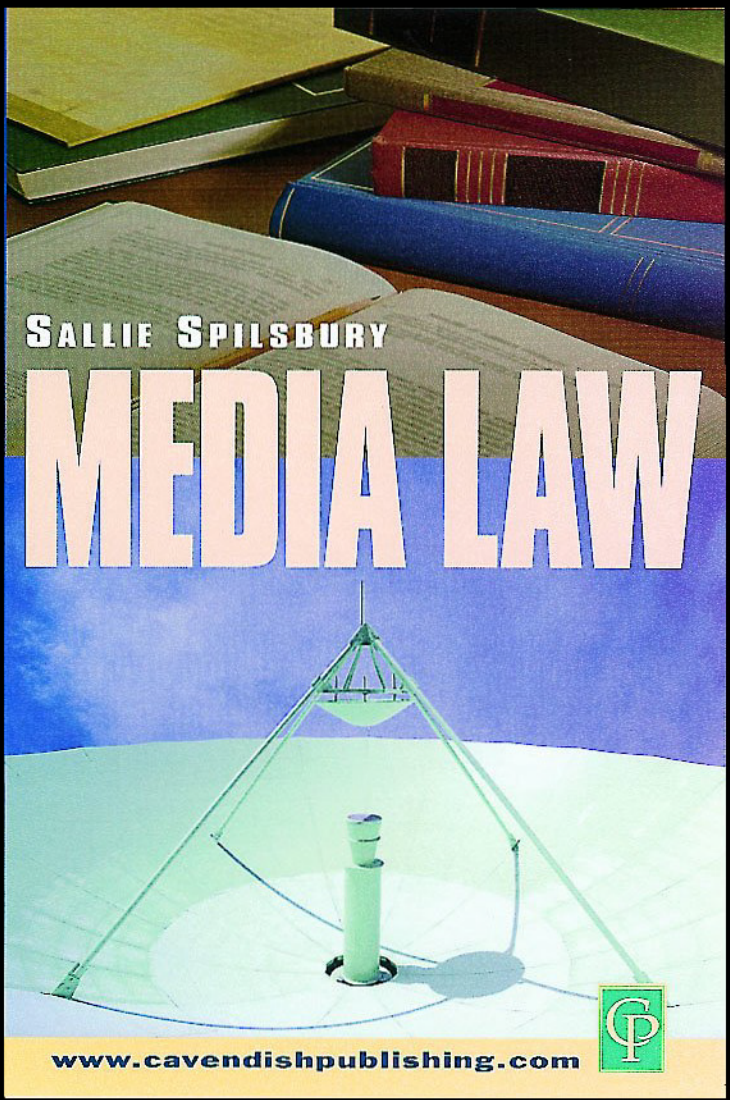
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BREACH OF CONFIDENCE

The emergence of the law of breach of confidence is one of the most significant developments for media law. The cause of action is relatively flexible and has been adapted to suit a variety of circumstances. In some instances, the action for breach of confidence has given claimants a legal tool to restrain unethical media activity. The action also provides an indirect means for the protection of privacy – a development that has the blessing of the Lord Chancellor.[1]

Yet the very flexibility which makes the action for breach of confidence such a useful tool for claimants also diminishes the action. As we shall see, there are uncertainties about the fundamental elements of the action, including the very principles on which it is based. In such a sea of uncertainty it is often difficult to predict with accuracy how the law of confidence will be applied. As Knox J noted in the case of *De Maudsley v Palumbo*,[2] 'so far as the law on the subject is concerned, although the broad general principles have been established at the highest level, there are still important issues which remain to be definitively settled'. One might even dispute whether the broad general principles are firmly established, at least outside the context of commercially valuable trade secrets. This makes it difficult for the media to regulate their own activities when the legal background against which those activities are judged is regularly shifting. On the plus side, the inherent flexibility means that the action can be adapted by the judiciary to provide relief where there is none available from any other source.

In this chapter, we shall examine how the action for breach of confidence has been developed with particular reference to media activity. As we shall see, this has largely been a piecemeal development on a case by case basis which has led to inconsistencies. It has also fostered an atmosphere where deficiencies in English law, such as the current lack of the right to privacy, can go uncorrected. The action for breach of confidence creates the impression that the law offers redress for such grievances, when in fact it goes only part of the way to doing so.

The law of confidence affects the media in two key areas. The first, and most significant for the long term interests of the media, is that the courts have tended to be easily persuaded to grant interim injunctions to restrain publication of allegedly confidential material, at least before the coming into

1 *Hansard*, HL, 24.11.1997, col 783.

2 *De Maudsley v Palumbo* [1996] FSR 447.

force of the Human Rights Act 1998. The action for breach of confidence is one of the main ways in which prior restraint has been applied to the media.[3]

The second area in which the cause of action can have relevance for the media relates to the protection of ideas which are submitted on a confidential basis, for example, ideas for scripts or television show formats.

The basis of the action for breach of confidence

In its 1984 Report,[4] the Law Commission noted that there was 'uncertainty as to the nature and scope of the remedy [for breach of confidence] owing to its somewhat obscure basis'.

One of the earliest cases which might properly be described as an action for breach of confidence dates back to 1849. The case concerned royalty in the shape of Prince Albert, consort to Queen Victoria.[5] The facts were as follows.

Prince Albert and Queen Victoria created a series of etchings. A number of impressions of their drawings were made from the etchings by a printer at the request of the royal couple. It seems that one of the employees of the printer retained a number of the copy drawings and sold them to the defendant, who planned to exhibit the copy drawings in public. The Prince Consort commenced proceedings against the defendants, claiming an injunction to restrain publication of any of the etchings and of the prints made from them. In his evidence, the prince deposed to the fact that the etchings in question were kept securely at Windsor Castle and were not made available to the general public.[6]

The court granted the injunction at first instance. The decision was confirmed on appeal.

In his judgment, the Vice Chancellor referred with approval to *obiter* remarks made by Yates J in the 1769 case of *Miller v Taylor*,[7] concerning a confidential manuscript:

> Every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public or commit them only to the sight of his friends. In that state, the manuscript is, in every sense, his personal property; and no man may take it from him, or make any use of it which he has not authorised, without being guilty of a violation of his property.

3 Prior restraint and breach of confidence was considered in Chapter 2.

4 Law Commission, *Report on Breach of Confidence*, Law Com No 110, 1984.

5 *Prince Albert v Strange* (1849) 2 De G & Sm 652.

6 Original drawings would qualify for copyright protection in modern times, but not at the time of this case. The prince's counsel conceded at the hearing that prints made from etchings did not qualify for copyright protection. The prince therefore had to find other causes of action in order to obtain relief.

7 *Miller v Taylor* (1769) 4 Burr 2303.

By analogy to the above, the court held that the Prince Consort had a right of personal property in the etchings and in prints or impressions taken from the etchings. The unauthorised reproduction of the etchings would be a violation of that right.

The Vice Chancellor also placed weight on the *means* by which the defendant had obtained the etchings. He found that the defendant must have come into possession of the etchings by 'a breach of trust, confidence or contract'.

He noted that 'this case by no means depends solely on the question of property, for a breach of trust, confidence or contract, would *of itself* entitle the plaintiff to an injunction' [emphasis added].

The breach of trust, confidence or contract rationale for awarding relief recurred in the 1851 case, *Morrison v Moat*.[8]

The claimant brought proceedings in respect of the unauthorised disclosure of a secret recipe for medicine which he has disclosed to his business partner, the defendant. The disclosure had been on the express undertaking given by the defendant that he would not disclose the recipe to anyone else. In breach of that obligation the defendant disclosed the recipe to his son.

The court granted relief to the claimant. Turner VC stated that 'it was clearly a breach of faith and of contract … to communicate that secret'.

As with the *Prince Albert* case, the court in *Morrison v Moat* focused on the relationship between the parties and, in particular, on the obligation of trust and confidence that had been found to exist. Neither decision was dependent on the breach of a *contractual* duty of good faith or confidentiality. The obligations were deemed to arise independently of any contract. In more recent times, Lord Denning made the same point when he stated that 'the law on this subject [breach of confidence] does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it'.[9]

Defining the action

An attempt to define the constituent elements of the emerging cause of action was not made until the 1969 case of *Coco v AN Clark (Engineers) Ltd*.[10] In that case, Megarry J identified the essentials of the cause of action, drawing on what was then the case law to date, as follows:

8 *Morrison v Moat* (1851) 9 Hare 241.

9 *Fraser v Evans* [1969] 1 All ER 8.

10 *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41, p 47.

- the information for which protection is sought must have 'the necessary quality of confidence' about it; and
- the information must have been imparted in circumstances importing an obligation of confidence; and
- there must have been unauthorised use of the information (to the detriment of the party communicating it?).

These elements offer a useful starting point for examining the ambit of the cause of action as it exists today. The elements have been refined over time and continue to exist as a focus for debate. They form the basis for much of the present day uncertainty about the ambit of the action.

Identifying the confidence

It is essential that a claimant in an action for breach of confidence is able to identify with precision what the material is for which confidentiality is alleged. A defendant must know what it is he is accused of misusing. Actions for breach of confidence can fail because the material on which a claim is based is not clearly identified or identifiable. In the case of *CMI-Centers for Medical Innovation GmbH v Phytopharm plc*,[11] the parties entered into an agreement for the development of a drug. During the lifetime of the agreement, the claimant alleged that it had made certain oral disclosures about the drug to the defendant. The negotiations between the parties then broke down. The claimant later learnt that the defendant was working independently on its own drug derived from the same plant. It alleged breach of confidence against the defendant. The claim failed, partly on the ground that the claimant was unable to identify with any precision what information of a confidential nature it had disclosed to the defendant. The court held that an injunction based on the oral explanations that the claimants said they had provided to the defendant would be too uncertain.

It is therefore a good idea for a party who is disclosing information to a third party on the basis that it is to be kept confidential (for example, an idea for a show format or a play synopsis) to ensure that the confidential information can be readily and precisely identified. To this end, the disclosure ought ideally to be made in writing so that there can be no argument as to what has been disclosed, with the date and the circumstances of disclosure also recorded.

11 *CMI-Centers for Medical Innovation GmbH v Phytopharm plc* [1999] FSR 235.

The 'necessary quality' of confidence

The first of the criteria identified by Megarry J in the *Coco* case was that the material which the claimant seeks to protect must be confidential. As Megarry J observed in *Coco*, 'there can be no breach of confidence in revealing to others something which is already common knowledge'.

Megarry J based his views on the earlier judgment of Lord Greene MR in *Saltman Engineering v Campbell Engineering*.[12] In that case, Lord Greene noted that information, in order to be confidential, must 'have the necessary quality of confidence about it, namely it must not be something which is public property and public knowledge'.

In the case of *Woodward v Hutchins*,[13] when the claimant pop singer, Tom Jones, sought to restrain disclosure of confidential information by a former employee about the singer's lifestyle, the Court of Appeal declined to award an injunction. One of the grounds for the refusal was the lack of confidence in the material which the claimant sought to restrain. Lord Denning observed that:

> [The injunction] speaks of 'confidential information'. But what is confidential? … The incident [concerning allegedly drunken behaviour on an aircraft] … was in the public domain. It was known to all the passengers on the flight. Likewise with several other incidents in the series.

He also observed:

> Any incident which took place at [a public dance] would be known to all present. The information would be in the public domain. There could be no objection to the incidents being made known generally. It would not be confidential information.

The meaning of the 'public domain'

In the case of *Barrymore v News Group Newspapers*,[14] (the facts of which are considered below), Jacob J felt that information ceased to be confidential, and therefore entered the public domain, when known to 'a substantial number of people'. He noted that 'the mere fact that two people know a secret does not mean that it is not confidential. If, in fact, the information is secret, in my judgment it is capable of being kept secret by the imposition of a duty of confidence on any person to whom it is communicated'.

12 *Saltman Engineering v Campbell Engineering* [1963] 3 All ER 413.

13 *Woodward v Hutchins* [1977] 2 All ER 751.

14 *Barrymore v News Group Newspapers* [1997] FSR 600.

In the *Spycatcher* litigation, Lord Goff expressed the view that information entered the public domain when it is so generally accessible that, in all the circumstances, it cannot be regarded as confidential.[15]

The question whether information is confidential for the purposes of an action for breach of confidence is therefore a question of degree. It involves asking such questions as 'who had access to the information?' and 'was it generally available or was it restricted to certain people?'. The fewer people who have access to it, the more likely it is to be confidential.

It is clear that the test is dependent on the accessibility of the information. This is a question of substance rather than form. Simply labelling material 'confidential' will not of itself give the information confidential status if it is in fact generally available.

Breach of confidence and particular types of confidential information

Information of a trivial nature may not be protected

In the *Coco* case,[16] Megarry J observed in *obiter* remarks that it was doubtful whether equity would intervene to protect information by way of breach of confidence unless the circumstances in question were of sufficient gravity. He said that equity ought not to be invoked merely to protect trivial tittle-tattle, however confidential. Lord Goff supported this view in the *Spycatcher* litigation, although he observed that it would only apply to prevent the protection of trivia 'of the most humdrum kind'.[17] In *Stephens v Avery*,[18] it was held that it was doubtful whether gossip about a person's sex life could properly be construed as 'trivial' and thus unprotectable under the law of confidence.

Personal information

The protection which the law of confidence provides for confidential personal information has given rise to a situation where the law of confidence is akin to a law for the protection of privacy. Lord Keith has observed, of the law of confidence: 'the right to personal privacy is clearly one which the law in this field should seek to protect'.[19] The Court of Appeal has also explicitly

15 *AG v Guardian (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109.
16 *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41.
17 *AG v Guardian (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109.
18 *Stephens v Avery* [1988] Ch 449; [1988] 2 All ER 477.
19 *AG v Guardian* (No 2) [1988] 3 All ER 545, p 638.

recognised that, in relation to confidential information, 'the concern of the law here is to protect the confider's personal privacy'.[20]

Communications between husband and wife and disclosure of details of intimate relationships by a party to the relationship

In the case of *Argyll v Argyll*,[21] the court held that the publication of confidential information relating to the claimant's private life, personal affairs or private conduct by the claimant's husband would be restrained on the ground that communications between husband and wife were capable of being confidential information, the disclosure of which by one party to the marriage could be restrained by injunction. Ungoed Thomas J was of the view that:

> There could hardly be anything more intimate or confidential than is involved … in the mutual trust and confidences which are shared between husband and wife. The confidential nature of the relationship is of its very essence …

The decision has been extended in other cases to cover disclosure of details of a relationship outside marriage by one of the parties to the relationship. For example, in the case of *Barrymore v News Group Newspapers*,[22] Jacob J considered disclosures to the media by one partner in a sexual relationship of details of that relationship to be in breach of confidence. He observed that common sense dictated that, when people entered into a personal relationship of that nature, it was not done for the purpose of publication in the newspapers; the information about the relationship was for the relationship, not for a wider purpose.

He went on to say that:

> When people kiss and later one of them tells, the second person is almost certainly breaking a confidential relationship, although this might not be the case if they merely indicate that there had been a relationship and do not go into detail. In this case the article went into detail about the relationship and crossed the line into arguable breach of confidence.

This judgment, like the *Argyll* judgment before it, is an important milestone in the development of the law of breach of confidence in its role as protector of privacy. It paves the way for a party who is the subject of a 'kiss and tell' exposé in the media to restrain the disclosure of confidential and private information about the relationship (subject to any defences which might be raised by the defendant. These are considered below).

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20 *R v Department of Health ex p Informatics* [2000] 1 All ER 786.

21 *Argyll v Argyll* [1965] 1 All ER 611.

22 *Barrymore v News Group Newspapers* [1997] FSR 600.

Information of a sexual nature

The court has considered whether information relating to sexual conduct can have the necessary quality of confidence on a number of occasions.

In *Stephens v Avery*,[23] the claimant and the first defendant were close friends who discussed matters of a private nature on the basis that what the claimant told the defendant was secret and disclosed in confidence. The first defendant passed on to the second and third defendants (who were the editor and publisher of a national newspaper) details of the claimant's sexual conduct, including details of the claimant's lesbian relationship. The claimant sought to restrain publication on the ground that it was in breach of confidence. The defendants applied to strike out the claim on the ground that it disclosed no reasonable cause of action. They contended that information about a person's sexual behaviour outside marriage was not protected by the law relating to confidential information because such behaviour was immoral. The defendant's application was unsuccessful. The court declined to grant the injunction. Whilst Browne-Wilkinson VC fully accepted that a court of equity would not enforce a duty of confidence relating to matters with a grossly immoral tendency, he found it hard to identify what sexual conduct would fall into that category in the present day when there is no generally accepted code of sexual morality. He noted that 'the court's function is to apply the law, not personal prejudice. Only in a case where there is still a generally accepted moral code can the court refuse to enforce rights …'. He also rejected as misconceived an argument that information relating to mutual sexual conduct could not be confidential because both parties to it must be aware of the conduct (see above in relation to the point at which information ceases to be confidential).

Jacob J followed *Stephens v Avery* in the more recent case of *Barrymore v News Group Newspapers* (which also concerned the disclosure of details of a homosexual relationship). He observed that 'to most people, the details of their sexual lives are high on their list of those matters which they regard as confidential'.

Photographs as confidential material

A person's appearance would not normally be thought of as confidential. The appearance is there for the entire world to see. But the courts have shown themselves willing in certain circumstances to treat the publication of photographs of an individual without consent as a breach of confidence.[24]

23 *Stephens v Avery* [1988] Ch 449; [1988] 2 All ER 477.

24 The courts have not yet found a breach of confidence where a photograph has simply been taken with no threat to publish.

This application of the law of confidence has important repercussions for the protection of privacy.

Photographs taken for a particular purpose

The earliest instance of the unauthorised use of a photograph giving rise to a breach of confidence occurred in 1889 in the case of *Pollard v Photographic Co*.[25] Mrs Pollard had her photograph taken at the defendant's photographic shop for her own private use. The defendant used the photograph without her consent by displaying it in the shop window in the form of a Christmas card. North J held that the unauthorised use of the photograph was a breach of confidence and observed that:

> The customer who sits for the negative … puts the power of reproducing the object in the hands of the photographer: and, in my opinion, the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer.

A similar decision was reached in *Hellewell v Chief Constable of Derbyshire*.[26] The facts of the case were as follows. In 1989 the claimant, who had a number of previous convictions, was arrested and taken to a police station where he was charged with theft. At the station, he was photographed pursuant to the provisions of the Police and Criminal Evidence Act 1984. The photograph took the form of a 'mug shot'. The judge found that it was in such a form that it would convey to anyone looking at it that its subject was known to the police.

In 1992, an organisation of shopkeepers in the vicinity, who were concerned about the local level of shoplifting, asked the police to supply them with photographs of known local troublemakers with the idea that it would help the shopkeepers and their staff to recognise them. The police supplied the shopkeepers with a number of photographs – including the 1989 mug shot of the claimant. The police gave the shopkeepers guidelines for the use of the photographs – namely, that they should not be publicly displayed, and that only the shopkeepers and their staff should see them.

When the claimant learned of this use of his mug shot, he commenced proceedings for breach of confidence against the police seeking an injunction to restrain the police force from disclosing the photograph. The judge, Laws J, found that a duty of confidence could arise when the police took a photograph of a suspect.

The judge analysed what the confidential material consisted of. He noted that the photograph would convey the fact that the claimant was known to the

25 *Pollard v Photographic Co* (1889) 40 Ch D 345.

26 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804; [1995] 4 All ER 473.

police. That, he said, was not a public fact. It was capable of being a piece of confidential information. Citing *Pollard*, he stated that:

> I entertain no doubt that disclosure of a photograph may, in some circumstances, be actionable as a breach of confidence. If a photographer is hired to take a photograph to be used only for certain purposes but uses it for an unauthorised purpose of his own, a claim may lie against him.

But what of the situation where rather than the photograph being taken for a particular purpose, the photograph is taken without the subject being aware that it has been taken at all? In *Hellewell*, Laws J considered this scenario. He observed that if someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph of the private act would surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. He noted that:

> In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence.

Whether this is a determinative statement of the law is far from conclusive. The remarks were *obiter*. There was no consideration of what might amount to a 'private act'. Nor did the judge consider whether there was a need for an obligation of confidence (the second of the elements of the action identified by Megarry J in *Coco*) between the unknown photographer and the subject of the photograph. The need for an obligation of confidence is considered below.

The contents of conversations

The courts have had to consider on two occasions whether the contents of a telephone conversation which was being surreptitiously tapped could be said to be confidential. Different conclusions were reached in both cases. In *Malone v Metropolitan Police Commissioner*[27] (the facts of which are considered below in relation to the duty of confidence), Megarry VC held that, in an instance of 'authorised' tapping by the Metropolitan Police, the conversation could not be said to be confidential information. He said: '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 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.'

The second case is *Francome v Mirror Group*,[28] which concerned unlawful tapping by a private individual. The Court of Appeal distinguished *Malone*

27 *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344.

28 *Francome v Mirror Group* [1984] 2 All ER 408.

from the *Francome* case on the ground that *Malone* concerned the authorised tapping by the police. *Francome* concerned unsanctioned, and therefore illegal, tapping by a private individual. The court said that it must be questionable whether the user of a telephone could be regarded as accepting the risk of illegal tapping in the same way as he accepts the risk that his conversation may be overheard in consequence of the risks inherent in the telephone system. The Court of Appeal held that there was a serious issue to be tried on the matter of confidentiality. The case did not proceed further.

It is difficult to reconcile the approach which the court took in the *Malone* case with Jacob J's decision in the *Barrymore* case as to the meaning of the 'public domain'. Jacob J emphasised the degree to which the confidential information is generally available as the determining factor in deciding whether information is confidential. The *Malone* decision, and to a lesser extent the decision in *Francome*, focuses on the reasonable expectations of the parties to the conversation – should a reasonable person expect to be overheard? If someone accidentally overhears a face to face conversation concerning something confidential, would the parties to the conversation lose the right to restrain disclosure of the conversation by the eavesdropper because they ought to have appreciated that they might be overheard (as the *Malone* case suggests) or ought the confidential nature of the information be dependent on the extent to which it is generally known (the *Jacob* decision)?

It is suggested that Jacob J's approach is to be preferred. Once material becomes known to a substantial number of people, it should cease to be confidential. This test should not be dependent on whether the subject has knowledge of the risk that the confidential material might be seen or overheard.

The disclosure of ideas[29]

In the media industries, literary, creative or entertainment ideas are often disclosed to broadcasters or to the press as proposals for development. For example, television programme formats, film treatments and plot synopses are sent to film and television companies on a regular basis. To what extent are they capable of protection as confidential information? The leading case in this area is *Fraser v Thames Television*.[30]

The claimants conceived the idea for a television series about the formation of a female rock group. Much of their idea was based on the lives of the claimants themselves. They disclosed their ideas to the defendant television company. The television company decided to make the series

29 Where an idea is sufficiently developed and recorded in a permanent form, eg, in writing, it may also qualify for copyright protection. See Chapters 6 and 7 for further detail.

30 *Fraser v Thames Television* [1983] 2 All ER 101 (the 'Rock Follies' case).

without the involvement of the claimants. The claimants alleged that the use of their ideas without permission was in breach of confidence.

Counsel for the defendant accepted that, as a matter of principle, the law of confidence was capable of protecting the confidential communication of an idea. However, he argued that a literary or dramatic idea cannot be protected unless it is fully developed in the form of a synopsis or treatment and embodied in a permanent form.

Hirst J did not accept the defendants' arguments. He held that for a literary, dramatic or entertainment idea to have the status of confidential information it must:

- contain some significant element of originality not already in the realm of public knowledge. The originality could take the form of a significant twist or slant to a well known concept;
- be clearly identifiable as the idea of the confider;
- be of potential commercial attractiveness;
- be sufficiently well developed to be capable of actual realisation and attractiveness. This would not necessitate a full synopsis in every case. It would depend on the facts.

The idea need not be expressed in writing:

> Neither the originality nor the quality of the idea is in any way affected by the form in which it is expressed. No doubt both the communication and the content of an oral idea may be more difficult to prove than in the case of a written idea, but difficulties of proof should not affect the principle …

The judge concluded on the facts that there had been a breach of confidence.

Similar facts arose in the case of *De Maudsley v Palumbo*.[31] The case concerned disclosure of an idea for a night club. The claimant alleged that the defendants had used his idea without his consent and that the use was a breach of confidence. The claimants' idea had five features which, in combination, were said to be original. They were:

- the club would open all night long (at the time of the disclosure of the idea, this was highly unusual in the UK);
- the club would be large and decorated in 'high tech industrial' style;
- the club would incorporate separate areas for dancing, resting and socialising and a VIP lounge;
- the club would have a separate enclosed dance area having an acoustic design to ensure high sound quality, light and atmosphere with no leakage outside the dance area;
- top UK and international DJs would appear.

31 *De Maudsley v Palumbo* [1996] FSR 447.

Considering the criteria for a protectable idea identified by Hirst J in the *Rock Follies* case, Knox J held that the features which formed the claimant's idea were too vague, they were not sufficiently elaborated, nor were they sufficiently novel either individually or in combination to enjoy the status of confidential information. To enjoy protection as a confidential idea, he held that the idea must go beyond identifying a desirable goal. A 'considerable degree of particularity in a definite product needs to be shown'. He said that this did not exclude simplicity, but that vagueness and simplicity were not the same thing.

Information which is embargoed for a limited time

What is the position where information is confidential in the short term only, but will shortly be made available in the public domain?

Limited exclusivity

The media sometimes purchase the exclusive rights to publish extracts from books in advance of the publication date. Where a rival media entity publishes a 'spoiler' in order to diminish the value of the exclusivity, to what extent can the owner of the exclusive rights claim that the rival has breached its confidence in the material? The material has not yet been published and is therefore not freely available to the general public. But it will be published at a future date. Can it therefore be considered to be confidential?

This point was considered in the case of *Times Newspapers v Mirror Group Newspapers*.[32] *The Sunday Times* had obtained exclusive serialisation rights to publish extracts from Lady Thatcher's memoirs in advance of their publication date. Prior to the serialisation by *The Sunday Times*, the *Daily Mirror* published a series of articles based on, and containing quotations from, the book. The claimant, which publishes *The Sunday Times,* sought an interim injunction to restrain the publication of any further articles in breach of confidence. The Court of Appeal declined to award an interim injunction. It noted that the information contained in the memoirs was not confidential in the sense that the public were never supposed to know about it. The confidentiality arose from the fact that the material was not intended to be made public until publication by *The Sunday Times*. Sir Thomas Bingham MR stated that to class such information as having the necessary quality of confidence appeared to him 'to be transferring from the area of commercial interest in exclusivity to the realm of confidence, a right which has not hitherto been recognised in law'. The court did not feel that it was appropriate to restrain publication by the defendant on an interim basis in such

32 *Times Newspapers v Mirror Group Newspapers* [1993] EMLR 443.

circumstances. The question whether such information could properly be regarded as confidential has therefore been left open. As far as the author understands it, *The Sunday Times* has not pursued the application.

Injunctions to restrain the publication of information which is or will shortly be in the public domain

Under s 2 of the Human Rights Act 1998 (discussed in detail in Chapter 1), the fact that information is or will shortly be in the public domain is a factor which the court must consider when deciding whether to grant an injunction (or other relief, including damages) where the relief may affect freedom of expression in relation to journalistic, literary or artistic material.[33] The Home Secretary has indicated that, where the material at issue will shortly be available anyway, for example, in another country or on the internet, it must affect the decision whether it is appropriate to restrain publication.[34] Note that the impending publication will not be determinative as to whether relief should or should not be granted. In *AG v Guardian Newspapers (No 2)*,[35] Lord Keith indicated that even where information was in the public domain abroad, it might still be appropriate to restrain publication in this country, for example, where publication in England would bring the information to the attention of people who would otherwise be unlikely to learn of it and/or where English audiences would be more likely to be interested in the information than foreign audiences would be.

Often, claimants argue that, although the information has been published in the public domain, further publication should still be restrained by injunction on the basis that it will exacerbate the damage already caused. Before the Human Rights Act comes into force, the courts lent a sympathetic ear to such arguments. It remains to be seen how the Human Rights Act will affect the position in practice. Pre-Human Rights Act case law on this issue is likely to remain relevant once the Human Rights Act comes into force, at least as a pointer of the type of issues and argument which may come before the courts.

Where information has become public, a claimant will also have difficulties in establishing that the obligation of confidence (the second requirement identified in *Coco v Clark*) remains in force. This is discussed in relation to the existence of the obligation of confidence, below.

33 HRA 1998, s 12. See Chapter 1 for further detail.

34 *Hansard*, 2.7.1998, col 538.

35 *AG v Guardian Newspapers (No 2)* [1988] 3 All ER 545, p 642; [1990] 1 AC 109.

Information already in the public domain – pre-Human Rights Act case law

There have been cases where the courts have restrained publication of information as a breach of confidence, although the information is already generally available.

In the case of *Schering Chemicals v Falkman*,[36] the Court of Appeal found that information which had already been publicised to the general public could still be the subject of an injunction to restrain breach of confidence.

The first and second defendants undertook to organise a training course for the claimant's management. The impetus for the course was the need to counter bad publicity surrounding one of the claimant's products, the drug Primodos. The first defendant contracted with the claimant that it would keep information imparted to it by the claimant for the purposes of the course confidential. The first defendant engaged the second defendant as an independent contractor to provide tuition to the claimant's management. There was no contract between the claimant and the second defendant. The second defendant was not under an express obligation not to disclose the information provided to him by the claimant for the course. The claimants alleged that the information which it disclosed to the first and second defendants for the purposes of the course was confidential. In fact, the court found that the information had previously been published in a number of press articles and television programmes. The third defendant, Thames Television, made a television documentary about Primodos based on some of the information given to the second defendant by the claimant. The claimant alleged that the defendants were in breach of confidence.

Of the three defendants, only the first defendant had a contract with the claimant. The action against the second and third defendant was based solely on the equitable principle of breach of confidence.

The majority of the Court of Appeal held that all three defendants were in breach of confidence. The decision was reached notwithstanding that the information disclosed by the second defendant to Thames Television had already been published. Templeman LJ stated:

> The information supplied by Schering to the second defendant had already been published, but it included information which was damaging to Schering when it was first published and which could not be republished without the risk of causing further damage to Schering. The second defendant must have realised that Schering would not supply [him] with any information at all if they thought for one moment that there was any possibility that he might make use of that information for his own purposes and in a manner which Schering might find unwelcome or harmful.

36 *Schering Chemicals v Falkman* [1981] 2 All ER 321.

He went on to say:

> There is nothing to prevent any journalist or television company … from making a film about Primodos provided that they do not employ the services of [the first and second defendants] who can only give those services by making use of information which they received from Schering.

The majority of the Court of Appeal appeared to be outraged at the notion that someone who had obtained information for a specific purpose should be able to make use of it to the detriment of the communicator. In their view, such a situation was unconscionable. When the second defendant agreed for reward to take part in the training course and received information from the claimant, the court held that he came under a duty not to use that information for the very purpose which the claimant sought to avoid, namely, bad publicity in the future. The court's focus was on the breach of trust that had occurred between the claimant and the first and second defendants notwithstanding that the material disclosed to the second defendant was not confidential at the time of disclosure. That focus appears to have weighed more heavily in the judges' minds than the need for the information actually to be confidential.

The dissenting judgment came from Lord Denning, who took the more orthodox view that, whilst the defendants owed a duty to the claimant not to disclose confidential information, there was no breach of the duty (at least by the defendants who had no contractual relationship with the claimant) where the information in question had entered into the public domain. It is submitted that Lord Denning's judgment is to be preferred. The majority decision was criticised by the Law Commission in its 1984 Report[37] and by the House of Lords in *AG v Guardian Newspapers (No 2)*.[38]

A similar issue fell to be considered during the course of the *Spycatcher* litigation.[39] Unlike the *Schering* case, the information in the *Spycatcher* case *was* originally confidential when disclosure was first threatened. The issue was not prior publication, but publication during the course of the litigation – could the further disclosure by the defendants who were already subject to interim injunctions continue to be restrained as a breach of confidence once the information had become public? Whilst it was eventually held that permanent injunctions should not be granted in respect of information in the public domain, interim injunctions were continued despite the fact that the allegations were freely available around the world, the damage which could accrue to national interest if the injunctions were lifted being held to outweigh the fact that the information was in the public domain.[40]

37 Law Commission, *Report on Breach of Confidence*, Law Com No 110, 1984.

38 *AG v Guardian Newspapers (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109.

39 The facts of the litigation were described in Chapter 2.

40 This reasoning was subsequently rejected by the European Court of Human Rights: *Observer v UK* (1991) 14 EHRR 153.

Despite the fact that both the *Schering* case and the *Spycatcher* decision have been comprehensibly discredited, the spectre of the injunction to restrain what is in the public domain continues to live on. This was graphically illustrated in a recent high profile case (decided before the Human Rights Act came into force).

The case[41] related to the family life of the Prime Minister Tony Blair. The family's former nanny provided information to *The Mail on Sunday* about the Blair family life. An article appeared in the first edition of the newspaper, which is available on late Saturday evening both for purchase and for transportation around the country. In the very early hours of Sunday morning, the Prime Minister's wife obtained an injunction restraining publication of the information about the family. The cause of action was breach of confidence (although it was, essentially, the family's privacy for which protection was being sought). The nanny had signed a confidentiality agreement with the Blairs, which placed her under an obligation to keep information about the Blairs secret.

By the time that the application for the injunction was made, the newspaper was already on the streets and in the process of being transported around the country (the injunction does not appear to have been brought to the attention of the transport company). The information contained in the first edition had accordingly already entered the public domain. There was no confidence left to protect. Yet an interim injunction was granted – resulting in the production of a later edition of the newspaper without the offending article.

It is inappropriate that an injunction should have been granted to restrain further publication of information already in the public domain. It is not clear whether this point was brought to the attention of the judge (the application having been heard over the telephone) but it would appear that the spectre of *Schering* lives on.

This is perhaps unsurprising, at least where the protection of personal information is concerned. Where the line between privacy and confidentiality becomes blurred, it is only to be expected that the focus of an application will be less on whether the information is, as a matter of fact, confidential (something that ought to be a prerequisite for an action for breach of confidence) and more on the violation and damage that the publication might cause (the very essence of an action for infringement of privacy).

In an almost simultaneous application to the Blairs', Mohamed Al Fayed sought an interim injunction to restrain the further serialisation by *The Daily Telegraph* of the memoirs of a former Al Fayed employee who had survived

41 Media coverage of the application included 'Nannygate' (2000) *The Guardian*, 7 March and 'Too much intrusion' (2000) *The Guardian*, 7 March. This case is not reported in the law reports.

the crash which killed Dodi Al Fayed and Diana, Princess of Wales. The injunction was refused, one of the grounds being that the application should have been made earlier, extracts from the memoirs having already been serialised in previous editions of the newspaper.[42] This decision would seem to be more in line with the nature of the action for breach of confidence, uncontorted to become a substitute for a privacy law.

The changes which s 12 of the Human Rights Act may bring to remedies which may affect freedom of expression were considered in detail in Chapter 1.

Where information is partly public and partly confidential

Where material is part public and part private, the courts have not been shy to restrain breach of confidence in the part of the material having confidential status. The practical difficulty arises in trying to separate the confidential material from the material in the public domain.

Lord Denning MR has offered the following advice to recipients of information which is partly public and partly confidential:

> When the information is mixed being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence.[43]

This was supported by Megarry J in the *Coco* case,[44] who noted that where information is a mixture of confidential and public material, the recipient must take care to segregate the two and, although free to use the public material, he must take no advantage of the communication of the confidential material.

The information must have been imparted in circumstances importing an obligation of confidence

This is the second element identified by Megarry J in *Coco*. He observed that 'however secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential'.

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42 (2000) *The Daily Telegraph*, 7 March.

43 *Seager v Copydex* [1967] 2 All ER 414, p 417.

44 *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41.

The obligation of confidence

The obligation of confidence can be imposed *contractually*. It is commonplace for commercial development agreements to contain a clause that information made available by one party to the other which is not in the public domain should not be disclosed by the other party. If that clause is breached, the owner of the confidential information would potentially have a remedy in breach of contract as well as for breach of confidence.[45]

But the obligation of confidence is not dependent on the existence of a contract. The law may imply an obligation of confidence in a wide variety of circumstances. This is one of the most crucial areas for the media. The implied duty might arise from the circumstances of the disclosure of the information or, more significantly, from the nature of the information itself. So, for example, if you were to find an obviously confidential document in the street, a duty of confidence might arise to restrain your use of the document even though there is no relationship whatsoever between the owner of the confidential information and you. This point is discussed further below.

The basis of the obligation of confidence

Contemporary case law has not tended to go down the route of seeking to define precise situations in which a duty of confidence might be found to exist. In the same way as it is not dependent on the existence of a contract, the duty is not confined to the existence of specified types of relationship.[46] Instead, the cases have tended to establish overreaching principles which apply in an infinite variety of situations.

The obligation of confidence has been expressed to depend 'on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it'[47] being based 'not so much on property or on contract, but rather on the duty to be of good faith'.[48] In the Australian case of *Moorgate Tobacco v Philip Morris*[49] (cited with approval by both the English Court of Appeal and the House of Lords in *AG v Guardian Newspapers (No 2)*),[50] the court observed that 'like most heads of equitable jurisdiction, its

45 Note that, where the obligation of confidence is imposed by an express or implied contract, any inducement by the media for one party to breach his contractual obligations could give rise to tortious liability for inducing breach of contract. The defendant (eg, the media) must know of the existence of the contract and must have intended to procure the breach before liability can arise. Film buffs may recognise this as the cause of action which caused problems in the film, *The Insider*, which concerned disclosures in the American tobacco industry.

46 *Stephens v Avery* [1988] Ch 449; [1988] 2 All ER 477.

47 *Seager v Copydex* [1967] 2 All ER 414, p 417.

48 *Fraser v Evans* [1969] 1 All ER 8, p 11.

49 *Moorgate Tobacco v Philip Morris* (1984) 56 ALR 193, p 208.

50 *AG v Guardian (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109

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'.

In *R v Department of Health ex p Informatics*,[51] Simon Brown LJ reviewed existing case law and indicated that:

> To my mind, the one clear and consistent theme emerging from all these authorities is this; the confidant is placed under a duty of good faith to the confider and the touchstone by which to judge the scope of his duty and whether or not it has been fulfilled or breached is his own conscience, no more or less.

A key issue in establishing that a duty of confidence exists in any particular case is whether the existence of the obligation of confidence is a subjective test (which depends on the recipient's actual understanding of the position) or an objective test (dependent on whether a reasonable person in the position of the recipient would have understood there to be an obligation of confidence). This question has been the subject of a number of contradictory judgments, respectively favouring a subjective test, an objective test, or a combination of the two. The reference in Simon Brown LJ's decision to the recipient's 'own conscience' seems to suggest that a subjective test would be appropriate. However, a purely subjective test would be inappropriate. An unscrupulous defendant is unlikely to suffer any pangs of conscience over the misuse of information. In any event it must be open to doubt whether a law which equates lawfulness with a defendant's conscience is a law at all. It could not set any meaningful standard against which to regulate one's conduct and may therefore be incompatible with the European Convention on Human Rights, which requires that restrictions on Convention rights must be prescribed by law.[52]

In the *Coco* case,[53] Megarry J proceeded on the basis that the test was probably an objective test. He said:

> I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence … It may be that that hard-worked creature, the reasonable man, may be pressed into service once more … It seems to me that if the circumstances are such that the reasonable man 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.

Megarry J's comments were *obiter*. On the facts of *Coco*, he was able to reach his decision without the need for application of the reasonable man test.

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51 *R v Department of Health ex p Informatics* [2000] 1 All ER 786.

52 Refer to Chapter 1 for further detail of this requirement.

53 *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41.

In its 1984 Report on the law of confidence,[54] the Law Commission noted the uncertainty of the basis for establishing the existence of the obligation of confidence. The Commission referred to comments it had received about the reasonable man test which pointed out the potential hardships that the application of the test could cause to those recipients of unsolicited information.

For example: a commissioning editor of a television company receives unsolicited proposals for a new game show from a member of the public. He returns the proposal with a letter, politely thanking the sender and indicating a lack of interest in the idea. Two years later, the company makes and broadcasts a game show in a similar format to the sender's idea. The sender alleges breach of confidence by the company in his idea. He alleges that a reasonable person in the position of the commissioning editor would have understood that he was under an obligation of confidence in relation to the proposal. The question of reasonableness would therefore have to be considered.

Having considered these comments, the Law Commission was not in favour of an objective test in that form. It suggested that an obligation of confidence should come into being where the recipient has either expressly given an undertaking to the giver of the information that he will keep it confidential or where such an obligation can be inferred from the relationship between the giver and the recipient or from the recipient's conduct (unless there is any indication to the contrary).

In our example, the commissioning editor would be less likely to be under an obligation of confidence under the Commission's proposal. There is no express undertaking. It may be an uphill struggle for the sender to show that an obligation is to be inferred from his relationship with the commissioning editor or from the editor's conduct (although where the disclosure involves information which has a commercial value an obligation of confidence is more likely to be inferred from the relationship).[55]

The Law Commission's proposals have not been incorporated into English law. The test to establish the existence of a duty of confidence remains unclear. In the case of *Carflow Products (UK) Ltd v Linwood Securities (Birmingham) Ltd*,[56] Jacob J considered the subjective and objective approach to establishing a duty of confidence. His decision was in the context of a registered design right dispute rather than breach of confidence, but his observations are equally relevant to breach of confidence.

54 Law Commission, *Report on Breach of Confidence*, Law Com No 110.

55 *Fairie v Reed* (1994) unreported.

56 *Carflow Products (UK) Ltd v Linwood Securities (Birmingham) Ltd* [1998] FSR 424.

Jacob J defined the subjective and objective approaches as follows:

- *subjective* – what did the parties themselves think they were doing by way of imposing or accepting obligations?;
- *objective* – what would a reasonable person have thought they were doing?

Jacob J indicated that he preferred the subjective approach.

The case of *De Maudsley v Palumbo*[57] contains a further consideration of the meaning of 'circumstances importing an obligation of confidence' as set out by Megarry J in the *Coco* case. The case concerned a dispute over an idea for a night club. The claimant claimed that he disclosed a novel idea for a night club to the defendants at a supper party. He alleged that the defendants had made use of the idea without his consent and so were in breach of confidence. The defendants argued (amongst other things) that the claimant had not disclosed his idea in circumstances importing an obligation of confidence. Knox J held that the test to apply to determine whether an obligation existed was an objective test. However, a factor to consider in applying the objective test (and, he said, it might be an important factor) was whether the parties regarded themselves as under an obligation to preserve confidence. But he did not accept that the test is entirely subjective. Another relevant factor to the decision would be any usual industry practice. We therefore see both subjective and objective elements emerging in Knox's test.

On the facts, Knox J held that the disclosure had taken place on a social occasion. There had been no mention of confidentiality. There was no evidence of trade or professional practice that such a disclosure would be regarded as confidential. On the facts, the defendants had not breached the claimant's confidence.

The position of employees and former employees and employers

The media may obtain confidential information about an employer from an employee or a former employee. Special rules apply to determine the obligation of confidence owed by an employee/former employee to an employer.

Employment contracts generally contain confidentiality provisions restricting the ability of the employee to disclose or make use of confidential information both whilst in the employ of the employer *and* after leaving that employment. Contractual provisions restricting a former employee from using confidential information must be reasonable in terms of subject matter, geographical area and duration. If the provisions are unreasonable, they may be void under the law relating to restraint of trade.

57 *De Maudsley v Palumbo* [1996] FSR 447.

Even where there is no express provision in an employment contact, duties of confidentiality will be implied by law.

The implied duties

An employee owes an implied duty of good faith and fidelity to his employer, whether or not the duty is expressly provided by a contract of employment. The extent of that duty will vary according to the seniority of the employee in question[58] and the nature of the employment. As a general rule, the more senior the employee, the more extensive the duty. In principle, the disclosure by an employee of his employer's confidential information would be a breach of the implied duty. The breach of duty will also extend to the employee who makes or copies his employer's property (for example, customer lists) for his own use after his employment comes to an end.

Former employees

The implied duty of confidentiality which applies *after* an employee has left his employer's employ is much more limited in scope. The extent of the duty was laid down in *Faccenda Chicken v Fowler*.[59] In that case, the Court of Appeal confirmed that in the first instance the obligations of the employee are determined by the contract of employment. Where there is no express term, the obligation of confidence will be implied as follows:

- the former employee must not use or disclose information of a sufficiently high degree of confidentiality to amount to a trade secret (for example, information about secret processes of manufacture);
- the implied duty does *not* extend to all information given to or acquired by the employee in the course of his employment unless it is a 'trade secret' as defined above;
- whether or not something is a trade secret is to judged on the circumstances of every case. Factors which may be relevant are: (a) the nature of the employment; (b) the nature of the information itself; (c) whether the employer expressed on the employee the confidentiality of the information; and (d) whether the relevant information can easily be isolated from other information which the employee is free to use or disclose.

Even where there is a restrictive covenant in the contract of employment, it will only be valid if there is some subject matter which the employer has a legitimate interest to protect. A court will not uphold a restrictive covenant

58 *Hivac v Park Royal Scientific Instruments Ltd* [1946] Ch 169; [1946] 1 All ER 350.

59 *Faccenda Chicken v Fowler* [1986] FSR 291.

taken by an employer merely to protect himself from competition from a former employee. The employer must be able to point to identifiable objective knowledge constituting the employer's trade secrets which have come into the employee's knowledge as a result of the employment. Protection cannot legitimately be claimed in respect of the skill, experience, know how and general knowledge gained from the employment. The employee can legitimately regard such matters as his own property.[60]

The Public Interest Disclosure Act 1998 and whistleblowers at work

The Public Interest Disclosure Act 1998 came into force on 2 July 1999. The Act makes it unlawful for an employer to subject any worker who makes a 'qualifying disclosure' to detrimental treatment (such as dismissal). In other words, the Act is intended to offer protection to employees who make disclosures in good faith. It does not, therefore, directly affect the position of the media, although it may affect their informants.

The Act is a response to a number of reports into public scandals or disasters which identified that employees of certain organisations were aware of the risk of harm occurring as a result of their employer's practices, but they did not dare to voice their opinions because of, for example, the 'autocratic environment' which existed. However, the definition of 'qualifying disclosure' in the Act is drawn in such a way that the worker is encouraged to disclose information to his employer in the first instance (or to a person appointed by his employer) rather than to the media or to the world at large. It is therefore to be queried how effective the Act will be in practice in encouraging effective disclosure of malpractice or dangerous practices.

The Act protects workers who make qualifying disclosures from unfair treatment. 'Workers' includes independent contractors, home workers, trainees on work experience programmes and employees.

Qualifying disclosure

A 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of six categories of information, which are as follows:

- that a criminal offence has been committed, is being committed or is likely to be committed;
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

60 *FSS Travel and Leisure Systems v Johnson* [1999] FSR 505, CA.

- that a miscarriage of justice has occurred, is occurring or is likely to occur;
- that the health or safety of any individual has been, is being or is likely to be endangered;
- that the environment has been, is being or is likely to be damaged; or
- that information tending to show any of the above matters has been, is being or is likely to be deliberately concealed.

The Act does not provide that the malpractice falling within the above categories has to be those of the employer in order to be a qualifying disclosure.

Information protected by legal professional privilege cannot be a qualifying disclosure, nor can the disclosure of information involving commission of a criminal offence (such as a breach of the Official Secrets legislation.

The Act sets out five ways in which a worker can make a 'qualifying disclosure'. The protection under the Act will only apply if a disclosure of information is made in accordance with one of the five methods. These methods are as follows:

- disclosure to the employer or to another person in pursuance of a procedure authorised by the employer;
- disclosure to a legal adviser;
- disclosure to a minister of the Crown (where the workers' employer is an individual or body appointed by a minister of the Crown);
- disclosure to a prescribed person (this term has not been defined at the time of writing);
- wider disclosure in other cases, for example, disclosure to the media. Such disclosure is permitted, provided that the following criteria are all met;
- the worker must reasonably believe that the information disclosed and any allegation is substantially true;
- he must not make the disclosure for personal gain (note that the Act does not refer to financial gain. It seems that any kind of personal gain would be covered);
- in all the circumstances it is reasonable for the worker to make the disclosure; and
- at least one of the following conditions must be met:
    - the worker reasonably believes that he would be subjected to a detriment by the employer if the disclosure was made to the employer or the prescribed person; or
    - if there is no prescribed person, the worker reasonably believes that it is likely that the evidence relating to the relevant failure would be concealed or destroyed if there was a disclosure to the employer; or

- that the worker had previously made a disclosure of substantially the same information to the employer or to a prescribed person.

The Act gives some guidance as to what factors should be borne in mind when considering the reasonableness of a worker's actions, for example, where disclosures are made to the media. The factors include:

- the identity of the person to whom the disclosure is made. Disclosure of an offence to the police, for example, would be more likely to be reasonable (and therefore protected) than disclosure to the media;
- the seriousness of the matter disclosed;
- whether the problem is continuing or most likely to occur in the future;
- the actions of the employer following any previous disclosure made to the employer on the same matter. Disclosure is more likely to be reasonable if the employer did not address the worker's concerns when first raised (although even in such circumstances, disclosure would not automatically be reasonable);
- the fact that a disclosure was made in breach of confidence will not in itself necessarily make the disclosure unreasonable.

A disclosure to the media may be true, but if the above criteria are not met, the worker will not enjoy the protection envisaged by the Act. A public disclosure is viewed as very much the last resort under the Act's provisions.

Example

Bill is an employee of Bloggs Biscuit Makers. He obtains a copy of his employer's confidential new recipe for a prototype biscuit. On reading it, he quickly sees that the recipe is in fact unfit for human consumption and would be dangerous to public health. He raises this with his employers, who do nothing about Bill's concerns. In desperation, Bill gets in touch with his local paper and informs it about the potential danger. The newspaper publishes the story, generating bad publicity for Bloggs Biscuits. Bloggs wish to dismiss Bill for what it sees as his act of treachery against the company and for breach of the implied duty of good faith in his employment contract and for breach of confidence.

Bill can rely on the Act to protect him from dismissal provided that he has made a qualifying disclosure. The information about the biscuits falls within one of the six categories identified above (namely, danger to the health or safety of any individual). However, Bill has made a disclosure of the information to the media. In order to gain protection, he must meet the requirements for a protected disclosure set out above. One of those factors is that it was reasonable in all the circumstances for him to make the disclosure. The fact that he has apparently breached his employer's confidence will be a material factor going against Bill, but will not in itself be determinative. Other

facts which tend to show that the disclosure was reasonable in the circumstances are the seriousness of the problem and the fact that Bill had already tried to get his employers to address his concerns.

This short example is an illustration of how difficult it will be to advise and make disclosures to the media with any certainty under the Act's regime.

So far as the newspaper is concerned, the Act only affects the worker's position. If Bloggs bring proceedings for breach of confidence against the newspaper it would either have to show that there was no breach of confidence on the facts or that the defence of public interest is available to justify the disclosure.

Where information disclosed concerns 'an exceptionally serious breach', the procedures set out above can be bypassed provided the worker can show:

- a reasonable belief that the information disclosed and any allegations are substantially true;
- that the disclosure is not made for personal gain; and
- in all the circumstances it must be reasonable for the individual to make the disclosure.

The Act provides no guidance as to what might be classed as 'exceptionally serious'.

Non-employees and the duty of confidence

Will the courts imply a duty of confidence in circumstances where information has been improperly obtained?

We have seen that the basis of the action for breach of confidence is generally accepted to be the enforcement of the duty of good faith.

The basis of the test to determine whether a duty of good faith exists has never been authoritatively determined. As we have seen, the test may be objective or subjective.

A number of cases have involved situations where the confidential material has been obtained by unlawful or improper means. To what extent will the courts find that a duty of confidence exists to restrain the publication of confidential material which is obtained by subterfuge? The application of the *objective test* to establish a duty of confidence has enabled the courts to infer an obligation of confidence in such circumstances. In essence, the courts apply themselves to the question whether, in such cases, the circumstances were such that it would be right to impose or imply an obligation of confidence.

The situation can be distinguished from what might be termed a 'straightforward' breach of confidence case involving breach of an express or implied *undertaking* to keep material confidential. In cases where information

is improperly obtained, the complaint is often about disclosure of information to which the recipient had no right at all. The duty of confidence arises in such cases because the defendant must have realised or ought to have realised that he was not entitled to the information. The case of *Prince Albert v Strange*[61] is an early example of an obligation of confidence arising from the manner in which confidential material was obtained.

When the Law Commission reported on the law of confidence in 1984, one of its terms of reference was whether information acquired not with an obligation to keep it confidential, but without the authority of the owner of the information, could be the subject of an action for breach of confidence. The origins of this term of reference is to be found in the Younger Report on privacy (published in 1972),[62] in which, concern had been expressed that a person who had obtained information without consent ought not to be in a better position than someone whom the holder of the information had entrusted in confidence.

The Law Commission recommended that the law of confidence be amended to provide that a person should owe an obligation of confidence in respect of confidential information acquired in circumstances which included the following:

- the unauthorised taking, handling or interfering with anything containing the information;
- by violence, menace or deception;
- while the user is in a place where he has no authority to be;
- by a device made or adapted solely or primarily for the purpose of surreptitious surveillance where the user would not have obtained the information without the device;
- the obligation ought not to arise where the information was obtained by any of the above methods by a person in the exercise of an official function (for example, a police officer).

This revision and codification of the law was never adopted. Instead, the flexibility of the equitable jurisdiction of the courts has been allowed to fill in the gap. Where material has been obtained surreptitiously in circumstances where it is evident that the material was to be kept confidential, the courts have been willing to restrain publication – at least on an interim basis. But a lack of defined principles has led to a position of uncertainty, making it difficult to predict the outcome of any particular case with certainty. It means that it is this area of the law of confidence which poses one of the greatest threats to the media's ability to act as public watchdog.

61 *Prince Albert v Strange* (1849) 2 De G & Sm 652.

62 *Report of the Committee on Privacy*, Cmnd 5012, 1972.

The traditional emphasis on the need for a duty of confidence to be positively asserted by the claimant is illustrated by the 1979 case of *Malone v Metropolitan Police Commissioner*,[63] in which Megarry VC held that, for an action in confidence to lie, the information must have been imparted in circumstances importing an obligation of confidence. The judge observed that 'No doubt a person who uses a telephone to give confidential information to another may do so in such a way as to impose an obligation of confidence on that other; but I do not see how it could be said that any such obligation is imposed on those who overhear the conversation, whether by means of tapping or otherwise'.

On Megarry VC's analysis, even where the eavesdropper would have appreciated that the information was confidential, an obligation would not be implied. This decision has been distinguished on the basis that it concerned authorised telephone tapping by the police. We shall see below that in more recent times, the courts have been more willing to imply obligations of confidence.

Meanwhile, in the case of *Franklin v Giddens*,[64] the Australian courts considered whether an obligation of confidence would be implied in circumstances where the confidential matter had been obtained unlawfully.

The claimant bred a new strain of nectarine. The defendant stole cuttings from the claimant's orchard and, taking the genetic information from the cutting, he developed his own competing strain of nectarine. The court dealt with the defendant's argument that there was no breach of confidence on the facts because no duty of confidence had ever been imposed in relation to the plants as follows:

> I find myself 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 the owner, to the detriment of the latter, and so uses it, is less unconscionable than a traitorous servant. The thief is unconscionable because he plans to use and does use his own wrong conduct to better his position in competition with the owner, and also to place himself in a better position than that of a person who deals consensually with the owner.[65]

The court held that there was a breach of confidence. The confidential information had become impressed with the obligation of confidence *by reason of the reprehensible means by which it was acquired*.

The English courts have applied the same principles in two recent cases. The first of these was *Shelley Films Ltd v Rex Features*.[66] The case concerned the film *Mary Shelley's Frankenstein*. The claimant gave evidence to the effect that it

63 *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344.

64 *Franklin v Giddens* [1978] Qd R 72.

65 Dunn J in *ibid*, p 80.

66 *Shelley Films Ltd v Rex Features* [1994] EMLR 134.

was to be an essential part of the marketing of the film that the appearance of the actor who played the Frankenstein character should be kept secret prior to the film's release. To this end, steps were taken to ensure that there was no unauthorised access to the film set. There were, for instance, security guards and signs at the main gate of the studios, which stated that entry was by permission only and that photography was prohibited. Similar signs appeared around the actual set. Notwithstanding these precautions, a photograph of a scene which featured the Frankenstein character was published in *The People* prior to the release of the film. The claimant alleged that the publication of the film was a breach of confidence and sought an interim injunction restraining any further breach.

The court held that there was a serious question to be tried as to whether the photograph was subject to an equitable obligation of confidence imposed on the defendants unilaterally because of the defendant's knowledge of the circumstances in which the photograph was taken.

The decision in the *Shelley Films* case was cited in the case of *Creation Records Ltd v News Group Newspapers Ltd*.[67]

The case concerned an album cover for the group Oasis. The cover consists of photographs of the group in a setting devised by the group. The setting consists of a number of carefully arranged props, such as a Rolls-Royce positioned in a swimming pool. The court heard evidence that it was essential for the group's plans that the photography and the appearance of the cover be kept secret. The defendant, who publishes *The Sun*, learnt of the photo shoot for the album and commissioned a freelance photographer to stay at the hotel where it was taking place and to take photographs of the shoot itself. Some of these photographs were included in *The Sun* before the album was released. One of the photographs taken and printed by *The Sun* was very similar to an 'official photograph' considered suitable for the album cover itself. *The Sun* subsequently invited readers to purchase that photograph in the form of a poster.

The claimants sought an interim injunction to restrain what they alleged was a breach of confidence, namely any further photographs taken by the photographer or the poster. They relied on evidence to the effect that efforts had been made to prevent unauthorised persons from photographing the scene, for example, security guards were patrolling the site and the area of the shoot was cordoned off. The claimants contended that the photographer must have been aware of these efforts to prevent people from taking photographs of the shoot and that he had only succeeded in doing so by being surreptitious and, if so, there was a clear inference that he did so because he realised that he was not permitted to take photographs of the scene. The photographer

67 *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444.

disputed the claimant's evidence, alleging that he had quite openly taken the photographs and that no attempt was made to stop him.

The court held that there was an arguable case that the nature of the operation plus the imposition of the security measures made it an occasion of confidentiality. It was also arguable that, in order to get his photographs, the photographer must have been less than open. If he did so, it was an easy inference that he did so because he knew that photography was not permitted. A reasonable man in the position of the photographer would have realised on reasonable grounds that he was obtaining the view of the posed set in confidence, that is, he was obliged by that confidentiality not to photograph the scene.

Counsel for the defendant argued that merely because a well known person tries to stop people taking photographs of him, it does not follow that any picture taken in evasion or defiance of those attempts is in breach of confidence. Lloyd J accepted the submission, but noted that the scenario which counsel had described was 'very far from this case' given the extensive security precautions which the claimants had taken. The injunction was granted.

Support for the view that an obligation of confidence will be imposed where confidential information is obtained by surreptitious means is also to be found in the *obiter* comments of Laws J in *Hellewell v Chief Constable of Derbyshire* (referred to above).[68]

The obligation of confidence and obviously confidential information

Will a duty of confidence be imposed simply by virtue of the fact that the information is obviously confidential, for example, against someone who finds confidential material in the street? The focus of the complaint in such circumstances would be on the nature of the information. The argument would run that the material is so obviously private that by virtue of that status it becomes automatically imbued with an obligation of confidence rendering any unauthorised disclosure a breach of confidence.

Obiter comments from case law suggest that an obligation would be inferred in such circumstances.

In *AG v Guardian (No 2)*,[69] Lord Goff suggested that the nature of the information and the fact that it was not intended that the defendant should acquire it, could lead to the imposition of the duty.

Simon Brown LJ in *R v Department of Health ex p Informatics*[70] equated the law of confidence with the conscience of the recipient of the information. If a

68 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804; [1995] 4 All ER 473.

69 *AG v Guardian (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109.

70 *R v Department of Health ex p Informatics* [2000] 1 All ER 786.

document or information depicts something which is obviously private or confidential, the conscience of the 'confidant' is likely to feel troubled by public disclosure. But, once again, this leaves open the question whether should this be judged on a subjective basis or an objective basis. The issue has yet to be determined.

The position of third parties

In many cases, the media are not the direct recipients of information which was originally disclosed in confidence. Take, for example, the *Stephens v Avery* case.[71] The claimant disclosed certain information to her friend in confidence. The friend then disclosed it to a newspaper. The claimant sought an injunction to restrain breach of confidence by the *newspaper*. This raises the question, in what circumstances will third parties such as the media be placed under an obligation of confidence to the original confider?

The general position is that the third party will be placed under an obligation of confidence to the original confider in circumstances where it is on notice that the information is confidential. The notice can be actual or constructive (that is, would a reasonable party in the defendant's position have known that the information was confidential?).

This is the general rule, but it will vary from case to case. In *AG v Guardian (No 2),*[72] the House of Lords stressed that there is no absolute rule that a third party who receives confidential information will be restrained from using it, even when placed on notice.[73] For example, there may be a public interest justification for disclosure by the third party which does not exist in relation to disclosure by the original confidant. This was the case in *AG v Guardian (No 2)* itself, where the majority of the House of Lords were of the view that the media were free to publish details about Peter Wright's book once the contents were in the public domain, but Wright (the original confidee) could not. Each party must, therefore, be considered separately when assessing whether an obligation of confidence exists.

A third party will not necessarily be placed on notice that information is confidential by a bare assertion to that effect. The third party should be given sufficient information as enables it to have a reasonable belief that the information is confidential.[74]

71 *Stephens v Avery* [1988] Ch 449; [1988] 2 All ER 477.

72 *AG v Guardian (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109.

73 See, eg, Lord Griffiths in *ibid*, p 272.

74 *Fraser v Thames Television* [1983] 2 All ER 101.

When does the obligation of confidence come to an end?

Where a party is under an express or implied obligation of confidence, will the duty come to an end when the information enters the public domain? This point was considered during the course of the *Spycatcher* litigation, where the majority of the House of Lords held that Peter Wright did continue to be under an obligation of confidence despite the information in question no longer being confidential. The rationale behind this decision appears to be the fact that the original breach of confidentiality by Mr Wright was of such a flagrant nature that he could not be said to have relieved himself of the duty in circumstances where the information had lost its private character as a direct result of his own wrongdoing. He must not be allowed to profit from his wrongdoing.

Lords Goff and Brightman dissented on this point. Lord Brightman observed that it was meaningless to talk of a continuing duty of confidence owed by Wright or anyone else in relation to material already disclosed worldwide. Once information is no longer confidential, the duty not to disclose can no longer apply. It was, however, a different question whether Peter Wright could *profit* from his disclosures. The dissenting Law Lords were of the view that any profit which he made as a result of his disclosures should be held on trust for the owners of the confidential information – the Crown in the *Spycatcher* case.

In *AG v Blake*,[75] a case which was heard some time after the *Spycatcher* litigation, the Court of Appeal adopted the same reasoning as the minority speeches in the House of Lords. The appeal judges observed that the duty to protect confidential information lasts only so long as the information is confidential.

If *AG v Blake* were to be followed in subsequent cases, it would seem that a duty to keep information confidential is not to be equated with a duty of loyalty or fidelity.[76] It ought therefore not to be possible to maintain a cause of action for breach of confidence based on an obligation to maintain the confidentiality of information which has ceased to be either confidential or secret.

Unauthorised disclosure of the confidential information

In order for there to be an action in breach of confidence, there must have been actual or threatened disclosure of the confidential information in breach of the express or implied duty of confidence.

75 *AG v Blake* [1998] 1 All ER 833 and see, also, the decision of the House of Lords [2000] 3 WLR 625.

76 This is more support for the view that *Schering v Falkman* was wrongly decided.

There has been some debate in case law as to whether it is necessary for the owner of the information to establish that the unauthorised disclosure was to his detriment. In *Coco v Clark*,[77] Megarry J left the question open.

As the law currently stands, it would appear that some form of threatened or actual detriment must be shown.[78] But detriment is a broad concept. It can take the form of financial loss (as in a case involving confidential trade secrets) or it could take a broader form, such as personal distress caused by the disclosure. The latter type of detriment is often the only damage which can be established where the claimant's claim is essentially a claim for breach of privacy, albeit in the guise of an action for confidence. In such cases, the claimant is complaining about the disclosure of private information rather than the disclosure of a piece of confidential business information whose value may be assessed in monetary terms.

During the course of the *Spycatcher* litigation, Lord Keith observed:

> As a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself. Information about a person's private and personal affairs may be of a nature which shows him in a favourable light and would by no means expose him to criticism. The anonymous donor of a very large sum of money to a very worthy cause has his own reasons for wishing to remain anonymous, which are unlikely to be discreditable. He should surely be in a position to restrain disclosure in breach of confidence of his identity in connection with the donation. *So, I think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it*, even though the disclosure would not be harmful to him in any positive way. (Italics for emphasis.)[79]

Lord Keith's views make sense in the context of the origins of the action for breach of confidence. If the basis of the action in equity is to uphold obligations of confidence, then it ought not to be fatal to the success of the action if the breach of the duty does not cause detriment sounding money terms. The obligation of conscience is to protect the confidence, not merely to refrain from causing financial detriment to the claimant.

Who can sue for breach of confidence?

On an orthodox analysis, the cause of action for breach of confidence belongs to the person to whom the obligation of good faith is owed. If A tells B something in confidence about C, then if B discloses that information to D, the

77 *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41.

78 *R v Department of Health ex p Informatics* [2000] 1 All ER 786.

79 *AG v Guardian (No 2)* [1988] 3 All ER 545, p 639.

claim for breach of confidence belongs to A (the discloser of the information), and not to C (the subject of the information). This is the case even though B's unauthorised disclosure might be to C's detriment.

This principle is illustrated by the case of *Fraser v Evans*.[80] The claimant was a public relations expert employed to write a report by the Greek Government. The claimant agreed to keep information obtained for the purposes of the report confidential. There was no corresponding undertaking by the Greek Government. A copy of the report was obtained by the defendant newspaper, which threatened to publish it. The claimant, fearing that the defendant's article would be damaging to him, sought an injunction to prevent the publication of the report, which he claimed the newspaper had obtained in breach of confidence. The Court of Appeal held that the defendant's obligation to be of good faith was owed to the government and it was for the government to say whether or not it could be published. Accordingly, the claimant had no standing to bring a claim in breach of confidence.

This principle is an important reason why the action for confidence cannot operate as a substitute for a law of privacy. It is generally the subject of personal information who will suffer a violation of privacy if the information is published to the world at large. The subject will not always be the person to whom the obligation of confidence is owed.

The disclosure of confidential information in the public interest

It is well established that where the *public interest* in the disclosure of confidential information outweighs the desirability of enforcing the obligation to protect confidence, the disclosure of the confidential information will be permitted. Outside the field of government affairs (see below), the public interest in the disclosure of confidential information is generally seen to be a defence to an action for breach of confidence or as a weighty factor militating against the grant of an interim injunction. 'I have no doubt … that in the case of a private claim to confidence, if the three elements of quality of confidence, obligation of confidence and detriment or potential detriment are established, the burden will lie upon the defendant to establish that some other overriding public interest should displace the plaintiff's right to have his confidential information protected' observed Lord Griffiths in *AG v Guardian (No 2)*.[81]

The public interest defence will arise where there is just cause or excuse for the publication of the confidential information. Or, in other words, as Megaw LJ observed in *Hubbard v Vosper*,[82] 'there are some things which may be

80 *Fraser v Evans* [1969] 1 All ER 8.

81 *AG v Guardian (No 2)* [1988] 3 All ER 545, p 649.

82 *Hubbard v Vosper* [1972] 2 QB 84.

required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret'.

Under s 12 of the Human Rights Act 1998, the question whether the publication of journalistic, literary or artistic works is in the public interest is a consideration which the courts must have regard to when considering whether to grant any relief which might affect freedom of expression.

The meaning of public interest

It is easier to define what is not in the public interest than to attempt to provide a definitive definition of the concept. Going back as far as the Report of the Younger Committee,[83] a distinction was drawn between information which is actually *in* the public interest and information which is *of* public interest. This was recognised by the House of Lords in *British Steel Corpn v Granada Television Ltd*,[84] where Lord Wilberforce stated that 'there is a wide difference between what is interesting to the public and what it is in the public interest to make known'. In order for the public interest defence to arise, the publication of the confidential information must genuinely be in the public interest. In the words of the Under Secretary of State, the courts must consider whether there is a good reason why the public should be told the confidential information.[85]

Each individual case should be judged on its own merits. It is in the interest of the media that the concept of disclosure in the public interest should be kept flexible to meet particular cases. In the case of *Lion Laboratories v Evans*,[86] the Court of Appeal declined to restrict the scope of the defence to any particular categories of information. The court pointed out that the public interest defence was best categorised in broad terms of whether there was *just cause or excuse* for publication of the information in question rather than on focusing on the narrow question whether it was information which can be described as of a particular type.

It is well recognised that there will generally be a just cause or excuse for publication where the disclosure of the confidence is made in order to disclose iniquity. For example, the case of *Gartside v Outram*[87] concerned a disclosure of information relating to the claimant's alleged habits of defrauding customers. In the case of *Initial Services v Putterill*,[88] Lord Denning MR held that the public interest in the disclosure of iniquities goes wider than

83 *Report of the Committee on Privacy*, Cmnd 5012, 1972.

84 *British Steel Corpn v Granada Television Ltd* [1981] AC 1096.

85 *Hansard*, 2.7.1998, col 562, in the context of debate about the HRA 1998, s 12.

86 *Lion Laboratories v Evans* [1984] 2 All ER 417.

87 *Gartside v Outram* (1856) 26 LJ Ch 113.

88 *Initial Services v Putterill* [1967] 3 All ER 145.

information relating to a proposed crime or the contemplated commission of a crime or civil wrong. He said that the defence extended to any type of misconduct of such a nature that it ought in the public interest to be disclosed to others. In *Lion Laboratories v Evans,* the Court of Appeal extended the scope of the public interest defence by making it clear that there could be a public interest in the disclosure of information which does not relate to misconduct. The information in question in the *Lion Laboratories* case concerned defects in a type of intoximeter approved by the Home Office for use by police forces. The Court of Appeal took the view that the public interest in the disclosure of the information about the defects in the intoximeter (which could lead to wrongful convictions if not corrected) outweighed the obligation to keep the information confidential.

The decision was cited with approval by Lord Griffiths, in *AG v Guardian (No 2),*[89] who observed as follows:

> I can see no sensible reason why the defence should be limited to cases in which there has been wrongdoing on the part of the plaintiffs. I believe that the so called iniquity rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that his behaviour should be exposed. No doubt it is in such circumstances that the defence will usually arise, but it is not difficult to think of instances where, although there has been no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information.

The allegations must have substance

Where a party published allegations using confidential information, the allegations themselves will not give rise to a claim of public interest unless the publisher had grounds to believe that they are true. This point was made by Lord Keith in *AG v Guardian (No 2),*[90] where he said 'it is not sufficient to set up the defence merely to show that allegations of wrongdoing have been made. There must be at least a *prima facie* case that the allegations have substance.'

So, if I use confidential information to support an allegation that solicitor X is defrauding his clients, I would not be able to rely on the public interest defence if in fact I had no real evidence to support my claim. I could not argue that the making of unfounded allegations *per se* would be in the public interest.

89 *AG v Guardian (No 2)* [1988] 3 All ER 545.

90 *Ibid*, p 643.

The commercial interests of the media and the motives of the defendant in disclosing the information

Certain sections of the media will have their own commercial interests in mind when disclosing alleged confidences: for example, increasing circulation or viewing figures. This is a factor which the court should bear that in mind when deciding whether there is just cause or excuse for the disclosure in question.

Where confidential information is sold to the media for gain, who then defend their publication as being in the public interest, the question has arisen whether the fact that the information has been sold in breach of confidence could negative any public interest defence. In *Initial Services v Putterill*,[91] Lord Denning implied that the sale of information could prevent the public interest defence from arising. He said: 'I say nothing as to what the position would be if [an employee] disclosed [information] out of malice or spite or sold it for reward. That indeed would be a different matter. It is a great evil when people purvey scandalous information for reward.'

The Court of Appeal in the *Lion Laboratories* case refused to take into account the motives of the defendants in making the material about the intoximeter to the *Express*. There was no evidence whether the defendants had been paid for the material they had disclosed, but that issue did not concern the court. Stephenson LJ observed:

> There is confidential information which the public may have a right to receive and other which, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer.

More recently, Jacob J was of the view that the public interest defence was available in respect of the publication of certain video camera stills by *The Sun* even though the newspaper had paid for the pictures. He observed:

> I do not think that the fact that … was paid and that *The Sun* expected to make money derogates in any way from the fair dealing (or any public interest) justification.[92]

It is submitted that the approach in the *Lion Laboratories* and *Hyde Park Residence* cases is to be preferred. If there is a public interest in the disclosure of information, the fact that it was sold to the media for money or out of an ulterior motive ought not to negative the existence of the defence.

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91 *Initial Services v Putterill* [1967] 3 All ER 145.

92 *Hyde Park Residence v Yelland* [1999] RPC 655. This was a copyright case. The first instance decision on public interest and copyright was overturned by the Court of Appeal in relation to copyright infringement, but the first instance judgment will probably continue to apply in relation to public interest and other areas of law, such as breach of confidence.

Public interest v obligation of confidence: a balancing exercise

In *Lion Laboratories v Evans,*[93] the *Daily Express* published details of a confidential report alleging that an intoximeter used by a number of police forces was liable to serious error. The newspaper argued that the disclosure of the report's findings was in the public interest. The Court of Appeal held that there was a serious defence of public interest which may succeed at trial. The approach that the court adopted was to look at the evidence in order to decide whether a defence of public interest existed. Having found that there was such a defence, it sought to balance: (a) the need to enforce obligations of confidence, based on the moral principle of loyalty; against (b) the public interest in disclosure of the information of the type at issue on the facts. The court observed that it may be that whilst there is a public interest in disclosing the information in question, it does not outweigh the public interest in the maintenance of confidences on the facts of any particular case. On the facts of *Lion Laboratories*, the court found that the issues raised about the intoximeter were serious questions concerning a matter which affects the life and the liberty of members of the public. On that basis, it observed that 'we must not restrain the defendants from putting before the public this further information … although the information is confidential and was unlawfully taken in breach of confidence'.

Example of the balancing exercise

In the case of *Hellewell v Chief Constable of Derbyshire,*[94] the court held that the circulation of a police 'mug shot' for purposes unconnected with the offence for which it was taken was justified in the public interest. Whilst the photograph itself was confidential, the publication of the image was excused on the facts of the case because it was for the purposes of the prevention and detection of crime and the distribution was restricted to those persons with a need to make use of it. The defendant has a public interest defence to the claim for breach of confidence. The breach of confidence was therefore outweighed by the public interest in preventing crime.

An interesting example of the operation of the balancing exercise occurred in the case of *Robert Bunn v BBC,*[95] which involved a number of conflicting elements of public interest, all of which had to be balanced against each other. The case concerned an alleged breach of confidence in a statement given to the police under caution. The claimant was a former employee of Robert Maxwell Group plc. In a statement under caution, he had admitted to conspiring to defraud certain banks. His prosecution never went to trial despite the

93 *Lion Laboratories v Evans* [1984] 2 All ER 417.

94 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804; [1995] 4 All ER 473.

95 *Robert Bunn v BBC* [1998] 3 All ER 552.

confession and, as a result, the Serious Fraud Office was heavily criticised over its handling of the prosecution. The BBC intended to refer to the case, including the admission as part of a series on the SFO called *The Fraudbusters*. It informed the claimant of its intention to do so. The claimant brought proceedings for breach of confidence to restrain the references to his admission. He contended that the police statement was the subject of a confidential obligation owed to him by the police which precluded its use save for the purposes for which it was provided (the aborted criminal trial).

The defendants argued that, even if the admission was confidential, the public interest in its disclosure in the context of a critique of the SFO outweighed the obligation of confidence. Lightman J rejected the defendant's argument. He observed:

> The fact that the statement discloses wrongdoing by Mr Bunn cannot as such destroy its confidentiality. The public interest may on occasion require the disclosure of confidential information disclosing iniquity, but this is not invariably so … The fact that the public debate about the SFO will be better informed by disclosure is insufficient in itself to justify overriding confidentiality.

He took the view that there was a substantial public interest in an accused person being able to make full disclosure to the police without fear of their statement being used for extraneous purposes; that public interest outweighed the public interest in publicising Mr Bunn's confession or in exposing the shortcomings of the SFO.

The balancing test and the Human Rights Act 1998

Once the Human Rights Act comes into force, the nature of the 'balancing test' ought to change to bring it into line with the jurisprudence of the European Court of Human Rights. It may no longer be appropriate to balance the public interest in maintaining confidence against the public interest in disclosure of the information in any particular case. Instead, a free standing right to freedom of expression must be recognised subject to specific limitations (for example, the protection of the rights of others) which must be narrowly interpreted and necessary to meet a pressing social need, especially where publication of the confidential material is in the public interest. The courts must also have regard to the broader public interest in freedom of expression on matters of public interest as it applies generally rather than in relation to a specific case. This change in approach is considered in Chapter 1.

Disclosure must be proportionate to the public interest

Even where disclosure of confidential information may *prima facie* be in the public interest; the public interest defence will only protect such disclosures as are proportionate to the public interest. It does not, therefore, follow that

publication should be to the world through the media. In some cases, the public interest may be adequately served by a limited form of publication, such as to the police or some other responsible authority.

In *Initial Services v Putterill*,[96] Lord Denning MR said that the disclosure must be to someone who has a proper interest to receive the information. Thus, it would be proper to disclose a crime to the police rather than to the public at large. He did, however, note that there might be cases where the misdeed was of such a character that the public might demand publication on a broader field 'even to the press'.

To illustrate this point, consider the two cases set out below.

In *Francome v Mirror Group*,[97] the claimant was a successful horseracing jockey whose telephone was tapped without his knowledge. During the course of a number of recorded telephone conversations, he allegedly admitted to a number of breaches by him of Jockey Club Rules. On an application to restrain publication by the defendant of the recorded conversations in the form of an 'exposé', the defendant alleged that publication of the allegations would be in the public interest. The Court of Appeal held that there was no public interest in the disclosure of the information in question by the press to the public at large. On the facts, disclosure to the police or to the Jockey Club would satisfy the public interest in disclosure. The court would not allow disclosure by the press prior to the full trial of the claimant's action.

Contrast this with the case of *Cork v McVicar*,[98] in which the claimant, a former detective sergeant in the Metropolitan Police, agreed to supply information about corruption in that police force to the defendant, who was a journalist. They agreed a contract under which the defendant agreed that the conversations were to be tape recorded, but that the claimant would supply certain confidential information on an 'off the record, non-attributable' basis. The defendant agreed not to record those parts of the conversation which related to the confidential information and not to use such information in his writing.

In breach of the agreement the defendant did in fact record the off the record information by use of a hidden tape recorder. He used the information to compile a manuscript to be serialised in the *Daily Express*. The claimant sought an injunction to restrain the publication of the information which he had given on an off the record basis. He claimed that the publication was in breach of confidence. In its defence, the defendant argued that publication of the confidential parts of the material disclosed by the claimant was in the public interest. The judge refused to grant the injunction. He observed that the

96 *Initial Services v Putterill* [1967] 3 All ER 145.

97 *Francome v Mirror Group* [1984] 2 All ER 408.

98 *Cork v McVicar* (1984) *The Times*, 31 October.

court would not protect confidential information which disclosed an iniquity or which the public interest required to be disclosed. The information in question related to alleged iniquities in the Metropolitan Police Force. Publication was in the public interest.

The *Cork* case can be distinguished from *Francome* on the ground that *Cork* concerned allegations of corruption in the police force itself. It could be said that, in such circumstances, a referral of the matter to the police was inappropriate. The same could perhaps be said of the *Lion Laboratories* decision, which concerned intoximeters used by the police. In that case, the Court of Appeal observed that the Home Office was 'an interested and committed party'. It was therefore no answer to say that the defendants should have taken the report about the intoximeter to the Home Office (and therefore presumably also to the police) instead of going to the press.

In *Hyde Park Residence v Yelland*,[99] one of the factors which Jacob J had regard to when considering whether the public interest defence was made out arose from the fact that the material published by the defendant was intended to correct a misleading story which had been put forward by a third party. That misleading story had enjoyed a wide circulation in the media. It was therefore appropriate and proportionate for the defendant to publish the confidential information in the same forum (that is, the media) in order to correct the misleading impression.

The public interest in correcting misimpressions

One of the areas where the courts have found there to be a public interest in disclosure relates to the use of confidential information to correct a false impression promulgated by the claimant or by a third party, particularly where they have sought publicity for that false impression. Most recently, in *Hyde Park Residence v Yelland*, Jacob J held there to be a public interest in the use of material to correct a version of events concerning Diana, Princess of Wales and Dodi Al Fayed. The case concerned copyright law, but the decision on the public interest defence will apply to breach of confidence cases. The facts of the case were as follows.

The claimant provided security services to Mohamed Al Fayed in relation to a house he owned in Paris. The security services included the use of a video security system. On 30 August, Diana, Princess of Wales and Dodi Al Fayed visited the house. Still pictures taken from the footage showed the arrival and departure of the couple. They show that the couple spent less than half an hour in the house and that they were unaccompanied by anyone except a member of the security staff. The car accident which killed the couple occurred the next day.

99 *Hyde Park Residence v Yelland* [1999] RPC 655.

Following their deaths, Mohamed Al Fayed led the media (and therefore the public) to believe that the couple had visited the house in Paris in preparation for their new life together, consistent with their intention to get married and to live in the house. He represented that the couple had spent a number of hours at the house, accompanied by an interior designer. In fact, as the video stills show, the couple was unaccompanied and spent a very short time at the villa. *The Sun* newspaper obtained copies of the video stills and published them in order to correct the misimpression which Mr Al Fayed had allowed to take place. Jacob J held that the publication of the stills was in the public interest (that is, there was just cause or excuse for their publication), because there was a genuine public interest in the information disclosed and the correction of the false image which the public had been given to date.

Similar issues arose in *Woodward v Hutchins*,[100] which concerned an exposé of certain scandalous behaviour on the part of Tom Jones. The Court of Appeal declined to restrain publication of the stories. One of their grounds for doing so was the desirability of correcting the false images which the claimant had portrayed of himself to the world. Lord Denning noted as follows:

> If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected.

And then:

> As there is truth in advertising so there should be truth in publicity. The public should not be misled.

Similar views were also expressed by Bridge LJ:

> It seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of privacy by publicity which shows them in an unfavourable light.

The *Hyde Park Residence* and the *Woodward* cases are restricted to those areas where the party who has fostered the misleading impression has sought publicity for that false image. So, a celebrity who has publicised his seemingly happy marriage may not be able to restrain the publication of confidential information about an extra-marital affair. The defendant could rely on the defence of publication in the public interest; the public interest being that of correcting the false image which the celebrity has created for himself. On the other hand, if the celebrity has never actively sought any publicity about his marriage, there would be no misimpression to correct and therefore there is unlikely to be any public interest defence in relation to publication of details about his affair.

100 *Woodward v Hutchins* [1977] 2 All ER 751.

It is yet to be determined whether disclosures about the private life of a public official, such as an MP, could be said to be in the public interest. The speeches of the Law Lords in the defamation case of *Reynolds v Times Newspapers*[101] indicate that they would not be, unless the disclosures impinged in some way on the public duties carried out by the official.

The Crown and the public interest

> There are rights available to private citizens which institutions of … government are not in a position to exercise unless they can show that it is in the public interest to do so.[102]

The courts have held that where it is the Crown that seeks to prevent the disclosure of allegedly confidential information, significant differences apply when considering the burden of proof in relation to public interest.

In the case of *AG v Jonathan Cape*,[103] it was held that the Crown must show as a positive part of its case that the disclosure of the confidential information which it seeks to restrain has damaged or is likely to damage the public interest. Public interest does not operate as a defence in such cases. The claimant (that is, the Crown) must positively show detriment to the public interest in order to succeed in its claim. The House of Lords confirmed this special position of the crown in *AG v Guardian (No 2*).[104] Lord Goff explained that the reason for this additional requirement in cases concerned with government secrets was that it was in the public interest that the workings of government should be the subject of scrutiny and criticism and the Crown therefore had to demonstrate that that public interest was overridden by the requirements of confidentiality in any particular case.

In the *Jonathan Cape* case, the crown sought to restrain publication of the diaries of the former cabinet minister Richard Crossman as a breach of confidence. The diaries contained details of cabinet discussions and differences of opinion amongst the members of the cabinet as well as of matters relating to the civil service. Lord Widgery CJ emphasised that the publication of the diaries could only be restrained when it was clearly necessary to do so in the public interest. He noted that in order to succeed in his claim the Attorney General had to show that:

(a) the publication would be a breach of confidence;

(b) that the public interest requires that the publication be restrained; and

(c) there are no other facets of the public interest contradictory or more compelling than that relied upon by the Crown, for example, the public

101 *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609.

102 Lord Keith in *Derbyshire CC v Times Newspapers Ltd* [1993] 2 WLR 449, p 451.

103 *AG v Jonathan Cape* [1976] QB 752; [1975] 3 All ER 484.

104 *AG v Guardian (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109.

> interest that the workings of government should be open to scrutiny and criticism.

In relation to (b) above, Lord Widgery was of the view that the Crown could not restrain publication of all types of confidential information without regard to the passage of time. The time limit after which the confidential character of the information would lapse might vary according to the nature of the information involved. However, the information at issue in the case was at the time of the proposed publication over 10 years old. He dismissed the argument that the disclosure would inhibit frank discussion in Cabinet or damage the doctrine of joint Cabinet responsibility. He also dismissed the argument that it would inhibit the frankness of the advice given to ministers by civil servants. The Crown had not demonstrated that publication of the diaries after that passage of time would do any harm to the public interest. In order to show public interest, it would seem that the Crown must be able to pinpoint a specific danger to the public interest to justify the grant of an injunction. Assertions of damage in the abstract will not do.

All levels of court cited the *Jonathan Cape* decision with approval in *AG v Guardian (No 2)*,[105] along with the Australian decision of Mason J in the case of *Commonwealth of Australia v John Fairfax and Sons Ltd*,[106] which concerned the publication by the defendants of a book on Australian defence and foreign policy by reference to a series of confidential governmental documents. In the *Fairfax* decision, Mason J had observed:

> It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action. Accordingly, the court will determine the government's claim to confidence by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.[107]

Applying this approach to *Spycatcher*, the Crown's inability to show that an injunction to restrain the media from further publication of allegations contained in *Spycatcher* was necessary in the public interest was instrumental in its failure to secure permanent injunctions in *AG v Guardian (No 2)*,[108] although interim injunctions remained in force. As Lord Keith indicated, 'the general publication in this country would not bring about any significant damage beyond what has already been done'.[109]

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105 *AG v Guardian (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109.

106 *Commonwealth of Australia v John Fairfax and Sons Ltd* (1980) 32 ALR 485, p 493.

107 Cited with approval by Lord Keith in *AG v Guardian (No 2)* [1988] 3 All ER 545, p 641.

108 *Ibid*.

109 *Ibid*.

Breach of confidence and privacy

This chapter has highlighted three principal reasons why the law of confidence cannot be equated with a law of privacy. In summary, they are as follows:

- not all personal information is confidential. As the Tony Blair/nanny case illustrates, the desire to protect privacy can easily lead to a contortion of the action for confidence to restrain publication of material which has passed into the public domain. This cannot be squared with a law of confidence on any analysis;
- at present, only the person to whom the obligation of confidence is owed may bring proceedings for breach of confidence. This may not be the party (or the only party) whose privacy has been violated. The law could overcome this difficulty by imposing a wider obligation of confidence to cover the subject of the confidential material, but that may lead to the law becoming unacceptably wide;
- the efficacy of the action for confidence as a way of protecting privacy is largely dependent on the courts giving recognition to the distress and feelings of violation which invariably accompanies an infringement of privacy. But the need to provide for this type of 'detriment' graphically illustrates the differences between the traditional action for breach of confidence and a violation of privacy. This was recognised by Lord Mustill in *R v BSC ex p BBC*,[110] where he observed:

> Privacy and confidentiality are not the same. For example, the reading and copying of personal diaries, letters to relatives or lovers, poems and so on could ground not only an allegation of tortious conduct, but also an *additional complaint* that the privacy of the writer and perhaps also of the recipient have been intruded upon. Such conduct is specially objectionable, not because legal rights have been infringed but because of the insult done to the person as a person [emphasis added].

The most explicit consideration of detriment in the context of privacy occurred in the recent case of *R v Department of Health ex p Informatics*,[111] which concerned the unauthorised disclosure by pharmacists of confidential information concerning patients. The information which had been disclosed was anonymised, so that the identity of the patients could not be discovered. The Court of Appeal held there was no breach of confidence because the identity of the patients was protected. It did not matter that the details which were disclosed happened to be confidential. Detriment had not been established on the facts. The law of confidence in the context of personal

110 *R v BSC ex p BBC* (2000) unreported.

111 *R v Department of Health ex p Informatics* [2000] 1 All ER 786.

information was only concerned to protect privacy. If privacy was already safeguarded, there could be no breach of confidence.

But, as we have seen in Chapter 2, under the present law one cannot be sure that the courts will recognise distress and hurt feelings as a separate head of damages. Lord Mustill thought that these feelings are an additional claim to any claim in confidence.[112] The law must be clarified to allow for recovery of such loss as a head of compensatory damages in its own right if adequate compensation is to be guaranteed.

112 *R v BSC ex p BBC* (2000) unreported.