

BREACH OF CONFIDENCE AND THE PUBLIC INTEREST DEFENCE: IS IT IN THE PUBLIC INTEREST?

A REVIEW OF THE ENGLISH PUBLIC INTEREST DEFENCE AND THE OPTIONS FOR AUSTRALIA

by

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1. INTRODUCTION

The equitable doctrine of breach of confidence seeks to protect confidential information provided by one party to another in circumstances which import an obligation not to disclose that information or to use it for unauthorised purposes.¹ The rationale underlying the protection of confidential information is that of a diverse range of commercial, professional and other relationships require confidentiality in order to function effectively and that the protection of these relationships will serve the public interest.² There are circumstances however in which courts will refuse to protect information given pursuant to an express or implied duty of confidence on the basis that to do so would be contrary to other public interests. Where the party to whom the duty of confidence is owed is not a government, the circumstances in which information may be disclosed and to whom is the subject of continuing judicial debate.

The approach in England has been to introduce a so-called “*public interest defence*”. This requires the courts to balance the public interest in maintaining the confidence against a countervailing public interest in disclosure:

“... although the basis of the law’s protection of confidence is that there is a public interest that confidences should be protected by the law, nevertheless the public interest may be outweighed by some other countervailing public interest which favours disclosure”.³

The Australian courts have watched the development of the “*public interest defence*” with unease. Although some members of the judiciary have shown interest in adopting the defence in some form, others have warned that the defence is based on an inadequate doctrinal basis. It has been described as:

“not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an *ad hoc* basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence by reference to matters of social or political opinion.”⁴

This article traces the development of the public interest defence in England and determines to what extent this criticism is valid. It then examines the three Australian responses to the defence and considers which approach would best serve the interests of the Australian public. There are four main criteria considered in relation to each approach. The first is whether the defence provides adequate protection for certain relationships which require an assurance of trust and confidence to function effectively. The second criteria is whether the defence would allow

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¹ *Coco v Clark (Engineers) Ltd* [1969] RPC 41 at 47 per Megarry J.

² See PD Finn “Confidentiality and the Public Interest” (1984) 58 ALJ 497 esp. at 498.

³ *Attorney-General v Guardian Newspapers Ltd. And Others* [1988] 3 All ER 545 at 659 (per Lord Goff).

⁴ These comments were made by counsel in *Smith Kline & French Laboratories (Australia) Ltd and Ors v. Secretary, Department of Community Services and Health* (1990) 95 ALR 87 and were cited with approval by Gummow J at 125.

disclosure of certain information where to do so would promote the public welfare and prevent harm being caused to members of the public. The third is whether the defence provides a reasonable degree of certainty and does not encourage decisions to be made solely on the basis of the social and political values of individual judges. The fourth criteria arises after it has been determined that the information should be disclosed and considers whether disclosure to certain recipients should be promoted and, if so, whether the defence encourages disclosure to the appropriate recipients.

2. THE DEVELOPMENT OF THE PUBLIC INTEREST IN ENGLAND

(a) The Evolution of the Public Interest Defence 1857-1988

The Iniquity Rule

The public interest defence developed out of the “*iniquity rule*” as propounded by Wood VC in the 1857 case of *Gartside v Outram*.⁵ In that case the plaintiff sought to restrain a former sales clerk from disclosing information relating to the plaintiff’s business. In answer to the plaintiff’s bill the defendant pleaded that the plaintiff had carried out its business in a fraudulent manner. In the course of his judgement the Vice Chancellor said:

*“The true doctrine is, that there is no confidence as to the disclosure of iniquity. You cannot make me a confident of a crime or a fraud, and be entitled to close my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist.”*⁶

His Honour said that although he had described the disclosure of iniquity as “*an exception*” this was not an accurate description as in fact no “*confidence*” comes into existence in respect of information of an iniquitous nature.⁷ From this statement it seems clear that where information relates to crimes and frauds, *a duty of confidence will not arise at all*, irrespective of to whom the information is disclosed or whether it was given in exchange for a fee.

Vice-Chancellor Wood explained that the *iniquity rule* was based on a notion of the public interest, as to deny the existence of the *exception* may give effect to a bargain between the parties to keep an iniquitous transaction secret. This would prevent those who are informed of the transaction in confidence from disclosing the information so to prevent the evil from occurring or bring the offender to justice.⁸

Vice-Chancellor Wood referred to the Irish case of *Annesley v the Earl of Anglesea*⁹ and approved of the words of counsel in that case:

*“... no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare.”*¹⁰

This suggests that there are two limbs to Wood VC’s *iniquity rule*. The first limb requires that there be some design formed which is contrary to the laws of society, and the second requires that the design destroys the public welfare. The public policy basis of Wood VC’s *iniquity rule* therefore seems limited to acts which constitute a breach of civil or criminal law *and* which are contrary to the public welfare. It did not extend to *any act* which may be perceived to be contrary to “*the public welfare*”.

5 [1857] L.J.(Ch. Div) New Series 113

6 *Ibid* at 114.

7 *Ibid*.

8 *Ibid* at 116.

9 17 How. State Trials, 1139.

10 *Supra* n.5 at 115.

In 1919, the case of *Weld-Blundell v Stephens*¹¹ was heard which seemed to place some limits on the iniquity rule. That case involved the negligent disclosure of a letter written by the plaintiff which was libellous. The information thus did not relate to a crime or fraud but a civil wrong. The plaintiff successfully brought an action against the confidant for breach of an implied contractual obligation of confidence. Lord Justice Bankes held that there was no useful purpose served by the disclosure and suggested that the iniquity rule exception applied to cases where there is a *proposed* commission of a criminal or civil wrong.¹²

Crimes, Frauds and Misdemeanors

Some fifty years later in the case of *Initial Services v Putterill*¹³ Lord Denning considered and rejected the view taken in *Weld-Blundell v Stephens* and instead sought to substantially broaden the 'exception':

*"Counsel suggested that this exception was confined to cases where the master has been 'guilty of a crime or fraud', but I do not think that it is so limited. It extends to any misconduct of such a nature that it ought in the public interest to be disclosed."*¹⁴

His Honour went on to say:

*"The exception should extend to crimes, frauds and misdemeanors, 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."*¹⁵

Lord Denning then referred to the case of *Annesley v Earl of Anglesea*,¹⁶ the case also relied upon by Wood VC in *Gartside*, as providing the principle upon which the notion of "the public interest" was based.

The decision in *Initial Services* was significant as it introduced the notion of "misdemeanors" and "misconduct" as grounds for the disclosure of confidential information. This was an important extension of the exception approved in *Gartside* which, based on the *Annesley v Earl of Anglesea* test, was limited to breaches of civil or criminal laws and fraud. Neither of these new concepts were defined or their scope identified. His Honour did suggest however that the distribution of misleading or inaccurate information may satisfy these new grounds for disclosure:

*"If the circular was misleading ... then it is at least arguable that it was in the public interest that that should be made known."*¹⁷

As the circular was not apparently in breach of any law, it seems that Denning MR considered that misleading the public may have been a "misdemeanor" which also undermined "the public interest", satisfying both requirements of the exception.

Denning MR also suggested that the exception should only apply in circumstances where the information has been disclosed in good faith to a person who has a proper interest in receiving the information:

*"The disclosure must, I should think, be to one who has a proper interest to receive the information ..."*¹⁸

11 [1919] 1 KB 520

12 *Ibid* at 527.

13 [1967] 3 All ER 145.

14 *Ibid* at 148.

15 *Ibid*.

16 *Supra* n.9.

17 *Supra* n.13 at 149.

18 *Ibid* at 148.

His Honour later said:

*"I say nothing as to what the position would be if [the defendant] disclosed it out of malice or spite or sold it to a newspaper for money or for reward. That indeed would be a different matter. It is a great evil when people purvey scandalous information for reward."*¹⁹

Lord Denning thus sought to make the recipient of confidential information and the circumstances under which it was disclosed relevant factors in determining whether the exception will apply. Notwithstanding these comments his Honour concluded that the disclosure by the defendant to the press, rather than a more appropriate body, without the receipt of a fee, was not sufficient grounds for striking out the defence and that it was arguable that the defendant should be excused for making the disclosure.

Lord Denning also added:

*"There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press."*²⁰

The decision reached in the case suggests that where the public have been misled in some way, disclosure of confidential information to the media may be justified.

Just Cause or Excuse

The defence was next discussed in the case of *Frazer v Evans*²¹ in which Lord Denning made the following oft cited although obiter comments:

*"..I do not look upon the word 'iniquity' as expressing a principle. It is merely an instance of a just cause or excuse for breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret."*²²

These comments indicate a severing of the links which the defence had held with Wood VC's *iniquity rule*. The *iniquity rule* operated to negate the very existence of a duty of confidence. In contrast, the "*just cause or excuse*" test recognised the duty of confidence but considered that in some circumstances a breach of that duty will be justified. Moreover, the "*just cause or excuse*" test no longer required a breach of a law or a misdeed, and the notion of "*the public interest*" began to take on the nature of a defence in its own right.

The scope of this new public interest defence was, however, far less certain. The phrase "*just cause or excuse*" introduced a concept which was virtually incapable of definition and inevitably required a subjective analysis of what was in "*the public interest*" in the circumstances of a particular case. Commentators have described this as having a "*fine equitable ring about it*", but having a meaning which is "*as variable as the Chancellor's foot*".²³

The consequences of relying on an ill-defined defence became evident in two cases in which the courts were called upon to determine whether confidential information of the Church of Scientology should be protected.

"Dangerous Material"

In *Hubbard v Vosper*,²⁴ the plaintiff was the founder of the Church who unsuccessfully sought an interlocutory injunction to prevent the defendant from publishing extracts of confidential material. The material had been obtained by the defendant in the course of completing studies on Scientology.

19 *Ibid* at 149.

20 *Ibid* at 148.

21 [1969] 1 QB 349 .

22 *Ibid* at 362.

23 S Ricketson "*Public Interest and Breach of Confidence*" (1979) 12 Melb. Uni. LR 191; Footnote 71.

24 [1972] 1 All ER 1023.

Lord Denning referred to the plaintiff's books as containing "*medical quackeries*" and found that there were good grounds for thinking that the relevant courses contained "*such dangerous material that it is in the public interest that it should be made known*".²⁵

In the second case, *Church of Scientology of California v Kaufman*,²⁶ Goff LJ said that at least some of the information sought to be disclosed was "*absolutely nonsensical mumbo-jumbo*", and capable of causing harm, not only to a person's spirit but also to their physical mind or body.²⁷ His Honour went on to say:

*"In my judgement the public interest does indeed require disclosure of the type of thing for which they are being asked to pay."*²⁸

Goff LJ dismissed the plaintiff's claim for an injunction on several grounds, including that the public interest required disclosure, that the plaintiffs did not come to equity with clean hands and that in any event the information sought to be protected was "*pernicious nonsense*".²⁹

In both these cases the potential for harm to the public was found to have provided "*just cause or excuse*" for the disclosure of the confidential information. In *Kaufman* it was relevant that the defendant claimed to have suffered a nervous breakdown as a result of attending the plaintiff's courses on Scientology. The courts dismissed the plaintiff's claim that disclosure would result in harm to the public as a result of the information falling into "*untrained hands*".

These two cases highlight a number of the difficulties which arise from the application of the public interest defence. First, there appears to be no reason why the information which was the subject of paid courses of study could not have been protected by the courts without inhibiting general public discussion about the allegedly harmful activities of the plaintiff.³⁰

Second, if the information in the course *was* harmful then by releasing it to the public it would seem that the Courts may have increased the potential for that harm to occur. It is odd to conclude that *because* the information may be harmful to the public it is in the public interest that it should be released to the public.

Third, in reading the judgments one cannot fail to observe the derisive language with which the courts discussed the information which the plaintiff sought to protect. The references to the confidential information sold by the plaintiff in courses of study as the work of "*medical quackeries*", "*nonsensical mumbo-jumbo*" and "*pernicious nonsense*" suggests that the members of the bench may have held the opinion that not just the information in issue but the Church itself was not "*in the public interest*".

The temptation for the bench to then apply the *public interest defence* to hinder the activities and/or influence of the Church may have been difficult to resist. These cases illustrate the potential for the court to use *the public interest defence* seek to achieve wider public policy objectives than the doctrine of breach of confidence was designed to effect.

Misdeeds of a Serious Nature

The broad approach taken in the two Scientology cases towards the *public interest defence* was tempered somewhat by the decision of Ungood-Thomas J in *Beloff v Pressdram*.³¹ In this case the plaintiff brought an action for breach of confidence after the defendant had published material

25 *Ibid* at 1029; note that Megaw LJ decided that the injunction should be refused on the basis of that the plaintiff's did not come to the court with clean hands.

26 [1973] RPC 635.

27 *Ibid* at 652 and 654.

28 *Ibid* at 654.

29 *Ibid* at 658.

30 This was the approach taken by Rose J in *X v Y* [1988] 2 All ER 648 and Powell J in the Australian case of *Westpac Banking Corporation v John Fairfax & Sons and Others* (1991) 19 IPR 513

31 [1973] 1 All ER 241.

naming the source of information obtained by the plaintiff in confidence. In the course of his decision Ungood-Thomas J took steps towards defining the scope of the defence:

*“The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which as Lord Denning M.R. emphasised must be disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country’s security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity ... Such public interest, as now recognised by the law, does not extend beyond misdeeds of a serious nature and importance to the country and thus, in my view, clearly recognisable as such.”*³²

His Honour concluded that as the publication of the plaintiff journalist’s source of information did not fall within any of these categories the defence was not available.

The attempt by Ungood-Thomas J to define and limit the scope of the public interest defence to matters of a serious nature and gravity was however short-lived. In *Distillers Co. (Biochemicals) Ltd. v Times Newspapers Ltd*³³ Talbot J referred to the above statement of Ungood-Thomas J and said that as the information in question did not fall within one of these categories, the defendant was not “entitled” to publish the material. However, Talbot J suggested that where the information fell outside these categories it was then necessary to ask whether the defendants had shown that there is a competing public interest which justified disclosure.³⁴ Talbot J thus considered that Ungood-Thomas J had merely provided a “list” of matters in respect of which confidential information should be disclosed, but failure to meet any of these did not inevitably result in the failure of the defence.

Surprisingly, Talbot J considered that acts of negligence did not fall within the ambit of the public interest defence:

*“There is here no crime or fraud or misdeed on the part of the plaintiffs, and in my view negligence, even if it could be proved, could not be within the same class so as to constitute an exception to the need to protect confidentiality.”*³⁵

If there is to be a defence based on competing public interests then one would expect that the critical issue is the nature of the confidential information and the public interest in receiving that information, not the intention of those whose actions gave rise to its existence. For example, where information relates to a matter which poses a real threat to public health but is a result of gross negligence it is at least arguable that under the public interest defence a breach of confidence may be justified.

Misleading the Public

In 1977 the public interest defence reached a high point in the case of *Woodward v Hutchins*.³⁶ This case involved an attempt by a popular musical group to restrain their former manager from publishing details about the pop stars private lives and behaviour. The court rejected the application on a number of grounds, including that the claim was interwoven with an action for libel in which the defendants were pleading justification and according to accepted principles, an injunction will not usually be granted.

32 *Ibid* at 260.

33 [1975] 1 QB 613.

34 *Ibid* at 623.

35 *Ibid* at 622.

36 [1977] 2 All ER 751.

Notwithstanding that the claim could have been disposed of on this basis, Lord Denning proceeded to make the following comments in respect to the public interest defence;

*"If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth."*³⁷

His Honour went on to say:

*"In this case the balance comes down in favour of the truth being told, even if it should involve some breach of confidential information. As there should be 'truth in advertising', so there should be truth in publicity. The public should not be misled."*³⁸

It is of note that Lord Denning did not seem perturbed by the fact that, notwithstanding his comments in *Initial Services*, the defendant in this case was receiving a "very considerable reward" for the information in question.

This decision has been widely criticised for suggesting that the public's interest in knowing the truth may alone outweigh the public interest in maintaining the confidence.³⁹ If the right of the public not to be misled alone justifies a breach of confidence then the duty of confidence may be completely undermined in any situation in which the public are under a misapprehension of the true facts, even if it cannot be shown that there is any other public interest in receiving the information. For example, a person may give the impression that they were healthy when in fact they were unwell. A strict application of Lord Denning's "truth in publicity" principle may have the effect that the person's doctor would be released from their obligation of confidence and be permitted to publish the person's medical details to ensure that the public are not misled as to the person's state of health.

As with the Scientology cases, *Woodward v Hutchins* may be explained in part by the Court's obvious disapproval of the alleged activities of the plaintiffs which was the subject matter of the confidential information. These activities included "very unsavoury" sex scandals, drug taking and what Lord Denning described as "other discreditable incidents".⁴⁰

In *Malone v Commissioner of Police of the Metropolis (No. 2)*,⁴¹ McGarry VC expressed his support for a defence which was not limited to acts of misconduct or misdeeds:

*"There may be cases where there is no misconduct or misdeed but yet there is a just cause or excuse for breaking confidence. The confidential information may relate to some apprehension of an impending chemical or other disaster, arising without misconduct, of which the authorities are not aware, but which ought in the public interest to be disclosed to them."*⁴²

Whilst McGarry VC referred to a situation in which physical harm may be caused to the public, there was no indication that his Honour sought to limit the defence to cases in which physical harm was threatened.

37 *Ibid* at 754.

38 *Ibid*.

39 For example, see *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980-81) 33 ALR 31 at 56 per Rath J.

40 *Supra* n.36 at 753.

41 [1979] 2 All ER 621.

42 *Ibid* at 635.

The unpredictable nature of the *public interest defence* was well-illustrated in the subsequent case of *British Steel Corp v Granada*.⁴³ In that case the plaintiff was a public company which had incurred enormous losses and was the subject of a national strike. The plaintiff had sought to blame the trade unions for many of their troubles. The issue to be determined was whether a television station was required to disclose the identity of an employee of the plaintiff who had provided them with some 250 confidential documents, the contents of which the defendant had published in a television program.⁴⁴ The documents disclosed that mismanagement of the plaintiff company was largely responsible for its inefficiency and that, contrary to the public perception, there had been significant government intervention in the matter.

In reaching the decision that the defendant was obliged to disclose the source of the documents, the majority of the House of Lords also decided that the disclosure of the confidential material was not justified. In many respects their Lordships appeared to be trying to reverse recent developments of the *public interest defence*, not least by referring to it at times as the *iniquity rule*.⁴⁵

Lord Wilberforce accepted that the *iniquity rule* extended to include misconduct generally. However, his Honour refused to find that the mismanagement and government intervention revealed by the documents could be classified as misconduct, and thus took that view that, in the absence of iniquity, disclosure of the information could not be justified.⁴⁶

Viscount Dilhorne said of the documents:

“At most they show mismanagement, that it was wrong to put the whole blame for the state of the industry on low productivity on the part of the workers and that it was not true that there had been no government intervention.”⁴⁷

Thus whilst the court clearly accepted that the *iniquity rule* extended to crimes, frauds, misdeeds and misconduct, it found that the disclosure of mismanagement, wrongful government intervention and the incorrect apportionment of blame in relation to the enormous financial losses of a public company did not fall within any of these categories.

It is difficult to reconcile this decision with those in *Initial Services v Putterill* and *Woodward v Hutchins* where it was successfully argued that disclosure may have been justified as the public had been misled. Frances Gurry suggests that the only distinction which can be made between these cases is that the mismanagement of the plaintiff company in *Granada* did not involve fraud or deceit of the same nature as that allegedly found in the two earlier cases.⁴⁸

Despite the more restrictive view taken in *Granada*, the decision did not provide any clear indication of what activities will constitute “*misdeeds*” or “*misconduct*”, exacerbating the uncertainty and confusion as to the circumstances in which “*the public interest*” will outweigh a duty of confidence.

Lord Fraser attempted to explain the way in which the English courts are required to weigh up the competing public interests:

43 [1981] 1 All ER 417.

44 *Ibid* at 453 per Lord Wilberforce; It should be noted that although the defendant television company had promised not to reveal the source’s identity, the information was not given to the defendant pursuant to a duty of confidence.

45 *Ibid* at 455 and 480.

46 *Ibid* at 455.

47 *Ibid* at 461.

48 F. Gurry, “Breach of Confidence”, Clarendon Press Oxford 1984 at 341.

“The answer to the question therefore seems to me to involve weighing up the public interest for and against publication. The balance does not in my opinion depend on the use made of the leaked information by the appellants in this particular case.

... No doubt there is a public interest in maintaining the free flow of information to the press, and therefore against obstructing informers. But there is also I think a very strong public interest in preserving confidentiality within any organisation, in order that it can operate efficiently, and so be free from suspicion that it is harbouring disloyal employees. ... In the present case I am of the opinion that the public interest in preserving confidentiality should prevail ... ”⁴⁹

This narrower view of the defence was adopted by Shaw LJ in *Schering Chemicals Ltd v Falkman Ltd and Others*,⁵⁰ where his Honour said that the *public interest defence* only applied where the subject matter is something which is “*inimical to the public interest or threatens individual safety*”.⁵¹

Conduct which is “Seriously” Contrary to the Public Interest

The next case to come before the English courts was that of *Francome and Another v Mirror Group Newspapers Ltd and Others*⁵² in which Sir John Donaldson MR made his contribution to the struggle for a definition of the public interest defence:

“The basis of this exception is that, whilst there is a public interest in maintaining confidences, there is a countervailing public interest in exposing conduct which involves a breach of the law or which is anti-social.”⁵³

His Honour did not define anti-social but said that it included such activities which, whilst not in breach of the law are “*seriously contrary to the public interest*”.⁵⁴

On the facts of the case Donaldson MR found that the public interest may have been served by the disclosure of the information in question to the police or another relevant body, but that there was no public interest which would be achieved by the publication of the relevant information in the defendant’s newspaper. The media, his Honour noted, “*... are peculiarly vulnerable to the error of confusing the public interest with their own interest*”.⁵⁵

Information Which Should be Made Known to the Public

The narrower approach to the *public interest defence* taken in *Francome* was successfully challenged in the same year by the decision in *Lion Laboratories Ltd v Evans and Others*.⁵⁶ In that case the defendants were two former employees of the plaintiff and a newspaper which sought to publish confidential information relating to the allegedly high levels of inaccuracy of the ‘Intoximeter’, a device used by police in testing the blood alcohol level of drivers. The results of these tests could later be used in criminal proceedings against those drivers found to have in excess of the legal level.

The English Court of Appeal found that it was in the public interest that “*this disturbing information should be made known to the public*”.⁵⁷ The Court also said that the defence of “*just cause or excuse*” applied equally in actions for breach of confidence and copyright.⁵⁸

49 *Supra* n.43 at 480.

50 [1981] 2 All ER 321.

51 *Ibid* at 337.

52 [1984] 2 All ER 408.

53 *Ibid* at 411.

54 *Ibid*.

55 *Ibid* at 413.

56 [1984] 2 All ER 417.

57 *Ibid* at 434.

58 *Ibid* at 422.

Lord Stephenson specifically rejected the approach taken in *Granada* which required that the information be iniquitous and adopted the view of Lord Denning in *Frazer v. Evans*.⁵⁹

His Honour also endorsed the approach taken in *Woodward v Hutchins* and *Granada* which requires the court to perform a balancing exercise, weighing up the public interest for and against publication.⁶⁰

Stephenson LJ, with whom Griffiths LJ agreed, said that it was necessary to consider the public interest *in the information* sought to be disclosed, which will not depend on whether there is shown to be any wrongdoing on the part of the plaintiff:

*“Suppose the plaintiffs had informed the police that their Intoximeter was not working accurately or safe to use, and the police had replied that they were nevertheless going to continue using it as breath test evidence. Could there then be no defence of public interest if the defendant sought to publish that confidential information, simply because the plaintiffs themselves had done nothing wrong but the police had? There would be the same interest in publication, whichever was guilty of misconduct; and I cannot think the right to break confidence would be lost, though the public interest remained the same. Bearing this last consideration in mind, in my opinion we cannot say that the defendant must be restrained because what they want to publish does not show misconduct by the plaintiff.”*⁶¹

This approach emphasises the *nature* of the confidential material and whether there is a sufficient public interest in receiving it, rather than whether it can be categorised as a crime, fraud or misdeed to justify the breach of confidence.

This shift in emphasis is significant for the reason that it was at least arguable that had the defendant's continued to promote the sale and/or use of the Intoximeter as a reliable product and suppressed evidence of its inaccuracy then this may have constituted a breach of contract or trade practices legislation so that the matter could have been dealt with under the *iniquity rule*.

Similarly, had the confidential information been disclosed at first instance to the police and they had failed to act or had suppressed the information, then this may be defined as a misdeed so to bring the matter within the scope of the iniquity rule.

The decision also seems to sit uncomfortably with that in *Francome* in which disclosure of alleged wrongdoings to the press, rather than the appropriate authorities, was not considered justified. There seems no reason why the defendant in *Lion Laboratories* could not have first disclosed the information to the police or, if this did not yield a result, to the Home Office. Had these bodies not responded appropriately this dereliction of public duties may have satisfied the iniquity rule as a “misdeed” and thus entitle the defendant to pursue wider disclosure to the press.⁶²

In *X v Y*⁶³ Rose J balanced the competing public interests which arose out of the proposed disclosure of medical records. In this case the plaintiff was a public health authority which sought an injunction after one or more employees had disclosed to a national newspaper information obtained from confidential hospital records which identified two doctors with AIDS who were continuing to work as general practitioners.

The plaintiffs sought to restrain the defendants from publishing or disclosing to third parties the information in any form, including information which did not identify the names of the plaintiff or the doctors.

59 *Ibid* at 423.

60 *Ibid* at 424.

61 *Ibid* at 423.

62 Where a party claiming protection of confidential information can be classed as a governmental body then the action may be subject to the test set down in *Attorney-General v Jonathon Cape* [1976] QB 752 (discussed below).

63 [1988] 2 All ER 648.

Rose J said that the main issue in the case was whether the publication of the confidential information was “*justified in the public interest*”⁶⁴ and that this involved balancing “*the various competing public interests*”. In applying this test Rose J said:

*“I keep in the forefront of my mind the very important public interest in freedom of the press. And I accept that there is some public interest in knowing that which the defendants seek to publish (in whatever version). But in my judgement those public interests are substantially outweighed when measured against the public’s interest in relation to loyalty and confidentiality both generally and with particular reference to AIDS patients’ hospital records.”*⁶⁵

In determining this balance Rose J also considered it relevant that public discussion about AIDS generally was not prevented by granting the injunction and that the deprivation of the public in not receiving the information in question would be “*of minimal significance*”.⁶⁶ In particular, Rose J noted that discussion as to whether doctors with AIDS should, as a matter of policy, be in general practice and the medical procedures that should be followed in the event that either a doctor or a patient had AIDS or were HIV positive were not in any way inhibited by the decision.⁶⁷

After referring specifically to the balancing test His Honour then went on to state that there had been no misconduct by the plaintiffs.⁶⁸

This is curious as it suggests that, notwithstanding the statements made in *Granada* and *Lion Laboratories*, Rose J considered that the conduct of the plaintiff was a relevant factor when applying the “*balance of public interest test*”.

His Honour also said that whilst there must be “*a substantial, not trivial, violation of the plaintiffs rights to justify equitable relief*”,⁶⁹ detriment in the use of the information was not a necessary precondition to the grant of an injunction.⁷⁰ It was found that detriment to the plaintiff and its’ doctors had occurred at the time the employee disclosed the confidential information to the defendant newspaper in breach of contract and in breach of confidence. The fact that the information had not been published did not, in Rose J’s view, lead to the conclusion that no wrong had occurred.

“Spycatcher”

The public interest defence next came before the House of Lords in *Attorney-General v Guardian Newspapers Ltd and Others*,⁷¹ the English chapter of the “*Spycatcher*” saga. The background to the proceedings was the proposed publication in Australia of the memoirs of Peter Wright, a senior counter-espionage officer in the British Security Service, MI5. The book contained information regarding the operation of MI5 and in particular outlined the attempts by Wright to investigate leaks of information, alleged crimes committed by members on behalf of the Service, an MI6 plot to kill President Nasser and attempts by the members of the Service to undermine the British Labour Government during the 1970’s.

64 *Ibid* at 656.

65 *Ibid* at 661.

66 *Ibid*; see also the decision of Powell J in *Westpac Banking Corporation v John Fairfax & Sons and Others* (1991) 19 IPR 513 regarding the ability of the public to discuss the topic in question without the disclosure of the confidential information.

67 The public policy issues considered by Rose J in *X v Y* were referred to with approval by Wallwork J in *Y v TVW Enterprises, Derryn Hinch and Geoff Parry*, Supreme Court of Western Australia, (unreported) 2 February 1990.

68 *Supra* n.63 at 661.

69 *Ibid* at 657.

70 *Ibid*.

71 *Supra* n.3.

The Attorney-General (UK) claimed that the information in the book was the subject of a lifelong obligation of confidence owed by Wright to the Crown and brought proceedings in Australia to restrain publication. In June 1986 in Britain the *Observer* and *The Guardian* newspapers published articles on the forthcoming Australian trial which contained some references to the yet unpublished manuscript. In July 1986 the Attorney-General obtained an interlocutory injunction against the two newspapers. On June 12, 1987, the day before the book was published in the United States, the Sunday Times published the first extract of a serialisation of the book.

The Attorney-General sought to continue and extend interlocutory injunctions obtained to restrict further publication of such material. The House of Lords held that the application for a permanent injunction should be refused on the grounds that the information had ceased to be confidential through the publication of the book in the United States, Australia and elsewhere. During the course of the trial however the court was required to consider the notion of the “*public interest*” in two respects. First, the Court adopted the approach taken by Mason J in *Commonwealth of Australia v John Fairfax*⁷² which required that in order to satisfy the elements of an action for breach of confidence a governmental plaintiff must prove that it would be detrimental to the public if the information was to be disclosed.⁷³ Second, the court considered the public interest in the context of the *public interest defence*. In both respects the Court found that, had the information still been confidential, the public interest would not have justified disclosure.

The consequences of allowing courts to weigh up the competing public interests in relation to the protection or disclosure of confidential information without the guidance of clear principles is exemplified in the *Spycatcher* decision. First, with the exception of Lord Goff,⁷⁴ the members of the House of Lords refused to seriously consider that the disclosures made by Wright may have been in the public interest, notwithstanding that some of the information included alleged crimes committed by members of the security services which would clearly have fallen within the definition of “*iniquity*”. Nor did their hardships consider that it *may* have been in the public interest that the book focused public attention on MI5 and forced the Secret Service to address allegations of treason and long standing inefficiencies which may otherwise may have undermined the Service and caused allies to restrict British access to relevant information.

Second, the decision reached by the House of Lords regarding the public interest is in direct contrast to the judgement of Kirby P in the Australian litigation in which his Honour found that much of the information may have been disclosed on the basis of the *public interest defence*. Even taking into account that the New South Wales courts considered the slightly different question of the interests of the Australian rather than the British public, such divergence in views as to how the public interest is best served gives support to the view that the defence is an opportunity for judicial idiosyncrasy and allows members of the bench to apply their subjective social and political values.

Third, the case provided yet another example of the judiciary gratuitously expressing their personal opinions about matters arising out of the case, which not surprisingly, coincided with their views of how the public interest would be best served. The disapproving comments made by members of the bench towards Wright, who was not a party to the proceedings, left no doubt about the Lawlords attitude towards the author. The judgments contain frequent references to

72 (1980) 32 ALR 485 at 492-3.

73 A discussion of the public interest in the context of a governmental plaintiff, who must prove sufficient detriment to the public interest in an action to restrain a breach of confidence, is discussed below.

74 Goff LJ suggested that the publication of some of the information in *Spycatcher* may have been justified although the publication of the whole book was not.

Wright's "wrongdoing", describe him as "treacherous" and his decision to write the book as an act which "reeked of turpitude".⁷⁵ Further, the Law Lords do not hide their wish to punish Wright by depriving him of the profits of his "wrongdoing".⁷⁶

Lord Griffiths, in discussing the "lifelong obligation of confidence" to which members of the secret services are subject, and which extended to what appeared to be "trivia",⁷⁷ considered the circumstances in which the *public interest defence* may justify the disclosure of information relating to the Secret Service:

*"Theoretically, if a member of the service disclosed that some iniquitous course of action was being pursued that was clearly detrimental to our national interest, and he was unable to persuade any senior member of his service or any member of the establishment, or the police, to do anything about it, then he should be relieved of his duty of confidence so that he could alert his fellow citizens to the impending danger. However, no such considerations arise in the case of Spycatcher."*⁷⁸

This comment seems ironical as it could be argued that the very reason that Wright wrote *Spycatcher* was that he was unable to get a satisfactory response from those in authority, including Sir Roger Hollis, the Director of MI5, who Wright suspected of being a Soviet spy.

It is also interesting that in the context of discussing the public interest defence Lord Griffiths referred to matters of "impending danger" or matters which are "clearly detrimental" to the national interest, rather than to allow the mere balancing of the public interest which he had earlier approved.⁷⁹ This suggests that a higher standard of "public interest" must be satisfied in cases of the Secret Service than in other circumstances.

Most importantly the Lawlords rejected any move to define the defence, leaving it open to courts to apply the balancing test without guide-lines as to its limits or its application. Lord Griffiths said:

*"....Judges are used to carrying out this type of balancing exercise and I doubt if it is wise to formulate rules to guide the use of this discretion that will have to be used in widely differing and as yet unforeseen circumstances."*⁸⁰

Despite the inability to agree on the precise scope of the public interest defence, it seemed clear by 1989 that where the court was required to consider the disclosure of confidential information, the defence of the "public interest", in some form, was the relevant defence. However, in two recent cases the English courts have taken a completely different approach in determining whether confidential information should be disclosed.

(b) Recent Developments:

The first case was *Re a company's application*⁸¹ heard in 1989. In this case the plaintiff carried on the business of providing financial advice and financial management of investment portfolios. The business was subject to the regulatory scheme imposed by the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA), the purpose of which was to regulate the activities of investment advisers.

75 *Supra* n.3 at 668 per Lord Jauncey.

76 In an attempt to deny Wright the profits of his "wrongdoing" all Lawlords said that they would not enforce any contracts or copyright in relation to the *Spycatcher* book. Ironically however, it is likely that these gratuitous comments would have encouraged the emergence of cheap, pirated copies of the book which would result in an increase in the circulation of the material.

77 Note that Lord Goff was the only Lawlord to question the lifelong duty of confidence stating (at 663) "...[if] the confidential information, as confidential information has ceased to exist, [then] with it should go, as a matter of principle, the obligation of confidence".

78 *Supra* n.3 at 650.

79 *Ibid* at 649.

80 *Ibid*.

81 [1989] 2 All ER 248.

The defendant, a former senior employee of the plaintiff had threatened to disclose to FIMBRA and the Inland Revenue that the plaintiff had acted in breach of FIMBRA regulations and had committed certain improprieties with regard to taxation. The plaintiff brought an action to continue an *ex parte* injunction which had been granted to restrain the defendant from making any disclosure based on the use of confidential information.

In the Chancery Division Scott J granted the injunction, subject to disclosure to the FIMBRA and the Inland Revenue. Whilst the result in the case was unexceptional, its significance is found in the *ratio decidendi* which suggests a move away from the *public interest defence*. Notwithstanding that the issue may have been resolved on the basis of the iniquity rule, Scott J found that the proposed disclosure was justified on the basis that the *width* of the duty of confidence owed to the plaintiff did not encompass disclosures to the two authorities.

Scott J said that whilst the defendant was clearly under a duty of confidence, the duty *did not exist* in respect to the disclosure of certain information to FIMBRA and the Inland Revenue:

“...the defendant’s undoubted duty of confidence does not extend so far as to bar the disclosures to FIMBRA and the Inland Revenue of matters that it is the province of those authorities to investigate.”⁸²

This suggests that as no duty existed in respect to the proposed disclosure to these authorities, it was not necessary to consider whether the public interest justified or excused the disclosures. Clearly the proposed recipient of the information was a critical factor in determining whether an injunction should be granted. However, the rationale for the conclusion that there was no duty owed to the relevant bodies was curious.

Scott J took the novel view that as FIMBRA *may* have otherwise obtained the relevant information then no wrong would be done in bringing that information to their attention. Scott J said that there were three possible consequences of disclosure to FIMBRA. These were; first, that FIMBRA may find that the allegations were groundless; second, that FIMBRA may decide not to pursue the matters raised; or third, the information may lead to an investigation by FIMBRA which causes harm to the plaintiff.

In respect to this last possibility his Honour said that as FIMBRA had the power to carry out “*spot checks*” of companies such as the plaintiff, FIMBRA may itself have come across the information in question. His Honour suggested that as the plaintiff may not suffer more than negligible harm in respect of the first and second possibilities and would only suffer harm which it *may* have suffered if the third possibility had occurred, the court should not protect the information.

Scott J refused to entertain the plaintiff’s argument that if disclosure to the authorities was found to be unjustified the plaintiff’s would still suffer damage as a result of resources being allocated to addressing the allegations raised.⁸³ Nor did his Honour accept that some damage may still result to the plaintiff even if the regulatory body decided not to proceed with any action, such as the regulatory body harbouring suspicion of the firm.

This conflicts with the approach taken in *X v Y* in which Rose J held that detriment resulting from *the use* of the information was not a necessary precondition to the grant of an injunction.⁸⁴

As regards the disclosure to the Inland Revenue, Scott J said that he would find it “*difficult to accept that the disclosure would be in breach of a duty of confidentiality*” if the information disclosed related to “*fiscal matters*”.⁸⁵ However, Scott J said that if non-fiscal matters were disclosed then the defendant would be in the same position as any other third party.

82 *Ibid* at 253.

83 *Ibid* at 252, Scott J accepted an undertaking from the defendant that he would not reveal to anyone other than his legal advisers the fact that he had made the disclosures to these bodies.

84 *Supra* n.63 at 657. This view has been supported by Gummow J in *Smith Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health and Others* (1990) 95 ALR 87 at 126.

85 *Supra* n.81 at 252.

His Honour did not address the difficulties which may arise in unravelling confidential information which specifically relates to fiscal matters from other confidential information which renders the fiscal matters comprehensible. It would seem however that the disclosure of such non-fiscal matters would still be subject to the duty of confidence and if disclosed, even for this purpose, would give rise to an action for breach of confidence.

Without specifically referring to the *public interest defence*, Scott J went on to suggest that there would be “no circumstances” in which disclosure of the information to the general public would be justified:

“If this were a case in which there were any question (sic) or threat of general disclosure by the defendant of confidential information concerning the way in which the plaintiff carries on its business or concerning any details of the affairs of any of its clients, there would be no answer to the claim for an injunction”.⁸⁶

By maintaining links with the *public interest defence* it would appear that Scott J has created a hybrid defence which combines Wood VC’s *iniquity rule* and Lord Denning’s “*just cause or excuse*” defence. The duty of confidence will not exist for certain recipients but remains for others to whom disclosure must be justified.

The approach taken by Scott J may also give rise to difficulties in determining whether disclosure of information to bodies such as the police or another government authority would be subject to the duty of confidence if the matter is one which is within their general scope of powers to investigate, or whether a duty of confidence exists and disclosure must be justified under the *public interest defence*.

This may have important consequences in relation to the onus of proof. For example, if it falls to the plaintiff to establish that the duty of confidence owed by the defendant to the plaintiff also applies in relation to a particular recipient, then the plaintiff’s failure to do so would mean that the first element of the action for breach of confidence would not be made out. The need for the defendant to prove that the defence applies is thus obviated.

This may be critical in cases where the plaintiff fails to show that a duty of confidence exists in relation to a particular recipient, such as a state taxation authority, even though the defendant may not have been able to show that the *public interest defence* would have been satisfied in relation to the disclosure in question.

The second and most recent case in which the public interest defence was considered is *W v Edgell*.⁸⁷ The plaintiff in that case was diagnosed as suffering from paranoid schizophrenia and was detained in a secure hospital after he shot and killed five people and seriously injured two others in 1974.

In 1984, following a recommendation by the plaintiff’s responsible medical officer, the mental health review tribunal recommended the plaintiff’s transfer to a regional secure unit. The Secretary of State refused to approve the transfer.

Around this time the plaintiff had consulted solicitors with a view to making an application to the tribunal for conditional discharge. The plaintiff’s solicitors instructed the defendant, a consultant psychiatrist, to report on the plaintiff’s mental state for use at the plaintiff’s forthcoming mental health review board application. The defendant completed his report which was adverse to the plaintiff’s application and also recommended against his transfer to a regional secure unit.

After receiving the report the plaintiff decided to withdraw the application and refused consent to any disclosure of the report.

⁸⁶ *Ibid* at 251.

⁸⁷ [1990] 2 WLR 471.

The defendant believed that his report contained new information about the plaintiff's interest in explosives and that both the hospital at which the plaintiff was detained and the tribunal should be supplied with a copy of his report, notwithstanding the withdrawal of the plaintiff's application and the plaintiff's opposition to its release.

The defendant made his view known to relevant hospital staff and was then requested to forward a copy of his report to the hospital. The defendant also requested that a copy of the report be sent to the Home Office which was done.

The plaintiff brought proceedings against the defendant seeking an injunction against the further disclosures of the report, the delivery up of all copies and damages. At first instance Scott J considered that the issue to be determined was the "*breadth of the duty*" owed to the plaintiff and that as the plaintiff was not an ordinary member of the public, the defendant owed the plaintiff a less extensive duty of confidence than that owed to other members of the community. The plaintiff appealed claiming the unauthorised disclosure of the report was in breach of the duty of confidence owed by the psychiatrist to his client.

The Court of Appeal accepted that the defendant owed the plaintiff a duty of confidence and held that the trial judge had been wrong to refer to the plaintiff's interest as being a private one. Sir Stephen Brown P then proceeded to balance the competing public interests, which he resolved in favour of the limited disclosure by the defendant.

*"The balance of public interest clearly lay in the restricted disclosure of vital information to the director of the hospital and to the Secretary of State who had the onerous duty of safeguarding public safety."*⁸⁸

Bingham LJ also found that in balancing the public interest, the facts of the case weighed "*most decisively*" in favour of limited disclosure. However, his Honour said that had the disclosure been made to a newspaper it would have been unlawful and that a court of equity "*would not hesitate for a moment*" before concluding that such conduct would be in breach of the duty of confidence owed to the plaintiff.⁸⁹

However, Bingham LJ then seemed to support the approach taken by Scott J at first instance in focusing on whether the disclosure fell outside of the *scope of the duty* of confidence owed:

*"It has never been doubted that the circumstances here were such as to impose on Dr. Edgell a duty of confidence owed to W. The breadth of a duty [of confidence] is, however, dependent on the circumstances."*⁹⁰

In reaching his conclusion Bingham LJ went on to make the following statement:

*"There is one consideration which in my judgement ... weighs the balance of the public interest decisively in favour of disclosure ... A consultant psychiatrist who becomes aware, even in the course of a confidential relationship, of information which leads him, in the exercise of what the court considers a sound professional judgement, to fear that certain decisions may be made on the basis of inadequate information and with a real risk of consequent danger to the public is entitled to take such steps as are reasonable in the circumstances to communicate the grounds of his concern to the responsible authorities".*⁹¹ (emphasis added)

This suggests that a factor in the balancing test is whether the defendant acted reasonably. If so, this may significantly alter the focus of the court from the interest of a particular party in receiving the information in question to whether or not the defendant acted reasonably.

88 *Ibid* at 485.

89 *Ibid* at 481.

90 *Ibid* at 488 per Bingham LJ.

91 *Ibid* at 493.

If the defence develops in this manner it may be argued that medical records, including a person's mental health or HIV status may be disclosed to a government authority, an employer or a spouse where the relevant medical practitioner believes that the information should be disclosed on the basis that there is a risk of injury to the public and that these steps are reasonable on the basis of his or her knowledge at the relevant time.

Were the "*risk of consequent danger to the public*" to include financial harm then a financial adviser who receives confidential information about a client company may also be permitted to take whatever steps they consider reasonable in the circumstances to communicate their concern to a relevant authority, provided that they are exercising sound professional judgement.

The question arises as to whether this may extend to wider disclosure to the company's shareholders, creditors and clients if these parties are reasonably perceived to be at risk of losing substantial sums of money.⁹²

A requirement that the defendant act reasonably may not take into account that the defendant's view may not be supported by other professionals also exercising "*sound professional judgement*". Nor may it adequately deal with a case in which a defendant discloses confidential information after making a decision on the facts before him or her, but it transpires that in fact the data available to the defendant was incomplete. Further, a defendant, although acting reasonably, may be wrong in their assessment.

If the defence adopts the concept of reasonableness as an element of the public interest defence it is possible that relationships which rely on a duty of confidence to operate effectively may be inhibited by the awareness that a confidant may lawfully disclose confidential information provided that they act *reasonably*. Moreover, pleading a defence to an action for breach of confidence in England may soon become a quagmire of the elusive concepts as reasonableness and foreseeability, rather than rest upon some ascertainable "public interest".

3. THE AUSTRALIAN RESPONSE – THE THREE APPROACHES

It was only just over a decade ago that Australian courts were given their first opportunity to consider the public interest defence as it had developed in England. Since that time the Australian courts have responded with broadly three views in respect to the juridical basis upon which the disclosure of confidential information should be permitted. The first view favours the introduction of a *public interest defence* similar to that which has evolved in England. This approach was recently approved by Kirby P in the New South Wales Court of Appeal in the Australian *Spycatcher* decision.⁹³ The second and most restrictive view is that championed by Gummow J. This approach can be called the "*narrow iniquity rule*". The third approach combines elements of both the "*narrow iniquity rule*" and the *English public interest defence*. This approach can be called the "*broad iniquity rule*" and was recently discussed by Powell J in the *Westpac v John Fairfax & Sons and Others*.⁹⁴

(a) The Public Interest Defence in Australia

Support for the English public interest defence in Australia was first expressed by Samuels JA in *David Syme & Co Ltd v General Motors-Holden Ltd*.⁹⁵ In that case his Honour approved of the "*balancing of the public interest*" test as discussed by Lord Denning in *Woodward v Hutchins*, although his Honour found that in this case the balance weighed in favour of maintaining the confidence.⁹⁶

92 See *European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559 at 565.

93 *A-G (UK) v Heinemann Publishers Australia Pty Ltd and Another* (1987) 75 ALR 353 at 390-447 esp. at 431 ff.

94 (1991) 19 IPR 513.

95 (1984) 2 NSWLR 294.

96 *Ibid* at 309-310; Street CJ and Hutley JA expressly disapproved of the defence.

The “*public interest*” was next considered by Mason J in the case of *Commonwealth of Australia v John Fairfax & Sons and Others*.⁹⁷ In that case Mason J said that where the plaintiff was a government seeking to protect its own information it was necessary to consider the public interest in the course of establishing that the plaintiff would suffer the requisite detriment to bring the action. In this context, Mason J was discussing “*the public interest*” as the third element of the action for breach of confidence as outlined by Megarry J in *Coco v AN Clark (Engineers) Ltd*, not as a defence.⁹⁸

Mason J drew a clear distinction between the juridical basis upon which the court will protect confidences of private citizens as opposed to the confidences of governments.⁹⁹ Whilst the former need only show that there will be unauthorised use of the information to establish detriment, the courts will look at government information through “*different spectacles*”:

“... *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.*”¹⁰⁰

His Honour approved of the statements of Widgery LCJ in the English decision of *Attorney-General v Jonathon Cape Ltd*:

“*The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon.*”¹⁰¹

Although these comments do not consider the *public interest defence* as such, the practical result of this approach is that where the party claiming the protection is a government, the onus of proof in respect to the public interest is reversed. Thus whilst in non-government cases the onus is on the defendant to show that the *public interest defence* applies, in government cases the onus is on the government to prove that the public interest is best served by the maintaining the confidence.¹⁰² There is in effect a presumption that it is in the public interest that information belonging to a government is disclosed.

This presumption must be rebutted in order to restrain publication of confidential material. Mason J provided some examples of where it would be detrimental to the public interest to allow disclosure:

“*If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained.*”¹⁰³

Both the English and Australian *Spycatcher* decisions referred with approval to the comments made by Mason J in *Fairfax* in respect of governmental plaintiffs.¹⁰⁴

However, it was not until Kirby P gave his support to the *public interest defence* in the New South Wales Court of Appeal in the Australian *Spycatcher* case¹⁰⁵ that the *public interest defence* of the English variety was both approved and applied in New South Wales.

97 *Supra* n.72.

98 *Supra* n.1 at 47.

99 *Supra* n.72 at 492.

100 *Ibid* at 493.

101 [1976] QB 752 at 770.

102 Note however that in *Attorney-General v Guardian Newspapers Ltd. And Others* (*supra* n.3) “*the public interest*” was discussed both in the context of establishing the necessary detriment required of a governmental plaintiff and as a defence.

103 *Supra* n.72 at 493.

104 *Supra* n.3 at 642 and 651, and also *A-G (UK) v Heinemann Publishers Australia Pty Ltd and Another* (*supra* n.93) per Kirby P.

105 *Supra* n.93.

In his judgement Kirby P, who formed one of the majority, cited with approval the dissenting judgement of Denning MR in *Schering Chemicals Ltd v Falkman Ltd*:

*“Freedom of the press is of fundamental importance in our society. ... It is not to be restricted on the ground of breach of confidence unless there is a ‘pressing social need’ for such restraint. In order to warrant such restraint, there must be a social need for protecting the confidence sufficiently pressing to outweigh the public interest in freedom of the press.”*¹⁰⁶

Kirby P also accepted and “happily” applied the definition of “the public interest” suggested by Megarry VC in *Granada*:

*“... the public interest [should not be construed] in the sense of something which catches the interest of the public out of curiosity or amusement or astonishment, but in the sense of something which is of serious concern and benefit to the public”.*¹⁰⁷

In reference to the *iniquity rule* Kirby P approved of the view taken by Denning MR in *Frazer v Evans*, saying that it was “*simply an instance of the wider category of the public interest in disclosure which may sometimes, even if rarely, outweigh the public interest in confidentiality and secrecy*”.¹⁰⁸ His Honour found that the *iniquity rule*, as with the doctrine of unclean hands, was unnecessarily restrictive as there were matters which, whilst not iniquities, justified disclosure:

*“... the suggested iniquities, crimes and other wrongdoings constitute only part of Spycatcher. Some of them are crimes and wrongdoings of Wright himself upon which he can scarcely rely. Accordingly, I prefer to deal with this publication by reference to a general principle of ‘public interest’ rather than by reliance upon a narrower defence, developed for special cases, to justify the publication of particular iniquities.”*¹⁰⁹

Kirby P found that in applying the public interest test to those sections of the book that were not yet in the public domain, the balance of public interest came down in favour of disclosure:

*“Precisely because of the very high Australian public interest in the disclosures contained in Spycatcher and the relevance of those disclosures to the defences which this country should build against similar treason, deception and error, I regard it as virtually impossible, in the circumstances for the appellant to overcome the defence of public interest ...”*¹¹⁰

(b) The Narrow Iniquity Rule

The *narrow iniquity rule* is most consistent with the approach taken by Wood VC in *Gartside v Outram*.¹¹¹ This rule denies the relevant information a *quality* of confidence if it concerns iniquity. Accordingly, no duty of confidence arises in respect of such information and the court has no discretion as whether it should be protected.

The first indication of support for this view is found in the decision of Sheppard J in *Allied Mills Industries Pty Ltd v Trade Practices Commission*.¹¹² In that case Sheppard J approved of the English decisions of *Initial Services* and *Granada* which found that the term “*iniquity*” embraced more than just criminal conduct.¹¹³ His Honour went on to say that the existence of iniquity will “*always*” justify disclosure, although he did suggest that the recipient of the information may be a relevant factor:

106 *Supra* n.93 at 432 per Kirby P.

107 *Supra* n.93 at 430 and 434 per Kirby P.

108 *Supra* n.93 at 434.

109 *Ibid.*

110 *Ibid.*

111 *Supra* n.5.

112 (1981) 34 ALR 105.

113 *Ibid* at 141-142.

*“The authorities establish that the public interest in the disclosure (to the appropriate authority or perhaps the press) of iniquity will always outweigh the public interest in the preservation of private and confidential information.”*¹¹⁴

Sheppard J acknowledged that the classification of “*iniquity*” may involve a value judgement but rejected the notion that subjectivity is inevitably the basis of such decisions:

*“I recognize that to decide whether the disclosure of a breach of the legislation amounts to iniquity involves the making of a value judgement. But it is not a subjective judgement. It is a judgement based upon the view that ought to be taken of the intended effect of the legislation in question once it has been understood and properly construed.”*¹¹⁵

Support for the *narrow iniquity rule* may also be found in the judgement of Murphy J in *A v Hayden*.¹¹⁶ In that case the High Court was required to consider whether the Commonwealth could be restrained from disclosing confidential information relating to the identity of employees of the Australian Secret Intelligence Service who were suspected of committing criminal offences during a training exercise. The majority took the view that there may be some circumstances in which the offence is so trivial that disclosure should not be permitted. Murphy J disagreed, suggesting that the court should not prevent the disclosure of iniquities on the ground of public policy:

*“It would be contrary to public policy for a minister or the executive government to be prevented [by a court] from revealing information which would assist in the investigation of a crime, whether great or less. ... Commonsense would suggest that the discretion be exercised against revelation in the case of a minor offence, but this is for the executive authority, not for the court.”*¹¹⁷

By far the most ardent advocate of the *narrow iniquity rule* has been Gummow J. In his dissenting judgement in *Corrs Pavey Whiting & Bryne v Collector of Customs (Vic) and Another*¹¹⁸ Gummow J discussed the development of the public interest defence in England and concluded that the decision of *Gartside v Outram* provided an insufficient basis for such a defence. His Honour said that *Gartside v Outram* could be seen merely as a case which was decided on the basis of unclean hands, instead of sowing the seeds for the *public interest* or the *iniquity rule* defences:

*“... Gartside v Outram may be understood as a case in which even if the plaintiffs had valid legal rights they would have been denied equitable relief, in accordance with general principles, by reason of unclean hands.”*¹¹⁹

Nevertheless, Gummow J acknowledged that the case was not decided on that basis and went on to give support to the *narrow iniquity rule*:

*“Finally, if there be some other principle of general application inspired by Gartside v Outram, it is in my view of narrower application than the “public interest defence” expressed in the English cases. That principle, in my view, is no wider than one that information will lack the necessary attribute of confidence if the subject matter is the existence of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.”*¹²⁰

114 *Ibid* at 141.

115 *Ibid* at 142.

116 (1986) 156 CLR 532.

117 *Ibid* at 563.

118 (1987) 74 ALR 428.

119 *Ibid* at 449-450.

120 *Ibid* at 450.

It is unclear from this statement whether Gummow J intended to suggest that the duty of confidence will remain in respect of parties *other than* a “third party” who has a “real and direct interest” in receiving the information.¹²¹ If so then the same information may be found to lack the quality of confidence in relation to one party but possess the necessary attribute of confidence in relation to another. If a person with a proper interest in the information passes it to another party who does not have that interest then the information would effectively change its spots and *become confidential* in that person’s hands, or *visa versa*.

However, his Honour later suggested that if the information is iniquitous then no duty arises:

*“It is no great step to say that information as to crimes, wrongs and misdeeds.... lacks what Lord Greene MR called ‘the necessary quality of confidence’: Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203 at 215.”*¹²²

If the information lacks the relevant quality of confidence, it would be irrelevant that the information was disclosed to a person who did not have a legitimate interest in it, or whether it was disclosed to a media organisation for profit, without any particular public interest being served. Gummow J’s approach is the most consistent with the iniquity rule expounded in *Gartside v Outram* in which it was held that no obligation of confidence arises in respect of “*designs formed, contrary to the laws of the society, to destroy the public welfare*”.

Gummow J took the opportunity to further consider the public interest defence in the later case of *Smith Kline & French Laboratories (Australia) Ltd and Others v Secretary, Department of Community Services and Health and Others*.¹²³ In that case Gummow J reasserted his view that the public interest as it has been developed in England was based on flimsy historical and doctrinal foundations, a view which his Honour said was confirmed by his reading of *W v Edgell*:

*“[In W v Edgell] concepts drawn from the law of discovery, contempt, contract, fiduciary duty, and undue influence, as well as from the equitable obligations of confidence owed to government and between citizens, are mixed to produce a curious melange, without an indication of the significance of what was being done.”*¹²⁴

Gummow J also considered whether it was necessary to prove detriment in respect of disclosures of confidential information. His Honour said that in cases other than where the plaintiff is a government seeking to protect its secrets, detriment will occur as a result of disclosure, without proof of further harm:

*“The obligation of confidence is to respect the confidence, not merely to refrain from causing detriment to the plaintiff. The plaintiff comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or restrain infliction of apprehended loss. To look into a related field, when has equity said that the only breaches of trust to be restrained are those that would prove detrimental to the beneficiaries?”*¹²⁵

(c) The Broad Iniquity Rule

The third view involves a two step process, combining the narrow iniquity rule with the public interest defence. This approach can be called the *broad iniquity rule*. This rule only applies to cases where an iniquity is involved, but the existence of an iniquity will not *automatically* justify disclosure. If an iniquity is involved the court must then balance the competing public interests to determine whether disclosure is justified.

121 If so Gummow J would be adopting a similar view to that in England which considered the recipient of the information relevant in determining whether the disclosure was justified.

122 *Supra* n.118 at 450.

123 (1990) 95 ALR 87.

124 *Ibid* at 125.

125 *Ibid* at 126.

This view was first adopted by Rath J in *Castrol Australia Pty Limited v Emtech Associates Pty Ltd and Others*.¹²⁶ In the Supreme Court of New South Wales Rath J found that on the facts there was no iniquity to justify disclosure of commercially sensitive information, but went on to say that even if there had been evidence of an offence this would not necessarily excuse the breach of confidence.¹²⁷

Rath J approved of the approach taken by Viscount Findlay in *Weld-Blundell v Stephens* in which his Lordship said that disclosures may be permitted where:

*"... some higher duty is involved. Danger to the State or public duty may supersede the duty of the agent to his principal."*¹²⁸

Even where iniquity was found to exist, Rath J, took the view that disclosures in "*the public interest*" should be construed narrowly. His Honour referred to the judgement of Ungoed-Thomas J in *Beloff* in which his Honour said that disclosure of confidential information in the public interest would only be justified if it related to matters which were carried out or contemplated "*in breach of the country's security, or in breach of law, ... fraud, or otherwise destructive to the public; and doubtless other misdeeds of similar gravity*".¹²⁹ Rath J described this as expressing "*no more than a reasonable elaboration of Viscount Findlay's 'higher duty' concept*".¹³⁰

Rath J expressed particular concern about the lack of definition which had developed in the English authorities, and favoured a defence which required that a matter be one of some gravity before the duty of confidence could be overborne by a perceived public interest:

*"What is particularly important about Ungoed-Thomas J's formulation is his emphasis on the gravity of the conduct that may give rise to the defence. If there is to be a defence labelled public interest, some such confinement of its vague boundaries is in my view essential."*¹³¹

Rath J specifically rejected the approach taken by Denning MR in *Woodward v Hutchins*:

*"In my opinion the court, when considering whether just cause for breaking confidence exists, must have regard to matters of a more weighty and precise kind than a public interest in the truth being told."*¹³²

Rath J's approach was specifically endorsed recently by Brownie J in the NSW Supreme Court in *Bacich v Australian Broadcasting Corporation*.¹³³

Support for *the broad iniquity rule* is also found in the views of the majority of the New South Wales Court of Appeal in *David Syme & Co Ltd v General Motors-Holden Ltd*.¹³³ Hutley JA, with whom Street CJ agreed, expressly rejected the *public interest defence* and in particular the notion that confidential information, in this case information of commercial sensitivity, should be disclosed in the interests of the public knowing the truth.¹³⁴

*"The [respondent's] proprietary right in its confidential information of this kind is not to be weighed against other circumstances except in cases where questions of iniquity are involved."*¹³⁵

126 (1980) 33 ALR 31.

127 *Ibid* at 52.

128 [1920] AC 956 at 965-966.

129 *Supra* n.31 at 260.

130 *Supra* n.126 at 55.

131 *Ibid*.

132 *Ibid* at 56.

133 (1992) 29 NSWLR 1.

134 *Supra* n.95.

135 *Ibid* at 305.

In *A v Hayden*¹³⁶ Gibbs CJ, criticized the narrow iniquity rule proffered by Sheppard J in *Allied Mills*¹³⁷ and favoured an approach which gave the court a broader discretion as to whether disclosure should be made.

"In Allied Mills Industries Pty Ltd v Trade Practices Commission, Sheppard J., after a careful review of the authorities, concluded that 'the public interest in the disclosure ... of iniquity will always outweigh the public interest in the preservation of private and confidential information'. That is too broad a statement, unless iniquity is confined to mean serious crime. The public interest does not, in every case, require the disclosure of the fact that a criminal offence, however trivial, has been committed".¹³⁸

Wilson and Dawson JJ agreed:

*"...there may be cases where the triviality of the alleged breaches of the criminal law will not lead a court to withhold relief by way of injunction to restrain a threatened breach of a duty of confidentiality ..."*¹³⁹

In the New South Wales chapter of the *Spycatcher* saga¹⁴⁰ Powell J at first instance found that although certain information relating to the British secret service had been subject to an obligation of confidence, it no longer retained the quality of confidence. Although it was not necessary for him to do so, his Honour then went on to discuss the *public interest defence*, favouring a two step process as required under the broad iniquity rule:

"... it seems to me that, with two possible exceptions, the cases do not support the view that the fact that publication of the subject information may be in the public interest will, without more, afford a defence to what would otherwise have been a successful claim to restrain a breach of confidentiality. ..."

*On the contrary, so it seems to me, a careful reading of the cases demonstrates that the question of how, in the particular case, the public interest is best served may arise in one or other of two ways, they being, first, in relation to what might be called governmental confidential information ... and second, in cases in which the otherwise confidential information relates to "iniquity", in which cases, ... the court's task is to evaluate the public interest in the exposure of "iniquity", and, having done so, to determine whether, on balance, the public interest is better served by permitting disclosure of the subject information, and if so, to what extent disclosure ought to be permitted."*¹⁴¹

Powell J favoured disclosure to the appropriate authorities but conceded that in rare cases wider disclosure ought to be permitted.¹⁴² His Honour then went on to discuss the *iniquity rule*, treating it as a separate defence. His Honour considered the iniquities which the Crown, through its officers, was said to have committed, which included crimes (other than treason) and breaches of international law. Powell J said that, in the light of the fact that the government had taken no action to ensure that its own officers observed the law, there was much to be said for the view that disclosure of these iniquities to the public was called for and ought to be permitted as it went to the very root of a democratic society.¹⁴³

136 *Ibid* at 306.

137 *Supra* n.116.

138 *Supra* n.112 at 141.

139 *Supra* n.116 at 545-546.

140 *Ibid* at 574.

141 A-G (UK) *Heinemann Publishers Aust* (1987) 8 NSWLR 341.

142 *Ibid* at 381.

143 *Ibid*.

As to the allegations of treason and the Soviet penetration of the Service, Powell J said that it would be a rare case in which disclosure other than to the appropriate authorities ought to be permitted. However, his Honour considered that given the failure of the executive government to act on information and the risk that it may have been misled by the very Service that was said to have been penetrated, this was such a case.¹⁴⁴

Notwithstanding these matters however, Powell J said that, if the information had remained confidential, he could see no reason justifying disclosure of information relating to the *general operations* of the Secret Service.¹⁴⁵

Curiously, his Honour went on to say that the distinction between the *iniquity rule* and the *public interest defence* may in the end be:

“... no more than an exercise in semantics and that publication will be permitted where there is some impropriety which is of such a nature that it should be disclosed.”¹⁴⁶

It is unclear what Powell J had in mind when he referred to some “*impropriety*”, and how this would differ, if at all, from an “*iniquity*”. Moreover, in respect of the public interest defence in England, it is clear that this defence has a far wider scope than the *iniquity rule* and may apply where there has been no crime, fraud or misdeed on the part of the plaintiff.¹⁴⁷

Powell J also used the term “*impropriety*” in the recent decision of *Westpac Banking Corporation v John Fairfax & Sons*.¹⁴⁸ In that case the confidential information comprised a series of letters written to the plaintiff by the plaintiff’s solicitors. The letters were thus also subject to legal professional privilege. The letters contained references to possible deal switching and point taking, along with suggestions of negligence and mismanagement by the plaintiff’s subsidiary as a result of which borrowers alleged that they had incurred substantial losses.

In addressing the argument that the public interest demanded disclosure of the letters in the media, Powell J seemed to suggest an expansion of the broad *iniquity rule* to encompass cases where there had been some “*impropriety*”:

“... it seems to me that the law in this area has now progressed to the stage where the so-called “*iniquity rule*” has been subsumed in a more general rule, namely, that publication of otherwise confidential material might be permitted in cases in which there is shown to have been some impropriety which is of such a nature that it ought, in the public interest, be exposed. ... In determining whether, and if so, to what extent, publication ought to be permitted, the Court is obliged to balance the public interest in the protection of confidential information against the public interest in the receipt of information.”¹⁴⁹

The term “*impropriety*”, whilst not defined, suggests that a defendant is required to meet a less stringent test than “*iniquity*”, before the balancing of the competing public interests takes place. There is nothing in the *Westpac Letters Case* to suggest that an “*impropriety*” would be satisfied where there was no wrongdoing on the part of the plaintiff. However, were the term “*impropriety*” to encompass such a situation then it would seem that Powell J was steering the *broad iniquity rule* towards the English *public interest defence* of which he seemed to disapprove in *Spycatcher*.

Powell J decided however that it was not possible to determine these matters at the interlocutory stage, and accordingly, the balance of convenience favoured the continuation of the injunction:

144 *Ibid* at 380-381.

145 *Ibid*.

146 *Ibid* at 383.

147 *Ibid* at 382.

148 See *Lion Laboratories Ltd v Evans and Others* (*supra* n.56) and *Malone v Commissioner of Police of the Metropolis* (No.2) (*supra* n.41).

149 *Supra* n.94.

This [balancing test] is an exercise which, in my view, can rarely, if at all, be satisfactorily carried out at an interlocutory stage of proceedings, and on less than complete information, it following, in my view, that it will be a rare case in which, at such a stage, an injunction will be refused or discharged, on this ground."¹⁵⁰

It is therefore unclear whether the contents of the letters would have satisfied either the "impropriety" or "iniquity" tests, or whether, on balance, his Honour would have concluded that the public interest in the information would have justified disclosure. It is important to note however that Powell J stressed that the continuation of the injunction would not inhibit the public discussion of the alleged misconduct by the plaintiff in connection with the making and management of the loans.¹⁵¹ This suggests that, in his Honour's view, there may have been no additional public interest served by the publication of the actual letters in the media, even at final hearing.

This approach was recently endorsed by the Queensland Information Commissioner in *B v Brisbane North Regional Health Authority*.¹⁵² In that case the Commissioner was required to consider whether information regarding B, furnished to a hospital by a third party under a duty of confidence, could be disclosed pursuant to the Freedom of Information Act 1992 (Qld). Section 46(1)(b) of that Act exempted matter communicated in confidence in certain circumstances, "unless its disclosure would, on balance, be in the public interest.". In considering the public interest the Commissioner found that:

*"... it will not be a defence to a claim that disclosure of confidential information to the public is in the public interest, where the public interest could have been served by disclosure in confidence to a proper authority".*¹⁵³

4. WHICH APPROACH IS IN THE PUBLIC INTEREST?

(a) Comments on the Public Interest Defence

The basis of the *public interest defence* is the recognition of the competing interests of the public in having confidences protected on the one hand and in being informed of matters of legitimate public concern on the other. The advantage of this approach is twofold.

First, the defence provides that the public interest is the paramount consideration in determining whether confidential information should be disclosed. This enables the courts to weigh up the competing interests in maintaining or disclosing the information according to how the bench considers that the public interest will be best served in each particular case. The defence therefore offers a high degree of flexibility. The emphasis is on the gravity of the consequences for the public of disclosure or non-disclosure, rather than the gravity of conduct of the plaintiff.¹⁵⁴

Second, it appears that the defence may apply where the actions of the plaintiff do not necessarily amount to "iniquity", nor are shown to be the result of some wrongdoing on the part of the plaintiff.¹⁵⁵ It is not difficult to envisage situations in which the plaintiff has not been guilty of any wrongdoing but that it may be in the public interest that confidential information be disclosed. Megarry VC discussed some of these in *Malone v Commissioner of Police of the Metropolis (No. 2)*:

¹⁵⁰ *Ibid*, at 525.

¹⁵¹ *Ibid*; a similar approach was taken by Henry J in *European Pacific Banking Corporation v Fourth Estate Publications Ltd* [1993] 1 NZLR 559 at p.564.

¹⁵² *Supra* n.94 at 526.

¹⁵³ (1994) 1 QAR 279.

¹⁵⁴ *Ibid* at 332.

*“There may be cases where there is no misconduct or misdeed but yet there is a just cause or excuse for breaking confidence. The confidential information may relate to some apprehension of an impending chemical or other disaster, arising without misconduct, of which the authorities are not aware, but which ought in the public interest to be disclosed to them.”*¹⁵⁶

Despite these advantages however, the extent to which the *public interest defence* has in fact served that end is far less clear. The English experience suggests that there continues to be a number of unresolved issues in relation to the defence.

First, the English authorities indicate an enduring failure to agree on the scope and application of the defence. There is no clear definition of “*the public interest*” nor any formula for determining what will constitute a “*just cause or excuse*” for breaking confidence. Each case seems to have devised its own ad hoc definition of the “*the public interest*” test and then decided the case on that basis.

The defence often requires the court to balance two or more important but competing public interests. In many cases however, the public interest, found to have been satisfied by reaching one conclusion, may also have justified the opposite conclusion. The difficulties which arise from such an uncertain rule of law is reflected in the number of cases which have been reversed on appeal.¹⁵⁷

Second, in many cases decisions based on the *public interest defence* are difficult to reconcile. Contrast for instance the case of *Initial Services* and *Re a company*. In the former case the court found that the public interest may have been served by the disclosure of the information to an appropriate authority. Nevertheless, disclosure to the media was not sufficient to strike out the defence. In *Re a company* disclosure to the appropriate authority was permitted but wider disclosure was expressly prohibited.

In *Woodward v Hutchins* Lord Denning deplored the fact that the public had been misled as to the true character of the plaintiffs and considered that the disclosure of confidential information to remedy this wrong perception was justified in the public interest. In *Granada* the House of Lords acknowledged that the plaintiff and the government had presented an inaccurate picture of the state of the steel industry and the factors underlying a national strike, and yet refused to entertain the view that it was in the public interest that “*the truth be known*”.

In both *X v Y* and *W v Edgell* there was no evidence of any iniquity or wrongdoing on the part of either plaintiff. In *X v Y* Rose J held that the public interest in maintaining confidence between doctors and their patients was paramount and refused to allow the use of confidential medical records *in any form*, taking the view that *any* unauthorised disclosure amounted to a breach of confidence. In *W v Edgell* however, Scott J reached the opposite conclusion in respect to the disclosure of information by a psychiatrist to a health authority. Whilst the proposed recipient of the information was an important factor in these cases, the policy issues regarding the confidential relationship between a patient and their doctor or hospital raised similar issues and yet the cases dealt with the public interest defence on quite different bases.

The *Spycatcher* decisions further illuminate the uncertainty and inconsistencies which result from the failure to provide an adequate definition of the “*the public interest*”. Of the numerous decisions handed down in England and Australia, the courts were divided on the issue of whether the information was justified in the public interest, both between countries and within the court hierarchies. Further, it seems ironic that whilst the English defence provided the greatest scope

155 *Supra* n.2 at 507.

156 *Supra* n.52 per Lord Griffiths.

157 *Supra* n.41 at 635.

for the disclosure of the material in *Spycatcher*, either on the basis of the *John Fairfax* test or the public interest defence, the English response to these arguments was the most restrictive, and the judgements the most critical of Wright's attempt to inform the public of the activities, illegal and otherwise, of its Secret Service.

In the light of these decisions it seems that the defence invites the judiciary to merely apply their own social and political values in determining how the public interest is best served in a particular case. Whether such subjectivity is in the public interest is questionable.

It is clear that the recipient of the information is a relevant factor in determining whether the disclosure is justified pursuant to the public interest defence. In the English *Spycatcher* decision the Law Lords sought to limit the availability of the defence to those who have an appropriate interest. Lord Griffiths said:

*"Even if the balance comes down in favour of publication, it does not follow that publication should be to the world through the media. In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or to some other authority who can follow up a suspicion that a wrongdoing may lurk beneath a cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purposes of their inquiry ... If it turns out that the suspicions are without foundation, the confidence can then still be protected."*¹⁵⁸

These statements acknowledge that it may be in the public interest that limited disclosures of suspected iniquities are made, and suggests that such cases would not amount to a breach of confidence although it may transpire that a matter did not warrant general disclosure. This view recognizes that the public interest defence may have a role to play in encouraging individuals to report their suspicions to the appropriate authorities, whilst offering some protection from an action for breach of confidence in the event that ultimately no wrongdoing is proved.

This view is also found in the obiter comments of Megarry VC in *Malone*. In that case his Honour approved of the application of the defence of public interest to cases of police breaching confidences for legitimate police purposes, at least in respect to telephone tapping. His Honour said that when tapping a phone it was not necessary that the police are "*certain*" that the conversation will be iniquitous, and that a defendant may have just cause or excuse to access and disclose confidential information for police purposes, notwithstanding that not all conversations would be iniquitous.¹⁵⁹

Even in the event that an action for breach of confidence is still available against a party who is found to have unjustifiably breached a duty of confidence, disclosure to the appropriate authorities may contain the damages which would be available against the renegade confidant.

Another consequence of the failure of the English courts to agree on a consistent approach to the *public interest defence* is that potential defendants may be discouraged from making disclosures as many will be unable to ascertain whether it will be available. By way of example, imagine the difficulties which a person in the position of the informer in *Granada* would have experienced in trying to determine in advance whether the defence would be available to them.

In *Gartside v Outram* Wood VC said that to come within the exception the defendant must act on more than a "*mere roving suggestion*".¹⁶⁰ In *Spycatcher* Lord Keith said that allegations must be of substance for the public interest defence to be pleaded:

*"As to just cause or excuse, it is not sufficient to set up the defence merely to show that allegations or wrongdoing have been made. There must be at least a prima facie case that the allegations have substance."*¹⁶¹

¹⁵⁸ Of the 11 English cases referred to in this paper which went on appeal, 7 of the decisions of the lower courts were overturned.

¹⁵⁹ *Supra* n.3 at p.649.

¹⁶⁰ *Supra* n.41 at 646.

¹⁶¹ *Supra* n.5 at 114.

Scott J took a broader view in *Re a company*, stating that where the disclosure is to a party who has a duty to investigate those matters it is not for the court to investigate the substance of the proposed disclosure. Scott J distinguished from the statements of Lord Keith on the basis that those remarks were made in the context of disclosure to the world at large, via the national press.

*"I think it would be contrary to the public interest for employees of financial services companies who thought that they ought to place before FIMBRA information of possible breaches of the regulatory system, or information about possible fiscal irregularities before the Inland Revenue, to be inhibited from doing so by the consequence that they might become involved in legal proceedings in which the court would conduct an investigation with them as defendants into the substance of the information they were minded to communicate."*¹⁶²

Despite earlier uncertainty,¹⁶³ it now seems clear that the motive of the defendant is irrelevant in determining the applicability of the defence.¹⁶⁴ It is noteworthy that, in *Re a company*, Scott J said that if it turns out that the defendant's allegations are groundless and that he is motivated by malice then the defendant would be at serious risk of being found liable for defamation or malicious falsehood.¹⁶⁵ This statement suggests that even if the allegations made against the plaintiff were unfounded and malicious the plaintiff would *not* have an action against the defendant for breach of confidence, although these other actions may be pursued.

The fourth issue which may be raised in regard to the public interest defence, as developed in the English caselaw, is that it seems to have failed to adequately consider the social and commercial implications of permitting confidential information to be disclosed on this basis. Several consequences may flow from the undermining of confidential relationships.

From a commercial perspective it is arguable that individuals and corporations who cannot be guaranteed of confidentiality may unnecessarily restrict the circulation of sensitive information and thus fail to consult with those who may have a proper interest in receiving and commenting on it. There may also be some circumstances in which commercial bodies may be discouraged from collecting certain data if they fear that the results may be disclosed in the media, instead of to an appropriate authority.¹⁶⁶ For example, a manufacturer of a product may commission and obtain ten confidential reports on the accuracy of the product, one of which is unfavourable. Is the manufacturer entitled to rely on the nine favourable reports or would it be a misdeed to disregard the negative report, such that an employee would be released from the obligation of confidence and could disclose the negative report to a wider audience rather than an appropriate authority?

Another concern is that commercial entities may also be reluctant to invest the large sums of money in developing intellectual property if, without wrongdoing on their part, there is a risk that some public interest may be identified which weighs the balance in favour of the disclosure of the information. For example, were a pharmaceutical company to carry out research which leads to a cure for cancer or for AIDS is there a public interest in the public disclosure of the research by employees if the publication of the research data would foster competition in relation to the timing and the cost of placing the new drugs on the market?

In a medical or social context, decisions such as *W v Edgell* may have the effect of discouraging individuals from seeking medical treatment for infectious diseases, psychiatric or psychological disorders or HIV testing¹⁶⁷ if they believe that the medical practitioner, acting

162 *Supra* n.3 at 644 per Lord Keith.

163 *Supra* n.81 at 252, 253.

164 *Supra* n.13 at 149.

165 *Supra* n.43 at 480 per Lord Frazer.

166 *Supra* n.81 at 253.

167 See *Lion Laboratories Ltd v Evans and Others* (*supra* n.56).

reasonably, can disclose the information without consent to persons who may be required to make a decision in relation to the patient, such as a spouse, an employer, or a superannuation fund.

Ascertaining the appropriate standard of reasonableness may also be difficult if not impossible. Some doctors may reasonably consider the duty of confidentiality should only be breached in very exceptional cases whilst others may require a less extreme situation to find that there are reasonable grounds to waive the duty.

If a patient in the course of obtaining psychiatric treatment states that they harbour feeling of aggression towards another person would this release the psychiatrist from their duty of confidentiality, such that they could inform others, including the person who is the subject of the aggression? In the United States the decision in *Tarasoff v Regents of University of California*¹⁶⁸ has placed doctors in the unenviable position of having to weigh up the duty to maintain patient confidentiality with the risk of violating a positive duty owed to a third person to warn them about the patient's violent tendencies.¹⁶⁹

There was no suggestion by the court in *W v Edgell* that a patient should be warned before discussing confidential matters with a medical practitioner that the results of a consultation may be disclosed to others. This denies the patient of the right to decide whether they wish to confide in the doctor.¹⁷⁰ In time there is a danger that this will create an environment of distrust and restraint between a patient and their doctor, contrary to the interests of public health.

In the context of the media, the decision in *Granada* raises important issues about the protection available to parties who give information to journalists in circumstances importing an obligation of confidence and the way in which a loosely defined *public interest defence* has the potential to undermine that confidence. For example, a journalist may discover the name of a confidential source of a competitor media organisation and seek to publish that information on the grounds that it is in the public interest that persons in private or public institutions who leak information be identified and duly reprimanded. On the *Granada* test the public interest would warrant disclosure of the source's identity, having serious consequences for the free flow of information to media organisations and journalists.

The recent trend away from the public interest defence in favour of restricting the scope of the duty owed to the plaintiff, and the introduction of the concept of reasonableness, has created further uncertainty about the extent to which the law will protect confidential information.

Thus after thirty years of the *public interest defence* in England, serious doubts can be raised regarding whether the interests of the public have in fact been served by the defence. Although the flexible nature of the defence may be used to allow disclosures of confidential information which, without being iniquitous, would promote the public welfare, any advantage which may have been gained in this flexibility has been lost as a result of the inability of the courts to agree on the scope of the defence, rendering it uncertain and unpredictable. The defence does take into account the recipient of the information in deciding whether disclosure should be permitted, but, as with other aspects of the defence, this issue has been dealt with inconsistently by the courts.

It can also be argued that the uncertain nature of the defence may, over time, have the effect of undermining legitimate commercial, professional and other relationships which depend on trust and confidence to function effectively.

168 The *Report of the Working Party on Privacy and AIDS/HIV* has shown that many medical practitioners consider it their duty to disclose a patient's AIDS or HIV status to the patient's partner, employer and others.

169 (1976) 551 P 2d 334.

170 For a discussion of the implications of this case in relation to AIDS/HIV and patient confidentiality in the United States see JS Talbot "The Conflict Between a Doctor's Duty to Warn a Patient's Sexual Partner that the Patient has AIDS and a Doctor's Duty to Maintain Patient Confidentiality" (1988) 45(1) Washington & Lee LR 355. See also M Neave, "AIDS - Confidentiality and the Duty to Warn" (1987) 9(1) Univ. Tas. LR 1.

This lack of definition has exposed the public interest defence to the criticism that judges are left to rely on their own personal views as to how the public interest should be served in a particular situation and the accusation that it can be manipulated to achieve whatever result a particular bench desires. On this basis the experience of the *public interest defence* in England supports the view of Gummow J that the defence is merely “*an invitation to judicial idiosyncrasy*” based on matters “*of social and political opinion*”. Accordingly, it is submitted that the adoption of the *public interest defence*, at least as it has been shown to operate in England, may not be in the best interests of the Australian public.

(b) Comments on the Narrow Iniquity Rule

The *narrow iniquity rule* returns to the notion of creating an exception to the *duty of confidence*, rather than a defence to an action for breach. The advantage of adopting the narrow iniquity rule is that confidences are protected except where they relate to iniquity, thus making the circumstances in which the defence is available more certain. Where information relates to iniquity it will not possess the necessary quality of confidence to give rise to the action. Iniquities have been defined by Gummow J as “*crimes, civil wrongs or serious misdeeds of public importance*”.¹⁷¹ Matters that could not be described as iniquitous may not be disclosed, irrespective of any perceived public interest in the information being made known.

It is unclear whether there needs to be some wrongdoing on the part of the plaintiff for the rule to apply. However, in most cases the crime, civil wrong or misdeed will involve some wrongful conduct on the part of the plaintiff.

As information relating to iniquity will lack the quality of confidence it is strictly irrelevant to whom the information is disclosed. Recipients of iniquitous information may freely disclose the information to a competitor of the plaintiff or to the media, irrespective of whether there is a more appropriate body to whom the information could have been disclosed. It would also be irrelevant that the information was disclosed in exchange for a fee.

It is submitted that this result would be inconsistent with the public policy basis of the defence. The rationale for both the *iniquity rule* and the *public interest defence* is the promotion of the public welfare.¹⁷² The failure to promote disclosure to appropriate authorities may encourage the exposure of trivial crimes or civil wrongs, given under a purported duty of confidence to a wide audience for purely financial gain and in respect of which no public interest is served. For example, it may transpire that a trade secret relating to a new product may be in breach of trade practices legislation in some minor respect. In many cases it would be contrary to the public interest if an employee, given the information under a purported duty of confidence, could sell the trade secrets to a competitor on the basis that there was no confidentiality in the information.

Similar issues may arise in respect of information given under a purported duty of confidence in a medical or social context, such as between a doctor and their patient, a priest and their penitent, and a social worker and their client. For example, a patient may disclose to a doctor in the course of treatment that they committed some trivial criminal offence many years ago. If there is no quality of confidence in the information then it would appear that the doctrine of breach of confidence could not prevent the doctor disclosing the information to a local newspaper for a fee.

This may be relevant in relation to HIV and AIDS in jurisdictions where certain homosexual acts constitute a criminal offence. It is arguable that a person who discloses to their doctor that they contracted HIV or AIDS as a result of a homosexual act may negate the duty of confidence which would usually attach to the doctor/patient relationship as the information relates to a “crime” and thus may be categorised as an “iniquity”.

¹⁷¹ It is suggested that there may be an implied term in a contract between a doctor and a patient that matters discussed are confidential. Accordingly, it may be argued that in not warning the patient that information may be disclosed, the doctor may be in breach of this implied term or be liable for misrepresentation.

¹⁷² *Supra* n.118 at 450.

In many cases the public interest will not be served to any significant degree by the disclosure of information to a party other than one with a proper interest in the information. Yet the narrow iniquity rule does not seek to achieve this end. Moreover, in some cases the public interest may be harmed by the undermining of confidential relationships without any commensurate benefit for the public. One is reminded of the comment of Shaw LJ in *Schering Chemicals Ltd v Falkman Ltd*:

*“The law of England is indeed, as Blackstone declared, a law of liberty; but the freedoms it recognises do not include a licence for the mercenary betrayal of business confidences.”*¹⁷³

Although the *narrow iniquity rule* may reintroduce an element of certainty into the defence, defining iniquities will still involve a value judgement, which undermines some of this certainty. Salmon LJ showed an appreciation of this in *Initial Services v Putterill*:

*“The iniquity referred to in [Gartside v Outram] was quite dramatic, but what is the sort of iniquity that comes within that doctrine is certainly not easy to define. What was iniquity in 1856 may be too narrow or perhaps too wide for 1967.”*¹⁷⁴

As to Gummow J’s suggestion that the case of *Gartside v Outram* may have been no more than an application of the equitable doctrine of clean hands, it seems that this view has not met with support.¹⁷⁵ In *Spycatcher* Powell J stressed that the maxim has a very narrow application:

*“Contrary to what appears to be a commonly enough held view, the maxim does not lay down a general principle that a plaintiff who is shown to have been guilty of some impropriety may be refused relief.”*¹⁷⁶

His Honour referred to the comments of Eyre CB in *Dering v Earl of Winchelsea*:

*“[The improper act of the plaintiff] ... does not mean general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as a moral sense.”*¹⁷⁷

Robert Dean takes the view that the *public interest defence*, in whatever form, and the doctrine of clean hands, are quite separate matters and moreover, that the notion that they are related confuses the question of a possible defence with the courts discretionary powers:

*“... the public interest considerations ... are a generic defence; not a bundle of discretionary or policy considerations. It is certainly not an extension of the unclean hands doctrine. Such a view confuses ‘private equities’ with the public interest.”*¹⁷⁸

(c) Comments on the Broad Iniquity Rule

The *broad iniquity rule* combines aspects of the *narrow iniquity rule* with the *public interest defence*, requiring that both be satisfied before the defence will succeed. The broad iniquity rule operates as a defence to an action for breach of confidence, not as an exception to the duty of confidentiality.

The broad iniquity rule will not consider disclosure unless the information is “*iniquitous*”, defined as crimes, frauds, or misdeeds of some gravity,¹⁷⁹ although Powell J has suggested that this definition could be expanded to include “*improprieties*”.

173 *Supra* n.9.

174 *Supra* n.50 at 338.

175 *Supra* n.13 at 151.

176 This doctrine allows the court to exercise discretion against the granting of relief where the plaintiff has acted improperly in relation to the matter in which relief is sought. See Meagher, Gummow and Lehane *Equity, Doctrines and Remedies* 2nd ed Butterworths 1984 at 76.

177 (1987) 8 NSWLR 341 at 383.

178 (1787) 29 ER 1184 at 1185.

179 R Dean *The Law of Trade Secrets* 1990 at 288.

Where the matter satisfies one of these tests the court is then required to balance the public interest to determine whether disclosure is justified. In some circumstances the iniquity will be of such a trivial nature that it is in the public interest that the confidence be preserved, as in the example discussed above where a patient discloses to a doctor in the course of treatment that they committed some trivial criminal act in the past. The *broad iniquity rule* thus enables the court to consider whether, on balance, the public interest would be served by the disclosure of the information and to whom.

Under the *broad iniquity rule* the court is required to consider the recipient of the information.¹⁸⁰ The rule thus accepts that iniquitous information may remain confidential and subject to a duty of confidence but that in certain circumstances disclosure to appropriate authorities would be in the public interest and therefore should not be restrained.

This may have advantages from a public policy perspective in that it may encourage persons to make limited disclosures of suspected iniquities to appropriate authorities where the defendant can show some public interest in the information. If it transpires that the information is not iniquitous or that the public interest did not in fact warrant disclosure then the damage suffered by the plaintiff, and recoverable in an action for breach of confidence, would be minimized.

This approach also accords with other public policy considerations which would discourage breaches of confidence for profit where some minor iniquity is found to exist.

The *broad iniquity rule* is consistent with the two-limb approach referred to by Wood VC in *Annesley v the Earl of Anglesea* and the definition of the *public interest defence* originally expounded by Denning MR in *Initial Services*, as in those cases it was necessary to show that there was both an iniquity (however defined) *and* that the public interest required disclosure.¹⁸¹

This approach also provides a degree of certainty with respect to social and economic relationships which require an assurance of confidentiality to operate effectively. The *broad iniquity rule* would guarantee the protection of confidence in those cases where it cannot be shown that the confidential information is iniquitous.

The main weakness with the *broad iniquity rule* is it would not allow for disclosure of confidential information which, although not iniquitous, is potentially harmful to the public. As it is not iniquitous then it would seem that the question of the public interest would not arise for consideration.¹⁸²

The *broad iniquity rule* has two options in this situation. The first would be to adhere to a strict application of the rule and prevent disclosure. The second, and it is submitted the more acceptable option, would be to narrowly expand the definition of iniquity to include information which gives rise to a *real* threat of *actual* harm to the community.¹⁸³ Information which would fall within this definition may properly be considered iniquitous.¹⁸⁴

The court would then be required to go on and consider whether the public interest would be served by the particular type of disclosure which is either proposed or had occurred.¹⁸⁵

180 See Rath J in *Castrol v Emtech* approving of the test set down by Ungood-Thomas J in *Beloff v Pressdram Ltd and Another* (*supra* n.31).

181 *Supra* n.94.

182 *Supra* n.13 at 148.

183 See *Malone v Commissioner of Police of the Metropolis (No.2)* (*supra* n.41) per Megarry J at 635. Note that this problem also arises in respect of the narrow iniquity rule.

184 There are indications of support for the defence to apply in cases of destruction, damage or harm to the community. See Rath J in *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (*supra* n.126) at 55 and Mason J in *Commonwealth of Australia v John Fairfax & Sons and Others* (*supra* n.72) at 497.

185 In the New Zealand High Court decision of *Duncan v Medical Disciplinary Committee* [1986] 1 NZLR 513 at 521 Jeffries J discussed the liability of doctors to warn third parties in breach of confidence and suggested that this should be limited to cases where "another's life is immediately endangered and urgent action is required".

The definition of “*iniquity*”, instead of being expanded to include “*improprieties*” as suggested by Powell J in the *Westpac Letters Case*, would thus be limited to crimes, (defined as breaches of criminal and civil law), frauds, and information which involves a real threat of actual harm to society and its members. Support for this approach can be found in the judgement of Mason J in *Commonwealth of Australia v John Fairfax* in which his Honour suggested that the public interest may justify disclosure of confidential information or material in which copyright subsists where to do so would “*protect the community from destruction, damage or harm*”.¹⁸⁶

As the recipient of the information is a relevant factor, in many cases the defence would only be available where there has been limited disclosure of the information to appropriate authorities.

One of the consequences of not protecting legitimate confidences is that rather than leading to free speech it may lead to less speech. Commercial, professional and other sensitive information may not be disclosed under a duty of confidence if matters may be disclosed by a confidant who can identify some public interest in the information. The *broad iniquity rule* attempts to formulate a defence which minimizes the risk of undermining commercial, medical and other relationships whilst also allowing disclosures of confidential information where it is both iniquitous and some ascertainable public interest will be served.

It is acknowledged that determining both an iniquity and the public interest are tasks which inevitably involve the exercise of some discretion and a degree of subjectivity. Nevertheless the *broad iniquity rule*, unlike the *public interest defence* in England, attempts to provide a clearer framework in which these tasks can be carried out.

5. CONCLUSION

An overview of the *public interest defence* as it has developed in England indicates that far from serving the public interest, the defence has become a concept without a precise definition and which is thus subject to vastly different and subjective interpretations. It is submitted that it is not in the public interest to adopt a defence which requires the judiciary to merely apply their own social and political values in determining when a breach of confidence should be permitted.

The *narrow iniquity rule* does provide a degree of certainty as it will deny iniquitous information the quality of confidence, regardless of who the recipient may be. However, it is submitted that this may not best serve the public interest as it may encourage information to be given to a competitor or to the media when the public interest is likely to be better served by the disclosure to proper authorities.

It is submitted that the *broad iniquity rule* offers a more acceptable framework for determining these difficult issues. It promotes a degree of certainty and protection for the duty of confidence in relation to economic, social and other relationships whilst also allowing for the disclosure of a broad range of *iniquities* to the most appropriate authorities in cases where it can be shown that there is an ascertainable public interest in doing so.

186 In *Duncan Jeffries* J suggested that the disclosure should be confined to exceptional circumstances and where the recipient was “*a responsible authority*”.

187 *Supra* n.72 at 497.