

# Case Comments

## The *Spycatcher* Cases

If the publication of this book in America is to have, for all practical purposes, the effect of nullifying the jurisdiction of the English courts to enforce compliance with the duty of confidence, . . . then, . . . the English law would have surrendered to the American Constitution. There the courts, by virtue of the First Amendment, are, I understand, powerless to control the press. Fortunately, the press in this country is, as yet, not above the law. . . .<sup>1</sup>

With this statement, Lord Ackner has, perhaps unwittingly, illustrated the vast difference between the freedom of the press in England and in the United States. In the United States, the Supreme Court has consistently maintained that any system of prior restraint bears a strong “presumption against its constitutional validity.”<sup>2</sup> The government, therefore, “carries a heavy burden of showing justification for the imposition of such a restraint.”<sup>3</sup> That burden is not reduced simply because the government seeks a temporary injunction against the press, because even a slight delay would interfere with the press’s “traditional function of bringing news to the public promptly.”<sup>4</sup> In England, however, the presumption is just the opposite. The courts, when balancing the competing interests between preserving confidentiality and keeping the public informed, resolve the conflict in favor of prior restraint unless the latter interest clearly outweighs the public interest in maintaining confidence.<sup>5</sup>

The difference between these two approaches is demonstrated by the *Spycatcher* cases. If these cases had arisen in the United States, the British claims would have been rejected in a manner similar to the Supreme Court’s dismissal of the temporary injunctions against the *New York Times* and *Washington Post* in *New York Times Co. v. United States*.<sup>6</sup> In both England and the United States the press sought to disclose secret activities of the respective governments regarding matters of public concern, and the governments relied on their national security interests to restrain the press. The British government’s claims, moreover, did not rest on a statutory authorization allowing for injunctive relief, but rather on a common law action for breach of confidence.<sup>7</sup> Furthermore, much of the information disclosed by Peter Wright in his book, *Spycatcher*, had previously been made public, and thus, the national security

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1. Attorney-General v. Guardian Newspapers Ltd. [1987] 1 W.L.R. 1248, 1306 (H.L.(E.)) (per Lord Ackner). The statement was made in his opinion upholding the temporary injunction that restrained the press from publishing information obtained from Peter Wright or from his book *Spycatcher*.

2. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

3. *Id.*

4. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976).

5. See, e.g., *Lion Lab. Ltd. v. Evans* [1985] 1 Q.B. 526 (C.A.). See *infra* text accompanying notes 81–93.

6. 403 U.S. 713 (1971).

7. The concurring opinions of Justices White and Marshall, for example, suggest that if statutory authorization had existed, the result of the case might have been different. *New York Times Co.*, 403 U.S. at 730–48. See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), in which the court upheld an injunction against the *Progressive* based on the danger of the information published and specific statutory authorization of the injunction. The suit was later dismissed because the information had been independently published by others. *United States v. Progressive, Inc.*, 610 F.2d 819 (7th Cir. 1979).

interest was limited to deterring others from emulating Wright.<sup>8</sup> A court in the United States would not have found the British government's interests sufficient to meet its burden to restrain the press from publishing the allegations disclosed by Wright and therefore would have dismissed its claim for a temporary injunction.

The *Spycatcher* cases did not, of course, arise in the United States, so the British government was successful in silencing the press. In fact, the various court decisions illustrate the government's ability to withhold from the public information it deems contrary to national security and also demonstrate the lengths to which the government will go to preserve its interests in confidentiality.

This Comment will focus on those cases, providing an overview of the legal theories used by the press and the government, and a description of the court decisions, showing the ease with which the courts resolved the competing interests in favor of the government. Part I will provide the relevant facts of the cases. Part II will outline the law of breach of confidence and the provisions of the Contempt of Court Act. Part III will describe the series of cases in which the English courts upheld a temporary injunction restraining the press from publishing any information directly or indirectly attributable to Peter Wright. The cases that established and upheld the applicability of contempt of court actions against those newspapers and libraries not bound by the original injunction will also be treated in Part III. Part IV will focus on the Hong Kong decisions in which the courts upheld a similar injunction against the *South China Morning Post*, and Part V will cover the English courts' decisions refusing to grant the government a permanent injunction.

## I. BACKGROUND AND FACTS

Peter Wright joined the British Service, M.I.5,<sup>9</sup> in 1955 as a scientific advisor in its counterespionage branch.<sup>10</sup> During the last years of his service, he acted as a personal consultant to the Director General on counterespionage and devoted his time to determining the extent of Soviet penetration of the Service.<sup>11</sup> When he joined the Service and again upon his retirement in 1976, Wright signed a declaration similar to those signed by all civil servants, acknowledging that he was liable to prosecution if he communicated any information he obtained as a result of his position, unless the information had been officially made public or the Service gave him permission.<sup>12</sup>

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8. See *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1988] 2 W.L.R. 805, 822-31 (Ch. D.). In the trial on the main action between the government and the newspapers, the court pointed out that the allegations made in *Spycatcher* had been published previously in 12 other books and 3 television programs, including 1 program that included an interview with Peter Wright. The government had not taken any action to prevent these publications or broadcasts, even though they covered materials similar to those contained in *Spycatcher*.

9. Military Intelligence 5, which is responsible for defending the United Kingdom against espionage, sabotage, and subversion, is similar to the FBI. The British Security Service, of which M.I.5 is a branch, is required to remain free from any political bias and is not allowed to make inquiries on behalf of government departments unless an important public interest relating to defense is involved. See Maxwell-Fyfe Directive, quoted in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1988] 2 W.L.R. 805, 813 (Ch. D.).

10. *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1988] 2 W.L.R. 805, 813 (Ch. D.).

11. *Id.*

12. See REPORT OF THE COMM'N ON SECTION 2 OF THE OFFICIAL SECRETS ACT 1911, 1972, CMND. 5104, at 19. All employees of the government and anyone receiving confidential information sign a declaration acknowledging that they are liable for prosecution under the Act if they disclose information in violation of the Official Secrets Act. While these

After his retirement, Wright submitted a memorandum to the Chairman of the Select Committee of the House of Commons calling for an inquiry into the Service.<sup>13</sup> He alleged that Sir Roger Hollis, the former director of M.I.5, was a Soviet agent and that members of the Service had conspired to destabilize the Labor government of Prime Minister Harold Wilson.<sup>14</sup> When Wright decided the Committee's investigation was inadequate, he made arrangements with Heinemann Australia to publish his account of the Service in the book *Spycatcher*.<sup>15</sup>

When the British government learned of Wright's plan in September of 1985, it began proceedings against Wright and his publisher in New South Wales seeking an injunction against publication, or, in the alternative, an accounting of profits.<sup>16</sup> Both Wright and Heinemann agreed not to publish his work until the Australian courts reached a decision.<sup>17</sup>

In June of 1986 *The Guardian* and *Observer*, in articles on the upcoming trial in Australia, published outlines of the allegations made by Wright in his unpublished manuscript.<sup>18</sup> The Attorney General immediately obtained a temporary injunction, which the Court of Appeal upheld on July 25.<sup>19</sup> The injunction prohibited the papers from publishing any information from or attributed to Wright, but allowed for disclosure of information previously published in other books and on television programs broadcast in England.<sup>20</sup> In addition, the injunction allowed the papers to publish information disclosed in open court in New South Wales and Parliament.<sup>21</sup>

The trial in Australia received a great deal of publicity in England, and on March 13, 1987, Justice Powell in New South Wales dismissed the Attorney General's claim. He decided that while Wright did not have a statutory duty of confidence, he did have an equitable one.<sup>22</sup> However, because the bulk of the information Wright sought to disclose was in the public domain, Justice Powell held that the British government had not demonstrated that the publication of the remaining confidential information would cause any detriment to the government.<sup>23</sup> The Attorney General

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declarations have no legal force, they do outline the restrictions governing the use of official information for nonofficial purposes.

13. *Attorney-General v. Newspapers Publishing Plc.* [1987] 3 W.L.R. 942, 946 (Ch. D.).

14. See *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 822-31 (Ch. D.) for an overview of Wright's allegations. See also Freeman, *Peter Wright: The Real Story*, *The Sunday Times*, Oct. 16, 1988, at 16, col. 3. According to Freeman, Wright admitted that he, in fact, was the ringleader in the plot to destabilize Wilson and that instead of 30 officers being involved as he claimed in *Spycatcher*, there were only 8.

15. *Attorney-General v. Newspapers Publishing Plc.* [1987] 3 W.L.R. 942, 946 (Ch. D.).

16. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 815 (Ch. D.).

17. *Id.*

18. *Attorney-General v. Observer, Ltd.* (C.A. July 25, 1986) (LEXIS, Enggen library, Cases file). The *Observer* article, for example, included Wright's allegations that M.I.5 had "bugged" various friendly and unfriendly diplomatic offices; that Guy Burgess had attempted to seduce Churchill's daughter; and that M.I.5 had plotted to assassinate President Nasser of Egypt. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 872 (C.A.).

19. See *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 815-16 (Ch. D.).

20. *Id.* See also *supra* note 8.

21. *Id.* at 815-16.

22. See *Attorney-General (U.K.) v. Heinemann Publishers Austl. Ltd.* [1987] 8 N.S.W.L.R. 341.

23. *Id.*

appealed that decision, and Wright and Heinemann again agreed to delay publication until the appeal was decided.<sup>24</sup>

In April of 1987 the *Independent* and two other London papers published major summaries of Wright's book, as did the *Melbourne Age* and *Canberra Times*. On May 3 the *Washington Post* also published a summary of Wright's allegations.<sup>25</sup> The Attorney General immediately began proceedings against the English papers for contempt of court.<sup>26</sup> At the same time, *The Guardian* and *Observer* applied to the court to lift the injunction against them in light of the other papers' disclosures of Wright's allegations.<sup>27</sup> The court postponed the latter application pending the resolution of the contempt of court proceedings.<sup>28</sup>

On May 14 Viking Penguin announced its intention to publish *Spycatcher* in the United States. The British government tried to convince the parent company of Viking, a British corporation, to use its powers to dissuade the New York subsidiary from publishing the book, but the corporation declined to do so.<sup>29</sup> The government, in addition, considered taking legal action against Viking to restrain publication and to seek an accounting of profits, but did not do so.<sup>30</sup> The government decided that such an action would be unsuccessful given the first amendment and the presumption against prior restraint in the United States.<sup>31</sup>

On June 2 the Vice-Chancellor dismissed the contempt of court charges against the *Independent* and the other papers that had published summaries of Wright's allegations.<sup>32</sup> The Attorney General appealed the decision. While this appeal was pending, the editor of the *Sunday Times*, who had obtained serialization rights of *Spycatcher* from Heinemann, secretly arranged with Viking to obtain a copy of the manuscript so that he could publish excerpts of the book to coincide with its publication in the United States.<sup>33</sup> In order to avoid government detection and to insure that at least some of the Wright material would be published, the *Sunday Times* did not include any of it in the first edition but saved the excerpts for the second edition of the paper, published on the evening of July 12.<sup>34</sup> The Attorney General, therefore, had to wait until the next day to begin proceedings against the paper for contempt of court and to obtain an injunction restraining further publication.<sup>35</sup>

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24. See *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 816 (Ch. D.). The New South Wales Court of Appeal upheld the court's decision. See *Attorney-General (U.K.) v. Heinemann Publishers Austl. Ltd.* [1987] 10 N.S.W.L.R. 86. Special leave to appeal to the High Court was given, but Heinemann was allowed to publish the book, and thus, on October 13, 1987, *Spycatcher* was available in Australia. In June of 1988 the High Court dismissed the Attorney General's appeal. The court refused to grant jurisdiction to enforce an obligation of confidence to protect a foreign government's "intelligence secrets and confidential political information." See *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 3 W.L.R. 776, 780 (H.L.(E.)) (per Lord Keith of Kinkel).

25. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 816-17 (Ch. D.).

26. *Id.* at 816.

27. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1255 (Ch. D.).

28. *Id.*

29. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 817 (Ch. D.).

30. *Id.*

31. *Id.*

32. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1256 (Ch. D.).

33. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 817-18 (Ch. D.).

34. *Id.*

35. *Id.*

On the very next day, July 14, 1987, Viking published *Spycatcher* in the United States, where it immediately became a best seller. One New York bookseller, claiming that the British were his "keenest" customers, ran out of copies by noon of that day.<sup>36</sup> Prime Minister Thatcher, however, ruled out any attempts to stop importation of the book, stating that such efforts were likely to be ineffective.<sup>37</sup> As a result of that decision, British citizens were free to purchase copies of the book from booksellers in the United States. One enterprising individual, claiming that the Prime Minister would be proud of his initiative, flew to New York, purchased 80 copies of *Spycatcher*, and, dressed as Uncle Sam, sold them in England. He was arrested, not for importing the book, but for selling without a vendor's license.<sup>38</sup>

Meanwhile, the Attorney General's appeal of the contempt of court dismissals was decided with the Court of Appeal's holding that any further publication of the Wright material would constitute contempt of court.<sup>39</sup> As a result of that decision, the *Sunday Times* appealed to the European Commission of Human Rights, and that case is still pending.<sup>40</sup> Because the contempt of court case had been decided, *The Guardian* and *Observer* renewed their application to have the injunction against them dismissed.<sup>41</sup> That action, joined by the *Sunday Times*, was heard on July 20 with the Vice-Chancellor dismissing the injunction.<sup>42</sup> The Attorney General appealed that decision, and the Court of Appeal reversed the Vice-Chancellor's decision on July 24.<sup>43</sup> The newspapers then appealed to the House of Lords, which upheld the Court of Appeal's decision and, in addition, modified the injunction to prohibit publication of any Wright material disclosed in open court in Australia.<sup>44</sup>

During this time period, the *South China Morning Post* in Hong Kong, *The Dominion* in New Zealand, and the *Nation* in East Africa all published serialized excerpts from *Spycatcher*. The Attorney General obtained a temporary injunction restraining the first two papers from publishing further excerpts of the book.<sup>45</sup> In November of 1987 the injunction against the New Zealand paper was dismissed with the court refusing to grant a temporary injunction pending appeal of its decision.<sup>46</sup>

36. *The Guardian*, July 15, 1987, at 1, col. 3. As of October of 1987, Viking Penguin had printed 715,000 copies of *Spycatcher*, and from August to October, the book was listed as a best seller for nine weeks. Similar sales occurred in Canada. As of August of 1987, there were estimates that 10,000 copies of *Spycatcher* were entering England each week. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 820-21 (Ch. D.).

37. *The Guardian*, July 15, 1987, at 1, col. 2.

38. *The Guardian*, July 28, 1987, at 30, col. 6.

39. *Attorney-General v. Newspaper Publishing Plc.* [1987] 3 W.L.R. 942, 958 (C.A.).

40. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 818 (Ch. D.).

41. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1255 (Ch. D.).

42. *Id.* at 1257.

43. *Id.* at 1271-82.

44. *Id.* at 1282-1321.

45. *See Attorney-General v. South China Morning Post Ltd.*, No. 114 (Civil) Sept. 8, 1987; *Attorney-General v. South China Morning Post Ltd.*, No. 4644 (HC) Aug. 24, 1987 (on file at the Ohio State Law Journal). In addition, the British government obtained a temporary injunction against serialization of the book by *The Dominion*, the main daily newspaper in Wellington, New Zealand. *The Guardian*, Aug. 5, 1987, at 1, col. 8. As of August 25, 1987, the government had not decided whether it would take similar action against the *Nation*, East Africa's largest daily, which also published abstracts. *The Times*, Aug. 25, 1987, at 16, col. 1.

46. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 820 (Ch. D.). The New Zealand Court of Appeal upheld the lower court's decision in April of 1988. *Attorney-General v. Wellington Newspapers Ltd.*

In December of 1987 the trial on the main action occurred in England. The trial court dismissed the injunction against the *Observer*, *The Guardian*, and the *Sunday Times*, but the court held the *Sunday Times* liable for any profit that resulted from the paper's publication of the Wright excerpts in July.<sup>47</sup> Both the Court of Appeal and the House of Lords upheld the lower court's decision.<sup>48</sup> Thus, on October 13, 1988, over two years after the Attorney General obtained the initial injunction, newspapers in England were free to comment on the allegations made in *Spycatcher*.

In all of the *Spycatcher* cases, the British government relied on the common law action of breach of confidence. The Attorney General argued that because Wright owed a duty of confidence to the government, and the newspapers were aware of that duty, they too were bound by his obligation of confidence. Thus, their publication of any material Wright disclosed in breach of his duty to the government was a breach of their own duty. Once the Attorney General was successful in obtaining an injunction against the *Observer* and *The Guardian*, he argued that any further publication of the Wright material would destroy the subject matter of his suit against those papers, and, thus, constituted contempt of court. In order to place in perspective the approach used by the Attorney General, a brief overview of the law of confidence and the provisions of the Contempt of Court Act is necessary.

## II. RESTRAINTS ON THE PRESS

### A. Breach of Confidence

A 16th-century verse concerning the Chancellor's power states:

These three give place in court of conscience,  
Fraud, accident, and breach of confidence.<sup>49</sup>

The rhyme reflects the long history of the law of confidence, and although earlier cases have been reported, the Victorian period marks the foundation of the modern action for breach of confidence.<sup>50</sup> The scope of the action is quite broad, covering everything from trade and government secrets and artistic confidences to communications between spouses.<sup>51</sup> No current statute focuses exclusively on the law of confidence,<sup>52</sup> but various statutes do include provisions that refer to confidential information in connection with their own statutory purpose.<sup>53</sup> Section 87(5) of the

(unreported), Apr. 28, 1988 (noted in *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 3 W.L.R. 776, 790 (H.L.(E.))).

47. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 820 (Ch. D.).

48. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 3 W.L.R. 776 (H.L.(E)). These decisions, however, did not end the legal battles over *Spycatcher*. Several newspapers published excerpts of the Wright material in defiance of the earlier House of Lords decision, and the Attorney General had begun contempt proceedings against them. *The Guardian*, Aug. 1, 1987, at 1, col. 2.

49. B. REID, CONFIDENTIALITY AND THE LAW 1 (1986) (quoting comment by Maitland in *EQUITY/TWO COURSES OF LECTURE 7* (1910)).

50. *Id.* at 7; see also F. GURRY, BREACH OF CONFIDENCE 3 (1984).

51. F. GURRY, *supra* note 50, at 90-108.

52. *But see* LAW COMM'N, BREACH OF CONFIDENCE, 1981, CMND. No. 8388, at 179 [hereinafter BREACH OF CONFIDENCE] (proposal for a statutory tort of breach of confidence).

53. B. REID, *supra* note 49, at 2; F. GURRY, *supra* note 50, at 237-38, 468-73.

Food Act of 1984, for example, prohibits disclosure of any trade secrets obtained by an inspector unless the disclosure is made in the performance of duty.<sup>54</sup> The law of confidence, however, is predominantly judge-made rather than statutory.

The jurisdictional basis of the action is uncertain: courts have granted relief on the basis of contract, property, and equity.<sup>55</sup> The theory used depends on the nature of the information involved and the circumstances under which the information has been disclosed.<sup>56</sup> While this uncertainty does not affect the existence of the jurisdiction, it may affect the remedy used in a particular case.<sup>57</sup>

The modern formulation of the action is found in *Saltman Engineering Co. v. Campbell Engineering Co.*<sup>58</sup> per Lord Greene: "If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights."<sup>59</sup> In order for a claim to be successful, the plaintiff must prove three elements. First, the information itself must be confidential.<sup>60</sup> Second, the information must have been given in circumstances that imposed an obligation of confidence.<sup>61</sup> Third, there must be a breach of that obligation; the defendant must have made unauthorized use of the information to the detriment of the plaintiff.<sup>62</sup>

For information to be confidential, it must not be public knowledge or public property.<sup>63</sup> A piece of information may, however, be available for anyone's use and still be confidential: "what makes it confidential is the fact that the maker of the document had used his brain and thus produced a result which can only be produced by someone who goes through the same process."<sup>64</sup> Information may also be public knowledge in some locations and still be confidential in others.<sup>65</sup> Moreover, for publication to destroy the confidentiality, all the details must be disclosed,<sup>66</sup> and even if all details have been divulged, the context in which the disclosure occurred and the association of the information to that context may still make the information confidential.<sup>67</sup> A defendant may, for example, be restrained from using information in the public domain if that information came to her in confidence and gives her an unfair advantage over the plaintiff.<sup>68</sup>

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54. B. REID, *supra* note 49, at 2.

55. F. GURRY, *supra* note 50, at 26; *see also* BREACH OF CONFIDENCE, *supra* note 52, at 3.1-5.2.

56. F. GURRY, *supra* note 50, at 59.

57. BREACH OF CONFIDENCE, *supra* note 52, at 5.2 n.483; F. GURRY, *supra* note 50, at 58-61.

58. [1963] 3 All E.R. 413.

59. *Id.* at 414.

60. *Id.* at 415; *Coco v. A.N. Clark (Eng'rs)* [1969] R.P.C. 41, 47.

61. *Coco v. A.N. Clark (Eng'rs)* [1969] R.P.C. 41, 47.

62. *Id.*

63. *Saltman Eng'g Co. v. Campbell Eng'g Co.* [1963] 3 All E.R. 413, 415.

64. *Id.*

65. *See Franchi v. Franchi* [1967] R.P.C. 149; *Exchange Tel. Co. v. Central News Ltd.* [1897] 2 Ch. 48; F. GURRY, *supra* note 50, at 74-75.

66. F. GURRY, *supra* note 50, at 74-75.

67. *Id.*

68. BREACH OF CONFIDENCE, *supra* note 52, at 3.15. *See also* *Schering Chem. Ltd. v. Falkman Ltd.* [1982] 1 Q.B. 1, 2 (C.A.); *Terrapin Ltd. v. Builders' Supply Co.* [1967] R.P.C. 41; *Exchange Tel. Co. v. Central News Ltd.* [1897] 2 Ch. 48.

The circumstances under which an obligation of confidence arises will vary. While an obligation may arise out of a contractual relationship—either express or implied—a contract is not required.<sup>69</sup> The key is whether the information was disclosed to the confidant for a limited purpose and if so, whether the confidant was aware of the limitations on the use of the information.<sup>70</sup> The test of whether the confidant knew of the limitations is not clear,<sup>71</sup> but Judge Megarry in *Coco v. A.N. Clark (Engineers)*<sup>72</sup> used a reasonableness test to imply an obligation in equity:

It seems to me that if the circumstances are such that any 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.<sup>73</sup>

In some cases the limited use restriction will be clear from the circumstances surrounding the disclosure, as in the case of an express contract or a statutory duty of secrecy. In other instances, it may be implied from custom, on the basis of an employment relationship, or implied by using a reasonable person test.<sup>74</sup>

If the plaintiff establishes that the information was confidential and that the defendant was aware of it, then the plaintiff has to establish that the defendant breached the obligation by making unauthorized use of the information. The question is a factual one, and the court will look at whether the information used was directly or indirectly obtained from the confider, and whether the use was inconsistent with the purpose for which it was given.<sup>75</sup>

A plaintiff must prove the same elements when a third party discloses confidential information, but this area of the law is uncertain.<sup>76</sup> It appears that if a third party has actual knowledge of the confidential nature of the information at the time of receiving it, she can be held liable for its disclosure if she stands to gain an advantage over the plaintiff, or if she aids the confidant in his breach.<sup>77</sup> If, however, she lacks actual knowledge and has no reason to know of the confidence, she will not be liable for its disclosure.<sup>78</sup> Furthermore, it is not clear whether an innocent third party who purchases the information for value can be held liable. If she has not changed her position in reliance on the information, some courts may, nevertheless, impose an obligation on her if the plaintiff will be harmed by the breach, but other courts will not.<sup>79</sup>

69. See *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923, 931 (C.A.) (“The law on this subject 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.”); F. GURRY, *supra* note 50, at 89–108.

70. F. GURRY, *supra* note 50, at 113.

71. *Id.* at 115–20; BREACH OF CONFIDENCE, *supra* note 52, at 4.4.

72. [1969] R.P.C. 41.

73. *Id.* at 47.

74. F. GURRY, *supra* note 50, at 120.

75. *Id.* at 256–57.

76. *Id.* at 270; BREACH OF CONFIDENCE, *supra* note 52, at 4.11–4.12, 6.52–6.55.

77. See F. GURRY, *supra* note 50, at 271; BREACH OF CONFIDENCE, *supra* note 52, at 4.11. See also *Schering Chem. Ltd. v. Falkman Ltd.* [1982] 1 Q.B. 1 (C.A.). In *Schering* the court granted an interlocutory injunction restraining Thames Television, a third party, from broadcasting a television program because Thames used information knowing it came from a confidant who breached his duty of confidence.

78. F. GURRY, *supra* note 50, at 275. See also *Fraser v. Thames Television Ltd.* [1984] 1 Q.B. 44, 65 (C.A.) (“in order to be fixed with an obligation of confidence, a third party must know the information was confidential”).

79. F. GURRY, *supra* note 50, at 275–83.



If the plaintiff establishes a cause of action for breach of confidence, whether it be against someone with whom he has a direct relationship or a third party, the defendant has several defenses at his disposal.<sup>80</sup> The primary defense is that the disclosure was made in the public interest.<sup>81</sup> The defense is outlined in *Lion Laboratories Ltd. v. Evans*,<sup>82</sup> in which Stephenson, L.J., relying on previous decisions,<sup>83</sup> describes the factors considered. The court focuses on the two competing interests involved: the public interest in preserving confidentiality and the countervailing interest of the public in being informed of matters that are "of real public concern."<sup>84</sup> If the information satisfies the requirements of public concern, individuals or the press may have a duty to disclose the information even though they obtained it unlawfully.<sup>85</sup>

Courts consider four factors to determine matters of public concern. First, courts note the "wide difference between what is interesting to the public and what is in the public interest to make known."<sup>86</sup> The general public may, for example, be interested in a piece of gossip about a member of the Royal family, but disclosure of that information may not be in the public interest. Second, with respect to the press, courts look at whether the "public interest" is, in fact, a private interest in increased circulation.<sup>87</sup> Third, courts consider whether the public interest will be best served by disclosure not to the public at large, but rather to the police or some other responsible party.<sup>88</sup> Fourth, courts have stated that there "is no confidence as to the disclosure of iniquity."<sup>89</sup>

What qualifies as iniquity is not certain. Lord Denning in *Initial Services v. Putterill*<sup>90</sup> stated that the defense should "extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always—and this is essential—that the disclosure is justified in the public interest."<sup>91</sup> However, the defense has also been given a less restrictive definition when an actual misdeed has not occurred.<sup>92</sup> In *Lion Laboratories*, for example, even though the plaintiffs were not guilty of any misconduct, the court allowed the defense because the information was a matter of grave public concern.<sup>93</sup> Once the court has examined

80. See BREACH OF CONFIDENCE, *supra* note 52, at 4.54–4.72; F. GURRY, *supra* note 50, at 325–59; B. REID, *supra* note 49, at 176–77.

81. See F. GURRY, *supra* note 50, at 325–52; BREACH OF CONFIDENCE, *supra* note 52, at 4.36–4.53.

82. [1985] 1 Q.B. 526, 536–39 (C.A.).

83. Schering Chem. Ltd. v. Falkman Ltd. [1982] 1 Q.B. 1 (C.A.); British Steel Corp. v. Granada Tel. Ltd. [1981] A.C. 1096; Woodward v. Hutchins [1977] 1 W.L.R. 760 (C.A.); Hubbard v. Vosper [1972] 2 Q.B. 84 (C.A.); Fraser v. Evans [1969] 1 Q.B. 349 (C.A.); Initial Servs. Ltd. v. Putterill [1968] 1 Q.B. 396 (C.A.).

84. *Lion Lab. Ltd. v. Evans* [1985] 1 Q.B. 526, 536 (C.A.).

85. *Id.*

86. *Id.* at 537 (quoting Lord Wilberforce in *British Steel Corp. v. Granada Tel. Ltd.* [1981] A.C. 1096, 1168).

87. *Id.* See also *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892, 898 (C.A.) ("[T]hey are peculiarly vulnerable to the error of confusing the public interest with their own.") (per Donaldson, M.R.).

88. *Lion Lab. Ltd. v. Evans* [1985] 1 Q.B. 526, 537 (C.A.). See also *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892, 898 (C.A.).

89. *Gartside v. Outram* [1856] 26 L.J. Ch. 113, 114; *Lion Lab. Ltd. v. Evans* [1985] 1 Q.B. 526, 537 (C.A.).

90. [1968] 1 Q.B. 396 (C.A.).

91. *Id.* at 405.

92. See *Lion Lab. Ltd. v. Evans* [1985] 1 Q.B. 526, 537 (C.A.); F. GURRY, *supra* note 50, at 340–41.

93. The information in that case dealt with faulty breathalyzers by which some members of the public may have been wrongly convicted for drunk driving.

the above factors, it weighs the competing interests based on the evidence and facts of the case.

The law of breach of confidence is fact-based, and the success of a claim depends upon the relationship of the parties involved, the nature of the information, and the extent to which the information is already available to the public. While most cases arise from disclosure of trade secrets, patents, or employment contracts,<sup>94</sup> a number of cases have involved the press.<sup>95</sup> With the exception of Lord Denning's dissent in *Schering Chemicals Ltd. v. Falkman Ltd.*,<sup>96</sup> nothing suggests that the press is given any greater protection from a breach of confidence action than any other defendant. Moreover, despite Blackstone's commentary on prior restraint,<sup>97</sup> the courts have not been reluctant to grant temporary injunctions restraining the press from publishing confidential material.<sup>98</sup> Courts weigh the same factors in granting any injunction: the adequacy of damages, the likelihood that one party will be greatly harmed as a result of the grant or denial of the injunction, and each party's likelihood of prevailing at trial.<sup>99</sup>

### B. *The Contempt of Court Act 1981*

The press, in addition to being subject to actions for breach of confidence, is also subject to the Contempt of Court Act 1981 (the Act).<sup>100</sup> The Act provides for strict liability if a publication creates a substantial risk that the course of justice will be seriously impeded or prejudiced.<sup>101</sup> In order for the strict liability rule to apply, the proceedings in question must be active.<sup>102</sup>

Criminal proceedings are active at the time of an arrest without a warrant, the issuance of a warrant or a summons, or the service of an indictment, whichever comes first.<sup>103</sup> Other proceedings become active at the time arrangements are made for the hearing or, if no such arrangements are made, from the time the trial begins.<sup>104</sup> Appellate proceedings are active when they are commenced by the appropriate

94. See generally F. GURRY, *supra* note 50; B. REID, *supra* note 49.

95. See *Lion Lab. Ltd. v. Evans* [1985] 1 Q.B. 526 (C.A.); *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892 (C.A.); *Schering Chem. Ltd. v. Falkman Ltd.* [1982] 1 Q.B. 1 (C.A.); *Home Office v. Harman* [1981] 1 Q.B. 534 (Q.B.D.); *British Steel Corp. v. Granada Tel. Ltd.* [1981] A.C. 1096; *Attorney-General v. Jonathan Cape Ltd.* [1976] 1 Q.B. 752; *Fraser v. Evans* [1969] 1 Q.B. 349 (C.A.); *Argyll (Duchess of) v. Argyll (Duke of)* [1967] Ch. 302.

96. [1982] 1 Q.B. 1, 22 (C.A.) ("Freedom of the press is of fundamental importance in our society. It covers not only the right of the press to impart information of general concern, but also the right of the public to receive it. It is not to be restricted on the ground of breach of confidence unless there is a 'pressing social need' for such restraint.").

97. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 W. BLACKSTONE, COMMENTARIES 151-52.

98. See Recent Developments, *Freedom of the Press and Government Secrets: The Availability of Prior Restraint Against the Press in the United Kingdom*, 28 HARV. INT'L L.J. 131, 133 (1987) (authored by Paula Dalley) [hereinafter Dalley].

99. *Id.* See also *American Cyanamid v. Ethicon Ltd.* [1975] 2 W.L.R. 316 (H.L.(E.)).

100. [1981] Ch. 49.

101. *Id.* § 2(2).

102. *Id.* § 2(3).

103. *Id.* sched. 1., ¶¶ 4-5.

104. *Id.* ¶ 12.

procedures.<sup>105</sup> All proceedings become inactive when they are disposed of or are discontinued.<sup>106</sup>

There is, then, a three-part test for the strict liability rule to apply. The proceedings must be active. If they are, then the Attorney General<sup>107</sup> must prove that there is a substantial risk that publication will affect the proceedings. This seems to be determined by the nature of the publication, its breadth, and the place of trial.<sup>108</sup> Then the Attorney General must prove that the publication will seriously impede or prejudice the proceeding. This determination depends on the content of the publication and its proximity to the date of trial.<sup>109</sup>

A defendant has four possible defenses. First, a publisher who does not know and has no reason to know that the proceedings are active cannot be convicted under the rule.<sup>110</sup> Second, a distributor who does not know or does not have reason to suspect that the publication contains prejudicial information cannot be held liable.<sup>111</sup> Third, a publication made as part of a good faith discussion of public affairs or other matters of public interest does not fall under the rule if the risk of prejudice is incidental.<sup>112</sup> Fourth, fair and accurate reports of public proceedings published contemporaneously and in good faith are not subject to the rule. The latter, however, can be postponed if the court thinks that it is necessary to avoid the risk of prejudice.<sup>113</sup>

Despite the limits on strict liability, the Act contains a savings provision that allows for common law defenses as well as for other kinds of actions for contempt.<sup>114</sup> Thus the press could be restrained from publishing information even if the proceedings were not active, if a court believed that the information published would impede justice. If, for example, in a child abuse case, the court believed that disclosing the child's name would be harmful to her, the court could prohibit its disclosure even if the proceedings involved were not active.

The freedom of the press in England is limited by each of the means outlined, and nothing suggests that either the government or the courts are hesitant about imposing restraints. The government, as the *Spycatcher* cases illustrate, combines these methods quite effectively to delay publication of information it believes should remain secret.

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105. *Id.* ¶ 15.

106. *Id.* ¶¶ 5, 12, 15–16.

107. *Id.* § 7. Section 7 requires the consent of the Attorney General or a motion of the court for an action to be brought under the rule.

108. *See* Attorney-General v. News Group Newspapers Ltd. [1986] 3 W.L.R. 365, 375, 377 (C.A.).

109. *Id.* at 377.

110. Contempt of Court Act 1981, Ch. 49, § 3(1).

111. *Id.* § 3(2).

112. *Id.* § 5.

113. *Id.* § 4.

114. *Id.* § 6.

## III. THE ENGLISH CASES

A. *The Breach of Confidence Actions*1. *The Pre-Publication Cases*

The British cases began on June 27, 1986, when Justice MacPherson granted an *ex parte* injunction restraining *The Guardian* and *Observer* from disclosing any information obtained by Wright and from publishing any information connected to *Spycatcher*.<sup>115</sup> Justice Millett modified the injunction to restrain the papers: (1) from publishing any information directly or indirectly obtained from Wright in his capacity as a member of the Service, and (2) from attributing any information concerning the Service to Wright by name or otherwise.<sup>116</sup> The papers, however, were free to publish information already made public in works published by Chapman Pincher or broadcast on programs by Granada television.<sup>117</sup> The papers could, in addition, publish information disclosed in open court in New South Wales.<sup>118</sup> The Court of Appeal upheld the injunction in a modified form allowing for disclosure of information discussed in open Parliament.<sup>119</sup>

On appeal, the Attorney General relied on the affidavit filed by Sir Robert Armstrong<sup>120</sup> in the Australian proceeding and on the common law action for breach of confidence. The Attorney General argued that because Wright's disclosure was a breach of his duty of confidence, the information itself was tainted by that breach. Any publication of that information by the newspapers, given their knowledge of its tainted nature, was a continuing breach of Wright's obligation to the government.<sup>121</sup> The newspapers, in essence, were third parties who, by virtue of their awareness of the confidential nature of the information, were in the same position as Wright: they, like Wright, were the confidants who had been given information for a limited use and, therefore, could not make any unauthorized disclosure of it.<sup>122</sup>

The Attorney General's primary argument was based on Sir Robert's affidavit. In the affidavit, Sir Robert pointed out the "exceptional scope" of the obligation accepted by Wright and other Service members.<sup>123</sup> Wright had had access to highly classified information, information Sir Robert claimed was still highly sensitive.<sup>124</sup> Sir Robert then outlined the dangers that would result, claiming that any disclosure would endanger the work of the Service and, thereby, the national security interests of the United Kingdom.<sup>125</sup> Sir Robert also stated that while the information itself may

115. *Attorney-General v. Observer Ltd.* (C.A. July 25, 1986) (LEXIS, Enggen library, Cases file).

116. *Id.*

117. *See supra* note 8. These works are among those that had earlier disclosed information similar to that disclosed by Wright.

118. *Attorney-General v. Observer Ltd.* (C.A. July 25, 1986) (LEXIS, Enggen library, Cases file).

119. *Id.* (The decision was unanimous, with Mustill, L.J. and Nourse, L.J. concurring in the Master of Rolls opinion.)

120. *Id.* Sir Robert is the Prime Minister's principal advisor on matters of security and intelligence.

121. *Id.*

122. *Id.* *See also supra* text accompanying notes 76-79.

123. *Attorney-General v. Observer Ltd.* (C.A. July 25, 1986) (LEXIS, Enggen library, Cases file).

124. *Id.*

125. *Id.* Sir Robert delineated three areas of potential damage:

not have been classified, and may seem innocuous, its disclosure could cause serious harm to the Service.<sup>126</sup> It could take on added significance when read in tandem with other information, allowing unfriendly governments to verify their sources.<sup>127</sup>

The press argued that the public interest in disclosure outweighed the security interest and asserted an additional public interest in exposing wrongdoing by the Service. The Service, they argued, was subject to the same laws as any ordinary citizen. The public, therefore, had a legitimate “interest in knowing of, and being able to bring pressure to bear to restrain, any breach by it of the law.”<sup>128</sup> The newspapers also argued that because the information had already been made public without any actions taken by the government, its confidentiality was destroyed.<sup>129</sup>

Sir John Donaldson, Master of the Rolls, after acknowledging that damages would be an inadequate remedy for either party, turned to the balancing test established in *Lion Laboratories*:<sup>130</sup> “The conflict should be resolved in favour of restraint, unless the court is satisfied that there is a serious defence of public interest which may succeed at trial . . . and that that interest outweighs the conflicting public interest in favour of preserving confidentiality.”<sup>131</sup> In weighing the competing public interests, he concluded that the balance tipped in favor of protecting the obligation of confidence and national security.<sup>132</sup> He rejected the papers’ defense of iniquity, pointing out that they had not sought to communicate the Service’s alleged wrongdoing to those in authority to investigate, but rather to the largest possible audience—the public.<sup>133</sup>

The Master of the Rolls also rejected the defense of prior publication. The papers had relied on the decision of *O. Mustad & Son v. Dosen*,<sup>134</sup> in which the court held that if a plaintiff were responsible for information becoming public knowledge, he could not assert a claim of confidence.<sup>135</sup> The Master of the Rolls distinguished this case by stating that the government had not authorized the previous publications and thus was not responsible for the disclosures.<sup>136</sup> Moreover, he pointed out that to accept this claim would allow the papers to profit from their wrongdoing.<sup>137</sup>

The Court of Appeal’s decision at this stage of the litigation is not surprising. The Attorney General had an arguable claim of breach of confidence by a third party,

a) the intelligence and security services of friendly foreign countries with which the British Security Service is in liaison would be likely to lose confidence in its ability to protect classified information; b) the British Security Service depends upon the confidence of other organizations and persons. That confidence would suffer serious damage should the Second Defendant [Wright] reveal information of the nature described above; c) there would be risk that other persons who are or have been employed in the British Security Service who have had access to similar information might seek to publish it. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. [1985] 1 Q.B. 526 (C.A.). See also *supra* text accompanying notes 81–93.

131. *Attorney-General v. Observer Ltd.* (C.A. July 25, 1986) (LEXIS, Enggen library, Cases file).

132. *Id.*

133. *Id.*

134. [1963] R.P.C. 41.

135. *Attorney-General v. Observer Ltd.* (C.A. July 25, 1986) (LEXIS, Enggen library, Cases file).

136. *Id.*

137. *Id.*

a claim sufficient at least to put the court in the position of balancing the competing interests involved. Once that occurred, the nature of the information became the controlling factor, and because the full contents of *Spycatcher* were not available or known, the Attorney General had an arguable claim that the information could harm the Service. Thus, the court's application of the balancing test was not unusual.

What is surprising, however, is the ease with which the court rejected the papers' iniquity defense and its trust in the very authorities to whom Wright had appealed prior to deciding to publish the book.<sup>138</sup> It may be that the court was persuaded by Sir Robert's affidavit, especially because at this time the only information disclosed was the papers' allegations and information made public previously. That all changed, however, once *Spycatcher* became available not only in England, but worldwide.

## 2. *The Post-Publication Cases*

The post-publication cases are really three phases of the same case, that is, *The Guardian* and *Observer's* attempt to have the Millett injunction dismissed, and the Attorney General's attempt to keep it in force. Each decision of the courts, however, develops a different approach to the issues involved, and for this reason, the decisions will be dealt with separately.

### a. *Chancery Division*

In their claim for dismissal, the *Observer* and *The Guardian* contended that a material change in circumstances had occurred since the granting of the initial injunction. These papers argued that the publication of *Spycatcher* in the United States and its availability in England, combined with other press disclosures, weakened the Attorney General's claim for breach of confidence.<sup>139</sup> The papers argued that for any claim of breach of confidence to succeed, the information must remain confidential; once it was in the public domain, it no longer had the "quality of confidence."<sup>140</sup> Thus, the Attorney General no longer had an arguable case at trial, and the injunction should be lifted.<sup>141</sup>

The Attorney General claimed that no material change in circumstances had occurred. He pointed out that the injunction was still temporary; the appeal on it had not yet been decided by the House of Lords, nor had the Australian action been determined; and, he stated, the concerns expressed in Sir Robert's affidavit remained the same.<sup>142</sup> He also argued that the availability of the information to the public was not determinative. He relied on the distinction between information imparted in confidence before publication and after publication. The Attorney General claimed

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138. See Dalley, *supra* note 98, at 137 (pointing out the court's faith in the "ability and inclination of the government to correct its own wrongdoing without demands from the press and public").

139. Attorney-General v. Guardian Newspapers Ltd. [1987] 1 W.L.R. 1248, 1261 (Ch. D.).

140. *Id.* The reference is to *Saltman Eng'g Co. v. Campbell Eng'g Co.* [1963] 3 All E.R. 413, 415. See also *supra* text accompanying notes 63-68.

141. Attorney-General v. Guardian Newspapers Ltd. [1987] 1 W.L.R. 1248, 1261 (Ch. D.).

142. *Id.* at 1257.

that if the information were not confidential prior to its communication, then no injunction could issue. If it were confidential when disclosed, then a later publication would not destroy the obligation of confidence.<sup>143</sup> That, he claimed, was the case here: the information acquired by Wright was confidential, and its later disclosure did not change Wright's duty or the confidential nature of the information.<sup>144</sup>

Anyone who obtained the information with notice of the fact that it was communicated in confidence came under the same obligation as Wright, whether or not it was still confidential at the time he obtained it.<sup>145</sup> The papers, then, were still under the same obligation of confidence as they were prior to publication of *Spycatcher*.

In the first part of his decision, the Vice-Chancellor accepted the newspapers' argument that there had been a material change in circumstances.<sup>146</sup> He pointed out that the publication of the book undermined the basis of the Millett injunction: "the injunction no longer preserves a position in which it can be said that the British Security Service is leak-proof; the various matters which Sir Robert Armstrong deposed to in his affidavit are now known."<sup>147</sup> The Vice-Chancellor's task, then, was to determine if the Attorney General still had an arguable case at trial.<sup>148</sup>

In making that decision, the Vice-Chancellor first rejected the papers' argument as too simplistic. He then pointed out the weakness of the Attorney General's version of third party liability for breach of confidence. The Vice-Chancellor distinguished between parties who participate in the breach and those who do not.<sup>149</sup> Thus, between a confider and confidant, the obligation of confidence remained, regardless of whether the information was in the public domain. A publisher who participated in the breach of an employee's contract by, for example, "poaching" information was bound by the obligation attached to the confidant.<sup>150</sup> If, however, a third party who had not participated in the breach obtained the same information, and at the time he received it the information was public knowledge, then he would not be bound by the obligation of confidence. Once the information was public, the third party had a right to it.<sup>151</sup>

The Vice-Chancellor placed Wright and his publisher, Heinemann, in the first category and the *Observer* and *The Guardian* in the second. The newspapers could purchase a copy of *Spycatcher*, disclose its contents, and not be in breach of confidence because they had not assisted Wright in his breach of duty.<sup>152</sup> The

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143. *Id.* at 1262. The Attorney General relied on the decisions in *Speed Seal Prod. Ltd. v. Paddington* [1985] 1 W.L.R. 1327 (C.A.) (when defendant who owed a duty of confidence publishes the information, an injunction will still lie even if information is available to the public) and *Schering Chem. Ltd. v. Falkman Ltd.* [1982] 1 Q.B. 1 (C.A.) (when third party participates in breach of confidence, an obligation to keep the confidence still exists even if the information is available from other sources).

144. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1262 (Ch. D.).

145. *Id.*

146. *Id.* at 1259.

147. *Id.* at 1261.

148. *Id.*

149. *Id.* at 1263-65.

150. *Id.* at 1264.

151. *Id.*

152. *Id.* at 1265.

information, in their case, was public: it no longer belonged to the government because it was in the public domain.<sup>153</sup>

The Vice-Chancellor also pointed out that the Attorney General's theory expanded the law of confidence and could lead to absurd results.<sup>154</sup> Under the Attorney General's theory, if a person purchased a copy of *Spycatcher* and read it, she could not, for example, disclose the contents to her husband without breaking the law.<sup>155</sup> However, because the Attorney General raised an arguable point of law, the Vice-Chancellor did not decide the case based on third party liability,<sup>156</sup> but decided he was bound to balance the competing interests.<sup>157</sup>

In favor of granting an injunction, the Vice-Chancellor pointed to its temporary nature and to the fact that all papers would be bound by it.<sup>158</sup> He also noted that allowing publication would be admitting that the courts could not protect state secrets and could lead others to emulate Wright.<sup>159</sup> The balance, however, fell on the side of the papers. The Vice-Chancellor focused on three points. First, the publication of *Spycatcher* defeated the purpose of the injunction. Any harm that could occur, already had. Second, given that the information was available, an injunction would act as an unnecessary restraint on the press. Third, he held that the public interest required that the courts be respected, and that to uphold an injunction whose purpose was defeated would make the law "an ass."<sup>160</sup>

A sense of reluctance runs through the Vice-Chancellor's opinion.<sup>161</sup> On the one hand, he expressed a concern over the danger of future publications like Wright's, but on the other, he realized the futility of preventing publications given the contemporary world of electronics and limited jurisdictions.<sup>162</sup> His opinion, however, also showed concern for the freedom of the press. He acknowledged that publication by the press would cause greater damage than that done by an individual, but stated that to restrain the press on this basis negated freedom of the press: "If the press is precluded from saying things that other people are not precluded from, that seems to be not a freedom of the press but an additional fetter on it."<sup>163</sup>

#### b. *The Court of Appeal*

On appeal, the Attorney General focused on three points. He argued (1) that the Vice-Chancellor's decision was inconsistent in that, having held the government had an arguable case at trial, he failed to protect it; (2) that the effect of discharging the

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153. *Id.*

154. *Id.* at 1266.

155. *Id.*

156. *Id.*

157. *Id.* See also *American Cyanamid Co. v. Ethicon Ltd.* [1975] 2 W.L.R. 316, 321-22 (H.L.(E.)).

158. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1266 (Ch. D.). See *infra* text accompanying notes 248-56.

159. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1268 (Ch. D.).

160. *Id.* at 1268-69.

161. *Id.* at 1269. He compares himself to the Dutch boy asked to place his finger in the hole of the dike when the dam has already broken.

162. *Id.*

163. *Id.*



injunction would make any later remedy an empty gesture; and (3) that the Vice-Chancellor failed to analyze what could be done by way of effective relief at that stage of the litigation.<sup>164</sup>

The Court of Appeal accepted the Attorney General's argument to a limited extent. First, the court distinguished between information that was public knowledge and information in the public domain. The contents of *Spycatcher* were public knowledge, but because the book was tainted by Wright's breach of duty, it was not in the public domain: the information still belonged to the government.<sup>165</sup> All publications that came from it were also tainted. Thus, the court held that the government's right to a temporary injunction had not changed since 1986.<sup>166</sup>

The court, however, accepted the lower court's view that equity does not act in vain and, therefore, considered whether maintaining the injunction would be an empty gesture. Relying once again on the affidavit of Sir Robert Armstrong, the court decided that to maintain the full force of the injunction would be futile because much of the harm he outlined had already occurred.<sup>167</sup> But a modified injunction could limit some of the damage if Wright and others who were tempted to follow him were prevented from profiting from their disclosures.<sup>168</sup> Because the United Kingdom was the "best market" for *Spycatcher*, the court modified the injunction to prohibit publication of any direct excerpt from the book or any statement from Wright.<sup>169</sup> In order to protect the freedom of the press and avoid public inconvenience and impairment of discussion, the court allowed the papers to publish Wright's allegations in very general terms.<sup>170</sup> The court also modified the injunction to insure that the press could not publish excerpts if the government lost its case in Australia.<sup>171</sup>

What is interesting about this decision is that it provides the government with another possible vehicle for protecting its secrets. The court, in effect, accepted the fact that the contents of *Spycatcher* were public knowledge, and yet it maintained, albeit in a modified form, an injunction not on the basis of breach of confidence, but on a deterrence theory. The injunction's purpose was not to protect against further disclosures, but to prevent Wright from profiting from them. While this would not be unusual in terms of the law of confidence as applied to the confidant, it is unusual when applied to third parties who have neither aided nor participated in the breach. It may be that the decision was directed to the *Sunday Times* and its attempt to escape detection by the government, but if so, the opinions do not make this clear. Under the reasoning of this case, the government conceivably could prevent information, regardless of how widely disseminated, from being published because it could lead others to do the same or allow the original confidant to profit. It does not appear to matter whether those interested in disclosing the information participated in the

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164. *Id.* at 1274.

165. *Id.* at 1275-76.

166. *Id.*

167. *Id.* at 1276.

168. *Id.* at 1277.

169. *Id.*

170. *Id.*

171. *Id.* at 1277-78.

original breach. If that is the case, and this opinion suggests that it is, the action would no longer be one for breach of confidence but one for deterrence.

c. *The House of Lords*

The House of Lords, by a three-to-two decision, overruled the lower court decisions and reinstated the Millett injunction with an added proviso prohibiting the press from publishing disclosures made in open court in Australia.<sup>172</sup> All parties agreed that the modified injunction was unworkable<sup>173</sup> and that the issue had to be resolved by either dismissing or maintaining the injunction.

In his opinion, Lord Brandon, initially pointed out that the Attorney General was not enforcing a private right that would normally be overridden by the public interest in the freedom of expression, but rather, that the Attorney General was acting to protect the public interest of the Security Service.<sup>174</sup> The press's interest in publication was subordinate to that of the Service.<sup>175</sup> Lord Brandon also noted that the injunction was temporary<sup>176</sup> and that the government had a strong case prior to *Spycatcher's* publication.<sup>177</sup>

The key issue, then, was whether the strength of that claim had been sufficiently diminished by subsequent events to require the injunction's dismissal.<sup>178</sup> In deciding that the claim was not weakened, Lord Brandon focused on two points. First, he rejected the notion that the contents of the book were public knowledge, stating that if they had been, the press would not have been as determined to publish as they were.<sup>179</sup> He then turned to the question of harm to the Service, and while he agreed that many of the harms outlined by Sir Robert had already occurred,<sup>180</sup> the potential damage to the Service had not been exhausted. There still remained the risk of future disclosures,<sup>181</sup> and that risk, he stated, was a real one, leaving the government with an arguable claim at trial.<sup>182</sup>

Lord Brandon concluded that the best way to resolve the issue was to have a full trial with both sides presenting evidence.<sup>183</sup> If the injunction were dismissed at this stage, the government's case would be destroyed by publication,<sup>184</sup> but if it were continued, the only harm to the press was delay, an effect that was not equivalent to the complete denial of a trial.<sup>185</sup> The choice, as he saw it, lay between one course resulting in irrevocable damage, and the other resulting only in a temporary delay.

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172. *Id.* at 1282.

173. *See, e.g., id.* at 1313. Lord Oliver pointed out that it would offer no protection to the Attorney General and would place the press in the awkward position of trying to interpret "general terms."

174. *Id.* at 1287-88.

175. *Id.*

176. *Id.* at 1289.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 1290. *See also supra* note 125.

181. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1290 (H.L.(E.)).

182. *Id.* at 1290-91.

183. *Id.* at 1291.

184. *Id.*

185. *Id.* at 1292.

The latter, he held, was preferable to the former, especially given the importance of the public issue involved.<sup>186</sup>

Lord Templeman approached the case from the perspective of Article 10 of the European Convention on Human Rights (Article 10).<sup>187</sup> In his analysis he accepted that Wright's publication of *Spycatcher* was a treacherous breach of duty. He also accepted the Attorney General's argument that the obligation of confidence applied to the press and anyone else receiving information from Wright with knowledge of its confidential nature.<sup>188</sup> The press's actions, therefore, were not protected by Article 10 because while that provision guaranteed freedom of expression, it allowed governments to interfere with that right in the interest of national security.<sup>189</sup> The issue, then, was whether the injunction was necessary to preserve national security.<sup>190</sup>

Lord Templeman decided that a democracy could prevent members of a security service from disclosing secrets and could prevent others from repeating them.<sup>191</sup> He agreed with the newspapers that the members of the Service were not above the law, but held that those who were aware of violations could freely report them to the appropriate authorities.<sup>192</sup> The press, moreover, was free to investigate allegations of wrongdoing and report their results as long as they did not publish information wrongly disclosed by Wright.<sup>193</sup>

Lord Templeman then turned his focus to Article 10, relying on three reasons why the injunction was justified. First, he pointed out that because members of the Service are sworn to secrecy, they must rely on the Attorney General to protect their interests by preventing mass circulation of accusations and revelations of the Service's activities.<sup>194</sup> If the press were allowed to publish Wright's allegations, the Service and its members would be subject to harassment and would be unable to defend themselves. This in turn, he stated, would "deal a blow to the morale" of the Service and could lead to a loss of public confidence in the Service.<sup>195</sup> Lord Templeman rejected the papers' counterargument that the law would look ridiculous if it imposed restraints on the press when others could purchase copies of the book.<sup>196</sup>

186. *Id.*

187. *Id.* at 1296. That Article in pertinent part states:

1. Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority . . . 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions . . . as are prescribed by law and are necessary in a democratic society, in the interests of national security, . . . for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (Rome, 4 Nov. 1950) ART. 10, quoted in *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1296 (H.L.(E.)).

188. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1294-95 (H.L.(E.)).

189. *Id.* at 1297.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 1297-98.

194. *Id.* at 1298.

195. *Id.*

196. *Id.* This is a reference to the Vice-Chancellor's opinion. See *supra* text accompanying note 160.

Second, he stated that if the injunction were dismissed, others could follow Wright's example by first publishing their memoirs abroad.<sup>197</sup> Moreover, if the court held the injunction served no purpose, Wright could continue to publish additional allegations, and nothing would prevent the British press from publishing them as well.<sup>198</sup> Finally, he stated that to allow publication would be to surrender to the press "an untrammelled, arbitrary and irresponsible power to evade an order of the court," an order designed to protect the safety of the realm.<sup>199</sup>

Lord Ackner provided an overview of the issues already raised<sup>200</sup> and then focused on the fact that it would be a denial of justice to dismiss the injunction before the initial action was heard. Stressing the potential harms to the Service and the importance of the public interest in deterring others,<sup>201</sup> he argued that if the Attorney General were denied a trial, Wright could publish his work in England, and more importantly, members of the Service and their families would not be protected from other disclosures.<sup>202</sup> The press's publication, then, would not only affect the morale of the Service, but it would also cause a further loss of confidence in the efficiency of the Service. That interest justified the maintenance of the injunction until trial.<sup>203</sup>

Lord Ackner also emphasized that a dismissal would undermine British justice.<sup>204</sup> He concluded by pointing out that the added proviso to prevent disclosures made in open court in Australia was necessary to keep the press from publishing excerpts of Wright's book.<sup>205</sup> It would have been naive and absurd, he stated, for the Lords not to have anticipated the press's use of this loophole to frustrate the court's order.<sup>206</sup>

Lord Oliver, in his dissent, focused on the inappropriateness and ineffectiveness of continuing the injunction given the events that had occurred. He stated that it had to be remembered that the parties involved were the *Observer* and *The Guardian*, newspapers that had done and were proposing to do nothing more than what any paper would do: collect and disseminate the news to the public.<sup>207</sup> The issue then was whether it made sense to restrain those papers from publishing information freely obtainable by the public and the press in all countries except England.<sup>208</sup> He concluded that it did not.

First, Lord Oliver argued that it was a misuse of the injunctive remedy to restrain the papers in order to deter others, especially when they had not been party to the breach.<sup>209</sup> Second, it was inefficient, given that the case itself demonstrated that an

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197. *Id.* at 1299.

198. *Id.*

199. *Id.*

200. *See supra* text accompanying notes 175–84. Lord Ackner also accepted Lord Templeman's opinion on Article 10 and held that an accounting of profits would be useless given the jurisdictional problems.

201. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1305 (H.L.(E.)).

202. *Id.* at 1305–06.

203. *Id.* at 1306.

204. *See supra* text accompanying note 1.

205. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1308–09 (H.L.(E.)).

206. *Id.* at 1309.

207. *Id.* at 1315.

208. *Id.* at 1316.

209. *Id.* at 1317–18.

injunction could not prevent publication.<sup>210</sup> Third, the harm to the Service had already occurred, and other measures, such as an accounting of profits, could have been used to protect its morale.<sup>211</sup> Moreover, the widespread availability of the book illustrated that the Service's morale would continue to be harmed. Restraint would not stop it. He argued that the contention of continuing harm to the Service would have been valid if the information had indeed been cut off, but it lost all force and was of little value given the level of publicity.<sup>212</sup>

Next Lord Oliver considered the Attorney General's claim of breach of confidence against third parties.<sup>213</sup> While he accepted that the Attorney General may have had an arguable case, he found it difficult to believe that it would be successful at trial.<sup>214</sup> He did not believe that the papers would be permanently enjoined from disclosing information that had been and still was being disclosed by members of the public. Moreover, given the papers' iniquity defense, he argued that it was impossible to try the case without disclosing the allegations. Would the court, he asked, have to try the case in the privacy of its chambers to prevent disclosing not state secrets, but information the public already had?<sup>215</sup> Given all of the above, the balance, he held, must fall to the press. Lord Oliver acknowledged that the freedom of the press was limited, but if that privilege which is at the "root of society" were to be overborne, it "must be overborne to some purpose."<sup>216</sup>

Lord Bridge, also dissenting, considered whether there was a remaining national security interest the Millett injunction could protect and, if so, whether it was of sufficient weight to justify the "massive encroachment" on the freedom of the press.<sup>217</sup> In deciding that no security interest remained, he pointed out that the state's claim had been defeated by publication—the deterrence theory carried little weight once it was clear that the information could not be contained—and if the Attorney General were concerned about disclosure of future allegations, he could seek injunctions when such disclosures occurred.<sup>218</sup> Given the weakness of the claim against the papers, Lord Bridge argued that the interference with the freedom of the press was not justified. In pointing out that the modified injunction may have been aimed at the *Sunday Times*, he stated that if there were a legal means to restrain that paper, he would allow it. But to prevent the press from discussing matters of interest to the public was not acceptable:

Freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. . . . The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road. The maintenance of

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210. *Id.* at 1317.

211. *Id.*

212. *Id.*

213. *Id.* at 1318. See *supra* text accompanying notes 143–45.

214. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1319–20 (H.L.(E.)).

215. *Id.* at 1320.

216. *Id.* at 1320–21.

217. *Id.* at 1285.

218. *Id.* at 1285–86.

the ban, as more and more copies of the book *Spycatcher* enter this country and circulate here, will seem more and more ridiculous.<sup>219</sup>

The House of Lords' decision illustrates the relatively low value placed on the freedom of the press in England and represents a potential expansion of the law of breach of confidence. The majority opinions are based on the assumption that further publication by the press would result in harm to the Service. That harm, they claimed, was not in the disclosure of classified secrets, but rather in subjecting its members to harassment when others emulate Wright in the future. The majority's reasoning assumes that others will be eager to follow Wright's example, that the procedures established by the Service to prevent leaks will fail again, and that actions for accounting of profits are useless. Thus, they assume that the only means to deter others is to restrain the press in this instance as a lesson for the future.

The weakness in the Lords' reasoning is apparent from the facts of the *Spycatcher* cases themselves. The potential harms the Lords mentioned had already occurred. Wright's book and all of his allegations were public knowledge regardless of how the term is defined. Only the press was prevented from discussing the book. Moreover, given this decision, the only restraint on future Wrights is a restraint on the press. Such people will still be free to publish their memoirs abroad, the public will still be free to purchase them, and the writers will still profit from their disclosures. Only the press suffers. The deterrent effect, then, is minimal, but the Lords, by attempting to prevent something that cannot be prevented by an injunction, have in the process expanded the law of confidence.

While the Lords decided only that the Attorney General had an arguable claim at trial, the majority opinions seem to suggest that a third party can be held liable for breach of confidence even though he did not participate in the original breach. That liability, it would appear, continues regardless of how widespread the disclosure has been. In cases up to this point, as the Vice-Chancellor outlined in his decision, courts imposed liability only when the third party aided the breach and stood to profit by it.<sup>220</sup> If the Attorney General's version of the law is accurate, potential claims existed against the general public for reading *Spycatcher* and discussing it. Obviously such claims would not have been brought, but the expansion of the law gives the government an additional weapon to use against the press. The majority opinions also seem to suggest that if the injunction had been lifted, Wright would have been free to publish in England because an injunction would have served no purpose.<sup>221</sup> Here it appears the Lords misinterpret the law. Up to this time, courts had held that unless the plaintiff makes the information public, the confidant can be enjoined regardless of whether or not the information is public knowledge.<sup>222</sup>

Finally, the majority opinions suggests that an injunction for breach of confidence can be brought on the basis of its deterrent effect even if the information

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219. *Id.* at 1286.

220. *See supra* text accompanying notes 149–55.

221. *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1289, 1305 (H.L.(E.)).

222. *See generally* F. GURRY, *supra* note 50.

involved has previously been disclosed. While the Lords distinguished between information that is public knowledge and information that is in the public domain,<sup>223</sup> in this case that distinction is of little use, given the scope of disclosure and the government's concession that bans on importation of the book would have been ineffective. It is not clear whether in future cases the government could restrain the press from publishing an article, for example, about a leak at a chemical weapons plant, not because the information was currently secret, but because it might lead others to divulge information that is secret. The Lords' reasoning suggests that such an action would be valid as long as the information had at one time been secret, and its original disclosure was a violation of a duty of confidence.

The House of Lords' decision, then, has the potential of providing the government with even wider means to restrain the press. Moreover, the government needs to enjoin only one paper from publishing material. All other papers, and perhaps anyone else who seeks to disclose the same information, will be prevented from doing so because their action will be in contempt of court.

### B. *The Contempt of Court Proceedings*

As noted earlier, after Justice Powell delivered his opinion in Australia, the *Independent* and two other London papers published major summaries of Wright's allegations, including direct quotations from *Spycatcher*.<sup>224</sup> The Attorney General brought proceedings against the papers for contempt of court. The courts, however, decided only the preliminary question of whether a publication made with the knowledge of an outstanding injunction against another party constituted criminal contempt because it interfered with the administration of justice.<sup>225</sup>

The Attorney General argued that it did. He distinguished between civil contempt, which consists of a breach by a party of an order of the court, and criminal contempt, which consists of conduct that frustrates or impedes the due administration of justice.<sup>226</sup> He argued that the papers had not committed civil contempt because they were not bound by the Millett injunction, but rather that they had committed criminal contempt by publishing material the Court of Appeal had held was contrary to public interest.<sup>227</sup> He claimed that if others published excerpts from Wright's memoirs, they would destroy the very subject matter of the action against the *Observer* and *The Guardian*: the confidentiality of the information.<sup>228</sup> Such publication would deprive the government of a right to a hearing on the main action, the purpose of which was to obtain a permanent injunction to protect the secrecy of the Service.<sup>229</sup> Thus the papers' action interfered with the administration of justice.

The newspapers argued that they could not be bound by an injunction to which

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223. See *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248, 1289 (H.L.(E.)).

224. See *supra* text accompanying notes 25–26.

225. *Attorney-General v. Newspapers Publishing Plc.* [1987] 3 W.L.R. 942, 949 (Ch. D.).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

they were not a party.<sup>230</sup> To hold third parties bound to an order, they argued, would be contrary to the principle of English law that courts decide only issues between the parties before them and make orders that bind only those parties.<sup>231</sup> Further, they claimed that to hold them in contempt would violate natural justice: they would be held guilty of a crime on the basis of an order not directed to them, made in ignorance of the facts applicable to them, and thus, they would be deprived of their opportunity to be heard.<sup>232</sup> Moreover, the newspapers pointed out that if the Millett injunction were dismissed, their status would be uncertain.<sup>233</sup> To hold them in contempt, therefore, would be an expansion of the criminal law, a matter for Parliament, not the courts.<sup>234</sup>

### 1. *The Vice-Chancellor's Decision*

The Vice-Chancellor, after reviewing the English authorities,<sup>235</sup> held that a third party had never before been held in contempt of court for breach of an order made against another, unless he had been privy to or a party to the doing of an act that constituted a breach of the terms of the order.<sup>236</sup> While the Vice-Chancellor noted that there were Canadian and Irish authorities to the contrary,<sup>237</sup> he did not find them compelling.<sup>238</sup> An injunction under English law, he stated, could bind only a party to the proceedings, his agent, or his servant, but not a third party who did not aid in its breach.<sup>239</sup> Thus, the newspapers could not be held in contempt because they had not aided either the *Observer* or *The Guardian* in breaching the Millett injunction as no breach of that order had occurred.<sup>240</sup>

While the Vice-Chancellor recognized that the underlying principle for holding a third party liable was that a court would not allow its orders to be knowingly flouted or frustrated, he concluded that that principle could not be extended to those who were not parties to the original action.<sup>241</sup> To do so, he stated, would in effect change the jurisdiction of the courts from acting in personam to acting in rem. A court's orders would become enforceable against all who had notice rather than against the parties involved. A person who was not a party to an action would, as a result, be

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230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 950.

234. *Id.* at 949.

235. See *United Kingdom Nirex Ltd. v. Barton, The Times*, 14 Oct. 1986; *Z Ltd. v. A-Z* [1982] Q.B. 558; *Cretanor Maritime Co. v. Irish Marine Management Ltd.* [1978] 1 All E.R. 164; *Marengo v. Daily Sketch & Sunday Graphic Ltd.* [1948] 1 All E.R. 406; *Seaward v. Patterson* [1897] 1 Ch. 545; *Wellesley (Lord) v. Earl of Mornington (No. 2)* [1848] 11 Beav. 180; *Wellesley (Lord) v. Earl of Mornington (No. 1)* [1848] 11 Beav. 181, as cited in *Attorney-General v. Newspapers Publishing Plc.* [1987] 3 W.L.R. 942, 951-95 (Ch. D.).

236. *Attorney-General v. Newspapers Publishing Plc.* [1987] 3 W.L.R. 942, 950-54 (Ch. D.).

237. See *Catkey Constr. Ltd. v. Moran* [1969] 8 D.L.R.3d 413; *Tilco Plastics Ltd. v. Skurjat* [1966] 57 D.L.R.2d 596.; *Bassel's Lunch Ltd. v. Kick (No. 2)* [1937] 1 D.L.R. 235; and *Bassel's Lunch v. Kick (No. 1)* [1936] O.R. 445, for the Canadian authorities, and *Smith-Barry v. Dawson* [1891] 27 L.R. Ir. 558, for the Irish, as cited in *Attorney-General v. Newspapers Publishing Plc.* [1987] 3 W.L.R. 942, 953 (Ch. D.).

238. *Attorney-General v. Newspapers Publishing Plc.* [1987] 3 W.L.R. 942, 953-54 (Ch. D.).

239. *Id.* at 954.

240. *Id.*

241. *Id.* at 955-56.



deprived of all procedural safeguards connected to contempt proceedings and would be denied his opportunity to present his case to the court involved.<sup>242</sup>

The Vice-Chancellor noted that the facts of the case presented a compelling justification for finding a legal basis to sanction the papers, but he held that the practical consequences in other cases could not justify such an expansion of the law. He illustrated his point with several examples. Suppose that an employer obtained an injunction against an employee for disclosing trade secrets. If the law of contempt were extended as the Attorney General argued it should be, another employee, not bound by the injunction, could be held in contempt if she disclosed the same secrets. The employer, however, might not have had a basis for enjoining her as she might not have been bound by a duty of confidence. Yet the employee could still be restrained by the injunction even though the employer had no action against her.<sup>243</sup>

The Attorney General argued that a distinction should be made between orders that are personal to the parties involved and those that are not. Thus in a marital dispute, if *B*, the husband, were enjoined from assaulting *A*, the wife, *C*, a third party, would not be in contempt if she assaulted *A*. The order would be personal to *A* and *B*, and *C* would not be guilty of contempt.<sup>244</sup> The Vice-Chancellor rejected this argument, pointing out that the distinction between “plainly personal” orders and others was too uncertain. This uncertainty, he stated, was incompatible with imposing criminal sanctions on parties without the current procedural safeguards.<sup>245</sup> He concluded by noting that sanctions should be available to the government in cases of national security, but if those sanctions were not found in the Official Secrets Acts,<sup>246</sup> then it was for Parliament, not the courts, to devise them.<sup>247</sup>

## 2. *The Court of Appeal's Decision*

The Court of Appeal rejected the lower court's interpretation of the law. The court held that publication of the material covered by the Millett injunction would constitute contempt of court not because the papers breached the original injunction, but rather because publication would destroy the subject matter of the action between the Attorney General and *The Guardian* and *Observer*. The papers, however, were not held in contempt because they had not had an opportunity to put forward their defenses, nor had the required *mens rea* been established.<sup>248</sup>

In its unanimous decision, the court distinguished between actions by third parties who aid in a breach of an injunction and actions by third parties who destroy

242. *Id.* at 957.

243. *Id.* at 956.

244. *Id.* at 957.

245. *Id.*

246. 1911, 1 & 2 Geo. 5, ch. 28; 10 & 11 Geo. 5, ch. 75; 2 & 3 Geo. 6, ch. 121. Section 2 of the Official Secrets Act provides for criminal liability for any unauthorized disclosures of official secrets. While the scope of the Act is quite broad with respect to whom and what is covered (there are 2324 separate offenses), the number of prosecutions under it is limited, primarily because other formal and informal sanctions exist. See generally REPORT OF THE COMM. ON SECTION 2 OF THE OFFICIAL SECRETS ACT 1911, CMND. 5104; P. O'HIGGINS, CENSORSHIP IN BRITAIN (1972); H. STREET, FREEDOM, THE INDIVIDUAL AND THE LAW (5th ed. 1982); D. WILLIAMS, NOT IN THE PUBLIC INTEREST (1965); Dalley, *supra* note 98.

247. Attorney-General v. Newspapers Publishing Plc. [1987] 3 W.L.R. 942, 958 (C.A.).

248. *Id.* at 960.

the subject matter of a suit and thereby interfere with the administration of justice.<sup>249</sup> With respect to the former, the court agreed that the Vice-Chancellor's interpretation of the law was correct. However, the issue in this case, the court stated, was whether publication of material restrained by an injunction could constitute contempt because publication would destroy the subject matter of the suit and deprive the original parties of their right to a trial.<sup>250</sup>

Sir John Donaldson resolved the issue by pointing to the inherently perishable nature of confidential material:

Confidential information is like an ice cube. Give it to the party who undertakes to keep it in his refrigerator and you still have an ice cube by the time the matter comes to trial. . . . Give it to the party who has no refrigerator or will not agree to keep it in one, and by the time of the trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.<sup>251</sup>

Because of the nature of the subject matter of the suit between the government and the other papers, republication of the Wright material by the *Independent* and other papers would render it "a pool of water," useless to those in the first action.<sup>252</sup>

The newspapers, then, had rendered the Attorney General's case less effective and thereby interfered with the administration of justice. While the court held that the newspapers had committed the *actus rea*, the criminal act, the court noted that the necessary *mens rea*, the criminal intent, had not been established.<sup>253</sup> Because the proceedings between the Attorney General and the *Observer* and *The Guardian* were not active within the meaning of the Contempt of Court Act,<sup>254</sup> the strict liability rule did not apply, and thus the court had to determine the requisite intent under the savings provision of the Act.<sup>255</sup> While the Attorney General argued that a recklessness standard should be used, the court held that specific intent was necessary as it comported with the statutory purpose of shifting the balance in favor of free speech.<sup>256</sup>

It is important to note that the court did not decide the papers were in contempt. That decision has yet to be made as the court decided only the preliminary issue. In addition, the court's decision was delivered the day after *Spycatcher* was published and after the serialization by the *Sunday Times* had begun. The timing of the decision and its holding, therefore, effectively cut off all future press disclosures of the book. Any other paper publishing disclosures would have been on clear notice that it was

249. *Id.* at 969-72, 979-82, 985-88.

250. *Id.*

251. *Id.* at 962.

252. *Id.* at 968. Lloyd, L.J., extended the reasoning to any destruction of the subject matter of a suit. Thus, if the subject matter were a race horse and an injunction existed to preserve the horse, a third party who shot the horse with knowledge of the injunction would be guilty of contempt. *Id.* at 981.

253. *Id.* at 976-77, 983-85.

254. See *supra* text accompanying notes 100-06.

255. Attorney-General v. Newspapers Publishing Plc. [1987] 3 W.L.R. 942, 975-77, 983-84 (C.A.); see also *supra* text accompanying note 114.

256. Attorney-General v. Newspapers Publishing Plc. [1987] 3 W.L.R. 942, 985 (C.A.). See generally REPORT OF THE LAW COMM. ON CONTEMPT OF COURT, 1974, CMND. 5794.

interfering with justice and, thus, would be presumed to have the requisite intent for being held in contempt.<sup>257</sup>

The ramification of the Court of Appeal's decision is quite broad, especially when combined with that of the House of Lords. The latter seems to establish that a third party can be held liable in civil court for breach of confidence on the basis of deterrence, while the former indicates that the same third party can also be criminally liable. In both cases, the third party need not be involved with the original breach of confidence nor be a party to the injunction.

The government, therefore, can restrain the press from publishing information it believes should remain secret without ever having to prove that a paper breached its duty to the state. To get a temporary injunction, all the government must show is that it has an arguable case at trial. Once it makes that showing, further publication will be cut off by contempt of court proceedings regardless of how widespread any previous disclosure has been.

If the various courts' reasoning is followed, that is, if disclosure of Wright's material was both a breach of confidence and a criminal act, then technically each person who read *Spycatcher* and discussed it with others violated the law. In theory, then, a librarian who provided a member of Parliament with a copy of the book not only could breach his duty of confidence, but would interfere with the administration of justice.

In fact, because the scope of these decisions was so broad, the Derbyshire Council sought clarification from the courts concerning the potential liability of its library.<sup>258</sup> The Council wanted to clarify, first, whether it would be acting in contempt if it made *Spycatcher* available to the public, and second, whether it was under an obligation to examine the newspapers it made available to determine if they had forbidden material.<sup>259</sup> The court held that while the scope of that library's distribution of the book might be limited, the House of Lords' decision required its prohibition.<sup>260</sup> Because other libraries would and could follow the Derbyshire library if the court allowed distribution, the court held it was bound to limit distribution and minimize any damage to the Attorney General's claim before trial. The court concluded that if the library lent copies of *Spycatcher*, it would have committed the *actus rea* necessary for contempt of court.<sup>261</sup> The court, however, did not require the library to screen its periodicals to see if they contained Wright's material.<sup>262</sup>

#### IV. THE HONG KONG DECISIONS

The Hong Kong cases arose when the *South China Morning Post*, which had purchased the serialization rights of *Spycatcher*, published a 4000-word excerpt of the

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257. *Attorney-General v. Newspapers Publishing Plc.* [1987] 3 W.L.R. 942, 985 (C.A.) (per Lloyd, L.J.: "The more obvious the interference with the course of justice, the more readily will the requisite intent be inferred.")

258. *See Attorney-General v. Observer Ltd.* [1988] 1 All E.R. 385, 387 (Ch. D.).

259. *Id.*

260. *Id.* at 397.

261. *Id.* at 398.

262. *Id.* at 399.

book in an article similar to that published by the *Sunday Times*.<sup>263</sup> The Attorney General sought and obtained an *ex parte* injunction to restrain further publication.<sup>264</sup> That injunction was similar to the one upheld by the House of Lords except that it allowed publication of information obtained in open court in Australia.<sup>265</sup> After the newspapers applied for its discharge, Justice Barnett dismissed the injunction.<sup>266</sup> The Attorney General appealed, and the Court of Appeal reinstated it in the same form.<sup>267</sup>

The arguments raised by the Attorney General both at trial and on appeal were essentially the same as those made in England. He argued that the paper was under a fiduciary obligation of confidence and the breach of that duty resulted not only in a loss of confidence in the Service by friendly nations, but also in a risk that others would emulate Wright.<sup>268</sup> Once again, the Attorney General relied on Sir Robert Armstrong's affidavit. Given that the British government had an arguable claim at trial, the Attorney General argued that the injunction should remain in effect until a trial on the merits.<sup>269</sup>

The defendants, while accepting that the Attorney General had an arguable claim, argued that his claim did not outweigh the public interest in the freedom of the press.<sup>270</sup> They argued that the deterrent effect on Wright and others did not apply as Hong Kong was not the "best market" for profit.<sup>271</sup> They also claimed that the concern over harassment of Service members did not apply to Hong Kong, nor did the arguments concerning interference with justice.<sup>272</sup> Thus, their case was distinguishable from that of the *Observer* and *The Guardian*, and, therefore, the reasoning of the House of Lords' decision had little or no application to them.<sup>273</sup>

After canvassing the opinions of the House of Lords, Justice Barnett concluded that he was not bound by their approach with respect to Article 10 of the Convention for the Protection of Human Rights,<sup>274</sup> but rather by the balancing approach outlined in *Lion Laboratories*<sup>275</sup> and *American Cyanamid v. Ethicon Ltd.*<sup>276</sup> That is, he had to balance the competing interests involved.

In balancing those interests, Justice Barnett agreed with the defendants that the interest in the freedom of the press outweighed the Attorney General's interests.

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263. *Attorney-General v. South China Morning Post Ltd.*, No. 4644 (H.C.) Aug. 24, 1987, at CNB/4. It is interesting to note that both papers are controlled by Rupert Murdoch, who has in the past been the subject of comments by the court. *See, e.g.*, *Schering Chem. Ltd. v. Falkman Ltd.* [1982] 1 Q.B. 1, 39 (C.A.) (per Lord Templeman: "The times of Blackstone are not relevant to the times of Mr. Murdoch.").

264. *Attorney-General v. South China Morning Post Ltd.*, No. 4644 (H.C.) Aug. 24, 1987, at CNB/4.

265. *Id.*

266. *Id.* at MEP/5.

267. *Attorney-General v. South China Morning Post Ltd.*, No. 114 (Civil) Sept. 8, 1987, at 17, 23.

268. *Attorney-General v. South China Morning Post Ltd.*, No. 4644 (H.C.) Aug. 24, 1987, at CNB/5-6.

269. *Id.* at CNB/13-14.

270. *Id.* at CNB/6.

271. *Id.* at CNB/15-16. *See supra* text accompanying note 169.

272. *Attorney-General v. South China Morning Post Ltd.*, No. 4644 (H.C.) Aug. 24, 1987, at CNB/15-16.

273. *Id.* at CNB/16.

274. *Id.* at CNB/13. *See supra* text accompanying notes 187-98. Justice Barnett stated that Article 10 is a factor in the balance but that the Lords did not use the national security approach as a pronouncement of law.

275. [1985] 1 Q.B. 526 (C.A.); *see also supra* text accompanying notes 80-93.

276. [1975] 2 W.L.R. 316 (H.L.(E.)); *see also supra* text accompanying note 99.

First, while Justice Barnett accepted the arguable claim of confidence, he pointed out that the deterrence argument had little effect in Hong Kong.<sup>277</sup> Second, he reiterated the fact that the *South China Morning Post* was not part of the original breach, nor did it aid in the breach.<sup>278</sup> Third, he stated that the government's claims could be satisfied by an accounting of profits or by an award of exemplary damages.<sup>279</sup> Thus, while the Attorney General had an arguable claim, it would not necessarily be destroyed by the dismissal of the injunction.<sup>280</sup>

Justice Barnett stated, however, that the press could not be compensated by damages and rejected the argument that the harm in delay of publication was inconsequential: the book and its contents were "hot news" and might not be at a later date.<sup>281</sup> He accepted, in addition, the papers' argument that the freedom of the press provisions in Article 19 of the International Covenant of Civil and Political Rights<sup>282</sup> and Hong Kong's unique political situation were factors to be weighed in the balance.<sup>283</sup> With respect to the latter he stated: "There is a particular sensitivity on the part of the Hong Kong public, to any constraint on or fettering of the free flow of information, comment or news. . . ." <sup>284</sup> The Attorney General's claim, therefore, did not outweigh or justify the potential damage of interfering with the freedom of the press.

The Court of Appeal rejected Justice Barnett's reasoning, especially his view on the use of damages as an alternative to an injunction.<sup>285</sup> In reinstating the injunction, the court adopted Lord Templeman's reasoning, pointing out that the differences between Hong Kong and England were not sufficiently important to require the injunction's dismissal.<sup>286</sup> The court also accepted the Attorney General's arguable claim and held that his claim and the interest of national security justified restraints on the press.<sup>287</sup> The court concluded that there was no material difference between the harm to the Service in England and the harm to it in Hong Kong, as the Service acted for both countries and was present in both.<sup>288</sup> The court dispensed with the lower court's concern over Hong Kong's political future by pointing out that the provisions of Article 19 would remain in force after 1997 and by stating that courts do not react to political pressure.<sup>289</sup> The situation after 1997, they continued, was irrelevant, as

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277. *Attorney-General v. South China Morning Post Ltd.*, No. 4644 (H.C.) Aug. 24, 1987, at CNB/16.

278. *Id.*

279. *Id.* at MEP/1.

280. *Id.*

281. *Id.* at MEP/2.

282. G.A. res. 2200 A (XXI) Mar. 23, 1976, reprinted in 6 I.L.M. 368, 374 (1967). Article 19 is similar to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. See *supra* note 187.

283. Hong Kong reverts to Chinese control in 1997. See *A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the People's Republic of China on the Future of Hong Kong* (Sept. 26, 1984), reprinted in 23 I.L.M. 1366 (1984).

284. *Attorney-General v. South China Morning Post Ltd.*, No. 4644 (H.C.) Aug. 24, 1987, at MEP/3.

285. *Attorney-General v. South China Morning Post Ltd.*, No. 114 (Civil) Sept. 8, 1987.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

the protection of freedoms in the future would continue to depend on the integrity of the courts.<sup>290</sup>

The Hong Kong case illustrates the British government's resolve to prevent the publication of *Spycatcher*. It must be remembered that this case was not the only one the government pursued beyond its borders. During the course of the summer, the government was, in essence, fighting battles on several fronts at home and abroad and in the process expending time and energy to prevent the press from publishing information already published and freely available to the public.

Moreover, the Court of Appeal's decision may, in fact, establish a dangerous precedent, given that Hong Kong will revert to Chinese control in 1997. The limits of a free press may be determined by this case, and if so, the integrity of the courts may not be sufficient to prevent prior restraints on the press. By accepting the House of Lords' reasoning, the court implicitly rejected the concept that any delay in publication interferes with the press's function of promptly providing the public with news. With such a rejection, the court may indeed have established unfortunate precedent.

The British government's success at obtaining temporary injunctions should not be interpreted as an isolated incident of a government seeking to protect its vital security interests from disclosure by an irresponsible press. The information Peter Wright disclosed was not classified, and while his actions may have been a breach of his duty to the state, the actions of the press were not. The press did not aid Wright in breaching his duty. They proposed to do nothing more, as Lord Oliver noted, than their job: to collect and disseminate the news and thereby provide a forum for public discussion of Wright's allegations.

The cases do, however, establish or reaffirm the fact that the freedom of the press is limited in England and Hong Kong. By using the double-edged sword of a breach of confidence action and a contempt of court proceeding, the British government can temporarily prevent the press from legally commenting on public issues. When combining the legal theories, the government does not have to prove that discussion of the public issues will be harmful to the state. It need only present an arguable case of a breach of duty, and as these cases demonstrate, that burden is not great. All the government has to show is that the originator of the information owed a duty of confidence, and the press is then under a fiduciary obligation not to disclose the material.

Once that is established, the press has the burden of showing an overriding public interest in publication. Their burden, on the other hand, is a heavy one. The amount of prior dissemination of the material is not dispositive, nor is the interest in disclosing wrongdoing by the government. The former will be irrelevant because of the original duty of confidence and the latter useless because the courts seem to require that such disclosures be made to the government itself. The government, therefore, instead of having to rely on internal measures to prevent disclosure or on

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290. *Id.*

the prosecution of those responsible, can achieve the same results by prosecuting the press. It should also be remembered that these cases focused only on the temporary injunction. Thus, the issues raised had not yet been fully explored or decided. Nevertheless, for over a year the press was deprived of its ability to act as a forum for discussion of issues that were matters of great public concern and rather wide public knowledge.

The effect of these cases on the press is clear. The press can be prevented from publishing information the government wishes to remain secret. That is not, however, the only effect. Because the government proceeded on a breach of confidence action, the precedents established in these cases may be applicable to all such actions. It may be that an employer as well as the government can use these same techniques to deter employees from divulging trade secrets or to stop the press from publishing information about safety violations. Therefore, by expanding the law in this instance, the courts may have opened the door for even wider restraints on open discussion of public issues.

#### V. THE PERMANENT INJUNCTION

The underlying issues involved in the *Spycatcher* cases were not resolved until October of 1988 when the House of Lords upheld the Chancery Court's dismissal of the temporary injunction. In deciding to dismiss the injunction the courts focused on five issues: (1) whether Wright breached his duty of confidence when he published *Spycatcher*; (2) whether the *Observer* and *The Guardian* breached their duty of confidence when they originally published Wright's allegation in 1986; (3) whether the *Sunday Times* breached its duty when it serialized portions of *Spycatcher* in 1987; (4) whether a permanent injunction was appropriate given the wide availability of the book; and (5) whether the courts could issue a preventive injunction to prohibit the papers from publishing or commenting on other information Wright may publish in the future.

The government and the press raised essentially the same arguments they had made in the earlier cases. At trial, the Attorney General relied on several propositions.<sup>291</sup> He argued that Wright owed a duty to the government not to disclose unauthorized information. Wright's duty was based both on his employment status and the interests of national security. Because he breached that duty by writing *Spycatcher*, the publication of the book constituted a continuing breach. The newspapers knew that the information he disclosed was confidential and represented a breach of duty. Thus, when the newspapers received it, they stood in the same position as Wright, and because subsequent publication would not relieve him of his duty, it likewise could not release the newspapers of theirs. The government, in addition, relied on its national security interests, but instead of basing its claim on secrecy, which of course was destroyed, it relied on the importance of promoting the efficiency and the reputation of the Service.

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291. Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1988] 2 W.L.R. 805, 831-34 (Ch. D.).

The newspapers contended that any duty of confidence that may have existed could not extend to disclosures of serious iniquities, and thus, their publication of the Wright allegations concerning Sir Roger Hollis and the destabilization of the Wilson government were legitimate.<sup>292</sup> The papers, moreover, argued that the publication of *Spycatcher* and its wide distribution destroyed the confidential nature of the information and thereby destroyed any duty they may have had. Finally, they pointed out that the injunction sought by the Attorney General conflicted with the provisions of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>293</sup>

The government responded by pointing out that publication could not destroy the duty of confidence, as the government itself was not responsible for the disclosure, and, further, that even if Wright's allegations were true, the iniquity defense did not justify publication. The proper procedure was to notify the appropriate authorities, not the public.<sup>294</sup>

The courts resolved these issues by what appears to be a straightforward application of the law of confidence. The decisions, however, are ambiguous. In some ways, they potentially offer the newspapers greater protection from further inroads on their freedom to publish, and in other ways, they provide the government with additional means to limit the free flow of information.

#### A. *Chancery Division*

Judge Scott began his opinion by providing an overview of the history of the case and by comparing the allegations in *Spycatcher* to those that had been previously published in books, interviews, and on television programs.<sup>295</sup> He then turned to the issues of law and fact. He characterized Wright's duty to the government as one of secrecy rather than confidence because an actual confider-confidant relationship did not exist between Wright and the government. Wright, therefore, was obligated to maintain secrecy with respect to information he received whether it was from someone to whom he owed no duty of confidence or was information he discovered himself.<sup>296</sup> The distinction is not particularly significant because the obligation imposed did not have to arise from an express or implied contract or a particular relationship; it could be imposed by equity if the circumstances by which Wright obtained the information created a confidential obligation.<sup>297</sup>

In the case of Wright, however, Judge Scott refused to impose a blanket duty of secrecy covering all the information Wright may have received. The duty, he said, could not extend to trivial or useless information (the Service meal plan or the amount of paper shredded in a waste reduction campaign), or necessarily to information

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292. *Id.* at 834.

293. *Id.* at 835; see *supra* note 187.

294. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 835 (Ch. D.).

295. *Id.* at 813-31.

296. *Id.* at 837.

297. *Id.* at 838. See also *Faccenda Chicken Ltd. v. Fowler* [1986] 3 W.L.R. 288 (C.A.); *Seager v. Copydex Ltd.* [1967] 1 W.L.R. 923 (C.A.); *supra* text accompanying notes 69-74.



readily available to the public. Moreover, he noted that when the government, and not a private citizen, sought to protect its information, it had to show that disclosure would harm the public interest in secrecy and that a countervailing interest was not superior.<sup>298</sup> The extent of Wright's duty, therefore, was "dependent, in relation to the information sought to be protected, on the relative weight of the needs of national security that the information should be kept secret, and the public or private interest . . . that the information should be free to be disclosed."<sup>299</sup>

Although Judge Scott held that the government's interest in secrecy outweighed any interest Wright may have had in publishing *Spycatcher*, his interpretation of the duty owed to the government is noteworthy. He appeared to place the burden on the government to show its interest was paramount and limited the extent of secrecy the government could claim was necessary. He refused to speculate, for example, whether the result might have been different had Wright only published trivial information, allegations previously disclosed, or allegations of wrongdoing by the Service.<sup>300</sup> His interpretation, however, should not be read as opening the door for other members of the Service to publish unauthorized but limited memoirs. He endorsed the current system requiring members and ex-members to obtain authority prior to any publication and accepted the Attorney General's argument that "prima facie" members of the Service "must carry their secrets with them to the grave."<sup>301</sup>

Even though Judge Scott held that Wright had breached his duty, he did not hold the newspapers to the same standard. He limited the duty of third parties who obtained information knowing it was confidential to circumstances that raised "an obligation of conscience."<sup>302</sup> He pointed out that there could be circumstances involving public interest factors that applied to a third party and not to the original confidant. In the case of the newspapers, those factors were the press's legitimate role in disseminating information to the public, the defense of iniquity, and constraints imposed by Article 10.<sup>303</sup>

Judge Scott acknowledged that Article 10 had not been incorporated into English law, but he accepted the *Sunday Times'* argument that when courts balance the competing public interests of the press and the government, they should do so in a manner consistent with the government's treaty obligations. Because Article 10 only allows for restrictions on the press that are *necessary*, he relied on two decisions by the European Court of Human Rights<sup>304</sup> to define *necessary* and held that the press could not be restrained unless there was a "pressing social need" for the restraint, and the restraint was "proportionate to the legitimate aim pursued."<sup>305</sup>

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298. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 840-46 (Ch. D.). See also *Attorney-General v. Jonathan Cape Ltd.* [1975] 3 W.L.R. 606 (Q.B.D.); *Australia v. John Fairfax & Sons Ltd.* [1980] 147 C.L.R. 39.

299. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 846 (Ch. D.).

300. *Id.* at 854-55.

301. *Id.*

302. *Id.* at 848.

303. *Id.* See *supra* text accompanying notes 81-93, 187.

304. *Lingens v. Austria* [1986] 8 E.H.R.R. 407; *Sunday Times v. United Kingdom* [1979] 2 E.H.R.R. 245.

305. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 851 (Ch. D.).

Judge Scott held that the government's claim for an injunction against the *Observer* and *The Guardian* for the articles they published in 1986 was not justified by a pressing social need. First, the articles, he stated, presented fair reports of the government's action in Australia. While they contained information that had not been previously published, the amount of information was not sufficient to constitute a breach of duty. Second, he accepted the newspapers' argument that the allegations concerning the destabilization of the Wilson government and the plot to assassinate President Nasser qualified under the iniquity defense.<sup>306</sup> The newspapers had a legitimate basis for reporting the information directly to the public; they were not bound to limit the disclosure to an investigating authority. Judge Scott acknowledged that the government might have been embarrassed by the disclosure, but he held that embarrassment was not a sufficient interest to prevent publication:

[T]he ability of the press freely to report allegations of scandals in government is one of the bulwarks of our democratic society. It could not happen in totalitarian countries. If the price that has to be paid is the exposure of the government of the day to pressure or embarrassment when mischievous and false allegations are made, then, in my opinion, that price must be paid.<sup>307</sup>

He concluded that the editors of those papers properly decided that the public disclosure of the confidential material was justified.

The *Sunday Times*, however, had in his judgment breached their duty of confidence. The serialized excerpt of *Spycatcher* was not limited to the Service's wrongdoing, nor had the editors exercised discretion in their determination of what was and was not legitimate information to place before the public. Accordingly, he held the papers liable for any profits that resulted from the July 1987 article.<sup>308</sup>

Judge Scott's opinion with respect to the Millett injunction is troubling. Even though he stressed the important role of the press in a democratic society, he undercut that role by subjecting the papers to the traditional balancing test used in the law of confidence. Thus, the *Sunday Times* was held liable because its editors did not properly weigh the competing interests involved, and the *Observer* and *The Guardian* stepped beyond the bounds of legitimate public interest by publishing Wright's allegations about Burgess and Churchill's daughter. Unfortunately, it is not clear what is or is not in the public interest. The balance appears to be on the side of the government and in favor of restraint. The press is free to report allegations of gross abuse by the government, but they are not free to comment on abuses that may not rise to that level but are nevertheless appropriate subjects for public debate. The restraints are imposed not because the information necessarily threatens national security, but because the source of the information itself was one who was obligated by virtue of his employment to remain silent.

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306. See *supra* text accompanying notes 81–93.

307. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 858–59 (Ch. D.).

308. *Id.* at 859–60.

The newspapers, however, fared better when it came to the permanent injunction. Judge Scott again engaged in a balancing test, weighing the claims of national security against the public interest in freedom of the press. In support of restraint, the government relied on several claims made by Sir Robert Armstrong.<sup>309</sup> Sir Robert first asserted that further disclosures would damage the trust members of the Service had for each other. Judge Scott rejected this claim, noting that the damage had already been done. Second, Sir Robert argued that others could be tempted to follow Wright's example. Judge Scott dismissed this claim as well by pointing out that if another ex-Service member tried to publish his memoirs in England, he would be enjoined from doing so, and if he sought to publish outside the jurisdiction, Wright already served as an example.

Sir Robert also argued that if a permanent injunction were not granted, the press could pressure current or ex-members to confirm, deny, or expound on Wright's allegations. Judge Scott accepted that this claim should weigh in the balancing, but he did note its speculative nature. Next, Sir Robert argued that informers and friendly foreign nations would lose confidence in the Service if the injunction were not granted. As with earlier claims, Judge Scott simply noted that the damage had already occurred. Judge Scott also rejected the government's claim that an injunction would protect against the disclosure of the methods, personnel, and organization of the Service. He noted that the claim could justify prohibiting members from publishing their memoirs, but it could not justify enjoining the press, as that information was already available. Finally, Judge Scott held that the government's claim that an injunction would improve the morale of the Service was beyond the scope of the law of confidence. The duties owed by the press were not based on the maintenance of morale, but on the maintenance of secrecy.

In refusing to grant the permanent injunction, Judge Scott accepted the papers' arguments that the information the government sought to restrain was in the public domain, and, moreover, it was information that could properly be placed before the public. He held, therefore, that because no "obligation of conscience" existed, the papers were free to publish and comment on the Wright allegations.<sup>310</sup>

Judge Scott also refused to grant the Attorney General's request for a preventive injunction prohibiting the papers from publishing any part of "*Spycatcher 2*," should it surface. He recognized that the government's fear of an additional volume of memoirs was legitimate, but he refused to rule on issues that had not yet arisen. He did note, however, that the remedy of an accounting of profits was available.<sup>311</sup>

Even though the newspapers were successful, their success was limited. The court's refusal to grant a permanent injunction was based primarily on the previous publication of *Spycatcher* and its widespread availability. The relative weight given to the competing interests no doubt would have been different if the government had taken steps to prevent earlier publications of the same allegations made by Wright or

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309. *Id.* at 860-61. See also *supra* note 120.

310. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 862-63 (Ch. D.).

311. *Id.* at 865.

if *Spycatcher* had not been published. Thus, the decision was not based on a recognized right of newspaper editors to choose what information they will or will not publish, but rather it was based on the recognition that, in this case, injunctive relief could serve no purpose. There are, of course, legitimate limits that may be imposed on the press, but those limits must be clearly defined. By relying on the balancing test incorporated in the law of confidence, this decision suggests that if confidential information concerns the Service, the balance will fall in favor of the government unless injunctive relief is futile. The press, in essence, is in no better position than it was at the outset of the litigation.

### B. *The Appellate Decisions*

Both the Court of Appeal and the House of Lords upheld the lower court decision and, in doing so, accepted Judge Scott's interpretation of the law and its application to the facts. Thus, the courts refused to grant a permanent injunction against the papers. They held that the *Observer* and *The Guardian* had not breached their duties, but that the *Sunday Times* had, and they refused to grant the Attorney General a preventive injunction with respect to "*Spycatcher 2.*"

Because the various judges primarily reiterated Judge Scott's conclusions, each opinion will not be discussed in detail. Rather, the opinions will be used to demonstrate that when the government uses the law of confidence to restrain the press from publishing information connected to national security, it will be successful unless the information the press seeks to disclose was already available to the public through no fault of the press.

All of the judges accepted the premise that the freedom of the press is limited by the law of confidence and that the press is not entitled to any greater protection than that owed to an ordinary citizen. The balance of competing interests will be weighted differently, however, simply because of the role of the press to disseminate information to the public. If the press is involved in a breach of confidence action, the courts, because of the public interest in freedom of the press, must engage in a balancing test. If an action is between the government and the press, the government has the burden to prove not only that the information is confidential, but also that it is in the public interest to withhold the information.<sup>312</sup>

Lord Keith of Kinkel, for example, relied on the distinction established in *Australia v. John Fairfax & Son Ltd.*<sup>313</sup> to demonstrate the difference between a claim of confidence by the government and a claim by a private citizen:

The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands

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312. *Id.* at 892, 906; *see also* Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1988] 3 W.L.R. 776, 783-85 (H.L.(E.)); Attorney-General v. Jonathan Cape Ltd. [1976] 1 Q.B. 752; *Australia v. John Fairfax & Sons Ltd.* [1980] 147 C.L.R. 39.

313. [1980] 147 C.L.R. 39.

of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles. . . . Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.<sup>314</sup>

If the government's claim of confidence is based on national security, injury to the public interest will be presumed, and the public interest in maintaining secrecy will, prima facie, outweigh the public interest in freedom of the press.<sup>315</sup> In order to overcome the prima facie case, the press must show that the information is no longer confidential, that it is trivial or useless, or that it concerns iniquities. The opinions of the various judges on appeal, however, suggest that the press is not likely to overcome the prima facie case unless it proves that the information is not confidential.

### 1. *Loss of Confidentiality*

The majority opinions of both the Court of Appeal and the House of Lords suggest that if the press can show that the information they seek to publish is in the public domain, the government will be denied permanent injunctive relief. The various judges, for example, agreed that the information the newspapers sought to publish was no longer confidential: *Spycatcher* had been widely published and it was readily available in England. However, the judges used different rationales.

Lord Keith of Kinkel, for example, did not base his decision on a balance of the competing interests involved, but simply stated that all of the harm that could have resulted to the Service had already occurred. He noted, however, that there could be a case where widespread publication would not destroy the duty of confidence, but his examples were limited to private, not government, interests.<sup>316</sup> Lord Griffiths approached the issue by balancing the competing interests and held that the freedom of the press outweighed the national security interest because the latter had been diminished by previous publications.<sup>317</sup> Lord Goff took a different approach. He reserved the question of whether an obligation owed, even one owed by the original confidant, could continue once the subject matter of the obligation was destroyed by publication. He suggested that the appropriate remedies may be criminal or legal and not equitable ones.<sup>318</sup>

Sir Donaldson relied on the balancing test with respect to the *Observer* and *The Guardian*, but in his dissent he argued that the *Sunday Times* should have been restrained from serializing *Spycatcher*. He stated that because the paper stood in the shoes of Wright by virtue of its having purchased the serialization rights from Heinemann, it could be restrained from publishing the full excerpts of the book.<sup>319</sup>

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314. *Id.* at 51–52.

315. *See* Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1988] 2 W.L.R. 805, 868, 892, 908–09 (C.A.); Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1988] 3 W.L.R. 776, 815 (H.L.(E.)).

316. Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1988] 3 W.L.R. 776, 786 (H.L.(E.)).

317. *Id.* at 798.

318. *Id.* at 810–13.

319. Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1988] 2 W.L.R. 805, 887 (C.A.); *see also* Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1988] 3 W.L.R. 776, 802 (H.L.(E.)) (per Lord Griffiths).

The majority opinions rejected Sir Donaldson's analysis. While the judges recognized that it was inconsistent to prohibit Wright and Heinemann from directly publishing what the *Sunday Times* could publish indirectly, they relied on a balancing test to justify serialization. The government's interest was not sufficient to prevent the newspaper from publishing in serialized form a book that could be purchased from a bookseller or borrowed from a library.<sup>320</sup>

Under any of the above approaches, a newspaper should be able to defeat a government claim of confidentiality. If the balancing test is used, the public interest in a free press should prevail because once the information is published, any injury to the government will already have occurred. If that test is not used, the press should still prevail because injunctive relief, as a remedy, would not serve any purpose. A newspaper could still be subject, however, to a legal or criminal remedy, such as an accounting of profits, but again, that may depend on where the balance of interests lies and whether the paper directly aided the original confidant.<sup>321</sup>

## 2. Trivial or Useless Information

The defense that the information is trivial or useless and thus cannot be confidential relies on the common sense notion that the interest involved is not worth protecting. In a commercial setting the defense would be absolute, but in the context of national security it may be limited.

As noted earlier, Judge Scott suggested that the courts were not in a position to draw the line between what was and was not trivial unless those who could had refused to draw any line at all:

National security is the responsibility of the executive government; what action is needed to protect its interests is . . . a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sorts of problems which it involves.<sup>322</sup>

Lord Griffiths echoed this point of view, stating that a bright line rule is necessary to protect the secrecy of the Service. He emphasized that members of the Service should be prohibited from releasing any information, regardless of how trivial it may seem, because information that may seem trivial to one person could provide the missing link sought by a hostile agency.<sup>323</sup>

Even though he was referring to members of the Service, it is unlikely that Lord Griffiths would hold the press to a different standard. If a balancing test were used, the government interest in secrecy would outweigh the press's interest in publication. What is ironic is that the more trivial the information the less likely the press will be able to justify disclosure based on a legitimate public interest. The government,

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320. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 3 W.L.R. 776, 792, 816-17 (H.L.(E.)); *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 900, 914 (C.A.).

321. See *supra* text accompanying notes 76-79.

322. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 841 (Ch.D.) (quoting *Council of Civil Serv. Unions v. Minister for the Civil Serv.* [1985] A.C. 374, 412).

323. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 3 W.L.R. 776, 795 (H.L.(E.)).

however, would still be able to justify restraint based on an argument that the trivial information could be damaging if used by a hostile agency. Of course, if the information is utterly trivial—the meal plan of the Service—the government would be hard pressed to show any potential damage, but in such a case, it is unlikely that the press would be interested in disclosing the information anyway. A defense based on the trivial nature of the information, therefore, will not, in most cases, be sufficient to overcome the government's *prima facie* case.

### 3. *The Iniquity Defense*

While the issue of whether the *Observer* and *The Guardian* breached their duty of confidence based on the 1986 articles was of little practical significance, this aspect of the *Spycatcher* cases, more than any other, demonstrates the strength of the government's ability to limit the freedom of the press and, thereby, public debate.

At trial and on appeal, the two papers relied on the iniquity defense. They argued in essence that the public interest in exposing the wrongdoing by the Service outweighed the government's interest in maintaining secrecy. The courts at all three levels accepted the papers' argument, but in doing so, the courts did not provide clear guidelines as to what is necessary to justify disclosure based on the defense. Two conflicting approaches emerge from the various opinions. In one, the government would be the ultimate decisionmaker, and in the other, the press would decide.

Under the test established by Sir Donaldson,<sup>324</sup> a newspaper would not be justified in publishing an allegation concerning the Service unless the parliamentary system broke down; that is, the paper would first have to report the allegation to everyone in the chain of command, including the Director of the Service, the Prime Minister, and the Opposition, and if they all refused to conduct an investigation, the paper could publish the allegation. The paper, however, would be justified in publishing only the allegation itself, not any of the supporting evidence. According to Sir Donaldson, disclosure of the evidence could not be justified because of the immense damage that could result if the operational methods of the Service were discovered.

Sir Donaldson also limited what could constitute iniquity. He suggested that even though the Service was not above the law, common sense and discretion should prevail. Thus, in his view, an allegation concerning burglary or surveillance would not qualify as iniquity, but an allegation of physical violence would.

Lord Griffiths essentially agreed with Sir Donaldson. He suggested that an editor should first inform the Treasury Solicitor in order to enable the government to seek an injunction so that the courts could decide the issue.<sup>325</sup> He suggested, for example, that if Wright had first approached the newspapers with the allegations concerning Sir Roger Hollis, and the Nasser and Wilson plots, the editors' duty would have been "to

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324. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 2 W.L.R. 805, 876–80 (C.A.).

325. *Attorney-General v. Guardian Newspapers Ltd.* (No. 2) [1988] 3 W.L.R. 776, 804–05 (H.L.(E)).

report the allegations immediately to the appropriate minister and only to consider publication . . . if convinced that no effective action had been taken.”<sup>326</sup>

If the views of Lord Griffiths and Sir Donaldson represent the current state of the iniquity defense, then realistically, in any case involving serious misconduct by the government, it is the government and not the press that decides what information is appropriate to place before the public. Even if an editor were to contact the Treasury Solicitor, so that the courts, rather than the government, made the ultimate decision, the *Spycatcher* cases themselves suggest that the courts would defer to the government unless the information were already in the public domain. The government, therefore, will decide how much and what kind of information the public will receive.

The other interpretation of the defense would leave the decision in the hands of the editors. Under this approach, the editor would have to conduct the balancing test incorporated in the law of confidence and in Article 10. The editor would first have to determine if the allegation were credible, but he would be able to rely on the apparent credibility of his source.<sup>327</sup> Judge Bingham, for example, stated that the newspapers were entitled to rely on the apparent credibility of Wright given his long experience with the Service.<sup>328</sup> Next, the editor would have to determine what harm could result from publication and consider whether the disclosure should be made to the appropriate authorities rather than to the public.<sup>329</sup> Finally, he would have to weigh the competing interests. Under this approach, if the editor “asks himself the right questions and gives them the right answers, that is enough; he is not required to submit his copy to the authorities for clearance before publication.”<sup>330</sup>

It is not clear which interpretation of the defense represents the current view of the law. The majority of the opinions in the House of Lords, for example, did not focus on the issue. The Lords simply upheld the lower court’s decision, noting that the disclosures were limited and represented a fair report of the government’s action in Australia. However, given the history of the *Spycatcher* cases, the ease with which the courts imposed the temporary injunction, and the strong presumption in favor of the protection of government secrets in cases of national security, the views held by Sir Donaldson and Lord Griffiths may be controlling. If so, the only means for the press to overcome the government’s prima facie case is to prove that the information has already been published. A defense based on iniquity would not be sufficient except under very limited circumstances. And even if the less restrictive view is controlling, the defense would still be limited to those few cases in which the balance of interests would justify disclosure.

Thus, even though the government lost its case with respect to the permanent injunction, it may have won the battle. The decisions of the three courts provide the

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326. *Id.* at 804.

327. *See* *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1988] 2 W.L.R. 805, 897, 917 (C.A.).

328. *Id.* at 917.

329. *Id.* at 897.

330. *Id.* at 898.



government with plenty of ammunition to use against the press and leave the press with few workable defenses.

## VI. CONCLUSION

The *Spycatcher* cases leave several issues unresolved: the role of Article 10 in cases involving the press and the law of confidence, the status of the iniquity defense, and the scope of the law of confidence itself. The latter may have been expanded to incorporate actions based on deterrence or based on detriment to the morale of those affected by disclosure of confidential material. In its attempt to prevent the press from disclosing Wright's allegations, the government may have expanded the law to such an extent as to limit the freedom of the press to publish information relating to government abuse to but a few narrow instances when the public is already aware of the information.

The cases show that if a newspaper publishes confidential information, the government will succeed in restraining the paper from further disclosures until an action on the merits occurs. It will also be able to prevent other papers from commenting on the information by an action for contempt of court. When the trial on the main action occurs, the government is likely to win unless the information becomes available by publication abroad. The government, therefore, has the potential to determine what information the public receives and to define the scope of any inquiry into its activities. The government need only claim that it is protecting the national security of the country, and unless its claim has absolutely no merit, the press will be unable to serve as a forum for public comment and debate.

If the freedom of the press is one of the bulwarks of a democratic society, then the *Spycatcher* cases may be but the first attack in an onslaught against the press. While one might be tempted to empathize with a government attempting to protect the secrecy of its intelligence agencies, it is not the agencies or the government that suffer if the attacks are successful, but the very institutions designed to protect a free society. When a government is capable of insulating itself from criticism and charges of abuse, its citizens are denied the information necessary to make responsible choices, and in the end, they, not the press, must bear the ultimate consequences of the government's actions.

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