

BREACH OF CONFIDENCE, SURREPTITIOUSLY OR ACCIDENTALLY OBTAINED INFORMATION AND PRIVACY: THEORY VERSUS LAW

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[A difficulty with the doctrine of breach of confidence is knowing to what extent it covers surreptitiously or accidentally obtained information. The answer to this question has great significance for the scope of the doctrine, in particular in the case of information of a private and personal nature. In this article it is argued that there are theoretical justifications for using the doctrine of breach of confidence to protect privacy interests. Moreover, it would not lead to too much uncertainty to accept the role of the law of confidential information in protecting surreptitiously or accidentally obtained information of a private and personal nature, given that the law already clearly applies to private and personal information that is imparted in confidence.]

INTRODUCTION

A grey area in the doctrine of breach of confidence is the extent to which it covers information which is not imparted in confidence, but comes into the hands of some other person through accident or deliberate effort. *Prima facie* such a notion appears to be at odds with the general view that the equitable action is based on a relationship of confidence. Nevertheless, the early cases indicate a broad approach, Swinfen Eady LJ in *Lord Ashburton v Pape*¹ stating that:

The principle on which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged.²

In 1948, when the equitable doctrine was revived in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*,³ Lord Greene MR adopted a similarly broadly framed formulation.⁴ Later cases have, however, suggested a narrower approach to the law. In particular, Megarry J, in his influential judgment in *Coco v AN Clark (Engineers) Ltd*,⁵ treated breach of confidence as ‘normally’

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¹ [1913] 2 Ch 469.

² *Ibid* 475.

³ (1948) 65 RPC 203.

⁴ *Ibid* 213, Lord Greene MR commented:

If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.

⁵ (1969) RPC 41.

limited to information imparted in confidence,⁶ suggesting that this is virtually a necessary element of the doctrine's application.

Certainly the large majority of English and Australian cases on breach of confidence fall within the parameters set by Megarry J. Nevertheless there have been cases since *Coco v AN Clark (Engineers) Ltd* where breach of confidence was found in respect of information not imparted in confidence, but rather obtained without the knowledge or consent of the 'owner'. Recently, in *Attorney-General v Guardian Newspapers (No 2)*,⁷ Lord Goff went as far as to assert the following principle:

I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.⁸

In making this statement Lord Goff referred to the High Court of Australia in *Moorgate Tobacco v Philip Morris Ltd (No 2)*⁹ where Deane J, drawing on a line of cases dating back to *Lord Ashburton v Pape*, identified the duty of confidence as 'an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.'¹⁰

The real issue in the cases now seems to be, not whether the doctrine of breach of confidence may extend to information so obtained, but in what circumstances it is possible. For instance, is any extension to be limited to 'improperly or surreptitiously obtained' information, as suggested by Swinfen Eadey LJ in *Lord Ashburton v Pape*? Or might the law extend more generally, as Lord Goff suggested in *Attorney-General v Guardian Newspapers (No 2)*, to information which accidentally falls into the hands of another, such as

where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by.¹¹

It is noteworthy that Lord Goff identified privacy interests as the interests to

⁶ See *ibid* 47 (Megarry J summarising the law):

In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene MR in the *Saltman* case on page 215 must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

⁷ [1990] 1 AC 109.

⁸ *Ibid* 281. The other Law Lords in that case refrained from expressing any general statement of the law although Lord Keith, with whom Lord Jauncy agreed, made reference to *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* as stating the general equitable principle and Lord Griffiths cited Megarry J in *Coco v AN Clark (Engineers) Ltd* as the correct authority.

⁹ (1984) 156 CLR 414.

¹⁰ *Ibid* 438.

¹¹ *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 281.

be served by a broad approach to breach of confidence. The particular question this article will address in examining the treatment of information surreptitiously or accidentally obtained is, to what extent does the doctrine of breach of confidence amount to an obligation to respect the privacy of others? In examining that issue a number of more specific questions will be addressed. First, what are the policy justifications for protecting privacy interests under the law of breach of confidence? Secondly, to what extent does the law of breach of confidence as presently applied reflect such policies and, in particular, is there consistency in the treatment of personal and private information obtained rather than imparted in confidence? Thirdly and finally, is there scope for a broader doctrine of breach of confidence more fully accommodating privacy interests?

LAW AND THEORY OF PRIVACY PROTECTION

It is well known that there is no general right to 'privacy' recognised by Anglo-Australian courts.¹² Thus in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*¹³ the High Court of Australia refused to grant an injunction prohibiting the defendant using his property, on which he had erected a high viewing platform, to broadcast information of horse races taking place on the plaintiff's neighbouring land. In response to the argument that the plaintiff's right to privacy was invaded, Latham CJ commented, '[h]owever desirable some limitation on invasions of privacy might be, no authority was cited which shows that any general right of privacy exists.'¹⁴ Similarly in the English case *Bernstein of Leigh (Baron) v Skyviews & General Ltd*,¹⁵ where the defendants flew an aeroplane over the plaintiff's property in order to take photographs, Griffiths J felt no need to directly respond to the broader invasions of privacy allegation in his finding that there was no nuisance or trespass. The cases may be contrasted with the American case *E I Du Pont de Nemours & Co Inc v Christopher*¹⁶ where the taking of aerial photographs of the plaintiff's plant was termed an invasion of the plaintiff's 'commercial privacy' for which there was a remedy under trade secrets law.¹⁷ Indeed in the United States, rights to privacy are directly recognised in separate torts of, *inter alia*, intrusion on seclusion or solitude and the public disclosure of embarrassing private facts.¹⁸ In the famous case *Melvin v Reid*¹⁹ the latter was the basis for protecting the privacy interests of a former prostitute who had married and changed her life

¹² See, for an historical overview of the English law, Professor Percy Winfield, 'Privacy' (1931) 47 *Law Quarterly Review* 23.

¹³ (1937) 58 CLR 479.

¹⁴ *Ibid* 496.

¹⁵ [1978] 1 QB 479.

¹⁶ 431 F 2d 1012 (1970).

¹⁷ *Ibid* 1015. Admittedly, the information in that case was more clearly of a private and confidential nature than in *Bernstein of Leigh (Baron) v Skyviews & General Ltd*.

¹⁸ See, generally, William Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

¹⁹ *Melvin v Reid* 112 Cal App 285 (1931); 297 Pac Rep 91 (1931). For a review of the United States privacy cases since *Melvin v Reid*, see Don Pember and Dwight Teeter Jr, 'Privacy and the Press since *Time, Inc v Hill*' (1974) 50 *Washington Law Review* 57.

and sought to prevent the publication of a film about her former activities.

In the United Kingdom it seems now to be considered that any extension of privacy protection through the law would have to be done by legislation. Thus in *Kaye v Robertson*,²⁰ where reporters intruded into the hospital room of a television personality who had suffered brain damage in a car accident, photographed him and purported to interview him and then sought to publish the information, Legatt LJ stated:

We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature.²¹

Curiously in that case, as in *Bernstein of Leigh (Baron) v Skyways & General Ltd*, breach of confidence was neither argued nor discussed as one of the causes of action. In *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* the possibility was raised, and dismissed, only in passing.²²

Attempts to provide for legislative protection of privacy have been equally ineffectual. In the wake of *Kaye v Robertson* the United Kingdom's Home Office issued a Report of the Committee on Privacy and Related Matters,²³ with terms of reference²⁴ directed at actions of intrusion by the media.²⁵ The Committee recommended against the enactment of a general privacy law,²⁶ although stating that criminal offences should be created for certain categories of intrusion where the intention was to obtain personal information with a view to publication.²⁷ The latter recommendation was substantially endorsed in a recent Review of Press Self-Regulation,²⁸ but with wide ranging defences significantly undermining the full thrust of the recommendation.²⁹ Interestingly, it was also recommended that the Government should now give further con-

²⁰ (1991) 18 FSR 62.

²¹ *Ibid* 71. The action, in fact, succeeded on the grounds of malicious falsehood.

²² In particular, Latham CJ and Dixon J rejected the notion that there could be 'property' in a spectacle. See, further, below n 125 and accompanying text.

²³ United Kingdom Home Office, Report of the Committee on Privacy and Related Matters (1990) Cmnd 1102.

²⁴ *Ibid* 1, para 1.1. These refer specifically to 'recent public concerns about intrusions into the private lives of individuals by certain sectors of the press'.

²⁵ This may explain the very limited attention given to the possibility of using breach of confidence, concerning the publication of information, to protect privacy interests. With very little discussion, the Committee seems simply to have assumed that (*ibid* 32, para 8.1):

Breach of confidence does not cover situations where confidential information is obtained either innocently or, albeit through improper means, without the intervention of anyone to whom the information has been confided.

²⁶ *Ibid* 46, para 12.5. The Committee felt that its specific recommendations regarding press self-regulation would probably be sufficient.

²⁷ *Ibid* 23, para 6.33.

²⁸ United Kingdom, Department of National Heritage, Review of Press Self-Regulation (1993) Cmnd 2135.

²⁹ The defences listed in the earlier proposals (which included acts done to prevent, detect or expose a crime or other 'seriously anti-social conduct') were extended to include acts done to prevent the public from being misled or to inform the public about matters affecting the discharge of a public function: see *ibid* 55, para 7.26. For a criticism of the Review see John Rubinstein, 'Calcutt Down to Size: Is Privacy a Dead Letter?' (1993) 4 *Entertainment Law Review* 31.

sideration to the introduction of a new statutory tort of infringement of privacy,³⁰ but there has been no suggestion to date that the recommendation will be pursued.

The Australian Law Reform Commission, in its earlier Report on Privacy³¹ had also concluded that reforms to the law were needed to better protect privacy interests. However, its terms of reference³² and recommendations were largely restricted to the collection, recording, storage and communication of information by Commonwealth government departments and agencies.³³ The Commission saw no need for general legislative protection of privacy interests³⁴ and indeed took the view that this would be too 'vague and nebulous'.³⁵ Some statutory amendments were recommended to strengthen the protection of privacy interests under the law of breach of confidence³⁶ but these were very limited.³⁷ The Law Reform Commission's Report resulted in the Privacy Act

³⁰ United Kingdom, Department of National Heritage, above n 28, 56-7. Ostensibly, the reason was the generally perceived ineffectiveness of the self-regulation mechanisms put in place after the Report of the Committee on Privacy. However, reference was also made (at paras 7.37-7.42) to the fact that there had not been a significant review of privacy protection in the United Kingdom since the Younger Committee recommended against the enactment of a general law of privacy (Home Office, Lord Chancellor's Office, Scottish Office, Report of the Committee on Privacy (1972) Cmnd 5021). This, however, omitted to mention an important report on one aspect of privacy, (United Kingdom, Data Protection: The Government's Proposals for Legislation (1982) Cmnd 8539) which, implementing the Council of Europe's Convention on Data Protection, led to specific legislative protection of personal data held in computerised retrieval systems: see Data Protection Act 1984 (UK).

³¹ Australian Law Reform Commission, Report No 22, *Privacy* (1983).

³² *Ibid* xxxvi, xxxvii. The restrictions were at least partly for constitutional reasons.

³³ *Ibid*, especially chapters 9-11. The Australian Law Reform Commission advocated that its recommendations also be adopted by the Australian States and self-governing Territories (paras 1088-92). However, that did not occur. Privacy proposals in New South Wales, notably Professor William Morrison, *Report on the Law of Privacy* (1973), have already led to the establishment of a Privacy Committee: see Privacy Committee Act 1975 (NSW). However, the Committee's role is limited to mediating complaints, with the ultimate sanction of naming persons in its reports left to the New South Wales Parliament. In Victoria, the enactment of privacy laws concerning the collection and use of information was recommended by the Legal and Constitutional Committee in its Report to Parliament on Privacy and Breach of Confidence (1990) but this was not adopted. Also not adopted were the Victorian Law Reform Commission's narrower recommendations for amendments to the Freedom of Information Act 1982 (Vic) in order to more fully protect privacy interests: see Victorian Law Reform Commission, Discussion Paper No 29 (1992). At various times, Privacy Bills also failed in South Australia and Tasmania: Australian Law Reform Commission Report, above n 31, para 1076. For recent privacy legislation in New Zealand, see, however, the Privacy Act 1993 (NZ).

³⁴ In part, this was because of the protection offered by other statutory and common law doctrines, including breach of confidence: see Australian Law Reform Commission, above n 31, paras 832-61.

³⁵ *Ibid* para 1081.

³⁶ Relatively little emphasis was placed on the suggestion that the law, flexibly interpreted, might cover at least surreptitiously obtained information not imparted in confidence. The issue was discussed only briefly: *ibid* paras 839-40. Thus, although it was suggested that the law of breach of confidence, flexibly interpreted, might extend to surreptitiously obtained information, the Commission concluded that the law was still not entirely certain. See, in particular, para 830, referring to the dearth of authority and para 862 referring to the English Law Reform Commission, Report on Breach of Confidence (1981) Cmnd 8388, where the same conclusion conclusion was also reached.

³⁷ In particular it was recommended that the right to claim for breach of confidence should extend beyond 'the confider' to the subject of information: clause 108(3) Draft Bill. See, below, Appendix, example D, for the situation under a broad approach to the common law. However, there was no broader suggestion that the treatment of surreptitiously or accidentally obtained information should be clarified. Also, again for constitutional reasons, the recommendations were limited to

1988 (Cth), although the title is a misnomer given the narrow scope of privacy interests protected.³⁸

An interesting feature of the English and Australian Reports is the general recognition of the validity of privacy interests and the acceptance that these should be reflected in the law. The Reports, however, were disappointing in their lack of recognition of the full scope for using the law of breach of confidence to protect privacy interests, obviating in part at least the need to consider enacting a more generalised and therefore uncertain tort of 'privacy'.

The Notion of Privacy

Both the Home Office Committee on Privacy and the Australian Law Reform Commission identified a range of privacy interests covering both physical intrusion and the unwanted publication of private and personal information.³⁹ In regard to the latter, the Australian Law Reform Commission referred to such privacy interests which an individual might have as 'information privacy'.⁴⁰ The focus in this article is on information privacy as being the appropriate subject for the law of breach of confidence. Moreover, on the basis that there may be group as well as individual interests in maintaining the privacy of information, the term 'privacy' as used in this article extends to encompass both such interests.

The meaning of 'privacy' advocated above is both narrower and broader than that suggested by Warren and Brandeis in an article 'The Right to Privacy'⁴¹ which led to the American torts of privacy developing in the way they did.⁴² It is broader in the sense that Warren and Brandeis were concerned exclusively with an individual's privacy. It is narrower because Warren and Brandeis argued that the right to privacy encompassed 'the right of the individual to be let alone'.⁴³ Nevertheless Warren and Brandeis were primarily concerned with information privacy and advocated that the law should encompass such interests, in particular:

The design of the law must be to protect those persons with whose affairs the community has no legitimate concern from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever their position or station, from having matters which they properly prefer to keep private made

Commonwealth government agencies and officers and persons subject to the law of the Australian Capital Territory.

³⁸ As to the provisions regarding breach of confidence, see Part VI.

³⁹ In particular, the Home Office Committee on Privacy adopted as its working definition of privacy, '[t]he right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.' (Emphasis added): United Kingdom Home Office, above n 23, para 3.7. This definition may seem overly simplistic in its suggestion that the act of publication of private information is equivalent to physical intrusion.

⁴⁰ Australian Law Reform Commission, above n 31, para 46, referring specifically to 'the interest of the person in controlling the information held by others about him [sic]'.

⁴¹ Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) *Harvard Law Review* 193.

⁴² See above n 18 and accompanying text.

⁴³ Warren and Brandeis, above n 41, 205.

public against their will.⁴⁴

Policies justifying the protection of information privacy

Warren and Brandeis argued for a legal right of privacy, *inter alia*, on the basis of the right to life enshrined in the American Constitution.⁴⁵ In *Melvin v Reid* the right to prevent the publication of embarrassing private facts was recognised on the basis of the 'right to pursue and obtain happiness' in the California Constitution.⁴⁶ There is no broad right to life or right to happiness constitutionally enshrined in English or Australian law and thus the American legal/constitutional justification for adopting a privacy doctrine does not apply in these countries.⁴⁷ The question then is whether any broader legal policy basis can be invoked.

It is said that Anglo-Australian law is based largely on utilitarian principles,⁴⁸ suggesting that any appropriate basis for protecting privacy interests should be a utilitarian or, more narrowly, an economic one. This makes particularly relevant the claim of Hartmann and Renas⁴⁹ that the English law of confidential information, as narrowly interpreted by them,⁵⁰ is more efficient than the American tort of the publication of embarrassing private facts. The claim is based on an argument by Posner that the American tort, based as it is on a rights approach, is too broad in its focus.⁵¹ Essentially the argument is that a law which protects the privacy of *embarrassing* private facts permits people to perpetrate a misrepresentation that the private information would expose — information which others who deal with that person are entitled to know in order to protect themselves from 'disadvantageous transactions'.⁵² However, in making this argument Posner accepts the value of protecting privacy interests in information where the information is not discreditable. The question is how this can be justified on economic or utilitarian grounds.

Posner identifies a clear economic/utilitarian argument for protecting private and personal information where the information constitutes a 'trade secret', broadly defined as information which is the product of skill and effort and which is used for commercial benefit in some trade or business.⁵³ Here the

⁴⁴ Ibid 214-5.

⁴⁵ Ibid 193-5.

⁴⁶ 297 Pac Rep 91 (1931), 93.

⁴⁷ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, [1976] 999 UNTS 171, art 17 (entered into force 3 January 1976), to which Australia is a party, refers to the right of persons not to be 'subjected to arbitrary or unlawful interference with his [sic] privacy, family, home or correspondence' although the terms 'arbitrary or unlawful' suggests a very weak level of obligation going beyond existing law.

⁴⁸ See, for instance, with respect to contract law, Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 779 and Patrick Atiyah, *Promises, Morals and Law* (1981) 4.

⁴⁹ Charles Hartmann and Stephen Renas, 'Anglo-American Privacy Law: An Economic Analysis' (1985) 5 *International Review of Law and Economics* 133, especially 143-6.

⁵⁰ Ibid. Discussed further, below n 75.

⁵¹ Richard Posner, 'The Right of Privacy' (1978) 12 *Georgia Law Review* 393.

⁵² Ibid 399-400, pointing to an analogy with the treatment of misrepresentations in commercial transactions.

⁵³ As Posner commented (ibid 410):

interest in encouraging investment in the production of socially valuable information presents the justification for granting rights in such secrets.⁵⁴ The difficulty, however, is that in the case of personal and private information which does not constitute a trade secret or something of an equivalent nature, economic value is more difficult to identify. The information is not the product of skill and effort, nor is it an input into some larger economic activity.

Indeed in many cases of private and personal information it may be argued that the only economic 'value' such information has lies in what it would fetch on the market because of the interest people have in knowing it, whether their reasons are genuine (for instance, as Posner suggests, to protect themselves from harm), or, as is perhaps more likely, simply because they are curious.⁵⁵ In the case of such information, as Warren and Brandeis have pointed out, the primary interest of the 'owner' of the information (in this context, the one whom it concerns) is in keeping the information out of the market.⁵⁶ Possibly, the owner would accept some price for the information but this may be unlikely to be a price which the market could realistically bear if there is a low level of genuine interest in knowing the information. However a market value of the information is more likely to be realised if the information comes into the hands of another person who had no particular reason to keep the information confidential and therefore may accept a lower price than the owner would if prepared to sell (although perhaps higher than the owner could afford to buy it back).⁵⁷ In order to justify maintaining the legal protection of privacy interests in such a case it is necessary to identify some larger value which overrides the value the information would have for people other than the owner.

By and large, Posner appears to have accepted that social value as a broader concept than economic value must be the general basis to justify protection of the confidentiality of (non-discreditable) private and personal information of a non-proprietary nature. However the analysis is still couched in efficiency terms. Thus Posner refers to the 'economy of communication'⁵⁸ and the 'resource-conserving' informality of dress and deportment which may be

Although the best known kind of trade secret is the secret formula or process, the legal protection is much broader — 'almost any knowledge or information used in the conduct of one's business may be held by its possessor in secret': *Smith v Bravo Corp* 203 F 2d 369, 373 (7th Cir, 1953).

See, similarly, for instance, *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418, 425 (Staughton LJ).

⁵⁴ Posner, above n 51, 397, approving of cases such as *E I Du Pont de Nemours & Co Inc v Christopher*.

⁵⁵ Posner (ibid 395-6) assumes that such information is valuable to those who want to know it on the basis that it enables a more accurate picture to be formed of friends and colleagues (those they deal with) and, more generally, even gossip columns 'open people's eyes to opportunities and dangers. They are genuinely informational'. Bloustein responds that such statements involve unlikely assumptions about the instrumental motives which people may have for wanting to know information about others: see Richard Bloustein, 'Privacy is Dear at Any Price: A Response to Posner's Economic Theory' (1978) 12 *Georgia Law Review* 429, 450-1.

⁵⁶ Warren and Brandeis, above n 41, 200, although not using the language of ownership as such (its use in this article being for convenience only and is not intended to suggest a proprietary basis for protection).

⁵⁷ Of course, the person who holds the information may have his or her own non-economic reasons for disclosing it — for instance the sheer enjoyment of being a gossip-monger.

⁵⁸ Posner, above n 51, 402.

facilitated by privacy protection.⁵⁹ A particular concern for Posner is that without privacy protection substantial costs may be incurred to avoid others overhearing potentially defamatory comments; costs which could be avoided by the 'relatively inexpensive expedient of providing legal sanctions against infringement of conversational privacy'.⁶⁰ The argument need not be limited to potentially defamatory statements. Indeed, the likelihood of expensive self-help measures being undertaken to prevent private information becoming public may be even greater when the information directly concerns the individual or group, rather than simply exposing someone to the remote possibility of court proceedings for defamation.

In general it may be said that Posner's focus on economic and quasi-economic justifications for protecting privacy interests is worthwhile in its broad consistency with the utilitarian philosophy underlying much of the development of Anglo-Australian law. However, in some fundamental respects, Posner's 'utilitarian' analysis is unnecessarily restrictive.

First, Posner's primary concern is with surreptitiously obtained information using techniques such as surveillance. Certainly sophisticated surveillance techniques are a particular concern for privacy. As Seipp has commented⁶¹:

Like the law of torts, privacy law has arisen, in part, as a response to new inventions and modes of organisation. If tort law was the product of the industrial revolution, privacy is the result of a communication and information revolution. Photographs, microphones, telephones and computers have all increased our vulnerability to unwanted intrusion without erasing our expectation of privacy, confidentiality and security.⁶²

However, privacy concerns are not limited to surveillance or listening devices or other technology deliberately used to obtain information. There is equally the concern about the accidental loss of information. The speed at which important transactions must be carried out, the fact of imperfect technology and simply the crowded conditions of modern life mean that the risk of accidental loss of information is as real as the risk of the information being surreptitiously obtained. Perhaps Posner takes the view that the owner of the information is in a better position to avoid information accidentally, as opposed to surreptitiously, falling into the hands of someone else. Nevertheless there may still be costs involved in preventing *any* accidental loss, as compared to the very low or zero costs involved for someone who comes across information which is clearly confidential to avoid learning its contents, or having learnt them, to avoid making any further disclosure. On that basis the economic policies of avoiding unnecessary costs in maintaining privacy can equally extend to the protection of accidentally obtained information (although the circumstances of any surreptitious obtaining may justifiably incur separate penalties).

⁵⁹ Ibid 403.

⁶⁰ Ibid 401.

⁶¹ David Seipp, 'English Judicial Recognition of a Right to Privacy' (1983) 3 *Oxford Journal of Legal Studies* 325.

⁶² Ibid 370.

Second, Posner seems to regard most purely private and personal information as discreditable and therefore not entitled to protection. However, that assumption is questionable. As Bloustein has pointed out, people may choose to keep information about themselves confidential, even if it would reflect well or neutrally on them, simply because they prefer not to live their lives in the public eye.⁶³ Moreover the argument for not protecting discreditable information is itself questionable. The argument is weakest if the only reason others wish to know the information is to satisfy their curiosity.⁶⁴ Also, even if some people have genuine reasons for knowing the information, this does not justify publication to a broader section of the community.⁶⁵ Nor is any genuine interest that others may have in knowing the information necessarily sufficient to override the interest of the owner in retaining its secrecy, bearing in mind the likely harm that person (or group) might suffer if the discreditable information were to become public. Thus it may be preferable to treat even discreditable information as *prima facie* protectable, subject to an exception where there is a genuine and overwhelming public interest in its contents being known.

Third, the actual social value identified by Posner for protecting the privacy of (non-commercial) private and personal information, the value of efficient conversation and dress and the costs of avoiding defamatory utterances, would appear to a serious exponent of privacy interests to be flimsy to the point of being trivial. Perhaps the problem is that Posner is still striving to find, if not an economic argument, then at least something akin to an economic argument, when in reality the only utilitarian justification for protecting private information is one which acknowledges the broad social benefit of privacy protection. That justification may be expressed in the widest possible terms of the value of having an open and liberal society in which people can flourish. John Stuart Mill, in arguing for a utilitarian principle protecting individual liberty,⁶⁶ framed his justification in terms of 'utility in the largest sense, grounded in the permanent interests of man as a progressive being.'⁶⁷ According to this philosophy people are only able to develop to the highest level of their potential if given the opportunity to make their own choices about how to live their lives, regardless of the judgments of others as to the value of those choices.⁶⁸ And among such choices must surely be whether to make personal and private information available to others, or to keep it entirely secret, or to disclose it only to a select

⁶³ Bloustein, 'Privacy is Dear at Any Price: A Response to Posner's Economic Theory', above n 55, 445-7.

⁶⁴ For the suggestion that this is indeed a likely motive in many cases, see above n 55 and accompanying text.

⁶⁵ *Melvin v Reid* was, for instance, a case where the defendant's film about the plaintiff's background was intended for viewing by a broad section of the population (most of whom could not be classified as family, friends or colleagues of the plaintiff).

⁶⁶ John Mill, 'On Liberty' in Mary Warnock (ed), *Utilitarianism, On Liberty, Essay on Bentham* (1962).

⁶⁷ *Ibid* 136.

⁶⁸ Mill states, 'It really is of importance, not only what men [sic] do, but also what manner of men [sic] they are that do it': *ibid* 188.

few who are judged as entitled to know.⁶⁹

The full and free exchange of information is important in a free and progressive society.⁷⁰ But it is only of value if the information is given and received in the spirit of tolerance. The inadequacy of reasons which Posner has indicated would lead others to wish to know private and personal information suggests rather a society which is ready to judge and condemn, regardless of whether the information indicates anything which would harm them directly.⁷¹ In such a society, as Bloustein points out, to compel the disclosure of private and personal information can only be harmful for the person or persons concerned without any compensating social benefit:

The [sic] man who is compelled to live every moment of his life among others and whose every need, thought, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones, his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.⁷²

Thus, the imposition of obligations on others to respect the privacy of those around them is justified on liberal and utilitarian grounds,⁷³ even though the liberty of those who are subject to the obligations may be constrained.

The question, then, is whether such broad utilitarian policies are best carried out with the sanction of the law or whether the economic and social costs of using the law to enforce such moral obligations outweigh any possible benefits. Wilson has argued against any general use of the doctrine of breach of confi-

⁶⁹ See, similarly, Bloustein, 'Privacy is Dear at Any Price: A Response to Posner's Economic Theory', above n 55, 447 and further, see references, below n 73.

⁷⁰ John Mill, of course, pays great attention to this in 'On Liberty', above n 66, arguing that the utilitarian justification for such freedom is that it is only in exchanging ideas and arguments that people can develop their most sophisticated and accurate judgments.

⁷¹ To prevent harm to others was the only justification which Mill saw for interfering with individual liberty. It should be noted that Mill defines 'harm' in the very narrow sense of 'a definite risk of damage either to an individual or to the public': Mill, above n 66, 213.

⁷² Richard Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962, 1003. Posner, criticises this argument as not born out by experience (above n 51, 407):

However, history does *not* teach that privacy is a precondition to creativity or individuality. These qualities have flourished in societies, including ancient Greece, Renaissance Italy, and Elizabethan England, that had much less privacy than we in the United States have today.

Curiously, Bloustein does not respond to this point in 'Privacy is Dear at Any Price: A Response to Posner's Economic Theory', above n 55. However, surely the answer is that in societies which were known for their tolerance and even encouragement of different views and ways of life, there is not the same need for privacy protection as a means of protecting people from the harmful effects of the judgments of others.

⁷³ See, similarly, Bloustein, 'Privacy as an Aspect of Human Dignity', above n 72 and 'Privacy is Dear at Any Price: A Response to Posner's Economic Theory', above n 55 — although Bloustein's position cannot be categorised as completely and explicitly utilitarian since he regards privacy as inherently valuable: 'Moreover, there are important non-instrumental or ultimate values which privacy serves, the most important of which are a sense of individuality and human dignity' ('Privacy is Dear at Any Price: A Response to Posner's Economic Theory', above n 55, 452). It is only when the argument for privacy is taken further to focus on social benefit to be obtained, that the argument for individual liberty becomes explicitly a utilitarian one.

dence to protect privacy interests on the basis that it is too cumbersome and uncertain to impose legal obligations in every case of a personal confidence, and would undermine the nature of social interaction as a free and flexible device for communication.⁷⁴ The argument, although directed at information imparted in confidence, can be extended to accidentally (although perhaps not surreptitiously) obtained information on the basis that it places a large burden on the person who obtains the information to have to be concerned with the possible legal implications of not respecting the wishes or possible wishes of the 'owner'.

Nevertheless, Wilson's arguments can be accommodated within a legal framework which protects private and personal information. Certainly there is no justification for protecting trivial information where it is of little real consequence to the owner whether it be published or not. But it is a different matter if the privacy of the information is of serious concern for the owner (as in *Melvin v Reid*, where it affected the whole course of the plaintiff's future life). That concern would seem to override any possible inconvenience which may be suffered by someone who receives or obtains information and who is subject to the sanction of the law in the event of disclosure.

BREACH OF CONFIDENCE AND PRIVACY PROTECTION

Despite the fact that English and Australian law recognises no law of privacy as such, the doctrine of breach of confidence has been used to protect some privacy interests. The question is how far it may be taken. Hartmann and Renas are among those commentators who have argued that there is only a narrow scope for protecting privacy interests⁷⁵ — but a close examination of the cases may serve to indicate a greater flexibility.

Privacy and information imparted in confidence

Of least doubt is that the confidentiality of private and personal information imparted in confidence is protected. However even here there are debates as to the limits of the doctrine's application. The cases may conveniently be divided into the early cases, dating back to the 18th and 19th centuries when the doctrine was first established, and the more recent cases — those which, dating from *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*, have given it its present form.

Some of the earliest breach of confidence cases concerned private and personal information imparted in confidence. In the famous case of *Prince Albert v*

⁷⁴ William Wilson, 'Privacy, Confidentiality and Press Freedom: A Study in Judicial Activism' (1990) 53 *Modern Law Review* 43, especially 54-6.

⁷⁵ Hartmann and Renas, above n 49, 138 suggest that the doctrine does not extend to surreptitiously or accidentally obtained information. See also George Wei, 'Surreptitious Takings of Confidential Information' (1992) 12 *Legal Studies* 302, who argues that it only extends to surreptitiously obtained information involving another breach of the law. For a more liberal view, see Mark Thompson, 'Breach of Confidence and Privacy' in Linda Clarke (ed), *Confidentiality and the Law* (1990) 65, 71-4.

*Strange*⁷⁶ the plaintiff and Queen Victoria had produced a series of private etchings which they gave to a printer for copying. The printer or his employee apparently took more copies and passed these to the defendant who proposed to mount an exhibition. He was prevented from doing so on the basis that the copies had been given to him 'in a breach of trust, confidence or contract'.⁷⁷ Breach of confidence was also found in a number of cases where a photographer, commissioned to make photographs, made extra copies for his own use,⁷⁸ and where the recipient of personal letters sought to publish them.⁷⁹

Similarly, after *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* the courts have not hesitated to protect the confidentiality of private and personal information imparted in confidence. Thus in *Argyll v Argyll*,⁸⁰ the plaintiff obtained an injunction restraining her ex-husband from disclosing secret information she had told him during their marriage. Ungeod Thomas J commented that:

Marriage is, of course, far more than mere legal contract and legal relationship, and even legal status; And there could hardly be anything more intimate or confidential than is involved in that relationship, or than in the mutual trust and confidences which are shared between husband and wife.⁸¹

The Court of Appeal in *Lennon v News Group Ltd*⁸² found no breach of confidence where the marriage secrets of John Lennon were disclosed, but they did so on the basis that so much had already been published about the marriage that it was 'all in the public domain'.⁸³ Similarly, in *Woodward v Hutchins*,⁸⁴ where the activities of various well known pop stars were exposed by a former employee, the extent of prior publication meant that the defendant was held entitled to 'disclose the truth'.⁸⁵ However the courts now appear to have accepted that the public interest defence cannot be invoked simply on the basis of the 'public interest' in knowing the truth. Rather, some serious and demonstrable danger to the public is required.⁸⁶

⁷⁶ (1849) 1 H and TW 1; 47 ER 1302.

⁷⁷ *Ibid* 1311.

⁷⁸ See, eg, *Murray v Heath* (1831) 1 B & Ad 804; 109 ER 985; *Tuck and Sons v Priestler* (1887) 19 QBD 629; *Pollard v Photographic Company* (1888) 40 Ch D 345.

⁷⁹ See, eg, *Thompson v Stanhope* [1774] Amb 737; *Folsom v Marsh* (1841) 2 Story 100.

⁸⁰ [1967] Ch 302.

⁸¹ *Ibid* 322.

⁸² [1978] FSR 573.

⁸³ *Ibid* 574-5 (Lord Denning MR), 575 (Browne J).

⁸⁴ [1977] 2 All ER 751.

⁸⁵ *Ibid* 754 (Lord Denning MR), 755 (Bridge LJ). The judgment represents an argument not unlike that made by Posner for not according protection to 'discreditable' information. See Posner, above n 51 and accompanying text.

⁸⁶ See *British Steel Corporation v Granada Television* [1981] AC 1096 and *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39. Some Australian courts have indicated an even stricter approach to the public interest defence. In particular, Gummow J, in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 456, suggested that in historical terms the 'defence' can more properly be viewed as a category of non-protectable information and is limited to information of 'iniquity in the sense of a crime, civil wrong or serious misdeed of public importance'. However, the correctness of that position is debatable. See further, below, the references in nn 110-2 and accompanying text.

Wilson has argued that the law should be construed narrowly to protect only particular relationships of confidence of a fiduciary⁸⁷ or institutional nature.⁸⁸ However *Stephens v Avery*⁸⁹ was a case of information imparted in the context of a personal relationship of no formal institutional significance and yet breach of confidence was found. The plaintiff had told a friend, in confidence, that she had been the lover of a woman who was killed by her husband after he discovered their relationship. The friend was held liable for breach of confidence when she sold the story to a newspaper. The case is also interesting in rejecting arguments that the immoral nature of the information and/or its triviality were reasons not to invoke the law. Nicholas Browne-Wilkinson VC held that, first, it was not for the courts to judge the morality of sexual conduct without a clear contravention of a 'generally accepted moral code',⁹⁰ and, second, that it was doubtful whether information which represented the 'wholesale revelation of the sexual conduct of an individual' could truly be regarded as trivial.⁹¹ Nevertheless, it was accepted that had the information truly been trivial it would not have been entitled to protection.⁹²

A number of cases concerning private and personal information imparted in confidence for medical or legal reasons have also confirmed the court's ability to protect privacy interests in a range of contexts. Thus in *X v Y*⁹³ an injunction was granted to a health authority to prevent the defendants publishing information which indicated that two doctors had contracted AIDS.⁹⁴ In the Australian case *G v Day*,⁹⁵ an informant was able to prevent the defendants from publishing information of his identity on the basis that they had received it in breach of confidence by an employee of the Corporate Affairs Commission.⁹⁶ Yeldham J commented that:

It is not necessary for me to determine the source from whence came the information which led Mr Richards to the plaintiff. I am satisfied that it probably was a person who, despite his knowledge that the plaintiff had been guaranteed anonymity, nonetheless, in breach of ordinary standards of honour and decency,

⁸⁷ As to whether employment relationships are fiduciary, as suggested in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J), 141 (Dawson J), or are better treated as contractual, see Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (1990) 135.

⁸⁸ See Wilson, above n 74, 51 arguing that *Argyll v Argyll* was a case where the public significance of the institution of marriage constituted the particular justification for protecting the confidentiality of private and personal information. Contrast Shelley Wright, 'Confidentiality and the Public/Private Dichotomy' (1993) 15 *European Intellectual Property Review* 237, 240-1.

⁸⁹ [1988] Ch 449.

⁹⁰ *Ibid* 454.

⁹¹ *Ibid*. The similarity between this case and *Melvin v Reid* may be noted.

⁹² See, for the proposition that trivial information is not protectable: *Coco v AN Clark (Engineers) Ltd* (1969) RPC 41, 48.

⁹³ [1988] 2 All ER 648.

⁹⁴ Although the public interest defence was raised it was held that the interest claimed, of having a free press and informed public debate, was insufficient in this case to warrant publication of the information.

⁹⁵ [1982] 1 NSWLR 24.

⁹⁶ Yeldham J referred by way of authority to the House of Lords decision in *D v National Society for Prevention of Cruelty to Children* [1978] AC 171, where discovery of documents which would have disclosed the identity of an informant was refused.

deliberately disclosed it to the journalist.⁹⁷

These cases confirm that the obligation of confidence may arise whenever private and personal information is imparted in circumstances of confidentiality.⁹⁸ Moreover, the treatment of third party liability suggests that the obligation readily extends to third parties as well, on the basis of their knowledge or putative knowledge of the confidentiality of the information.⁹⁹

Nor has the protection of privacy interests been limited to the privacy interests of individuals who impart confidences. In *Schering Chemicals Ltd v Falkman Ltd*,¹⁰⁰ the Court of Appeal held there was breach of confidence where the defendant sought to publish information which indicated the dangerous side-effects of a drug the plaintiff company had been manufacturing but had since removed from the market. Lord Denning specifically referred to the plaintiff's 'right to privacy' as a factor favouring confidentiality.¹⁰¹ In *Lion Laboratories Ltd v Evans*,¹⁰² a case involving information disclosed to the press which indicated inaccuracy in breath testing equipment manufactured by the plaintiffs and used by the police, the action for breach of confidence would have succeeded but for the finding that the plaintiff's interest in maintaining confidentiality was outweighed by the public interest in publication.¹⁰³ An unusual Australian case where group privacy interests prevailed is *Foster v Mountford and Rigby Ltd*,¹⁰⁴ where a Northern Territory court restrained the publication of a book containing details of Aboriginal tribal secrets by an anthropologist who had studied the tribe. Particular reference was made to the argument that the social system of the tribe required that the secrets be kept from the women and uninitiated members of the tribe.¹⁰⁵

Significantly, however, a clear distinction has been drawn between, on the one hand, the privacy interests of private groups, and, on the other hand, the interests of governments and governmental agencies carrying out public

⁹⁷ [1982] 1 NSWLR 24, 35. See similarly *Falconer v ABC* [1992] 1 VR 662 where the identity of a police informant was protected.

⁹⁸ In *G v Day* [1982] 1 NSWLR 24, 35, Yeldham J also indicated that the law was not limited to the actual information imparted:

[T]he principles of equity which protect confidentiality should extend not only to the information imparted but also, where appropriate, to the identity of the person imparting it where the disclosure of that identity (as in the present case) would be a matter of substantial concern to the informant.

Thus, indirectly, the case suggests that the law may extend to information obtained rather than, strictly speaking, imparted in confidence.

⁹⁹ In both *X v Y* and *G v Day*, it appears that the courts were prepared to accept that information had been disclosed in breach of confidence by an employee of the organisation which had been given the information, although the actual employee who made the disclosure was not identified. For third party liability, see generally, *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 361, and the text accompanying n 147 below.

¹⁰⁰ [1982] QB 1.

¹⁰¹ *Ibid* 22, although Lord Denning dissented, *inter alia*, on the question whether the information was still confidential, there having been some previous publication.

¹⁰² [1985] QB 526.

¹⁰³ *Ibid* 534, 538 where Stephenson J commented on the risk that motorists might be unfairly put to trial for drunken driving.

¹⁰⁴ (1976) 29 FLR 233.

¹⁰⁵ *Ibid* 236.

responsibilities. In *Commonwealth of Australia v John Fairfax & Sons Ltd*,¹⁰⁶ a case concerning the publication of secrets concerning the Australian Government's defence policy, Mason J on behalf of the High Court of Australia indicated that:

The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of executive government Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.¹⁰⁷

Similarly, in *Attorney-General v Guardian Newspapers (No 2)*, the House of Lords was unanimously of the view that a government claiming breach of confidence must show that the publication would be detrimental to the public interest.¹⁰⁸ Such constraints on the assertion of privacy interests by governments are consistent with the assumption that the general policy justifications for protecting privacy interests do not extend to them.¹⁰⁹

Finally, the public interest defence may provide an important safeguard of genuine public interests in knowing confidential information, indicating serious and demonstrable danger to the public. This was, for instance, indicated in *W v Edgell*.¹¹⁰ A psychiatrist, who at the plaintiff's request had conducted an examination of the plaintiff (a convicted murderer) who was seeking parole, was permitted to disclose details of his conclusions to the authorities on the basis that the danger of exposing the public to risk of harm outweighed the plaintiff's interest in keeping the information private.¹¹¹ Similarly, the public interest defence succeeded in *Lion Laboratories Ltd v Evans*, a case discussed above concerning the privacy interests of a company which manufactured faulty breath testing equipment used by the police. There the public interest in avoiding wrongful convictions was considered more important than the plaintiff's privacy interests.¹¹²

¹⁰⁶ (1980) 147 CLR 39.

¹⁰⁷ *Ibid* 51-2.

¹⁰⁸ [1990] 1 AC 109, 256 (Lord Keith), 265 (Lord Brightman), 270 (Lord Griffiths), 282 (Lord Goff), 293 (Lord Jauncey). The House of Lords also accepted that in the case of private complainants any standard of detriment is less strict. In *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, Deane J went as far as to suggest that, for private complainants, the preservation of confidentiality need only be of 'substantial concern' to the plaintiff, a standard which would seem to be largely covered already by the standard of non-triviality. See, further: *Coco v AN Clark (Engineers) Ltd* (1969) RPC 41, 48 and text accompanying n 92 above.

¹⁰⁹ Similarly, it may be noted that in both *X v Y* [1988] 2 All ER 648 and *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 (although a case of privilege rather than breach of confidence), where the protection of the information was being claimed by a government agency rather than an individual or private group, the courts also seemed to be looking for some substantial public detriment rather than merely serious concern — although the distinction between private and public interests was less explicit in these cases — and in *X v Y* was actually denied.

¹¹⁰ [1990] Ch 359.

¹¹¹ Contrast the Australian case of *Wigginton v Brisbane TV Ltd* (1993) 25 IPR 58 where an injunction was granted to prevent the disclosure on television of information regarding the plaintiff's mental state as recorded under hypnosis on videotape by doctors assisting in preparing her defence to a murder charge for which she was convicted — but there the plaintiff was not seeking to be released into the community and the public interest defence was not raised.

¹¹² See [1985] QB 526 and the text accompanying n 103 above. This was one of the few cases in which

Thus the courts appear to have accepted that, where private and personal information is imparted in confidence, an action for breach of confidence will lie if the information is disclosed. However, there are the constraints that the information must not be trivial, that it must concern some private individual or group rather than the government acting in some public capacity and it must not be in the public interest (in the sense of preventing or exposing some public harm or danger) that the information be made public. Those constraints, coupled with the general constraints of the law that the information must be of a sufficiently confidential nature to warrant protection¹¹³ and that the recipient must know or be reasonably aware of its confidential nature,¹¹⁴ bring the use of breach of confidence principles within the limits justified by the general utilitarian policy basis for protecting privacy interests discussed above.

Nevertheless, the cases where breach of confidence actions have succeeded for private and personal information imparted in confidence represent the exception rather than the rule for breach of confidence cases, most of which concern trade secrets imparted for commercial reasons.¹¹⁵ Indeed it is perhaps unlikely that private and personal information will be deliberately imparted to an untrustworthy confidant where there is no good reason to do so.¹¹⁶ What may be more likely is that a disclosure occurs because the information has been surreptitiously or even accidentally obtained by someone who feels no moral obligation to respect its confidentiality. To accept that the doctrine of breach of confidence does, or at least could, extend to some or all such situations is thus potentially significant for defining the scope of legal protection against invasions of

the public interest defence was held to permit disclosure to the general public, not just the proper authorities. For an Australian case, also concerning group privacy interests, see *Westpac Banking Corporation v John Fairfax Group Pty Ltd* (1991) 19 IPR 513, where publication of confidential bank documents concerning the making and managing of foreign exchange loans was permitted on the basis that there was a public interest that the substance of the documents be known (particularly given the publication that had already occurred).

¹¹³ The standard seems to be applied in a liberal fashion where private and personal information is involved. Thus in *G v Day* [1982] 1 NSWLR 24 the information was treated as confidential despite the fact that there had already been some publication on nationwide television, on the basis that the publication was of a transitory nature and would have meant nothing to those who heard it.

¹¹⁴ The requirement is stated by Megarry J in *Coco v AN Clark (Engineers) Ltd* (1969) RPC 41, 48:

It seems to me that if the circumstances are such that any reasonable man [sic] standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.

See, similarly, *Smith Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1991) 28 FCR 291, 303, although the case indicates that the confidant's known purpose in receiving the information is also relevant. Query whether it is sufficient that the recipient is notified of the information's confidentiality after receiving it. Contrast *Seager v Copydex* [1967] 2 All ER 415 which suggests that it may be sufficient, and *Fractionated Cane Technology Ltd v Ruiz-Avila* [1988] 7 Qd R 610 which suggests that there can be no obligation.

¹¹⁵ See, eg, *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*, (information concerning the manufacture of leather punches); *Coco v AN Clark (Engineers Ltd)* (information about the design of a moped) and *Seager v Copydex* (information concerning the design of a carpet grip) where the imparting occurred in the context of contractual negotiations.

¹¹⁶ For instance *X v Y* and *G v Day*, where there were legal/medical reasons for the information to be imparted; *Schering Chemicals Ltd v Falkman and Lion Laboratories Ltd v Evans*, where the information became available to employees; *Argyll v Argyll* and *Stephens v Avery*, where a trusted spouse or friend later turned out to be untrustworthy.

privacy. However, as the analysis below indicates, the courts have been ambiguous in their readiness to take the step beyond protecting the privacy interests of those who impart information in confidence.

Privacy and surreptitiously or accidentally obtained information

The application of the doctrine of breach of confidence to information obtained, rather than imparted in confidence, is ambiguous in a number of respects. First, there is the question of the full scope of the doctrine's application to surreptitiously obtained information. The cases indicate some conflict. Even more debatable is whether the doctrine has any application to accidentally obtained information (other than by a third party to an existing breach of confidence). The cases may, again, be conveniently divided into the early cases and those since *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*.

Lord Ashburton v Pape was an early and notable case which directly referred to the treatment of 'information improperly or surreptitiously obtained'.¹¹⁷ The information in question was confidential correspondence which the defendant, a prospective bankrupt, had obtained from the solicitor of one of his creditors through the solicitor's clerk. The court treated the matter as third party liability for an employee's breach of contract or confidence in surreptitiously obtaining the information — an extension of the law which is now well accepted.¹¹⁸ However, Swinfen Eady LJ did not limit his statement of the law to those in an employment or equivalent relationship, rather appearing to suggest that anyone who improperly or surreptitiously obtains information will be liable for breach of confidence.¹¹⁹ Indeed, it would seem that the defendant in the case was liable because of his improper conduct in procuring the employee to obtain the information rather than as someone who benefited from the employee's wrongdoing.¹²⁰ It was only later that it became accepted that an innocent third party, not implicated in the original breach of confidence, could be made liable.¹²¹

¹¹⁷ [1913] 2 Ch 469, 475 and see n 2 and accompanying text.

¹¹⁸ Thus, in the recent case *X Ltd v Morgan — Grampian (Publishers) Ltd* [1990] 2 All ER 1, where the plaintiffs sought discovery in order to ascertain the identity of an employee who had leaked a surreptitiously obtained report to the defendant publishers, the House of Lords assumed there to have been a breach of confidence in the disclosure for which the plaintiff would be liable as a third party.

¹¹⁹ The other judges in the case were more circumspect, Cozens-Hardy MR at [1913] 2 Ch 469, 472, stating simply that, the law was as stated in *Lamb v Evans* [1893] 1 Ch 218, 235, referring to *Morison v Moat* (1851) 9 Hare 241; 68 ER 492:

Then the judgment goes on to give several instances, and many of them are of cases where a man, being in the employment of another, has discovered the secrets of the manufacture of that other person, or has surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence, and he has been restrained from communicating that secret to anybody else, and anybody who has obtained that secret from him has also been restrained from using it.

¹²⁰ See, eg, *Argyll v Argyll* [1967] Ch 302, 333 where Ungood-Thomas J thus interpreted thus interpreted *Lord Ashburton v Pape* as standing for the principle that:

an injunction may be granted to restrain the publication of confidential information not only by the person who was a party to the confidence but by other persons into whose possession that information has improperly come.

¹²¹ For a statement of the law, see below n 147 and accompanying text.

Prior to *Lord Ashburton v Pape*, there had already been the suggestion that breach of confidence could be found on the basis of 'improperly or surreptitiously obtained' information by someone other than an employee or agent or third party where that information was of a 'proprietary' nature; that is, a trade secret or its equivalent. However, the cases did not concern private and personal information.¹²² Indeed, there was some indication that, without at least some proprietary or contractual basis, the courts would be reluctant to grant protection to surreptitiously obtained information. Thus, for instance, in *Corelli v Wall*¹²³ a novelist was unable to prevent a surreptitiously obtained photograph of herself being used without her consent for advertising purposes because she had no contractual relationship with the photographer.¹²⁴

Even after *Lord Ashburton v Pape*, the courts seemed reluctant to adopt the broad equitable doctrine as stated in that case — preferring instead to rely on proprietary and contractual doctrines as defining the scope of an action for breach of confidence. Thus, the prospect of using breach of confidence principles to protect the privacy of information remained restricted, particularly given the narrow meaning accorded to the concept 'property'. In *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*, the plaintiff's argument that the surreptitiously obtained information (concerning the spectacle of the horse races on their land) was their property, was given short shrift. Latham CJ commented:

I find difficulty in attaching any precise meaning to the phrase 'property in a spectacle'. A 'spectacle' cannot be 'owned' in any ordinary sense of that word. Even if there were any legal principle which prevented one person from gaining an advantage for himself or causing damage to another by describing a spectacle produced by that other person, the rights of the latter person could be described as property only in a metaphorical sense.¹²⁵

In the United Kingdom a narrow approach to the concept of 'property' was

¹²² See, eg, *Exchange Telegraph v Howard* (1906) 22 TLR 375 which involved the surreptitious obtaining and use of information developed by the plaintiff for its use in the stock market, which was treated as the plaintiff's property. In *Abernethy v Hutchinson* (1825) 2 LJ Ch 219; 47 ER 1313, a publisher was restrained from publishing lectures given by a surgeon to a group of medical students at a teaching hospital. The evidence did not indicate whether the defendant had received the information from one of the students or from someone who surreptitiously entered the lecture room to record the lectures. Lord Eldon treated the publication as, in either event, breach of confidence, on the basis that valuable information had been 'stolen'.

¹²³ *Corelli v Wall* (1906) 22 TLR 532.

¹²⁴ *Ibid* 532, which, interestingly, was a judgment of Swinfen Eady J. See, similarly, *Sports and General Press Agency Ltd v 'Our Dogs' Publishing Co Ltd* [1917] 2 KB 125 (and contrast, in the case of imparted information, *Pollard v Photographic Company* (1888) 40 Ch D 345). More recent cases have indicated that there may be proprietary rights in personal information where this is a source of business goodwill. However, the protection is under the law of passing off rather than breach of confidence. See, eg, *Henderson v Radio Corporation Pty Ltd* (1960) 60 SR (NSW) 576.

¹²⁵ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 496-7. Conversely, Dixon J (at 509) suggested that the spectacle, although perhaps the result of the plaintiff's skill and effort, was not entitled to be treated as property because it did not come within the established categories of intellectual property. For a commentary on the case, distinguishing the different approaches to the concept of 'property' which were adopted in the individual judgments, see Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 266 ff.

also indicated by *Oxford v Moss*,¹²⁶ although it was not a breach of confidence case but an action in theft brought against a student who had had access to a confidential examination paper. The Court of Appeal held that there was no theft as the information did not constitute 'intangible property' within the meaning of the Theft Act 1968 (UK).¹²⁷

The proprietary analysis became less significant with the move back to the equitable doctrine of breach of confidence in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*,¹²⁸ since the doctrine was formulated in sufficiently broad terms to cover any confidential information, whether imparted or obtained.¹²⁹ The difficulty, however, was the emphasis placed by Megarry J in *Coco v AN Clark (Engineers) Ltd* on the need for the information to be 'normally' imparted in confidence for the equitable doctrine to apply.¹³⁰ In the United Kingdom it was not until the broad statement of the doctrine by Lord Goff in *Attorney-General v Guardian Newspapers (No 2)* that this constraint was placed in question, and the way was opened for the equitable action for breach of confidence equally to extend to surreptitiously or accidentally obtained information.

In Australia, the breadth of the equitable doctrine was perhaps open for debate at an earlier stage. In *Commonwealth of Australia v John Fairfax & Sons Ltd*, Mason J referred to the statement of Swinfen Eady J in *Lord Ashburton v Pape* as representing the scope of the law.¹³¹ Similarly, in *Moorgate Tobacco Co Ltd v Philip Morris Ltd*, Deane J commented that:

A general equitable jurisdiction to grant such relief [for breach of confidence] has long been asserted and should, in my view, now be accepted: see *The Commonwealth v John Fairfax & Sons Ltd*. Like most heads of exclusive jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.¹³²

The statement makes clear the High Court's rejection of any residual proprietary basis for the action for breach of confidence. However, Deane J's reference to the protection of information 'obtained' as well as imparted in confidence

¹²⁶ (1979) 68 Cr App R 183.

¹²⁷ The case may be contrasted with the treatment of the medical lectures in *Abernethy v Hutchinson*.

¹²⁸ Ricketson has suggested that the case may be taken to support a proprietary analysis. Staniforth Ricketson, 'Confidential Information — A New Proprietary Interest?' (1977) 11 *MULR* 223, 232-3. Nevertheless, as he acknowledges, the language used in the case indicates an equitable analysis: see (1948) 65 *RPC* 203, 213, where Lord Greene MR stated that; '[t]he principle is established and is not disputed; and it is perfectly clear that an obligation, based on confidence, existed and bound the conscience of the Defendants.'

¹²⁹ See, however, the recent Hong Kong case *Linda Chih Ling Koo v Lam Tai Hing* (1992) 23 *IPR* 607 where breach of confidence was found on the basis that the information in question (survey material) was the property of the plaintiff which the defendant had stolen.

¹³⁰ See (1969) *RPC* 41, 46, where Megarry J also emphasised the equitable nature of the obligation:

The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust In the case before me, it is common ground that there is no question of any breach of contract, for no contract ever came into existence. Accordingly what I have to consider is the pure equitable doctrine of confidence, unaffected by contract.

¹³¹ (1980) 147 *CLR* 39, 50.

¹³² (1984) 156 *CLR* 414, 438.

suggests a broad scope for the equitable doctrine and thus for its capacity to protect privacy interests in information.

It is this broad interpretation of the equitable doctrine which provides the best way of explaining one of the few relatively recent cases on surreptitiously obtained information, *Franklin v Giddins*.¹³³ The case, an Australian case which concerned the theft of the plaintiff's nectarine budwoods by a trade competitor, was not about private or personal information but about information of an arguably proprietary nature, and yet that was not the basis of the decision.¹³⁴ Rather, Dunn J, relying on the authority of *Lord Ashburton v Pape*, referred to the 'unconscionability' of the defendant's actions as being the basis for finding breach of the equitable obligation of confidence:

I find myself quite unable to accept that a thief who steals a trade secret, knowing it to be a trade secret, with the intention of using it in commercial competition with its owner, to the detriment of the latter, and so uses it, is less unconscionable than a traitorous servant.¹³⁵

The English courts have, in cases following *Franklin v Giddins*, been more circumspect in accepting that the equitable doctrine of confidence extends to surreptitiously obtained information. Thus, in the well known case of *Malone v Metropolitan Commissioner*,¹³⁶ concerning information obtained as the result of a tap placed on a known criminal's telephone by the police, the plaintiff's argument for breach of confidence was rejected by Megarry VC. The Vice-Chancellor commented that:

It seems to me that a person who utters confidential information must accept the risk of any unknown overhearing that is inherent in the circumstances of the communication When this is applied to telephone conversations, it appears to me that the speaker is taking such risks of being overheard as are inherent in the system.¹³⁷

Nevertheless Megarry VC appeared to acknowledge the possibility that, had the telephone not been used by someone in circumstances where a lawful tap could be anticipated,¹³⁸ an action for breach of confidence might have succeeded.¹³⁹ That possibility was the basis for the action in *Francome v Mirror Group Newspapers Ltd*,¹⁴⁰ where the Court of Appeal held that the doctrine of breach of confidence did extend to an unlawful telephone tap used by a private person

¹³³ [1978] Qd R 72 .

¹³⁴ It has, however, sometimes been interpreted as such. See, eg, Jennifer Stuckey, 'The Equitable Action for Breach of Confidence: Is Information Ever Property?' (1981) 9 *Sydney Law Review* 402, 429-30, where the case is criticised on that basis.

¹³⁵ [1978] Qd R 72, 80.

¹³⁶ [1979] Ch 344.

¹³⁷ *Ibid* 376.

¹³⁸ The fact that the plaintiff was a known criminal seems to have influenced Megarry VC's decision and indeed the Vice-Chancellor went on to hold that, had the action been made out the public interest defence would have applied: *ibid* 377.

¹³⁹ For a stricter interpretation of the case, see Staniforth Ricketson, *The Law of Intellectual Property* (2nd ed, 1984) 828-9, who argues that Megarry VC rules out the possibility of an action for breach of confidence against an eavesdropper.

¹⁴⁰ [1984] 2 All ER 408.

(to obtain information as to unlawful betting tips allegedly given by the plaintiff).¹⁴¹ Fox LJ commented that in *Malone v Metropolitan Police Commissioner*:

The Vice-Chancellor was only dealing with a case of authorised tapping by the police and he makes that clear Illegal tapping by private persons is quite another matter, since it must be questionable whether the user of a telephone can be regarded as accepting the risk of that in the same way as, for example, he accepts the risk that his conversation may be overheard in consequence of the accidents and imperfections of the telephone system itself.¹⁴²

Francome v Mirror Group Newspapers Ltd thus indicates that the doctrine of breach of confidence may apply to surreptitiously obtained personal and private information. However, it also suggests that the fact that the information was obtained in breach of some other law was significant, a finding which was necessary to distinguish the case from *Malone v Metropolitan Police Commissioner*. It is unclear whether this was intended to mean that the doctrine could only ever extend to information surreptitiously obtained if obtained in breach of some other law, although perhaps this is the logical conclusion.¹⁴³ If so, that conclusion has been placed in doubt by the statement of Lord Goff in *Attorney General v Guardian Newspapers (No 2)*.

Thus the courts, in moving away from the proprietary analysis indicated in the early cases, have opened the door for the fuller extension of breach of confidence principles to private and personal information. Nevertheless, a number of issues remain to be resolved.

First, there is the question whether the action for breach of confidence may extend to information obtained (outside a particular employment or equivalent relationship and not by a third party) in circumstances where there was no other breach of the law. *Franklin v Giddins* indicates that unconscionable conduct rather than unlawfulness in the obtaining is the standard to be applied.¹⁴⁴ However, *Malone v Metropolitan Police Commissioner* and *Francome v Mirror Group* perhaps suggest otherwise. The question is particularly significant in the case of accidentally obtained information where, *ipso facto*, there is no breach of the law. Megarry VC in *Malone v Metropolitan Police Commissioner* explicitly rejected any possibility that a remedy for breach of confidence could lie:

Those who exchange confidences on a bus or a train run the risk of a nearby passenger with acute hearing or a more distant passenger who is adept at lip-reading. Those who speak over garden walls run the risk of the unseen neighbour in a toolshed nearby ... I do not see why someone who has overheard some secret in such a way should be exposed to legal proceedings if he uses or divulges what he has heard. No doubt an honourable man would give some warning when he realises that what he is hearing is not intended for his ears; but I have

¹⁴¹ The public interest defence was raised but dismissed on the basis that the intended publication was not limited to the proper authorities.

¹⁴² *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, 415.

¹⁴³ This conclusion was, for instance, drawn by Wei, above n 75.

¹⁴⁴ However, it should be noted that there had actually been trespass and theft of physical property in that case.

to concern myself with the law, and not with moral standards.¹⁴⁵

In contrast, however, is the later and more authoritative statement of Lord Goff in *Attorney-General v Guardian Newspapers (No 2)* that a person might be subjected to an obligation of confidence whenever the circumstances are such that he or she is placed on 'notice' that the information is confidential.¹⁴⁶ This, at least, suggests that the doctrine of breach of confidence cannot be regarded as restricted to certain cases of surreptitiously obtained information.

Secondly, there is the question why someone who surreptitiously or accidentally obtains information should be subject to lesser risk than a third party whose liability follows from actual or putative knowledge. Megarry VC summarised the law in *Malone v Metropolitan Police Commissioner*:

If A makes a confidential communication to B, then A may not only restrain B from divulging or using the confidence, but also may restrain C from divulging or using it if C has acquired it from B, even if he acquired it without notice of any impropriety In such cases it seems plain that however innocent the acquisition of the knowledge, what will be restrained is the use or disclosure of it after notice of the impropriety.¹⁴⁷

Arguably, the third party situation can be distinguished on the basis that there has already been an actionable breach of confidence. Nevertheless, the result is that liability depends on notification. This suggests there is no good reason for not applying a similar standard to someone who surreptitiously or accidentally obtains information.¹⁴⁸ Moreover, if the standard is one of notification, there can only be breach of confidence if, after notification, the information is used or disclosed. That option would seem to amply justify placing the 'risk' on the one who obtains the information rather than the owner.¹⁴⁹

Thirdly, there is the unresolved question of the precise jurisdictional basis for extending the action for breach of confidence to cover surreptitiously or accidentally obtained information of a private and personal nature. That the equitable basis was broadly framed in terms of 'unconscionability' in *Franklin v Giddins*, and was simply assumed in *Malone v Metropolitan Police Commissioner* and *Francome v Mirror Group Newspapers Ltd*, has raised difficulties at the conceptual level. In particular, there is the question of how a general equitable basis could extend to cover the situation where there is no 'relationship of confidence' in the context of which information is imparted.

¹⁴⁵ [1979] Ch 344, 376. The distinction between moral and legal concerns may be one with which Wilson would agree. See Wilson, above n 74 and accompanying text.

¹⁴⁶ [1990] 1 AC 109, 281. See also, n 8 and accompanying text and, note, in particular, Lord Goff's subsequent statement that the law should encompass the situation of 'an obviously confidential document' which finds its way onto a public street.

¹⁴⁷ [1979] Ch 344, 361.

¹⁴⁸ Note that the analogy with third party liability also suggests that a person who obtains information (or receives information imparted in confidence) should be liable for breach of confidence, even if he or she only became aware of the information's confidentiality after learning its contents as long as this is before the breach. See above n 114 and accompanying text and further, Appendix, eg B.

¹⁴⁹ An exception might need to be made if the party who obtains the information has suffered costs in reliance on the information — although contrast, regarding third party liability, the situation of a *bona fide* purchaser in *Wheatley v Bell* [1982] 2 NSWLR 544.

Various answers may be suggested. For instance, the fact that Lord Goff in *Attorney-General v Guardian Newspapers (No 2)* makes his statement of the law in similar terms to those used in a well-known book on restitution of which he is an author,¹⁵⁰ might be taken to suggest a restitutionary basis.¹⁵¹ On the other hand it may be argued that the 'unconscionability' basis suggested in *Franklin v Giddins*, drawing on an accepted equitable principle,¹⁵² provides a more straightforward solution.¹⁵³

Without attempting to exhaust the issue, the following tentative comments are suggested in favour of an unconscionability rather than a restitutionary principle. First, restitutionary arguments have so far had only limited application in Anglo-Australian courts, although that, in itself, does not provide a reason against using restitutionary arguments where clearly applicable.¹⁵⁴ Secondly, there is little suggestion in the cases, apart, perhaps, from Lord Goff's statement in *Attorney-General v Guardian Newspapers (No 2)*, that the basis of a breach of confidence action might be restitutionary rather than equitable in a more general sense.¹⁵⁵ Thirdly, there is the problem of the available remedies in a restitutionary action, particularly given the fact that the injunction remedy is not a restitutionary remedy.¹⁵⁶ Fourthly, there is the question whether the restitution of an unjust enrichment is the appropriate way to categorise the treatment of a party who breaches the confidentiality of private and personal information (and who may do so for personal motives rather than economic 'benefit').¹⁵⁷ Finally, there is the argument that an unconscionability approach would provide the least disruption to existing law and is the most consistent with the policies at

¹⁵⁰ Robert Goff and Gareth Jones, *The Law of Restitution* (3rd ed, 1986) ch 35, apparently based in turn on Gareth Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 *Law Quarterly Review* 463.

¹⁵¹ Note, however, that Lord Goff specifically refrained from indicating a jurisdictional basis for his statement of the law in *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 and indeed suggested that the proprietary basis might still be possible in the United Kingdom.

¹⁵² For an application in Australia to contract law, see *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, and for an application to promissory estoppel, see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. In the United Kingdom, although the unconscionability principle has been less utilised, the doctrine of undue influence in contract law was similarly elaborated in terms of 'victimisation' in *National Westminster Bank Plc v Morgan* [1985] AC 686 (although, see more recently, the possibly different approach indicated in *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200).

¹⁵³ See, similarly, the discussion, albeit brief, in favour of using an unconscionability principle to find breach of confidence in Roderick Meagher, William Gummow and John Lehane, *Equity, Doctrines and Remedies* (3rd ed, 1992) 871-2.

¹⁵⁴ See, eg, *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, concerning the restitution of an 'involuntary' payment made in mistake of law. The case is usefully discussed by Michael Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (1993) 15 *Sydney Law Review* 461.

¹⁵⁵ A possible exception is *Seager v Copydex Ltd*, where Lord Denning referred to the equitable obligation as an obligation of 'good faith', a statement which was cited in support of the restitutionary analysis in Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence' and Goff and Jones, *The Law of Restitution*, above n 150.

¹⁵⁶ It should be noted, however, that Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence' and Goff and Jones, *The Law of Restitution*, above n 150, take the view that a restitutionary jurisdictional basis for breach of confidence would not limit the remedies available so as to exclude an injunction.

¹⁵⁷ See, for a (speculative) discussion of the possible non-economic motives for disclosing personal and private information, above n 57.

stake.

As Finn has pointed out, an argument that a person has acted 'unconscionably' towards another recognises that there has been exploitation of a position of vulnerability on that person's part.¹⁵⁸ The exploitation is based on the person's actual or constructive knowledge of the other's vulnerability, and the unconscionability lies in taking advantage of that vulnerability.¹⁵⁹ Applying this to the case of surreptitiously or accidentally obtained information of a private and personal nature, a person who surreptitiously or accidentally obtains such information and who knows or has reason to know that the owner is vulnerable to its not being treated as confidential, acts unconscionably in disclosing the information.¹⁶⁰ Thus, the obligation of confidence arises through the circumstances in which the information is obtained and its confidentiality made apparent and the breach of confidence is the disclosure of the information in those circumstances.

The advantage of such an approach is not only one of consistency with the present law as exemplified, in particular, in *Franklin v Giddins*, but also that it comes closest to acknowledging the utilitarian policy basis for using the law to protect privacy interests. The approach acknowledges that the value at stake is the freedom of those who seek to prevent access to private and personal information, and that there is a corresponding obligation placed on others to respect this freedom, regardless of whether the information has any proprietary 'value' as such, or whether there is any 'benefit' to be obtained from its use for restitutionary purposes.

CONCLUSION

In *Attorney-General v Guardian Newspapers (No 2)*, Lord Goff suggested that the doctrine of breach of confidence applies if a person discloses confidential information, whether received in confidence or otherwise obtained, in the reasonable knowledge that it should be treated as confidential.¹⁶¹ It has been argued that this approach clarifies some of the ambiguities in the present law

¹⁵⁸ See Paul Finn, 'The Fiduciary Principle' in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1.

¹⁵⁹ *Ibid* 6, where Finn elaborates as follows:

In its primary setting, (unconscionability's) concern is with relationships (ordinarily, though not necessarily, culminating in contractual outcomes) in which both parties would, as a matter of course, be expected to look after their own interests in their dealings *inter se*, but in which one party, because of his own circumstances or because of the relative positions of both, is in fact unable to conserve his own interests. That person is vulnerable to exploitation and, on occasion, to manipulation at the hands of the other. At least where that other knows or has reason to know of that vulnerability, the courts will countenance claims that the other should be held responsible in some measure for the protection of the vulnerable party's interests in dealings between them.

Note that here the term 'relationship' is used in a looser sense than is normally thought to be appropriate for a 'relationship of confidence'.

¹⁶⁰ See *Franklin v Giddins* and, in particular, n 134 and accompanying text.

¹⁶¹ [1990] 1 AC 109, 117. See above n 8 and accompanying text. The statement might be taken to suggest the information must be actually received or obtained with notice of its confidentiality. However, that was not argued in Gareth Jones, 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 *Law Quarterly Review* 463, on which Lord Goff's statement appears to be based: see above n 150.

regarding the treatment of surreptitiously or accidentally obtained information and provides a simple answer to the problems of fully accommodating a utilitarian policy of information privacy protection within the law of confidential information. Moreover, it is consistent with the general equitable principle underlying the law.

Effectively, the approach seeks to assimilate the obligation of confidence for information obtained in confidence to the obligation which applies for information imparted in confidence, and which has been proved to work satisfactorily. Moreover, given the constraints which have been accepted to apply to the doctrine of breach of confidence,¹⁶² there is no need for great difficulty or uncertainty in its application to surreptitiously or accidentally obtained information.¹⁶³

APPENDIX: THE APPROACH APPLIED IN PRACTICE

A consideration of some of the possible cases in which a breach of confidence may occur through the use of personal and private information obtained rather than imparted in confidence indicates that the guiding principle of the information being possessed with notice of its confidentiality can be applied without undue unfairness or uncertainty.

A *Information spoken over the telephone in the privacy of a person's house and which is overheard by a third person due to crossed lines.*

The person who overheard the information is, or should be, aware that the lines had been crossed and so there would *prima facie* be a breach of confidence if he or she proceeded to disclose the information to anyone else.¹⁶⁴ The situation is different from one where information is blurted out in public and thus loses any confidentiality.¹⁶⁵ Rather than placing the risk of publication on the person using the telephone, the risk is on the one who overhears, who would be under an obligation to respect the speaker's confidentiality in the same way as someone who was told the information in confidence.¹⁶⁶ A remedy for breach of confidence may not be available if the information in question is merely trivial. But where the privacy of the information is of serious concern for a person's future life,¹⁶⁷ that argument would not prevail.

¹⁶² For instance, that the information should not be trivial, that its confidentiality be known or reasonably apparent and that there be no overriding public interest in favour of its disclosure — see above nn 113-4 and accompanying texts and, further, n 148.

¹⁶³ This is further indicated by the discussion of examples in the Appendix which follows.

¹⁶⁴ Note that this is contrary to what was suggested by Megarry VC in *Malone v Metropolitan Police Commissioner*: see text accompanying n 145.

¹⁶⁵ See *Coco v AN Clark (Engineers) Ltd* (1969) RPC 41, 47-8.

¹⁶⁶ However, the person using the telephone could not use breach of confidence principles to prevent the listener overhearing the conversation in the first place — and so there would still be some risk involved in using the telephone.

¹⁶⁷ For instance, involving a situation such as that in *Stephens v Avery* or *Melvin v Reid*.

B Documents concerning the financial affairs of a corporation which, through accident, come into the public domain

A distinction might need to be made between, for instance, unmarked documents left lying in a public place and documents left in a clearly marked confidential briefcase. In the second case, anyone who reads the documents is notified of the confidentiality of their contents, and the owner is entitled to have that confidentiality respected — unless the information indicates misconduct of such a nature that there is a public interest in having the information disclosed.¹⁶⁸ The situation is more difficult if the documents are not marked confidential and it is only after reading them that their nature becomes apparent. Nevertheless, here it is still arguable that there is a future obligation to respect their confidentiality.¹⁶⁹

C Information which is simply observed about a person or group of persons in a private or secluded place.

The information can be obtained even though it is not directly spoken (and therefore could never be imparted in confidence). The question is again, however, whether anything reasonably leads the observer to realise that what he or she observes is confidential. A distinction might also have to be made between the case where it is difficult for a passer-by to avoid observing the conduct¹⁷⁰ and the case of someone who goes out of his or her way to observe.¹⁷¹ In the first case, it can be argued that the information was effectively blurted out in public. Also, trivial information is not protected and it is unlikely that, for instance, the fact that the information showed a person wearing casual clothing would suffice for a remedy.¹⁷²

D Information obtained indirectly by a journalist about a public figure where the source of the information is an ex-employee or spouse.¹⁷³

Breach of confidence could be claimed both by the public figure as the owner, as well as, in appropriate circumstances, the source. If the information is obtained from, or imparted by, the 'owner' in circumstances indicating its confidentiality, then, assuming the source's disclosure was deliberate, the situation is one of third party liability.¹⁷⁴ Conversely, the source would have a

¹⁶⁸ See *Malone v Metropolitan Police Commissioner*, regarding the application of the public interest defence in that case.

¹⁶⁹ By analogy with the situation for third party liability, discussed above n 148.

¹⁷⁰ The distinction was not drawn in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 494-5 (Latham CJ, for instance) — although the defendant, in erecting his viewing platform, had gone to some trouble to view the plaintiff's horse races.

¹⁷¹ As in the case of the aerial photographs in *Bernstein v Skyways and General Ltd*.

¹⁷² Contrast, however, Posner, above n 51, at n 59 and accompanying text, where he suggests that the protection of the informality of dress and deportment should be sufficient for legal privacy rights.

¹⁷³ The example is offered by analogy with cases such as *Argyll v Argyll*, *Lennon v Newsgroup Ltd*, as well as *Woodward v Hutchins*.

¹⁷⁴ An analogy may be made with the treatment of third party liability in *X v Y* and *G v Day*.

cause of action against the journalist if the information was obtained from him or her through surreptitious or accidental means rather than deliberate disclosure. Finally, in this situation, the owner may also have a cause of action against the journalist on the basis that the information was obtained from him or her, albeit indirectly through the source. The journalist would be liable not as a third party but in his or her own right.¹⁷⁵

¹⁷⁵ Cf the position under the Privacy Act 1988 (Cth), discussed above nn 37-8.