantial waste of public funds.

58 *Whistleblowers Protection*, 8 April 1992. The proposals are presently being considered by the Government.

> existence to a whistleblower whose conduct is specifically denied protection in EARC's recommendations. Nigel Powell, the former Queensland police officer who took his story to the Four Corners television program and the Courier-Mail newspaper, made important statements through the media and in the public benefit in circumstances where the "proper channels", in his judgment, could not be trusted.[59]

This point is glossed over by both the Commission and the Committee without any real debate. It is perhaps not surprising that the various bodies set up in the wake of the Fitzgerald Report seem to regard themselves as independent and incorruptible conduits for whistleblower allegations. But who is to guard the guards? There is no guarantee that the present enthusiasm in Queensland (and elsewhere) for identifying and cleaning up corruption will last forever. When complacency sets in, it will fall once again to the media, whatever their other failings, to promote accountability by airing allegations of wrongdoing. In the meantime, whistleblowing is also on the agenda of the Independents who currently hold the balance of power in the Lower House of the New South Wales Parliament. It will be interesting to see whether any new Bill they or the Government might propose reflects this important role, or instead follows the Queensland authorities in ignoring it.

Returning to the common law, the requirement that any disclosure be no more extensive than the public interest dictates helps to provide an answer to two further questions. The first is whether the defendant must adduce evidence as to the accuracy of information whose truth is contested. It has been said that "a mere allegation of iniquity is not of itself sufficient to justify disclosure",[60] and that the confidant must make out a "prima facie case that the allegations have substance".[61] Where the disclosure is to an authority whose function is to investigate such allegations, however, it would seem that this principle does not

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59 At p14.

60 *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 WLR 776 at 807.

61 At 787. See also *Butler v Board of Trade* [1971] Ch 680.

and should not apply.[62] The second issue is whether the motive of the confidant in seeking disclosure is relevant. Again, although it may be that the defence would be refused to one who sought to publish information "out of malice or spite" or to "purvey scandalous information for reward"[63] (a formula with which one would think the British tabloids would have particular difficulty), the worst of motives will be overlooked if disclosure is solely to the proper authorities.[64] On both these scores media defendants will be at a considerable disadvantage in attempting to invoke the defence of justification, compared to those who want to use official channels.

The difficulties were highlighted in *Westpac v Fairfax*,[65] in which Powell J refused to accept the defence as a reason for lifting the injunctions on the publication of the Westpac letters, despite the fact that they can now clearly be seen to have revealed at least some level of wrongdoing by Westpac. He stressed that the issue of whether disclosure to the public at large should be permitted was one too complex to be decided at an interlocutory stage of proceedings. In a sense this is the easiest course for most judges to take and the suspicion must be that it will only be in cases where the authorities have firmly aligned themselves with the plaintiff, or indeed constitute the plaintiff, that courts will feel impelled to side with institutions whom many judges seem to regard as their natural enemies.

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62 *A v Hayden (No 2)* (1984) 156 CLR 532; *Re a Company's Application* [1989] 2 All ER 248.

63 *Initial Services v Putterill* [1968] 1 QB 396 at 406.

64 *Re a Company's Application* [1989] 2 All ER 248.

65 (1991) 19 IPR 513.

EFFECT OF INJUNCTIONS ON MEDIA ORGANISATIONS NOT FORMALLY BOUND

In this second part of the article, the focus of attention moves from possible ways for the media to resist claims for injunctions on grounds of confidentiality to the scope and effect of such injunctions. The discussion is almost entirely concerned with numerous problems of law and policy raised by the recent House of Lords decision in *Attorney-General (UK) v Times Newspapers Ltd*,[66] one of the many Spycatcher cases. This case seeks to establish the principle that, when an injunction has been granted against a defendant restraining disclosure of confidential material, other individuals or organisations (including the media) may be guilty of contempt of court if, knowing the terms of the injunction, they publish the material.

The Last of the Spycatcher Cases

Reduced to their bare essentials, the facts of the case are as follows. At a time when, as described earlier, the Observer and the Guardian in England were restrained from publishing extracts from Spycatcher by an interlocutory injunction granted to the Attorney-General on grounds of breach of confidence, other English newspapers, including the Independent, published extracts from this same book. The Attorney-General brought proceedings for criminal contempt in the Chancery Division against the proprietors and editors of these three newspapers. These proceedings were dismissed at first instance by Sir Nicolas Browne-Wilkinson V-C.[67] While an appeal by the Attorney-General to the Court of Appeal was pending, Times Newspapers, the proprietor of the Sunday Times, then caused the first instalment of a serialisation of Spycatcher to be published in that newspaper. It did so after receiving written legal advice that this would not amount to contempt. The Attorney-General immediately commenced contempt proceedings against Times Newspapers and the editor of the Sunday Times. Two days later, the Court of Appeal allowed the Attorney-

66 [1991] 2 WLR 994; [1991] 2 All ER 398.

67 *Attorney-General v Newspaper Publishing* [1988] Ch 333.

General's appeal,[68] holding that the publication by the first three newspapers could constitute criminal contempt, though there were issues of fact, notably as to mens rea, to be resolved. It remitted the case to the Chancery Division for determination of these issues.

In the second contempt hearing in the Chancery Division, before Morritt J, the case against Times Newspapers was heard, along with one of the remitted claims, against the Independent. The Attorney-General decided not to press for substantive relief against the other newspapers. Morritt J held that, since the proprietors and editors of the Sunday Times and the Independent knew of the interlocutory injunctions against the Observer and the Guardian, they had the necessary mens rea and were guilty of criminal contempt. On appeal, the Court of Appeal confirmed this ruling, but discharged fines of £50,000 imposed by Morritt J on each of the proprietors (leaving them liable for costs only). Times Newspapers and the editor of the Sunday Times appealed to the House of Lords.

Significantly, counsel for the appellants conceded that mens rea was present. The sole question in issue was therefore whether any actus reus had been committed. The House of Lords held unanimously that it had. The principal steps in the House of Lords' reasoning can be outlined in the following propositions:

(1) Conduct amounting to deliberate disobedience of an injunction by the party whom the injunction binds is punishable as civil contempt. This is a basic principle of contempt.

(2) As a reinforcement of this sanction, where a third party, not bound by the injunction, aids and abets such conduct with knowledge that the party bound is in fact disobeying the injunction, the third party is guilty of criminal contempt. A relatively small number of cases,[69] dealing with both

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68 *Attorney-General v Newspaper Publishing* [1988] Ch 333. The decisions up to this point are discussed in Miller, *Contempt of Court* (Clarendon Press, Oxford, 2nd ed 1989) pp23-24, 432-434; Laws, "Current Problems in the Law of Contempt" (1990) 43 *CLP* 99.

69 Notably *Wellesley (Lord) v Earl of Mornington* (1848) 11 Beav 180, 150 ER 785; *Seaward v Paterson* [1897] 1 Ch 545; *Z Ltd v A* [1982] QB 558.

interlocutory and final injunctions, have so held, indicating that the proper classification is criminal contempt because the injunction does not in terms bind the third party.

(3) The basic consideration underlying proposition (2) is that the third party's conduct constitutes an interference with the administration of justice in the proceedings in which the injunction was granted.

(4) This same basic consideration justifies the further proposition that, where the terms of an injunction granted in proceedings between two parties are known to a third party, it may be criminal contempt by the third party to do the act forbidden by the injunction - that is, to do it on their own accord, without any participation by the party bound by the injunction. But for such conduct to actually constitute criminal contempt, two further conditions must be satisfied:

   (a) The infringement of the injunction (the actus reus) must "prejudice or impede" the administration of justice by "frustrating the evident purpose of" the injunction. For example, if the purpose of the injunction is to preserve the subject matter of the litigation, destruction of this subject matter would constitute the actus reus.

   (b) The third party must have acted with mens rea - that is, with a specific intent to prejudice or impede the administration of justice by frustrating the evident purpose of the injunction.

It is in proposition (4) that the House of Lords breaks new ground. Dicta moving in its direction were uttered in *Z Ltd v A*,[70] the most recent of the cases to apply proposition (2), but they fell far short of establishing it as a rule of law.

Applying proposition (4) to the facts, the House of Lords had little difficulty in concluding that the publication of extracts from Spycatcher in the Sunday Times was an act of criminal contempt. The publication was an act forbidden by the prior interlocutory injunction

70 [1982] QB 558.

granted on grounds of confidentiality against the publishers of the Observer and the Guardian at the instance of the Attorney-General. By destroying the subject matter of these proceedings - the alleged confidentiality of Spycatcher - it frustrated the evident purpose of the injunction so as to prejudice or impede the administration of justice in the proceedings. It therefore satisfied the criteria laid down for the actus reus. As already stated, the relevant mens rea was conceded by counsel for Times Newspapers.

Unsatisfactory Aspects

Proposition (4), the ratio of the case, presents many problems. It has the potential to work considerable injustice - not merely to the detriment of the media's claim to freedom of expression, but also in a wide range of other situations not necessarily involving the media or freedom of expression. But the overall attitude of their Lordships to these problems is one of breathtaking insouciance. While acknowledging here and there that some limitations or exceptions to it must exist, they do very little to explain what these limitations or exceptions might be.

The most obvious problems which their Lordships fail to address satisfactorily involve the applicability of the decision to final injunctions, the question of mens rea, the possibility that third parties may have just as strong a claim as the plaintiff to disclose the relevant information, and the anomaly inherent in "splitting" the enforcement of confidentiality remedies.

Final Injunctions

The injunction granted to the Attorney-General against the Observer and the Guardian was interlocutory only at the time of the Sunday Times publication. Its "evident purpose" was thus to preserve confidentiality in Spycatcher - the "subject matter of the litigation" - until the merits of the Attorney-General's claim to confidentiality against these two newspapers had been finally determined, and it was

the "administration of justice" in these as yet unconcluded proceedings that the Sunday Times publication "prejudiced or impeded".

The question immediately arises: would Times Newspapers have been in contempt, through similar reasoning, if the Attorney-General's injunction had been final, not merely interlocutory, at the time of the Sunday Times publication? Would the "evident purpose" of the injunction have been characterised as one of preservation of confidentiality for the indefinite future, in place of preservation pendente lite? Would the phrase "prejudicing or impeding the administration of justice" in the injunction proceedings have been deemed appropriate when the proceedings were in fact over and done with, and the thing "prejudiced or impeded" was really the operation of the final order rather than the conduct of the proceedings?

Significantly, whichever way these questions are answered, the result is an uncomfortable one. If the decision in *Attorney-General v Times Newspapers* is taken to refer to interlocutory injunctions only, plaintiffs seeking to protect confidential information (or any other "subject matter") have a clear incentive to dawdle in their progress towards a final injunction. The interlocutory injunction, if duly publicised, would give significantly wider protection than a final one would do. If on the other hand the decision covers final injunctions as well, one is dangerously close to the outcome that a final injunction granted in proceedings against one party is given the status of a final injunction against everyone else who is aware of the proceedings.

Amazingly, the House of Lords make no pronouncement whatsoever as to whether final injunctions are covered by its decision. Lord Oliver displays at one point an awareness that attaching protection against publication by third parties to interlocutory injunctions granted in cases of breach of confidence may encourage the plaintiff to delay proceedings.[71] His suggested remedy is that in future courts should try to reach a final decision in such cases sooner than they do at present. But the relevant passage in his judgment does not necessarily imply that the extra protection is lost when the interlocutory injunction becomes final. His concern seems rather to be that the claim for a final injunction may turn out, after an excessive period of time, to be

71 *Attorney-General v Times Newspapers* [1991] 2 WLR 994 at 1022.

ill-founded. Others of the law lords refer to the need to protect the integrity of current proceedings,[72] but again draw back from saying that the principle of contempt law being established applies only to interlocutory injunctions. The three cases from which the principle is chiefly drawn (that is, those which directly support proposition (2) above) give no help: two of them involved final injunctions[73] and the third an interlocutory one.[74]

Behind this regrettable failure to consider significantly, let alone resolve finally, a crucial issue as to the scope of the principle being established, there lies an equally regrettable failure to discern ambiguities in key concepts being employed. The judgments speak of the "evident purpose" of the injunction in this case,[75] and of "prejudice or impediment" to "the administration of justice", as if the connotation and denotation of these phrases were clear and unproblematic. In fact, even though these phrases, which appear regularly in the rhetoric of contempt law, are inherently broad and uncertain of meaning, they are regularly left unanalysed. In *Attorney-General v Times Newspapers*, the parlous consequences are all too obvious.

Mens Rea

In the interests, at least, of clarification of this new dimension of contempt law, it would have been better if counsel for Times Newspapers had not conceded the issue of mens rea. In the Court of Appeal it had been held that what was required was a specific intent to interfere with or impede the administration of justice, and that this "could properly be inferred from the foreseeability of the inevitable consequences of what was done".[76] On account of counsel's

72 At 1000, per Lord Brandon; at 1020, per Lord Oliver.

73 *Wellesley v Mornington* (1848) 11 Beav 180, 150 ER 785; *Seaward v Paterson* [1897] 1 Ch 545.

74 *Z Ltd v A* [1982] QB 558.

75 See in particular *Attorney-General v Times Newspaopers* at 1019, per Lord Oliver.

76 At 1013, per Lord Oliver.

concession, the House of Lords did not cast any doubt on these rulings.[77]

In the earlier cases, however, on which the decision in *Attorney-General v Times Newspapers* is based, the mens rea found to exist contained a strong element of contumacy, in the sense of thumbing one's nose at the authority of the court. This appears most clearly in the judgments of the Court of Appeal in *Seaward v Paterson*,[78] the case most clearly responsible for establishing the proposition (proposition (2) in the above list) that a person who knowingly aids and abets the infringement of an injunction by the party bound is guilty of criminal contempt. Lindley LJ, for instance, described the defendant's conduct as "aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice".[79] He added that "the court will not allow its powers to be set at naught and treated with contempt".[80]

In the specific circumstances of *Attorney-General v Times Newspapers*, however, it is far from clear that Times Newspapers were "contumacious". Far from intending to "set at naught" the authority of the court, they only made the publication on receiving legal advice that it would not constitute contempt. By conceding the issue of mens rea, however, Times Newspapers passed up the opportunity to argue in the House of Lords that an attitude of defiance or contempt for the court's process should be a necessary ingredient of mens rea in this new dimension of contempt, and that Times Newspapers itself had no such attitude at the relevant time.[81]

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77 In a more recent case, *Re Supply of Ready Mixed Concrete* [1991] 3 WLR 707 at 726, Lord Donaldson MR laid down a very similar formulation of the test of mens rea for contempt in the context of disobedience of court orders. Glidewell and Taylor LJJ concurred. For a penetrating critique (which expresses considerable disquiet at the decision in *Attorney-General v Times Newspapers* also), see Wedderburn, "Contempt of Court: Vicarious Liability of Companies and Unions" (1992) 21 *ILJ* 51.

78 [1897] 1 Ch 545.

79 At 554.

80 At 556.

81 See also the discussion in Miller, *Contempt of Court* pp23-24.

Third Parties and "Overriding Rights"

Where A and B are litigating over a "thing", and A obtains an interlocutory injunction against B preventing B from destroying or impairing the "thing" until the proceedings are over, the bald proposition that absolutely no-one else can destroy or impair the "thing" either, on pain of contempt sanctions, is clearly unsupportable. Even if the reasoning which supports the proposition is accepted in general terms, there must be some exceptions, sufficient at least to exonerate from contempt liability a third party C who, on any view, has rights to or in respect of the "thing" which override those of A and B. If for instance A, a tenant of C, were to obtain an interlocutory injunction against B, another tenant of C in the same building, restraining B from using the premises leased to B in a manner unlawfully interfering with A's quiet enjoyment of the premises leased to A, it could hardly be contempt for C, exercising her lawful rights as landowner, to terminate both tenancies, cause both A and B to quit (or be evicted) and demolish the building.

The Lords' judgments recognise this problem, but once again give little guidance on its solution. Lord Oliver speaks of the possibility that a person in C's position would not be liable for contempt if they were merely making "perfectly proper use of the court's own machinery".[82] Lord Jauncey acknowledges that there may be cases where a person in C's position should not be liable when "the perfectly legitimate pursuit of a purpose ... has the incidental result of frustrating an order".[83] Neither of these approaches to the problem is developed to any extent.[84]

In the particular context of injunctions on confidentiality grounds, this is a serious omission. In some confidentiality cases, the confider may be one of a small group of persons who are all in possession of the

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82 *Attorney-General v Times Newspapers* at 1018.

83 At 1026.

84 See too the discussion in *Attorney-General (UK) v Observer Ltd* [1988] 1 All ER 385 at 398. In this case, following the first Court of Appeal decision in the case under discussion, it was held that a public library in England which obtained copies of *Spycatcher* and made them publicly available could be in contempt of court.

information. The basis for any injunction granted to the confider is generally that unauthorised disclosure of the information by the confidant breaches a personal equitable obligation (in some cases reinforced by contract) towards the confider, not that the confider "owns" the information.[85] In these circumstances, why should the granting of an injunction, interlocutory or final, to the confider, restraining the confidant from disclosing the information, have any effect on the rights of other persons who possess the information and owe no duty of confidence whatsoever to the confider?

Suppose, for example, that A, C and D have in the course of a joint venture come to possess confidential information of some commercial value, and that no obligations of confidence have arisen between them in respect of the information.[86] A passes it on to her employee B for purposes connected with B's employment, but then discovers that B, in breach of a clear obligation of confidence to her, is about to pass it on to a newspaper proprietor X. To prevent this, A obtains an interlocutory injunction against B, restraining any such disclosure. She notifies C, D and all local media proprietors of the terms of the injunction. It cannot seriously be argued that criminal contempt sanctions should descend automatically on C or D if either of them subsequently publish the information. Any argument by A that they should keep the information secret should depend on the circumstances of the dealings between A, C and D, not on the incidental circumstance that, in reaction to B's attempt to make the information public, A has obtained an interlocutory injunction against B and made this known to C and D. Yet the case under discussion establishes a principle whereby C and D are at least prima facie liable for contempt, and it is not at all clear whether the loose exonerating criteria briefly mentioned by Lord Oliver or Lord Jauncey would protect them.

In reaching this result, the House of Lords has taken massive liberties with the concept of "subject-matter of the litigation". Some of the law-lords' judgments compare proceedings to protect confidentiality with proceedings to protect an item of property - for example, a house

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85 See McKeough and Stewart, *Intellectual Property in Australia* pp47-54.

86 See *International Scientific Communications Inc v Pattison* [1979] FSR 429.

or valuable chattel - which the plaintiff owns or claims to own.[87] They then treat public disclosure of the information as analogous to demolition of the item of property - in both cases, there is said to be a destruction of "the subject-matter of the litigation, resulting in frustration of the evident purpose of the injunction". But the analogy is shaky, to say the least. While it may be (this is not to say that it necessarily is) appropriate to describe a physical item of property (a house, a chattel etc) as "the subject matter" of litigation when title to it is in dispute, neither the information nor its confidentiality can be universally characterised as the "subject-matter" of equitable proceedings for breach of confidence. Generally speaking, the subject-matter is no more than the obligation of confidence, arising initially between confider and confidant and extending, in appropriate circumstances, to bind other persons to whom the information is communicated directly or indirectly by the confidant. It follows that publication of the information by a third party not affected by the obligation of confidence cannot reliably be described as "destruction of the subject-matter of the litigation".

The Enforcement of Confidentiality Remedies

Under the principle laid down in *Attorney-General v Times Newspapers*, the court will not impose sanctions on the third party (C) who has done the act forbidden by the injunction, unless some person or body commences contempt proceedings. An officious bystander, if asked who should have the power to decide whether or not such proceedings should take place, would probably reply: "The original plaintiff (A), of course - they are the one who cares about the information being spread around". Yet because the proceedings against C are for criminal contempt, the prosecutor in the normal course will not be A, but the Attorney-General or Director of Public Prosecutions.[88]

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87 *Attorney-General v Times Newspapers* at 1003-1004, per Lord Brandon; at 1015 per Lord Oliver.

88 Although Australian cases generally acknowledge the right of "any person" to instigate criminal contempt proceedings (see *R v Dunbabin; ex parte Williams* (1935) 53 CLR 434 at 445) and also the right of the court to act on its own motion (see *R v Fletcher; ex parte Kisch* (1935) 52 CLR 248 at

In *Attorney-General v Times Newspapers*, this point was generally overlooked because A, the original plaintiff seeking to preserve confidentiality in Spycatcher, was the Attorney-General. Having sued as a civil plaintiff to obtain the interlocutory injunctions, he simply had to put on a different hat before taking the contempt proceedings against Times Newspapers and the other media defendants. If the original plaintiff had not been the Attorney-General, this splitting of the enforcement of confidentiality remedies between confiders and contempt prosecution authorities would have been more apparent and its theoretical and practical disadvantages might have attracted some discussion. Whether this would have deterred the House of Lords from deciding as it chose to do is another matter.

A Better Approach

No matter how much the House of Lords sought to avoid the issue, its judgment in *Attorney-General v Times Newspapers* has the outcome of elevating an injunction granted in personam towards the status of an order in rem. Of all the judges who were involved in the proceedings, only one, Sir Nicolas Browne-Wilkinson V-C (the judge at first instance in the first proceedings) seemed to see this as objectionable. He was also the only judge to hold that no contempt of court arose. His conclusions on the in personam/in rem dichotomy are most convincing:

> English civil courts act in personam, that is to say they adjudicate on disputes between the parties to an action and make orders against those parties only. In certain instances where the court has assumed the care and administration of a person or property, the court does make orders which, in one sense, operate in rem. Any interference with the person or the property being administered constitutes a contempt of

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258), the Attorney-General or the Director of Public Prosecutions is de facto the prosecuting authority: see generally Australian Law Reform Commission, *Contempt* (Report No 35, 1987) paras 463-464. In England, the Attorney-General's predominant, but not exclusive, role is acknowledged in the case law: see, for example, *R v Duffy; ex parte Nash* [1969] 2 QB 188; Miller, *Contempt of Court*, pp86-90.

> court: for example, acts in relation to a ward of court, a ship subject to attachment or property of which the court has appointed a receiver. But in other cases so far as I am aware injunctions can only properly be made to restrain a defendant to the proceedings (as opposed to a third party) from doing certain acts ... Even a declaration made by a court is not binding on persons who are not parties to the suit. In my judgment this is the basis of the present state of the law that, for a third party, C, to be liable for contempt, the acts complained of must constitute a breach of the actual terms of the order. The Attorney-General's contention, if correct, strikes at the root of this basic principle. An order of the court would, in effect, operate in rem, ie be enforceable against everyone who had notice of it. The practical implications of this in ordinary civil litigation would be far reaching and in many cases unjust.[89]

The last sentence of his judgment, referring specifically to the circumstances of Spycatcher, was also entirely apt:

> Private rights should not be bolstered by a distortion of the law of contempt in an attempt to produce a judge-made public law protecting official secrets.[90]

We would take this approach further. It may be quite legitimate that a possessor of other types of confidential information as well as official secrets - for example, trade secrets or personal information - should be able to argue that their right to maintain confidentiality should be available, at least prima facie, against all the world. By analogy with the protection granted to copyright material, it may well be appropriate, in policy terms, for the law to ensure, as far as it can, that the "owner" of such information should have control over the extent and circumstances of dissemination of such information.

If the law is to do this, however, it should be through reform of the substantive principles relating to confidential information. The relevant changes to the law may have to arise from statute, rather than

89 *Attorney-General v Newspaper Publishing* [1988] Ch 333 at 347.
90 At 350.

case law, and may have to be confined to specified categories of confidential information. It would probably be necessary for the protection of confidentiality against "all the world" to be established by court order on application of the plaintiff, with or without judicial discretion in the matter, and to be made subject to the right of any person to claim an entitlement, despite the order, to make limited or widespread disclosure of the information.[91]

To sum up: a proposition is put forward out of concern (a) for freedom of expression in general, (b) for the media's role in disclosing both matters of public interest and matters of interest to the public, and also (c) for the rights of all sorts of persons who are affected, but not bound, by injunctions granted inter partes. The proposition is that reform of the substantive law of confidential information is the proper way to deal with the question of whether a person who is not a party to confidentiality proceedings should be affected by an injunction granted in those proceedings.[92] The alternative of a newly-sprouted tentacle of the law of contempt is, by contrast, wholly unwelcome. Australian courts should firmly resist the temptation to follow the House of Lords, and should stay right away from this highly dubious form of genetic engineering.

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91 In the first Court of Appeal judgment in the litigation, Balcombe LJ made suggestions along these lines (at 387-390). But he was still prepared to concur in the decision of his fellow judges that the publication in the *Sunday Times* could constitute contempt. See also Laws, "Current Problems in the Law of Contempt" (1990) 43 *CLP* 99 at 113.

92 See similar strictures, on the use of contempt law to distort accepted principles of labour law, in Wedderburn, "Contempt of Court: Vicarious Liability of Companies and Unions" (1992) 21 *ILJ* 51 at 51-52, 56-57.