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UNIVERSITY OF SOUTHAMPTON

THE PROTECTION AND DISCLOSURE OF CONFIDENTIAL INFORMATION

VOLUME 1 OF TWO

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UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF LAW

Doctor of Philosophy

PROTECTION AND DISCLOSURE OF CONFIDENTIAL INFORMATION

by Penelope Ann Pearce

This work consists of an examination of relevant areas of law and some typical situations concerned with confidential information in order to discover principles applicable to the disclosure and protection of such information.

English law has on different occasions approached the problems of confidential information from the bases of the relationship between the parties, or the position of the holder of the information, or the purpose for which it is required. Consideration of the reasons for seeking protection indicates that such information is of three types, namely personal information, commercial information and information relating to policy-making and administration, called governmental information. It is the thesis of this work that the nature of the information is the most relevant basis for clarification of the law on this subject.

After consideration of the law of breach of confidence, official secrets and discovery and privilege, relevant areas typical of the traditional approaches, Part II examines problems of confidentiality in relation to medical information, commercial information and in local government. Part III explores the extent of protection of confidential information, or its donor, in court, Parliament and certain statutory inquiries, all situations requiring information in the public interest.

The conclusions indicate that the significance of competing public and private interests varies according to the type of information. A draft Bill, based on existing law and proposed reforms, reflects that variation and, with reference to existing causes of action and rules of law, would codify the law relating to confidential information.

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I am glad to state publicly my thanks to my husband who progressively removed from me other time-consuming activities and my daughters, Sarah and Dinah, who gave me cheerful encouragement and much practical help.

A recent biographer likened her subject to an old and disagreeable aunt who came to tea and stayed for years. This work is more like a child which has been always wanted but had a very long gestation period. But every child has a father as well as a mother, and the father of this work is undoubtedly Mr G.T.Griffiths, LL.B., Solicitor, Head of the Department of Legal Studies at Trent Polytechnic. Inseminator of my original concern for the subject, he encouraged and supported me throughout with all the solicitude and practical help an expectant mother could wish. His long experience and wise judgment coupled with deep knowledge and understanding of the law and its role in society have been always readily available to me, as they are to all his staff. Perhaps sadly, though, I cannot claim that the features of the resultant offspring are his; I take full responsibility for my child.

The law is stated as at December 15 1978.

INTRODUCTION

"Shameful garrulity. To have revealed
Secrets of men, the secrets of a friend,
How heinous had the fact been, how deserving
Contempt and scorn of all."

Milton[1]

The simplest question may be the most difficult to answer. It is very easy to describe a piece of information as confidential; one may write CONFIDENTIAL on the top of a document or tell the recipient of an oral communication that it is 'confidential' or 'given in confidence.' But the quite reasonable question "what is the effect of calling the information confidential?" receives no simple answer. At one extreme a few mintues' listening in a crowded bus will reveal "she told me in confidence," suggesting that, like the Statute of Uses, the sole effect of the description is to add five words to its transmission. At the other extreme, if the description is that of a government department an unauthorised discloser, or mere recipient, may find himself in prison having committed an offence under the Official Secrets Acts 1911-1939. Similarly, one may refuse to give information on the ground that it is one's own, and confidential, or that it was given in confidence. Even if the holder of the information is asked to disclose it in legal proceedings, in one case the court may readily excuse him from disclosure[2] and in another may commit him to prison for contempt of court for refusal to disclose.[3] The matter is further complicated by the fact that one person may be quite happy to disclose information which another would consider confidential and refuse to disclose. There is thus no one meaning either of what is confidential or of the effect of the description.

There is also no unanimity about the restriction which the describer intends, or wishes, to impose by the description; what he means by describing the information as confidential. It is, however, possible to see from the context of the statement that the various meanings fall into four main groups, roughly corresponding whether the describer is the originator of the information or a recipient. The originator who says "the information is confidential" may be saying:

(1) "I am not going to tell anyone. The information is my secret, no-one knows it and I refuse to tell." (This meaning is only

realistic if the information is exclusively within his knowledge.);

(II) "I am telling you but you must not tell anyone else." (This may arise in the course of a close personal relationship, or may be a preface to gossip, indicating a hope that the subject will not discover what has been said.);

(III) "I am giving you the information for a particular purpose only, so you must not use or disclose it for anything else." (This meaning is often unspoken but assumed by the discloser, for example in his dealings with his bank or doctor. Confidentiality in this sense may be offered by a would-be recipient seeking to perform a service, such as a social worker or contraceptive centre.);

(IV) "The information is mine and you hold it on my behalf." (This meaning applies for example to an employee in 'confidential employment' who mixes the secret ingredient in manufacture.)

The recipient who says "the information is confidential" may be saying:

(I) "I have been given this information subject to restriction and I cannot (or do not want to) disclose it." (This meaning may be used by a local councillor of information relating to a matter under consideration by the council.);

(II) "I have been given this information, or discovered it, because of a particular relationship between myself and the donor, or subject, and I cannot (or do not want to) disclose it." (Doctors, priests and journalists may use this meaning.);

(III) "I have been given this information for a particular purpose and I cannot (or do not want to) disclose it for another purpose." (This is the meaning given by government departments, for example the Inland Revenue, which fear difficulty in obtaining information unless they show reluctance to spread it around);

(IV) "I hold the information on behalf of another and may only use it for his benefit." (This meaning may apply to an agent for several persons who receives information which could be useful to more than one of his principals.)[4]

It can be seen that the originator of the information is seeking to assert for himself a right and, if he does disclose, to impose an obligation on the disclosee, but an obligation which varies from one situation to another. The recipient of the information asserts an obligation on himself as a reason for non-disclosure, but an obligation

which has no uniform basis in all cases.

The motives of the originator in asserting that the information is confidential may not be the same as the motives of the recipient who seeks not to disclose it. For the originator of the information the motive basically depends on the quality of the information to him. His view of the information may be divided into three major areas; he sees the information as personal information, as commercial information or as governmental information.

Personal information is easily recognised. In relation to the information which a doctor may be told or discover, it has been said that[5]

> "Confidential information is what the patient does not want the neighbours to know."

The question of protection of personal information is related to the current debate about the protection of privacy. It has been said that[6]

> "Privacy is a domain where a man . . . may either tell no-one, or tell only selected persons, what he knows or believes."

The content of confidential personal information varies from one individual to another, and from one society to another, but the essence is that the originator says "This information relates to me and therefore I do not wish to disclose it or will only disclose it subject to restriction."

Commercial information is that group of items which the originator or "owner" has a financial interest in protecting. The clearest example is the trade secret used in manufacture; if it is disclosed others will copy it and the owner will suffer financial loss, or at least make less profit. Other information in this group may relate to buying policy or organisation, solvency of a concern or efficacy of its product, knowledge of any of which by competitors may affect the financial position of the owner. It may also include information which is only potentially of value to the owner, such as an idea for a play which is not yet written or an invention which he cannot exploit without backing and assistance. In all these cases the motive of the owner in seeking to protect his information is that of protecting his property.

The third group are items of information concerning decision-making and administration, such as who said what in the meeting, what decision was taken, who voted which way, what information was used, what criteria were applied, what is the policy on this matter? Here

the motive for non-disclosure relates to ease and efficiency of decision-making and implementation. Where the information concerns the internal deliberations of a body or group it may be claimed that disclosure of anything other than the final decision would impede the proper working of the body or cause embarrassment to individual members, limiting frankness of discussion, slowing the process of decision-making, creating an additional burden of formulating reasons for decisions, imperilling the strength of a collective decision. The organisation to which this type of information relates may be a public or a private one, the essential being that one person or group runs the organisation rather than all the members together, and the group are seeking to keep information away from the members. Because the word most accurately descriptive of the activities of policy-making and administration is 'governing,' this type of information is described as governmental information.

The recipient of the information also sees it from his own viewpoint. In seeking not to disclose it his motive may be to protect himself from suit by the donor or the criminal law, or it may be to protect his source of information against personal danger, libel action or embarrassment. He may wish not just to protect the particular donor but to safeguard his supply of information which might dry up if individual donors were not protected. This supply may be necessary to his work (for example, police informers, journalists' sources[7]) or may affect the quality of his service (for example the need for full disclosure by a doctor's patient or a lawyer's client). He may fear adverse reaction to his holding information even if he has a statutory right to receive it (for example the Inland Revenue) or he obtains it from his own sources (for example the employer asked to disclose files on employees). As Shils[8] has pointed out, there may be a sense of importance and security in belonging to a group which is "in the know" and this feeling may contribute to the noticeable reluctance of one professional group to pass information to another[9] as much as the fear that the other group may adopt a lower standard of 'professional ethics.' At the other extreme there may be a genuine fear that disclosure might adversely affect national security or some other aspect of the public interest.

The question whether the obligation of non-disclosure or limited disclosure is to be protected by law depends on whether the law recognises the underlying motives as values which it should protect. Both the Universal Declaration of Human Rights Article 12 and the European Convention on Human Rights and Fundamental Freedoms Article 8 recognise some rights

in respect of one's private and family life, though there is doubt as to the extent of the protection;[10] property is well protected by English law, though there may be doubt as to what information is property;[11] some right to know what is done on one's behalf is given at least to beneficiaries[12] and corporators.[13] But these values are not the only ones to be considered; there may be equally cogent or more compelling reasons for disclosure.

The person who wishes to receive the information may be the person to whom it relates or a third person. Reasons for seeking disclosure may be for personal profit or for use as evidence in litigation. Or it may be felt that the person to whom it relates is entitled to know what is said about him with a view to correcting or challenging it. A third party may wish to have the information to help in his work; he may seek it because that is easier or quicker than going to the original source, or the original source would not give it to him or he does not want the original source to know that he is making inquiries. Another reason for seeking disclosure is a feeling that people are entitled to know what is being decided, by whom and for what reasons. It may be said that the members of an organisation are entitled to know because the information relates indirectly to them or affects them or because those who know are representatives of them and therefore know it on their behalf. Or it may be said that the public at large ought to know. Aneurin Bevan has said[14] "A representative of the people has no right to secrecy."

It is one of the pressures on a democratic society that those who govern seek freedom to govern in secrecy and those who elect them seek to know what they are doing and why. But it is not only government whose activities impinge on individuals; the activities of a commercial corporation or even an individual may be of direct public concern.

It can be seen that, as well as conflicting with the interests of individuals, protection of personal information may conflict with the principle of freedom of speech, protection of commercial information may conflict with the exploitation of inventions, freedom of competition and freedom of enterprise and protection of governmental information may conflict with the democratic "right to know" which has been described as[15]

"the natural and reasonable expectation of the citizen."

The task of the law in this sphere in seeking to hold the balance

and protect legitimate interests is inevitably a very complex one. It is perhaps made more so because by the nature of English law it has proceeded pragmatically, answering specific problems as they have arisen and creating different principles for different situations. Even where Parliament has been concerned it has only dealt with one aspect of the problem at the time, leaving related matters unconsidered. For example, should the holder of an unpatented invention have rights similar to, or lesser or greater than, the holder of a patent; if the 'leaker' of civil service discussions risks incurring penalties should there also be penalties for the 'leaker' of local authority discussions? The Younger Committee[16] considered various related aspects of the problem of "intrusions into privacy," but the whole of the public sector was excluded from its terms of reference. The Committee also decided against a general right of privacy and so even within its terms of reference proceeded to make different types of recommendation for different situations. The Law Commission Working Paper on Breach of Confidence[17] again excluded the whole of the public sector from its deliberations and even so felt unable to do more than tinker with the problem, because of the Younger Committee's rejection of a right of privacy. Other relevant, but unconnected, reports have concerned discovery, contempt of court, defamation, conduct in local government and openness in government, the press and computers. Small changes have been proposed but the various inter-related problems have not been studied together. But the attitude is beginning to change. The Royal Commission on the Press[18] recommended that the Government should put forward a single White Paper giving its policy on the various reports so that

> "public debate on proposed changes could be conducted within a coherent framework."

and the Report of the Data Protection Committee[19] has proposed general principles at least for information stored in computer systems; if implemented the anomaly of, for example, rights of inspection of one's own file depending on the physical form of the file will soon be apparent.

As a result of the fragmentation and piecemeal approach, the law has developed various bases. The relevant factor may be the relationship between the parties to a disclosure; the position of the holder of the information; the purpose for which disclosure is required. Rarely is the major factor the quality of the information itself, though patent law is an exception here. Thus it is possible to say with some certainty what information is patentable[20] but the courts have not developed a

comprehensive body of rules as to what information may be protected as confidential. For the decision of a particular case it may be, in the words of Ungoed-Thomas J.[21]

> "sufficient that the court recognises that the communications are confidential, and their publication within the mischief which the law as its policy seeks to avoid, without further defining the scope and limits of the jurisdiction."

but lack of certainty as to what information may be called confidential creates many practical difficulties as well as creating what Bentham castigated as "dog's law." Uncertainty encourages excessive claims of secrecy;[22] in many situations in practice if a person is told that information is confidential he will respect that confidence even though there may be strong argument for disclosure. A trade union may make life very difficult for a committee member who discloses, local government officers may become "unhelpful" to a councillor who tells his constituents, an employee will hesitate before risking his employer's wrath and his own career, it took a Crossman to challenge the convention of cabinet secrecy. If the person wishing to disclose can clearly say "but this information is of this type. It clearly cannot be confidential", his situation is made much easier. It may be that the test of 'confidential nature' now being developed in breach of confidence cases will be found to be applicable in other circumstances.

A recognition of the confidential nature of some information, that is ascribing a legally protectable value to the motive of the 'owner' in relation to information of that kind, would enable the courts to provide the appropriate level of protection, taking into account both the motive for protection and the strength of the argument for disclosure in the particular case. For the level of protection may vary from allowing the "owner" a right not to disclose, or imposing an absolute duty of non-disclosure on the recipient, through limiting disclosure whether to particular people with a special interest or in constrained circumstances, such as in a court sitting in private or with an embargo on publicity, to requiring the disclosee to pay for the information.

The extent of permissible disclosure has been discussed extensively in relation to automated databanks which are seen as a major threat to confidentiality. It has been said[23] that

> "modern, complex societies are 'information-hungry' "

and it is recognised that computers enable more information to be stored, and for longer periods, facilitate retrieval and the combining of data from several sources in ways which are not practicable if information is stored and sorted manually,[24] and could lead to the compiling of detailed profiles of individuals without their knowledge or the dissemination of commercial secrets. On the other hand, there are undoubted benefits to be obtained from the use of computers. Not only can information be more quickly retrieved but some tasks, such as monitoring nationwide the effectiveness and safety of vaccines,[25] can be performed which would be impracticable in manual systems. Furthermore, it is physically possible to build in safeguards against unauthorised disclosure[26] which are far more sophisticated and secure than the lock on a filing cabinet. Although computers present an obvious potential threat to confidentiality, it is suggested that they

"affect the scale and not the principle"[27]

and do not require different principles of control,[28] though they have highlighted the lack of principles in this field. Treating computers as 'different' can lead to a blurring of essential issues. On the question of accuracy of stored information the White Paper Computers: Safeguards for Privacy was able simply to say[29]

"Information held in computers is no more prone to this kind of error than information in manual records"

so side-stepping the issue of whether people should be allowed to check the accuracy of information held concerning them. Many countries, such as Sweden, West Germany and France, have recently legislated to allow people to see and correct information held in data banks; if the principle is a right one then it would seem appropriate for information however stored. Apprehension about computers has motivated the debate about control over information held by others; principles are needed in relation to collection, storage, use, dissemination and destruction, but they must be principles of general application.

In any of the various relevant fields of law the public interest may be raised as a reason for preventing disclosure or to justify disclosure. The motives of a recipient in seeking not to disclose may be more than an expression of the wishes or needs of his donor; there may be a public interest in non-disclosure of information even if the particular donor would not insist on secrecy. The Attorney-General or the Court itself may raise the question if the parties do not.

Clearly there must be some point at which the public interest requires information to be kept secret - defence information is an obvious one - but how far does this extend and who is to decide? The courts, having liberated the concept of public interest from the tight rein of identity with the interests of central government have perhaps another "unruly horse" to control. Public interest may be concerned with the content of the information, as with defence secrets, the circumstances of its making, as with Cabinet discussions, the need to protect sources of information, such as police informers. It may be that the need to protect the subject of the information is also in the public interest, as with the court's traditional concern for children. It is not difficult to find situations analogous to each of the examples but having no relation to central government or the maintenance of public order. The courts have to decide, now over a much wider field, whether a claim for non-disclosure has a motive which is merely a personal, private one or whether it is sufficiently far-reaching and important to affect the public interest.

Problems also arise where the public interest is claimed as a reason to justify disclosure of information which would otherwise be protected as confidential. Not only must the Courts distinguish between the public interest and what the public are interested in (a task with which they are familiar in the law of defamation) but they must decide whether the disclosure is sufficiently important to justify overriding the "owner's" interest in confidentiality. Several questions arise; is it relevant that the teller is a disgruntled ex-employee or that he is paid for his disclosure; is it relevant that he obtained the information on discovery rather than as a member of a society bound by a contractual duty of confidence; could disclosure be justified only for some purposes or to some people or does the public interest simply negative any right to confidentiality? If it extends beyond the negative of not protecting confidentiality relating to misdeeds, does the defence extend to positive purposes such as disclosure to protect people or help them? It has rightly been said[30] that the defence of public interest is

> "outside and independent of statutes . . . and is based on a general principle of common law."

But the extent of that principle in its application to confidential information has yet to be defined.

The aim of this thesis is to examine the law relating to

confidential information and ascertain and clarify general principles for protection and disclosure. It proceeds on the premiss that confidential information is of three kinds, namely personal information, commercial information and governmental information.

The substantive part of the thesis is divided into three sections which are followed by a conclusion. Firstly three areas of law are considered in detail. These are chosen both because they are of immediate importance to the subject and because they reflect the three standpoints from which the law has traditionally considered it. Thus Breach of Confidence is concerned with relationships between parties to a communication (as are Contract and Trust); Official Secrets is concerned with the position of the holder of the information (as are many statutory provisions); Discovery and Privilege are concerned with the purpose for which the information is required (as are the rules of Natural Justice).

The second section is concerned with typical factual situations relevant to each of the three kinds of information. Thus, as typical of the problems of personal information, medical confidentiality is considered; commercial information is discussed in various typical contexts such as between employer and employee, between partners and in relation to inventions; as typical of the pressures for and against disclosure of information relating to policy-making and administration, local government confidentiality is examined.

The third section is concerned with the various levels of protection which may be given. Situations are taken where there is a strong public interest in information being disclosed and the effect of the confidential nature of information in such circumstances is examined. This chapter concerns the giving of information in court, to Parliament and in certain inquiries and inspections.

The thesis concludes with an assessment, in relation to each of the three kinds of information, of the present law and proposals for reform. A draft Bill includes aspects of the present law and proposed changes and, with reference to existing causes of action and rules of law,would codify the law relating to confidential information.

NOTES

1. *Samson Agonistes lines 491-494.*

2. *Morgan v Morgan [1977] 2 All,E.R. 515.*

3. *Attorney-General v Mulholland [1963] 1 All E.R. 767. C.A.*

4. *North and South Trust Co. v Berkeley [1971] 1 All E.R. 980.*

5. *Editorial: Journal of Royal College of General Practitioners March 1978.*

6. *Cranston: The Right to Privacy, Lecture 2. Privacy as a Human Right: BBC Radio 3 June 17 1974; The Listener July 11 1974 page 45.*

7. *The Report of the Royal Commission on Tribunals of Inquiry (1966) Cmnd. 3121 para.124 recognised that although journalists might speak of honour or moral duty their motive in seeking to protect sources is to safeguard their own jobs.*

8. *Shils: The Torment of Secrecy 1956 pub. Heinemann.*

9. *As revealed in the Report of the East Sussex County Council on the implications of the Maria Colwell case: April 1975.*

10. *Robertson: Human Rights in Europe 1977 pub. Manchester University Press page 88.*

11. *For example, Lord Upjohn in Boardman v Phipps [1966] 3 All E.R. 721, 759.*

12. *O'Rourke v Darbishire [1920] A.C. 581*

13. *R v Master & Wardens of the Merchant Tailors' Company (1831) 2 B. & Ad.115; 109 E.R. 1086.*

14. *Quoted in Levy: The Press Council 1967 pub. Macmillan page 38.*

15. *Kenneth Warren M.P. House of Commons Committee for Freedom of Information: The Times June 27 1978.*

16. *Report of the Committee on Privacy (1972) Cmnd 5012.*

17. *No.58 (1974).*

18. *(1977) Cmnd. 6810 para. 19.6*

19. *(1978) Cmnd. 7341. especially para. 21.09.*

20. *now Patents Act 1977 sections 1-4.*

21. *Argyll v Argyll [1965] 1 All E.R. 611, 625.*

22. *The most ludicrous claim in my experience was a letter, marked 'Private and Confidential' on both envelope and contents, which merely acknowledged receipt of a request for information and stated that the addressee was on holiday.*

23. *Corbett: (1976) 126 N.L.J. 556.*

24. *The Government have said that they have no plans for a central data bank. Computers: Safeguards for Privacy (1975) Cmnd. 6354 para.10.*

25. *British Medical Journal April 1 1978.*

26. *Examples of those used in the Exeter medical trials are given in Chapter 4.*

27. *Statement by the Data Processing Management Association to the Data Protection Committee: The Times November 30 1976.*

28. *Though Tapper in (1977) 40 M.L.R. 198 argues that since one cannot in practice have absolute security the most cost-effective method would be to consider the motive for abuse rather than the sensitivity to the subject. Generally this would mean more protection for commercial than for personal information.*

29. *(1975) Cmnd 6354 para.13. But the Data Protection Committee did not ignore it.*

30. *Beloff v Pressdram Ltd. [1973] a All E.R. 241, 259.*

PART I

CHAPTER 1

BREACH OF CONFIDENCE

1. Introduction

Although there is no general rule in English law that whatever A tells B may not be passed on by B to anyone else without A's consent,[1] from early times there has been some measure of protection of confidential information taken surreptitiously or used without consent to the detriment of the owner. This may have been based on the concept of property, or later, of contract or on abuse of the reliance placed by the plaintiff on the defendant. Common law recognition of reliance, which early allowed damages in an action on the case against a person who sold cattle of which he was not the owner,[2] in 1836 granted damages against an attorney who, having been given title deeds by the plaintiff for the purpose of obtaining a mortgage, informed the plaintiff's brother (who was also his client) that he had a better title to the land than the plaintiff.[3] Surreptitious publication of a hitherto unpublished work could also be dealt with by the common law, Yates J saying

> "Most certainly, the sole proprietor of any copy may determine whether he will print it or not. If any person takes it to the press without his consent, he is certainly a trespasser; though he came by it by legal means, as by loan or by devolution; for he transgresses the bounds of his trust and therefore is a trespasser."[4]

But an aggrieved party would often prefer to seek an injunction to prevent disclosure rather than wait for damages afterwards and equity naturally played a large part in the protection of confidential information. The rhyme, attributed to Sir Thomas More and called by Coke "the ancient rule,"[5]

> "These three give place in court of conscience
> Fraud, accident and things of confidence,"

indicates the basis of equitable intervention and some aspects of the protection of confidential information fell naturally within it. Surreptitious taking was seen as

> "What this court would call a fraud."[6]

"Things of confidence" is primarily a reference to trusts which are the prime example of personal reliance - the Preamble to the Statute of Uses 1535 applies the provisions of the Act to "uses, confidences and trusts"[7] - but of course the principle of protecting personal reliance was applied in other ways, for example in the recognition of undue influence in contracts or gifts. The earliest cases of equitable intervention in breach of confidence concern an attempt by his former clerk to publish a deceased conveyancer's precedents[8] and an attempt to publish the manuscript of an unpublished book which had been lent to the defendant's vendor by the owner.[9] In each case the defendant was enjoined because he had obtained the information by reason of his special position. Ashburner[10] has pointed out

> "Courts of equity in the early cases sometimes professed to grant the injunction in furtherance of a common law right, because they were anxious to conceal every extension of their jurisdiction from the common law judges. These cases, as well as many later ones, are really governed by the principle that information obtained by reason of a confidence reposed or in the course of a confidential employment cannot be made use of either then or at any subsequent time to the detriment of the person from whom or at whose expense it was obtained."

Just as equity was able to take a wider view of fraud than did the common law[11] and in equity no distinction was made between the dishonest mind of a person who knowingly deceives and the

> "breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience"[12]

so liability for breach of confidence was most developed by equity and was based on either nefarious conduct or breach of an obligation created by either agreement or a relationship. The equitable definition of fraud enabled the courts to impose liability for negligent mis-statement where the defendant was in a fiduciary relationship to the plaintiff[13] long before Hedley Byrne v Heller[14] gave a more general liability in tort for negligent mis-statements, at least in the commercial sphere.[15] It is submitted that the growth of liability for breach of confidence is pursuing a similar path.[16]

Tort is compensation-based and well established for the protection of property;[17] equity is based on personal relationships and obligations. Confidential information, like negligent mis-statement may need to be

protected on both bases. Tort is a very suitable vehicle for the protection of confidential information seen as property. The ideas of liability based on compensateable loss to the plaintiff; of making even an innocent user pay for his interference with the plaintiff's property;[18] of the property belonging to the defendant once he has paid for it;[19] analogies with the sale and licencing of patents,[20] all these are highly suitable and relevant concepts in circumstances where the information is commercial information and the plaintiff's concern is with his financial gain or loss.

But where the information is personal[21] or governmental[22] and the plaintiff's concern is to prevent disclosure, either temporarily or permanently, the concepts of tort are largely irrelevant. Quite different questions have to be asked. How far should a person be able to limit the freedom of speech of another by saying that information about himself should not be disclosed? How far do those in a position of power have a right to limit the expectation of those governed to know how and why decisions are taken which affect them? Here the relevant constraints may be seen to be the protection of personal reliance or different aspects of the public interest. These areas are much less developed than that of commercial information but, although the courts do not draw the distinction, it is submitted that the equitable principles should continue to apply, and be developed, within the areas of personal and governmental information while that of commercial information becomes a developed tort.[23] The relationship of the recipient of the information to the donor may be of more significance, and the extent of a defence of disclosure in the public interest may depend on the type of information disclosed.

In Coco v A.N.Clark (Engineers) Ltd.[24] Megarry J identified three requirements for the protection of confidential information, namely that the information must be confidential in nature, it must have been disclosed in confidence and some unauthorised use of it must be made (or threatened) to the detriment of the plaintiff. It is proposed to discuss each of these requirements in turn in relation to each type of property. It will be seen that the statement that jurisdiction in breach of confidence is based on a broad equitable principle that

> "he who has received information in confidence shall not take unfair advantage of it"[25]

may be too wide as a general proposition and in some respects also too narrow.

2. Requirements for Breach of Confidence

2.1. The Information Must Be Of A Confidential Nature

a) Personal Information

Although it may be thought that all personal information is of a private nature, there is no general protection of privacy in English law,[26] and something more than an invasion of privacy is needed before the courst will intervene. An action for breach of confidence will lie only if the information is considered to be confidential. In Argyll (Duchess) v Argyll (Duke) Ungoed-Thomas J held that personal communications from wife to husband could be restrained by injunction but added

> "Of course, even in such cases, decision has to be made whether a communication between husband and wife is confidential and should be protected."[27]

He lamented the absence of tests of confidentiality but concluded

> "It is sufficient that the court recognises that the communications are confidential, and their publication within the mischief which the law as its policy seeks to avoid."

The case itself is not much assistance in trying to formulate tests since the precise nature of the proposed disclosures is obviously not mentioned. The only "serious breach of confidence" mentioned is the plaintiff's disclosure that her husband had been taking purple hearts. However, the plaintiff's affidavit is of significance. She speaks of discussing with her husband

> "many things of an entirely private nature concerning our attitudes, our feelings, our hopes, aspirations and foibles, our past lives and previous marriages, our business and private affairs, and many other things which one would never have discussed with anyone else."[28]

The important factor seems to be that the information was such that the defendant would not have obtained it but for the relation of confidence between himself and the plaintiff. The legal relationship of marriage is neither sufficient nor necessary; a relationship of confidence in which secrets are told is both. Thus Gareth Jones can say

> "no spouse or lover can exploit the verbal indiscretions of the double bed".[29]

There is some support for the proposition that the information and the relationship are equally important in the cases concerning

pictures. In Wyatt v Wilson[30] Lord Eldon enjoined the disclosure of an engraving of the King during his illness, and in Pollard v Photographic Co. North J said

> "The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and . . . the photographer who uses the negative to produce other copies for his own use, without authority is abusing the power confidentially placed in his hands."[31]

Yet as was said in Bernstein v Skyviews and General Ltd

> "There is . . . no law against taking a photograph."[32]

In that case an action for damages for trespass and breach of privacy by photographing the plaintiff's house from the air was dismissed simply on the ground that no trespass had been committed. Thus the reason for enjoining the disclosure of the pictures in the earlier cases is not simply that they related to an individual who had not consented to their disclosure but that they had only been obtained because of the position of the defendant in relation to the plaintiff and disclosure would be an abuse of that position.

Similarly Lord Eldon is reported[33] to have said

> "If one of the late King's physicians had kept a diary of what he heard and saw this court would not, in the King's lifetime, have permitted him to print and publish it."[34]

The diary would have been compiled by the physician, and therefore his own property, but the information on which it was based would have been obtained only because of his relationship with the King.

It may be that the relationships which will be considered by the courts to be of this confidential nature can be found by analogy with the law of undue influence, which, although it is concerned with setting aside gifts, proceeds along similar lines.

> "The general principle which governs in all cases of this sort is that, if a confidence is reposed and that confidence is abused, the courts of equity would grant relief"[35]

could as appropriately be said of the law of breach of confidence as of undue influence. Thus matters learned by priest, doctor or lawyer may well be such that "one would never have discussed with anyone else"[36] and so be protected by the law of breach of confidence. There may even be, as in the case of undue influence, a presumption

to this effect.[37] Other circumstances may on the facts indicate an equally confidential relationship.

It may also be that all personal information obtained by a government department, or other body acting under statutory powers,[38] will also be considered to have been obtained solely because of the relationship and so any unauthorised disclosure may be restrained. Certainly government departments consider themselves bound not to disclose such information without statutory authority or compulsion of the court, and the Franks Committee said that in this area there is no conflict between public and private interest - both require non-disclosure.[39] The Courts have recognised the importance of non-disclosure of information given to government departments and will only require its disclosure for legal proceedings if the public interest in disclosure outweighs that in retaining confidentiality.[40] But in Norwich Pharmacal Co v Commissioners of Customs and Excise, in which the plaintiffs were seeking disclosure of the names and addresses of importers for the purpose of litigation, Viscount Dilhorne said

> "I do not accept the proposition that all information given to a government department is to be treated as confidential and protected from disclosure, but I agree that information of a personal character, obtained in the exercise of statutory powers, information of such a character that the giver of it would not expect it to be used for any purpose other than that for which it is given, or disclosed to any person not concerned with that purpose, is to be regarded as protected from disclosure."[41]

Again it is made clear that both the nature of the information and the relationship under which it was obtained are important. It is suggested that this statement provides a useful analogy for breach of confidence.

In all these cases the information has been openly obtained and it is the disclosure or use which is a breach of confidence. In other cases there may not be a relationship of confidence but the information may have been obtained surreptitiously. Thus in Prince Albert v Strange[42] there was no relationship of any kind between the owner of the etchings and the compiler, and would-be publisher, of the catalogue. The catalogue was his own work, and therefore his own property. But the court granted an injunction against publication of the catalogue on the ground that

> "the catalogue and the descriptive and other remarks therein contained, could not have been compiled or made, except by means of the possession of the several impressions of the etchings surreptitiously and improperly obtained,"[43]

although the defendant was apparently a bona fide purchase for value of the copies.

Thus the information may have been received because of a confidential relationship or acquired surreptitiously, but it will still not be protected (in the absence of contract[44]) if it is not confidential in nature, and information which is readily available elsewhere cannot be considered confidential. This was one of the factors which persuaded the court to authorise disclosure in the Norwich Pharmacal case,[45] though in this context the case must be treated with caution as there is a strong public interest in disclosure on discovery which is lacking in breach of confidence cases.[46] There are, however, many dicta in the commercial cases that publicly-known information is not confidential and Gareth Jones accepts that this is a general rule.[47] It also accords with commonsense; what is the value of enjoining one person if many others may disclose the same information with impunity? Thus information such as the plaintiff's true age, which can be ascertained from the Register of Births, cannot be called confidential however carefully the plaintiff has tried to conceal it and however lovingly it was whispered in the defendant's ear. It is suggested that it is not necessary that the information be available on public records. That which has been made public cannot be called confidential even though it is not very easily obtainable;[48] thus a person's criminal record is not confidential information[49] since, as has often been emphasised, publicity in criminal proceedings is upheld in the public interest. Furthermore, it would seem sensible that information which is generally known from observation by people not in any special relationship to the person to whom it relates cannot be said to be confidential. Thus, matters such as a person's occupation or number of children which can readily be known by neighbours (as opposed to matters of speculation by neighbours) cannot be protected by the law of breach of confidence. On the other hand, information which is disclosed in confidence and then receives a limited disclosure may not lose its confidential nature. An example would be medical information which may be disclosed to a medical team but otherwise remains confidential.

b) Commercial Information

An action in breach of confidence will only lie if the information imparted is of a confidential nature. In a commercial case where the plaintiff company was known to be anxious to preserve its monopoly position, Templeman J said

> "the technical information . . . was all communicated to the plaintiff's employees and customers on terms that it was confidential. That itself would not spread confidentiality over something which was not confidential or make a trade secret out of something which was common knowledge."[50]

The position may be rather different in contract.

> "A well known or readily ascertainable fact such as the height of Nelson's Column cannot be confidentially disclosed; there is nothing of substance to be protected; what the discloser is bargaining for when he discloses such a fact "in confidence" is not the protection of that information but the silence of that particular disclosee."[51]

In commercial cases two problems may arise, namely is the information public property[52] and is the information part of an employee's own knowledge and expertise.[53] In some cases only one of these questions arises; in others both may be relevant.[54]

(i) Is it public property?

The clearest case for protection is an invention made by the plaintiff and kept secret by him and only imparted to another under cloak of secrecy,[55] or taken surreptitiously.[56] The plaintiff can point to the invention as his own property and show that by his conduct he has treated it as secret. The conduct of the defendant may be breach of contract (express or implied) or of an employee's duty to be of good faith[57] or otherwise nefarious.

The defendant may claim that the information is not subject to protection because the materials on which it is based are commonly known and available. In the Saltman Engineering case Lord Greene M.R. said

> "It is perfectly possible to have a confidential document, be it a formula, a plan, a sketch or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody;

but what makes it confidential is the fact that the maker of the document has used his brains and thus produced a result which can only be produced by someone who goes through the same process."[58]

Similarly, in Coco v A.N.Clark (Engineers) Limited Megarry J said

"Novelty depends on the thing itself not upon the quality of its constituent parts. Indeed often the more striking the novelty the more commonplace its components . . . [But] whether it is described as originality or novelty or ingenuity or otherwise . . . there must be some product of the human brain which suffices to confer a confidential nature upon the information."[59]

In other cases the confidentiality may relate not to an invention but to information known about a matter significant to the plaintiff. Thus in Cranleigh Precision Engineering Ltd. v Bryant it was a matter of knowing which was the best clamping strip for the purpose and how to define its characteristics to a manufacturer which was held to be a trade secret of the plaintiff[60] although the clamping strip could be bought quite easily and in Robb v Green[61] an injunction was granted against an ex-employee who surreptitiously took a list of his master's customers although he could have obtained the information from published material - the list saved him the expense and delay of finding the information. On the other hand, in Worsley & Co v Cooper the court refused to enjoin the defendant from using his knowledge of which paper mills could provide certain kinds of paper on the ground that

"this information was not in the nature of a trade secret."[62]

and in Baker v Gibbons[63] it was held that individual names and addresses of a company's agents, as opposed to a written list of all of them, were not prima facie confidential information. It has been argued[64] that insofar as the Worsley & Co v Cooper decision is based on the fact that the information would be discoverable by a trade rival it is inconsistent with other decisions such as Exchange Telegraph Ltd. v Central News Ltd.[65] It will be seen below that a distinction must be drawn between information which a reasonable employee would recognise as the property of his employer and that which the employee honestly and openly acquires in the course of his employment and may treat as part of his own skill and experience.

It may be argued that both these cases are decided on the basis that the information belonged to the person who had acquired it in the course of his work, although in both cases they were directors of the company.

If the acquirer of the information has obtained it surreptitiously[66] or from a person who was under a duty (express or implied) not to disclose it,[67] the court seems to be less anxious about the confidential nature of the information. There is no question of balancing the interests of competitors or ex-employees against those of the plaintiff; as Lord Eldon said in Abernethy v Hutchinson such conduct "would certainly be what this court would call a fraud." This can be of importance, for the employee in Robb v Green would have been entitled to use the information if he had obtained it from published material, and the partner in Floydd v Cheney[68] would normally have been entitled to use and make copies of partnership drawings by virtue of his position as partner. If the employee in Yovatt v Winyard had obtained the information in the course of his employment the court would, at least at that time, have been reluctant to grant an injunction against his subsequent use of it.[69] Surreptitious acquisition will in some cases be an indication that the information was kept secret either expressly[70] or by implication,[71] but it is seen from Robb v Green and Floydd v Cheney that this is not necessarily so and the protection given by the court is based on the surreptitiousness and not on the secrecy of the information.[72]

In relation to the American cases, where the law is further developed, Turner says[73]

> "It is submitted . . . that the requirement of secrecy and the requirements of novelty are essentially the same and represent merely a difference in the degree of proof required by the court in deciding that a process has the quality of being subject-matter for confidential disclosure. The criterion is value . . . In some cases the courts have found it expedient to consider the state of the art in relation to the process for which protection is claimed, to decide whether the process is deserving of protection. In other cases they have found it sufficient evidence of value that secrecy was observed in the plaintiff's factory."

It is suggested that, apart from surreptitious taking, the courts in England are acting in the same way.

It is not necessary, in order for the information to be confidential, to show that no-one else knows it or could know of it. In Franchi v Franchi[74] Cross J said

> "It must be a question of degree depending on the particular case, but if relative secrecy remains the plaintiff can still succeed."

Turner suggests that

> "there is sufficient secrecy if there are a substantial number of interested persons who do not know the information, although there are also a substantial number which do."[75]

The fact of the existence of others prepared to pay for the information was held to be important but not decisive on the question whether the information was confidential in Potters-Ballotini Ltd. v Weston-Baker and others.[76]

The existence of information in brochures or technical papers will not prevent secrecy, at least if work would have to be done on it to make the information available to the public.[77]

Where the information is "imperfectly secret"[78] for example by being known to some but not others, or disclosed by the plaintiff to some but not to others, or discoverable because of the plaintiff's lack of secrecy, the actions of the plaintiff, as well as those of the defendant, are relevant. If the plaintiff has disclosed the information or not made it clear that disclosure is in confidence the court is less likely to protect him. In O.Mustad & Son v S.Allcock & Co.Ltd. and Dosen[79] the appellants had obtained an interlocutory injunction to prevent the second respondent disclosing secrets to the respondent company and sought committal proceedings for breach of that injunction. But in the meantime the appellants had applied for, and obtained, a British patent relating to the secret. Lord Buckmaster said[80]

> "The important point about the patent is not whether it was valid or invalid, but what it was that it disclosed, because, after the disclosure had been made by the appellants to the world, it was impossible for them to get an injunction restraining the respondents from disclosing what was common knowledge. The secret, as a secret, had ceased to exist."

The House of Lords discharged the injunction. This case was followed, and the significance of the plaintiff's own conduct made clear, in

Franchi v Franchi.[81] It had earlier been suggested that knowledge of the information in other countries did not prevent its protection as a trade secret in this country.[82] The plaintiffs in Franchi applied for a Belgian patent for their invention and their application was published in Belgium in June 1963. They accepted that they could not obtain relief for breach of confidence by their former partner after June 1965 when the Belgian patent specification became available in the British Patent Office, but claimed relief for misuse in the previous two years. The evidence showed that British patent agents are in the habit of inspecting foreign patent specifications as soon as they are published abroad. Cross J refused relief, saying

> "By applying for the Belgian patent they set in train a process which would, in the ordinary course of events, lead to the process becoming known to their competitors at or shortly after the publication date in Belgium."[83]

It has been suggested that if the owner of the information reasonably believes that its release would be injurious to him or of advantage to others and reasonably believes that it is not in the public domain (even though in fact it is known to his rivals) he is entitled to protect it against disclosure by the duty of fidelity imposed on his employees.[84] This goes further than the cases on breach of confidence which, it is submitted, base protection on the actual property value of the information rather than on a belief in its value.[85] The suggested test would be suitable for the meaning of confidential information in an express covenant, where the intentions of the parties are more significant than ownership, but it is too wide for breach of confidence.

If the plaintiff has not taken steps to protect the information from discovery the court is less likely to hold that the information was secret. In Bjorlow (Great Britain) Ltd v Minter the defendant was employed as a laboratory assistant in connection with experiments on the plaintiff company's process. After his dismissal he wrote to competitors offering to sell them a process based on the plaintiff company's process. The defendant claimed that the process was not secret. In the Court of Appeal the claim for an interlocutory injunction was dismissed, the Master of the Rolls saying[86]

> "I think it is a matter of strong comment, as regards the alleged secrecy, that quite plainly, according to the evidence, the plaintiffs took no steps whatever, as far as I can see, to impress upon anybody that there

was here any important secret which they desired to preserve."

On the other hand, as was seen above, if the defendant has acted dishonestly, by obtaining surreptitiously information which the plaintiff did not allow him to have, the court will enjoin him from using or disclosing it. The mere fact of setting up in competition or joining a competitor of the plaintiff is not an indication of dishonesty.

ii) Is it the employee's property?

The question whether an employee may disclose or use information learned in the course of his employment may be entirely a matter of contract. In Vokes Ltd. v Heather the Master of the Rolls said

> "the suggestion of an obligation arising from good faith is not some separate cause of action, but is merely saying in other words, on the true construction of the contract, what are the obligations of the parties."[87]

This statement appears to be at variance with later statements of the Court of Appeal that

> "the jurisdiction [to restrain the publication of confidential information] is based not so much on property or on contract as on the duty to be of good faith"[88]

and

> "The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it."[89]

Neither of the later cases was one of disclosure by an employee or ex-employee and although the later statements are accepted as the present law by Gareth Jones[90] it is submitted that in the employer-employee situation the statement in Vokes Ltd v Heather is still applicable. The controversy is not simply academic for the answer may affect the question whether any obligation is to be implied if the contractual provision is void or some, but insufficient, provision is made in the contract and the question whether the right to insist on secrecy is assignable with the secret by the employer. These matters are further discussed in Chapter 5, Confidentiality of Commercial Information.[91] The existence of protection for confidential information in spheres wider than contract does not prevent the rules of contract applying where they are relevant. As North has said

"The fact that equitable remedies will lie against he [sic] who misuses confidential information in circumstances where there is no common law liability does not affect the validity and credibility of a common law action for damages for breach of contract, or a tortious action for inducement of breach of contract where there is a contractual nexus."[92]

An express contractual provision against use or disclosure of confidential information by the employee either during or after the employment is prima facie void as a covenant in restraint of trade. It will however be valid if the employer can show that it is no more restrictive than is necessary to protect his legitimate interests, which may be wider than his property,[93] and it does not so restrain the employee that he cannot use his own skills. But if no express provision is made the law provides a more restricted protection for the employer. The "obligation arising from good faith" referred to above is presumed to be a part of every contract of employment (except insofar as it is varied by the contract[94]), and furthermore the employee must not use information which is the property of the employer.

There is no rule (apart from contract) that an ex-employee may not set up in competition with his former employer or work for his deadliest rival. But the obligation of good faith requires that he shall not take information surreptitiously[95] or make use of information which was given to him expressly in confidence[96] or which he obtained in confidential employment.[97] But in one case[98] where an ex-employee set up a business manufacturing a product identical with that made by his former employer the court refused an injunction in the absence of a contractual restraint. Bennett J said

"When the defendant entered the plaintiff's employment he was not told that he was going to be put into possession of secret knowledge nor was he told that what he learned was to be regarded as confidential knowledge. He was merely employed . . . without any express obligation of any kind being laid upon him . . . In those circumstances it seems to me to be almost impossible, in justice to the servant, to restrain him when he leaves his master's employment from using - not disclosing - information which he could not help acquiring . . . knowledge which in that way has become his own."[99]

Thus information, skill and expertise acquired by the employee in the normal course of his work are seen to be his property in the absence of some indication that they are not. The mere fact that the employer claims the information to be his, and to be secret, is not necessarily enough to restrain an ex-employee from using it.[1] Cross J described the test[2]

> "If the information in question can fairly be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do as he likes with."

He refused to grant an injunction against disclosure of recollections of features of the plaintiff's plant, saying[3]

> "I do not think that any man of average intelligence and honesty would think that there was anything improper in his putting his memory of particular features of his late employer's plant at the disposal of his new employer. The law will defeat it's own object if it seeks to enforce in this field standards which would be rejected by the ordinary man."

On the other hand, in B.O.Morris Ltd v F.Gilman (B.S.T.) Ltd the plaintiffs, anticipating the outbreak of war, had imported from Germany four machines of which they were the only users in this country. Two workmen were employed to copy one of the machines and build others like it. They then left and built an identical machine for the defendant company (except that they couldn't make it work!), Asquith J held[4]

> "I find as a fact that the details of the machine were confidential; that they were a trade secret and that they were a trade secret as between the plaintiff company and the two workmen; and that they were known by the two workmen to be such."

Damages and an injunction were obtained against the defendant company for inducing breach of the workmen's contract. The difference between this case and Printers & Finishers Ltd v Holloway is clear. Holloway learned about particular features of the machinery as part of his general experience as works manager in that industry; the employees of B.O.Morris Ltd were employed particularly to do the job of copying the machines which they knew could not be obtained elsewhere, they only discovered how the machine was designed because of that job,

and they knew that their employers treated the machine as secret. If the information is treated by the employer as secret and is not in fact generally known[5] the court will usually protect it, either by saying that the employee was in "confidential employment"[6] or by holding that a reasonable man would recognise it as his employer's property.

c) Governmental Information

It was held in Attorney-General v Jonathan Cape Ltd that the law of breach of confidence can be applied to governmental information.[7] Lord Widgery C.J. said

> "I cannot see why the courts should be powerless to restrain the publication of public secrets, whilst enjoying the Argyll powers in regard to domestic secrets."[8]

Since the courts must have power to enjoin disclosure of information which threatens national security,[9] the extension of the law of breach of confidence to governmental information of a less dangerous nature is an extension of degree not of kind.[10]

The basis for an injunction on the ground of national security may be that such a disclosure would almost certainly be a crime within the Official Secrets Act 1911,[11] and an injunction may be obtained, at the suit of the Attorney-General, to prevent a crime if the public interest requires it.[12] There may be many disclosures of governmental information which are technically breaches of Section 2 of the 1911 Act but which are not prosecuted[13] and it is unlikely that the law of breach of confidence would be used simply on the ground of the technical crime. It may be that the categories of defence and internal security, foreign relations, the currency and reserves, and maintenance of law and order, proposed by the Franks Committee[14] as a basis for criminal sanctions, would provide suitable indications of the public interest in breach of confidence cases. In all these cases the content of the information may be said to be confidential by virtue of its potentially damaging nature. There would still, however, be room for argument either that the information was not in fact damaging (for example obsolete or trivial information) or that there was an overriding public interest in disclosure.

In the Crossman diaries case the court had to consider information said to be damaging not by its content but because it indicated the views of individuals and such disclosure would discourage frankness. The information was of three groups, namely Cabinet discussions

(including the views expressed by both Mr Crossman and his colleagues), advice received by Mr Crossman from civil servants and his own views about the suitability and capacity of individual civil servants. Lord Widgery C.J. held that information about discussion in Cabinet and the individual views of ministers could be protected but there was no legal ground for the protection of advice given by civil servants[15] or views about individual civil servants. The distinction between the first category and the other two turns on whether the information can be said to be confidential[16] and Lord Widgery indicated a more stringent test than that applied to personal or commercial information.[17] He said that the plaintiff 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 facets of the public interest contradictory to and more compelling than that relied on."[18]

Governmental information can only be said to be confidential if, and for so long as, there is an overriding public interest which requires publication to be restrained. He held that

> "The maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual ministers."[19]

The duty of confidence was owed to the Queen not merely to other members of the Cabinet and extended also to the minister's own views since

> "It would only need one or two ministers to describe their own views to enable experienced observers to identify the views of the others."[20]

The classic reasons for requiring non-disclosure were stated by Lord Gardiner in his evidence

> "Ministers would not feel free to discuss frankly and surrender their personal and departmental preferences for the achievement of a common view or abide by a common decision if they knew that the points they surrendered would become public knowledge."[21]

It has, however, been pointed out since that

> "Collective responsibility means a government stand or fall together, speak formally to Parliament with one voice and ministers resign if defeated on a

Commons vote of confidence. None of these is impeded by the publication of the views of individual members."[22]

This is the view of collective responsibility held by academics[23] but not, for example, by the Cabinet Secretary.[24] While some members of the public will agree that

"Government decisions should be reached behind closed doors. Watching the Government planners trying to make up their minds in public is not only demoralising but amounts to indecent exposure,"[25]

others will applaud Louis Heren when he says

"Surely it is no bad thing for Parliament, the parties and the electorate to know the stand taken by ministers in Cabinet . . . A knowledge of how the compromises were reached would increase public understanding of government."[26]

And a knowledge based on a right to see documents rather than, as at present, the chance of leaks which may be biased, would give a fairer picture.

In the result it was held that the publication would not be restrained since nothing to be disclosed would be likely to inhibit free discussion in Cabinet nearly ten years later. Although Lord Widgery C.J. clearly indicated that more recent disclosures could be restrained, no injunction was sought against television programmes purporting to show Cabinet discussions only weeks after they had taken place.[27]

The question arises, however, whether disclosure of other types of governmental information would be restrained by the law of breach of confidence. Could it be said that wherever a group, by law or custom, make a single decision the law will protect their unanimity by preventing disclosure of the discussions that led up to the decisions? Attorney-General v Jonathan Cape Ltd would suggest that this is so provided there is a public interest in that unanimity and no conflicting, overriding public interest in disclosure. In many cases the matter is merely consensual and there is no public interest involved. Thus a union or local government committee[28] may decide to exclude any member who leaks information about discussions but if the body of members does not accept that it may, for example, re-elect the recalcitrant member. Breach of contract has long been a ground for granting an injunction against breach of confidence[29] and so if, for example, the rules of a club required a committee

member not to divulge information it might be that an action in breach of confidence would lie at the suit of those to whom the duty of confidence was owed.[30] But just as the courts have upheld a corporator's right to know information only if he has some property interest to be protected[31] so, it is suggested, they will limit restraint of governmental information to cases where there is some property or public interest to protect.

In other cases the public interest may have already provided protection under another branch of the law.[32] Thus in Ellis v Dehear the Court of Appeal affirmed the general rule that no information may be given about the deliberations of a jury. Atkin L.J. said

> "The reason why that evidence is not admitted is on a high ground of public policy, and it is, to my mind, both in order to secure the finality of decisions of fact arrived at by a jury . . . and also . . . for the protection of jurymen themselves."[33]

Dicta in the case suggested that disclosure would be punishable as a contempt of court.

But if the circumstances were such that contempt of court (or of Parliament[34]) was not in issue, could the law of breach of confidence be invoked? An example might be that of a member of an Examination Board seeking to disclose the views of individual members of the Board in deciding to exclude a student on academic grounds. Assuming that the requirements of natural justice had been fully met, is there a sufficient public interest in securing the finality of the Board's decisions of fact - that the student is academically unsuited to continue the course, that his examination performance is of an insufficiently high standard - and in protecting members of the Board from pressure to disclose their reasons to justify an injunction against disclosure of the, undoubtedly confidential, discussions of the Board? There may well be said to be a public interest in the maintenance of academic standards; in Herring v Templeman the Court of Appeal referred to

> "the public interest in competent teaching in schools,"[35]

and this would equally apply to other professions. However, the point which was crucial in the Crossman diaries case was not just that the Cabinet takes decisions in the public interest but that those decisions are unanimous decisions under the convention of collective responsibility[36] and that the protection of this convention is also in the public interest. The Examinations Board may well by

custom present a unanimous decision but it is submitted that the courts would be unlikely to decide that there was a public interest in upholding that unanimity. The decision would be just as valid and just as binding, if it were expressed as a majority decision, although the excluded student might feel a greater sense of grievance if he knew that the decision was a marginal one.[37]

One could suggest many other examples of circumstances in which a group make a collective decision and would wish to prevent their individual views being made known later. The Franks Committee having rehearsed the arguments for protecting Cabinet discussion under the Official Secrets Acts conceded that

"Those who take collective decisions in any sphere of life will acknowledge the force of the considerations"[38]

but decided to recommend that criminal sanctions should not apply to other discussing or deciding bodies even within central government. "The discipline of the public service" was a sufficient, and more appropriate, method of control.[39] It would seem that the civil law is showing a similar caution. However much the discussion may be held in confidence it would seem that information of this kind will only be protected by the law of breach of confidence if it can be said not only that the discussion is held and the decision taken in the public interest but also that there is an overriding public interest in collective responsibility or the unanimity of the decision itself.

The significance of the refusal to enjoin disclosure of civil service advice in the Crossman diaries case[40] should not be underestimated. The importance of political impartiality in civil servants is carried to extreme lengths in, for example, not allowing incoming ministers to know what advice was given to their predecessors.[41] The tradition of anonymity of civil servants is only slowly disappearing.[42] The argument for restraining disclosure on the ground that it would inhibit the giving of forthright and frank advice still receives support.[43] And yet Lord Widgery C.J. rejected the claim to restrain disclosure, not after a careful balancing of conflicting public interests or (apparently) on the ground that the information was too old to do any harm but simply with the statement

"I can see no ground in law which would entitle the court to restrain publication of these matters."[44]

Thus, where an injunction is claimed to prevent a disclosure of governmental information, the plaintiff must show either that the content of the information is such that disclosure would be damaging to the national interest or that the non-disclosure protects a

confidentiality which it is in the public interest to protect. The basis of the jurisdiction is not the protection of a relationship[45] (as with personal information) or the protection of property (as with commercial information) but solely the protection of the public interest.

2.2. The Information Must Have Been Given In Confidence

a) Personal Information

i) Expressly given in confidence

Personal information is sometimes given expressly in confidence either by a statement made at the time of giving it or by a note to that effect written on the document. For example, a reference for employment is usually marked "confidential," and indeed a pledge of confidentiality may have been offered when the reference was sought. A medical certificate issued by a hospital may be headed

> "The information contained in this letter is strictly private and confidential to the person to whom it is addressed and must not be divulged without the consent of the writer."[46]

Such a statement may obviously be very important in relation to qualified privilege against libel;[47] it also clearly fulfils the requirement for protection against breach of confidence.[48]

ii) Disclosure for a particular purpose

In other cases it may not be stated that the information is given in confidence, but it may be given expressly or impliedly for a particular purpose only. Here disclosure for the purpose is permitted but in relation to disclosure for any other purpose the information can be said to have been given in confidence.[49] Adequate disclosure for the purpose is, at least by implication, permitted but further disclosure or use for a different purpose would be a breach of confidence. Two questions, therefore arise, namely was the information given only for a particular purpose and, if so, how much disclosure or use is permissible?

Where personal information is given under compulsion, especially to Government, there is wide agreement that its use should be restricted.[50] Lord Reid has said

> "If the State insists on a man disclosing his private affairs for a particular purpose, it requires a very strong case to justify that disclosure being used for other purposes."[51]

Where the compulsion is that of statute, there is often statutory restriction on disclosure and use for other purposes.[52] There is likely to be public expression of disquiet when use for other purposes is proposed.[53] If the compulsion is contractual, for example information given on joining a club, it is suggested that a similar presumption would apply.

On slightly different grounds, it is suggested that where the donor was persuaded to give the information by the recipient this should raise a presumption that it was given only for the purpose comprised in the persuasion. So, where the recipient says "I can only help you if you tell me all about the problem" that information prima facie may only be used for the purpose of that assistance.[54]

If there is a public interest in the information being received, the court is likely to say that it was given in confidence (and so may not be disclosed except for the purpose) if this is the only way of ensuring that such information is received, or is given truthfully or is given with co-operation.[55]

On the other hand, it is clearly too wide a proposition to say that all personal information given to another can only be used for the purpose for which it was given and may not be disclosed by him to anyone else. In the absence of a statutory provision,[56] information which is not confidential by nature is not protected merely because it was given for one purpose. Also, it is suggested that information which is volunteered will not normally be protected as confidential unless it is given within a relationship which requires confidentiality.

The essence of all these cases where confidentiality applies is that the information would not have been imparted but for the pressure applied by the disclosee, and it would be inequitable to allow him to abuse his position.[57]

The question sometimes arises whether the proposed disclosure is within the permitted area or whether permission for disclosure must be sought. If files are accessible to other people or agencies, the receiver of the information may be in doubt whether to put it on the file or not.[58] The problem arises particularly in local authorities where several departments may have dealings with the same people for different purposes and access to each others' files is not practically difficult. Should the departments pool their information[59] or must each act independently? In practical terms it is a question of balancing the need for confidentiality against efficiency (not having to seek the same information twice) or adequate help for the person

to whom the information relates or, sometimes, the protection of third parties. It is obviously necessary that those concerned with the problem should know the full facts, but social workers sometimes express concern at the sharing of information in case conferences without express consent of their client. Recent tragedies have suggested that excessive concern for confidentiality may cause much greater harm that it prevents.[60] The legal problem is whether a subjective or an objective test should be used. May the recipient of the information make only those disclosures contemplated by the donor (or explained to him at the time of disclosure) or may he make any disclosures which are reasonably necessary for the purpose? It is suggested that the objective test should be applied on analogy with the rule in Osborn v Thos. Boulter & Son[61] that qualified privilege against libel is not lost by a communication in the reasonable and ordinary course of business.

iii) Information discovered in the course of a relationship

It was suggested above that information obtained in the course of a personal relationship may by reason of that fact be said to be confidential unless the nature of that information cannot be said to be secret. The essential factor is that the information would not have been discovered but for the relationship of confidence between the plaintiff and the recipient. It follows therefore that such information is clearly obtained in confidence although nothing was said about confidentiality or about it being given for a particular purpose and no pressure was placed on the plaintiff to disclose it. The clearest examples are things said in the course of a marriage[62] or to a medical attendant in the course of an illness, but other relationships could also give rise to a similar duty not to abuse the relationship. The information may not even have been given by the plaintiff but may have been discovered by the defendant from his own observations or, for example, medical tests. Since the essence of the court's involvement here is the protection of the relationship an injunction may be obtainable in either case.

b) Commercial Information

> "However secret and confidential the information there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential."[63]

It has been said that the test of whether the information was imparted in confidence is an objective one.

> "[I]f the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."[64]

As with personal information, the cases indicate three basic circumstances imposing the obligation, namely where the information was expressly given in confidence, where it is implied that the information will not be disclosed, and where there is a relationship giving rise to a duty not to act unfairly or take advantage. In the latter case it is not necessary to show that the actual information in question was given under an obligation of confidence. It may be also that, as discussed above, if information is surreptitiously obtained its use or disclosure may be restrained without rigid adherence to the requirement of disclosure in confidence; Megarry J's statement does not refer to this situation but Turner's statement

> "Where no relationship of contract or confidence is found, the courts give no protection to subject-matter even though it is capable of protection,"[65]

may need modification.

i) Disclosure expressly in confidence

This may[66] create a contractual obligation, the acceptance of the secret being acceptance of the condition. A clear example, on the facts, is the original disclosure to the defendant's father in Morison v Moat[67]. A trade secret is often imparted to an employee on express terms of secrecy, as in Amber Size & Chemical Co Ltd v Menzel,[68] but in employer-employee situations the fact that the employer required non-disclosure is not sufficient if the information was in fact well known[69] or if the contractual provision is an undue restraint of trade.[70] The employer will have to show that the information was genuinely his property and not skill and experience which the employee is entitled to take elsewhere. The court will not necessarily require an employee, or ex-employee, to honour his agreement since it recognises his relatively weak bargaining position.

Problems may arise where unsolicited information is imparted; should the disclosee be bound to treat it as confidentially disclosed just because he accepted it? This may be of great importance since disclosure in confidence may give a greater protection than registration

of a patent[71] and if the disclosee would soon have discovered the secret himself disclosure may put him at a unique disadvantage.[72] In United Indigo Chemical Co Ltd v Robinson[73] one reason why the judge refused an injunction against an employee was because he had only been told the information was secret after he had acquired it. Turner suggests[74] that each case should be decided on its own facts, particular emphasis being placed on the behaviour of the disclosee.

ii) Disclosure in confidence implied in a contract

In many cases where information is disclosed for a particular purpose the court has implied into the agreement a term that it is to be used for that purpose only and not disclosed elsewhere. Thus in Pollard v Photographic Co.[75] it was implied that the photographer would use the negative only for the purpose of supplying a photograph to the plaintiff, and in Nicrotherm Electrical Co.Ltd. v Percy Romer L.J. said[76]

> "the prototype of the machine was shown by the plaintiffs to Percy for a particular purpose, as Percy well knew. That gave rise to an implied promise by him that he would not copy the machine for some other purpose."

Thus it appears that mere knowledge that disclosure is for a particular purpose is sufficient,[77] though it is submitted that in these circumstances the requirement that the information be of a confidential nature, that is genuinely the discloser's property,[78] is equally important, if people are not to be unduly restrained from competing with each other.

In Ackroyds (London) Ltd v Islington Plastics Ltd. it was held that the implied term was still operative after the contract had been repudiated and the secret tool returned.

In Coco v A.N.Clark (Engineers) Ltd. Megarry J said[80]

> "Where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence."

Such an implied term is sometimes imported into a contract of employment where nothing was expressly said about disclosure of information by saying that the employment is "confidential employment." Thus in Tipping v Clarke[81] a counting-house clerk was held to be in

confidential employment so that disclosure of any information relating to his employer's business would be a breach of contract. Similarly in Lord Ashburton v Pape[82] a solicitor's clerk was held to be in confidential employment so that handing over to a third party a document received from his employer was a breach of his contract of employment although nothing had expressly been said. But it is clearly too wide to assert that everything disclosed to any employee in the normal course of his employment will be protected from further disclosure or use by him. Apart from express contract (subject to the limits stated above) an employee will only be restrained by implied contractual term if the information is the property of the employer within the definition in Printers & Finishers Ltd v Holloway.[83]

iii) Relationship giving rise to a duty not to act unfairly or take advantage

In Floydd v Cheney[84] the first defendant, an architect, had copied drawings and other documents and claimed that as a partner[85] of the firm he was entitled to retain the copies when he set up in practice on his own and to use confidential information. Megarry J said[86]

> "Such acts seem to me to be a plain breach of the duty of good faith owed by one partner to another."

The first defendant in Cranleigh Precision Engineering Ltd v Bryant[87] was the managing director of the plaintiff company when he discovered, or rather devised, the plaintiff's secret. Roskill J cited with approval the opinion of the Privy Council[88] that

> "men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect,"

and held[89] that Bryant had acquired the information as the plaintiff's managing director and so in confidence. The judge would have been prepared to imply such a term in the defendant's contract of employment if that had been necessary.[90]

A similar result can be obtained without any need for contract or express statements of confidentiality by use of the concept of constructive trust. In Boardman and another v Phipps[91] the House of Lords held that the appellants, who were not express trustees, had placed themselves in a fiduciary position in relation to the trust property and in that position had acquired information which they had used to make a profit. They must therefore account to the trust for that profit as constructive trustees. Lord Upjohn in a strong

dissenting judgment denied that information could be described as trust property, saying[92]

> "the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship"

He argued that a trustee should only be prevented from using information if it was given to him expressly or impliedly as confidential or in a fiduciary capacity and its use would place him in a position where his duty and his interest might conflict. The test he suggested was whether the knowledge was capable of being used for his own benefit to injure the trust. It is submitted that Lord Upjohn is wrong in denying that information, particularly commercial information, is truly property but that his judgment raises the valid question of the basis of the court's interference - is it loss to the plaintiff or profit to the defendant?[93] However, the case was followed in Industrial Development Consultants Ltd v Cooley[94] where on facts rather similar to Cranleigh the managing director was held liable to account to his former company as a constructive trustee and the company clearly made a windfall. Thus where the relationship can be described as a fiduciary one plaintiffs may be better advised to sue in constructive trust rather than breach of confidence, for there is no need to show that the information is confidential in nature,[95] only that it was obtained as a fiduciary, and there is no need to show detriment to the plaintiff.

In Saltman Engineering Co Ltd and others v Campbell Engineering Co Ltd there was no direct relationship between the first plaintiff and the defendant and so the action could not succeed on contract. But Lord Greene M.R. accepted a wider proposition, namely

> "If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights."[96]

Turner[97] points out that there was in that case a "close practical relationship" even though there was no contract, but the proposition quoted suggests that no relationship at all is necessary. This would, for example, give a right of action in breach of confidence against a person who found information and showed it to another not knowing whose or what it was. Turner suggests[98] that use of the word "consent" indicates that

> "non-contractual confidence can arise only when the owner of the subject-matter has the freedom of choice between relying on the recipient or of not doing so, and, as an act of confidence, does so rely on the future probity of the recipient."

Thus it is necessary that the defendant should know that the information is confidential and that the owner of it does not consent to his disclosure. Is then the fact that a found document is marked "Confidential" sufficient to ground an action in breach of confidence? In Fraser v Evans, Lord Denning M.R. said

> "No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless, once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence."[99]

The mere fact that the document is marked "confidential" is not enough since it may be obsolete and the document may have been abandoned rather than given to anyone in confidence. But once the recipient actually knows that his receipt stems from a breach of confidence or contract or (apparently[1]) that the owner of the information objects to his disclosure of it he can be restrained[2] from any further use or disclosure of the information though he is under no liability for earlier acts.[3]

c) Governmental Information

Governmental information is frequently disclosed in confidence. A "policy of secrecy"[4] is frequently employed by governing bodies of all kinds. The requirement of confidentiality may be stated by the chairman at the beginning of the meeting or printed on the documents. There may be, in local government, a resolution excluding the press and public from the meeting.[5] The governing body may make a general rule that all meetings are confidential.[6]

A requirement of confidentiality may be implied. Thus civil service consultations with outside bodies on the evolution and application of policy are "usually confidential."[7] The Fulton Report on the Civil Service, though generally in favour of more openness, said

> "At the formative stages of policy-making, civil servants no less than ministers should be able to discuss and disagree among themselves about possible courses of action, without danger of their individual views becoming a matter of public knowledge."[8]

Such discussions would probably be held by implication to have been undertaken in confidence. On similar grounds, internal discussion by officials in local government[9] as well as advice given by officials to the authority,[10] may be held by implication to have been in confidence. It is suggested, however, that no such implication would be made in the case of other governing bodies unless it could be shown that there was a public interest in maintaining the secrecy of preliminary discussion and the impartiality of advisers.

Another area in which it may be that confidentiality would be implied is where information of a political nature has been given on an "unattributable" or "background" basis. Will an injunction lie to prevent the source of the information being disclosed? In Beloff v Pressdram Ltd.[11] the plaintiff argued that it was contrary to the public interest that press sources of information should be disclosed as otherwise the sources of information which should be available to the public would dry up. When Mr Wilson's press secretary ended the daily unattributable lobby briefings to journalists he gave as a reason

> "the increasing reluctance of your members to keep secret the source of information"[12]

but said that unattributed statements were not in the interest of the general public. The judge in Beloff v Pressdram Ltd commented

> "On the other hand, it might be thought that informants, particularly if public representatives or public officials speaking on public affairs, should not be concealed by anonymity."[13]

and in a letter to the Times, Walter Merricks has said

> "This sort of journalism masks a conspiracy between politician and editor, where by the politician can circulate a story but can later deny any involvement in it if it later proves convenient for him to do so ... The public has a right to know who it is who attempts to feed us stories anonymously."[14]

Although the courts have shown some sympathy for journalists' wishes to protect their sources of information,[15] there is no overriding public interest to prevent disclosure. A further difficulty is that the only person who could claim an injunction is the person to whom the confidence is owed[16] (or the Attorney-General). The journalist would wish to protect his source (as in Beloff) but would have no locus standi;[17] if the person who gave the information tried to

prevent disclosure that would immediately indicate who it was. There would not seem to be such an overwhelming public interest as would justify intervention by the Attorney-General.

Even if the information is given in confidence, that is not sufficient ground for an action in breach of confidence unless the information is confidential in nature, as discussed above.

The question arises whether, if the information is of a confidential nature and is given in circumstances which would normally imply that it was given in confidence, that implication can be rebutted by the recipient of the information. If a person is in a position where he has a right to receive the information can he avoid the obligation of non-disclosure by unilateral decision? If a local councillor states publicly that he considers his constituents are entitled to any information which he receives, could an injunction be obtained to prevent disclosure by him on the ground of breach of confidence? If other members know of his views, can it be said that by giving him information, or stating their opinions in his presence, they accepted that he could not be bound by an obligation of confidentiality? If they know his views and disagree with him they may wish to prevent him from obtaining information, but this may not be possible,[18] so mere knowledge of his views may not indicate acceptance of them.

This was one of the matters raised in the Crossman diaries case. In his affidavit of evidence Lord Gordon-Walker, a former Cabinet colleague of Crossman said that

> "He remembered Mr Crossman saying in Cabinet that if people did not like him keeping a diary he would resign ... Every Cabinet member knew that Mr Crossman was keeping a diary ... and that it contained accounts of Cabinet meetings and committees, including accounts of the views expressed by particular ministers. The existence of the diary or its proposed publication did not in any way inhibit discussion or action by him and he could not think that they inhibited discussion or action by his Cabinet colleagues."[19]

Lord Houghton made a similar point.[20] Counsel for the Sunday Times, submitting that the Attorney-General was the wrong plaintiff, argued that the confidentiality would have had to be imposed by a minister or Civil servant who imparted the information and that only such a person could bring an action.[21] Counsel for Mr Crossman's literary executors argued that the Attorney-General would have to show that

the material had been imparted to Mr Crossman in circumstances in which he accepted that it would not be disclosed.[22] In his judgment Lord Widgery C.J. said

> "Even if, as a matter of law, a minister can release himself from a bond of secrecy [by consent of his colleagues], I do not find that Mr Crossman effectively did so. It is not enough to show that his colleagues accepted the keeping of the diary. It was vital to show that they accepted Mr Crossman's intention to use the diary whether it passed the scrutiny of the Secretary of the Cabinet or not."[23]

Although the word "accepted" is somewhat ambiguous, meaning either "knew" or "consented to", it is clear from the earlier use of the word "consent" that the judge did not consider a unilateral intention to disclose to be sufficient. Thus it would seem that only if the intention to disclose was consented to by the donor of the information could an obligation of confidentiality be excluded.

However, his Lordship went further. In the case of confidentiality of Cabinet discussion

> "since the confidentiality is imposed to enable the efficient conduct of the Queen's business, the confidentiality is owed to the Queen and cannot be released by the members of the Cabinet themselves."[24]

While no doubt correct as a matter of constitutional politeness, this rule appears not to have been recognised in practice. Harold Wilson's evidence of why he had discussed certain matters in his book was that "he had received the specific authority of the Cabinet,"[25] not of the Queen. In practical terms the meaning of the Lord Chief Justice is that there is a public interest in the confidentiality imposed on Cabinet discussion and the public interest cannot be overridden by mere private agreement. Are there other circumstances where such a rule would apply and the obligation of confidentiality would be binding inspite of agreement to disclose? Obviously if parties agreed to disclose information injurious to national security an injunction could still be obtained to prevent the disclosure.[26] Jurors cannot be allowed to disclose their discussions just because they agree to do so, since the public interest requires "finality of decisions" as well as protection of individual jurors.[27] But this requirement of secrecy and unanimity in the public interest, which appears to be a pre-requisite for protection of governmental infor-

mation by action for breach of confidence is not of wide application. Counsel for the literary executors in the Crossman diaries case said that

> "the Cabinet was an institution sui generis and it was not easy to draw parallels from other institutions."[28]

There are no other institutions, except perhaps judges and the Privy Council,[29] which can be said to be "conducting the Queen's business" in the same way. There is no need for unanimity in local government, for example where the nearest equivalent to the Cabinet is the party caucus meeting. We have not yet acquired a convention of collective caucus responsibility in local government. In many other governing situations the matter is basically one of contract and no public interest is involved. Thus an obligation of confidence which cannot be avoided even by agreement may exist in the case of the cabinet but rarely, if ever, elsewhere.

2.3. There Must Be An Unauthorised Use Of The Information To The Detriment Of The Party Communicating It.

2.3.1. Authorised Use

The use or disclosure of the information is unauthorised unless it is in some way authorised or required to be made. Express authorisation of disclosure by the person to whom the confidentiality is owed may be a problem in some areas,[30] but here it is a clear bar to action since only the person to whom the confidence is owed may bring an action for breach of confidence.[31]

Authorisation of disclosure may be implied. In Tournier v National Provincial and Union Bank of England[32] the Court of Appeal implied into the contract between a banker and client a duty of non-disclosure subject to four qualifications. Disclosure was impliedly allowed under compulsion of law, where there was a duty to the public to disclose, where the interests of the bank required disclosure and where the client expressly or impliedly consented. In Hopkinson v Lord Burghley[33] it was held that a person who sent letters marked "private and confidential" impliedly allowed their use for lawful purposes including production in court.

Disclosure may be required by the law, in which case no action for breach of confidence may lie. In Parry-Jones v Law Society[34] the Court of Appeal held that disclosure was required by statute and any contract not to disclose in such circumstances would be illegal and void. Similarly disclosure may be required at common law or by order of the court on discovery or in court proceedings.[35] It may, however, be possible to obtain an injunction against the use of

information obtained in breach of confidence even though the defendant intends to use the information in court proceedings.[36] The grant of an injunction is discretionary and at least if the court proceedings are a public prosecution no injunction will be given.[37]

2.3.2. The Need For Detriment

a) Personal Information

The disclosure of personal information in breach of confidence may sometimes cause financial detriment[38] but is more likely to cause less tangible loss such as embarrassment[39] or distress.[40] The distinction between personal and commercial information in this respect was pointed out by Warren and Brandeis.

> "Where the value of the production is found not in the right to take the profits arising from publication but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation of that term."[41]

It is doubtful whether any particular detriment must be shown by the plaintiff in these cases; injury may be assumed. In Prince Albert v Strange Lord Cottenham L.C. justified the granting of an interlocutory injunction where the plaintiff had not established the threatened invasion of a legal right by saying

> "where the privacy is the right invaded the postponing of the injunction would be equivalent to denying it altogether."[42]

No other reference was made to any detriment to be suffered by the plaintiff.

On the other hand, the fact of such intangible injury may be a factor in persuading the court to act. In Gee v Pritchard[43] Lord Eldon was rather reluctant to follow older decisions that the writer of a letter retained a joint property in it but he granted an injunction against publication saying

> "I do not say I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this court has been accustomed on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised and refuse to forbid it."[44]

In Argyll v Argyll[45] the intervention of the court was not based on the likelihood of any financial loss to the Duchess and

nothing was expressly said about distress to her. The authorities, discussed in that case, which had been considered in Rumping v Director of Public Prosecutions[46] tended to show that the law exercises a policy of protecting marriages in general rather than just the particular marriage by the rules of non-compellability of spouses as witnesses.[47] It could not be said that the Duchess's marriage would suffer by the revelations since it had already been dissolved. Thus the reason for the court's intervention in that case was not the prevention of some detriment to be suffered by the plaintiff but the public policy of upholding "the mutual trust and confidences"[48] which are shared between husbands and wives in general.

It may be that in this field the court will not only consider abuse of a relationship as sufficient injury but will also take account of injury which only indirectly affects the plaintiff. Williams v Settle concerned a photographer who had sold a copy of the plaintiff's wedding photograph to newspapers in connection with the plaintiff's father-in-law's murder. The plaintiff obtained damages for breach of copyright, the Court of Appeal saying

> "it was a flagrant infringement of the rights of the plaintiff and it was scandalous conduct and in total disregard not only of the legal rights of the plaintiff regarding copyright but of his feelings and his sense of family dignity and pride. It was an intrusion into his life, deeper and graver than an intrusion into a man's property."[49]

It is obvious that the major casualty in that case was the plaintiff's wife but the copyright in the photographs was in the husband. Willmer L.J. said

> "there is no reason why the distress caused to the wife should not be regarded as part of the injury suffered by her husband."[50]

If the facts of the case had been such that no question of copyright had applied, for example if the photograph had been taken by the defendant at a family party to which he had been invited, or the photograph had been given to him by the plaintiff, and an action had been brought in breach of confidence it is submitted that these dicta would be equally applicable. In Coco v A.N.Clark (Engineers) Ltd Megarry J said (obiter)

> "I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and

yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect."[51]

It is suggested that in such a case the court would be ready to grant an injunction.

Thus the detriment necessary for an action of breach of confidence for the disclosure of personal information may be either abuse of a relationship or injury of the widest kind suffered directly or indirectly by the plaintiff. And it may be that such injury will be assumed rather than having to be proved.

b) Commercial Information

Detriment to the plaintiff is not alone sufficient ground for an injunction or damages for breach of confidence even against a former employee. In United Indigo Chemical Co Ltd. v Robinson[52] a former employee set up a business manufacturing a product almost identical to that of his former employer, clearly to the detriment of the latter, and yet the court refused to enjoin him from using[53] information which he had inevitably acquired in the course of the employment without any stipulation of secrecy.

However, detriment to the plaintiff may convert otherwise unexceptionable conduct into breach of an employee's duty of fidelity. Thus in Hivac Ltd v Park Royal Scientific Instruments Ltd[54] employees were enjoined from working in their spare time for competitors of their full-time employer, even though they had not disclosed any confidential information. Conversely it is suggested[55] that an employee who in his spare time works for himself or another without detriment to his employer could not be enjoined from doing so.

Similarly, the surreptitious taking of information by an ex-employee is actionable if done to the detriment (at least potentially) of the former employer. In Robb v Green, Kay L.J. said

"It is enough ... to say that, where we find a servant using, after he has left his employment, a document surreptitiously compiled from his master's book to the detriment of his master, there is a breach of trust, if not a breach of contract."[56]

If the information is genuinely a trade secret of the plaintiff, disclosure will almost always be detrimental to him. If it is not used in immediate competition with him the likelihood of such use by a person against whom he would have no redress[57] is increased. The

commercial value of his secret, whether for sale or exploitation,[58] is diminished and his chances of obtaining patent protection are lessened.[59] In Terry v F.Reddaway & Co. Ltd.[60] the plaintiffs and defendant had entered into an agreement, in the compromise of an earlier action, "as far as reasonably possible not to disclose [the secret processes] to any person not a party to the action." The defendant assigned part of his business, including the exploitation of the process, to another company. The question arose whether such disclosure was within the terms of the contract and whether it had injured the plaintiffs. On the latter point Swinfen Eady L.J. said

> "The effect of the sale has been to disclose the secret to some body of persons - the persons interested in the purchasing company. They are manufacturing, and no doubt will have employees of their own to manufacture, and thus, not only is the risk of the secret becoming public substantially increased, but, to the detriment of the plaintiffs, the secret has been passed on to persons who are under no contractual obligation to the plaintiffs not to disclose the secret process."[61]

Megarry J. has noted[62] that some of the cases speak of a need for detriment but others do not mention it. He said

> "At first sight, it seems that detriment ought to be present if equity is to be induced to intervene."

but thought that there might be other circumstances where without detriment to the plaintiff the court might properly intervene.[63] Perhaps the most likely circumstances where this would arise in relation to commercial information would be where the owner of the secret was unable to use it. In Aas v Benham[64] a partner was held entitled to use information which he had received as member of the partnership but the exploitation of which was outside the scope of the partnership. On the other hand, in other cases the court has intervened and imposed a constructive trust in circumstances where a person has obtained information in a fiduciary capacity and used it to make a profit. In these cases detriment to the plaintiff need not be shown; the basis of the court's intervention is profit made by the defendant by use of his fiduciary position. It is possible that in the early case of Keech v Sandford detriment to the plaintiff was contemplated, Lord King L.C. saying

> "I very well see, if a trustee, on the refusal to

to renew, might have a lease to himself, few trust estates would be renewed to cestui que use."[65]

The rule, imposing a constructive trust whenever a profit is made[66] from a fiduciary relationship, clearly no longer requires detriment to the plaintif , if it ever did. The suggestion of the Master of the Rolls that the trustees in Boardman v Phipps could have obtained permission of the court to use the information themselves[67] is fanciful; any suspicion that the Gas Board might have changed their policy and awarded the contract to the plaintiff company in Industrial Development Corporation v Cooley[68] is far-fetched. In both of these cases the plaintiffs suffered no detriment but indeed received a windfall from the decision of the court.

Thus detriment to the plaintiff is seen to be a necessary, though not a sufficient, ingredient in an action for breach of confidence in relation to commercial information, except where the breach is seen as resulting from the use of a fiduciary relationship where profit to the defendant is sufficient. There is no real justification for this difference and it is suggested that the better approach would be that, whereas in either case detriment might be presumed, if the defendant could show that in the particular circumstances no detriment had been caused he should not be held liable either for breach of confidence or as a constructive trustee.[69]

On the other hand, a plaintiff may complain of a detriment which it is not in the public interest to recognise. If the plaintiff's complaint is that the disclosures of the defendant have resulted in detriment to his commercial reputation or the reputation of his goods and the disclosures of the defendant are substantially true, on analogy with the law of defamation the plaintiff should not succeed. If, as is suggested, the law in the this area is protecting property the plaintiff is claiming property - a commercial reputation for himself or his goods - by deluding the public and he cannot complain if he loses it. Thus an ex-employee may reveal the misleading nature of his advertisements[70] even if no offence has been committed.[71] So also presumably the employee, or an employee of an advertising agency working for the plaintiff, could reveal that the ingredients are not as indicated or the product does not have the properties claimed for it.[72] The plaintiff's claim is to protection of his property against loss by breach of confidence, not just the upholding of obligations of confidence in themselves.

c) Governmental Information

The basis of the intervention of the court in these cases is the public interest - there must be a public interest which makes the information confidential and which makes the circumstances of its communication confidential. It follows, therefore, that the disclosure to be restrained must be of potential damage to the public interest. In the Crossman diaries case the court looked carefully at the Cabinet information and decided that none of this information would undermine the doctrine of joint Cabinet responsibility even though many of the people concerned were again in government and many of the problems were similar. Lord Widgery C.J. rejected suggestions[73] of a thirty-year limit by analogy with the Public Records Act 1967 or a limit of the public life of the persons concerned[74] and said

> "The court should intervene only in the clearest of cases where the continuing confidentiality of the material can be demonstrated."[75]

This contrasts with the attitude of the court to the need for detriment in disclosure of personal information. In that case detriment may be presumed and the protection given may be extensive, for example beyond the breakdown of the relationship[76] or for the whole life of the individual,[77] whereas in the case of governmental information even though the information is confidential in nature and given in circumstances of confidentiality a present need for restriction must be shown by the plaintiff[78] and the extent of restraint will perhaps be limited to that need.[79]

3. Defences To An Action For Breach Of Confidence

In Fraser v Evans Lord Denning M.R. said

> "No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so."[1]

The extent of "just cause or excuse" is not yet settled.

a) Publication In The Public Interest

i) Disclosure Of Iniquity

a) What is iniquity?

In Gartside v Outram, Wood V-C said

> "There is no confidence as to the disclosure of iniquity."[2]

If the duty of confidentiality is contractual[3] and the contract is illegal then obviously the duty of confidentiality cannot be enforced.[4] In deciding whether the contractual provision is illegal

> "the crucial question is the tendency of the contract

itself - will it, if carried out according to its terms, operate to the public detriment?"[5]

In Weld-Blundell v Stephens[6] the House of Lords held that an agreement not to disclose a libellous statement was not contrary to public policy. On the other hand, an agreement not to disclose information about past and possible future frauds on a third party was contrary to public policy as the agreement would disable the third party from prosecuting or preventing recurrence of the frauds.[7]

However, the defence of disclosure in the public interest does not depend on invalidating an express contractual provision but is a general defence "based on a general provision of the common law."[8] The difficulty arises in deciding how far it extends.[9] Both Lord Denning M.R. and Salmon L.J. have given examples. Thus

> "The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always - and this is essential - that the disclosure is justified in the public interest."[10]
>
> "I do not think that the law would lend assistance to anyone who is proposing to commit and to continue to commit a clear breach of a statutory duty imposed in the public interest."[11]

The Court of Appeal has refused an injunction against disclosure of

> "medical quackeries ... such dangerous material that it is in the public interest that it should be made known,"[12]

and another where the plaintiffs had sought favourable publicity. Lord Denning M.R. said

> "If the image which they fostered was not a true image, it is in the public interest that it should be corrected ... As there should be 'truth in advertising,' so there should be truth in publicity. The public should not be misled."[13]

The defence of disclosure in the public interest is now perhaps wider than the list given by Ungoed-Thomas J. in Beloff v Pressdram Ltd, namely

> "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."[14]

One would hardly describe misleading publicity about the lives of pop-stars as "of a serious nature and importance to the country" however disapproving one might be. North has suggested[15] that the grounds for the defence are analogous to the grounds on which a contract is rendered void for illegality. There is much sense in this because in both cases the public interest is invoked as a reason for overriding private rights,[16] but in view of the restricted nature of "immoral" contracts[17] it would seem that Woodward v Hutchins is outside this analogy also.[18]

b) To whom may the information be disclosed?

It has been suggested that the defence will only apply if disclosure is made to the right person. Lord Denning M.R. has said

"The disclosure must, I should think, be to one who has a proper interest to receive the information."[19]

There are no cases where the court has decided that disclosure would only have been defensible if it had been made to someone else, though that was contended for by counsel in Initial Services Ltd v Putterill,[20] As Salmon L.J. said

"it raises questions of great importance with far-reaching consequences about which there is very little relevant authority."[21]

The obvious analogy which suggests itself is qualified privilege in libel. Disclosure there is authorised if made to one who has a duty or interest to receive the information.[22] May not the same test be applicable to breach of confidence? However, there is good reason for a more restrictive approach to privilege in libel because here ex hypothesi the statement to be protected is both damaging and untrue.[23] In breach of confidence the statement, though probably damaging, will be true or the plaintiff would be suing in libel.[24] There is therefore less ground to protect the plaintiff in breach of confidence because strong counter-arguments for freedom of speech[25] can be raised. A difference of approach is seen in relation to publication in the press. It is doubtful whether qualified privilege in libel can exist for a publication in the press unless the publication was a matter of duty or in response to a public attack.[26] But in Initial Services

Ltd v Putterill publication had been in a national newspaper and the Court of Appeal refused to strike out the defence of publication in the public interest. Even Lord Denning M.R. who had suggested the restriction, accepted that

> "There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication . . even to the press."[27]

This seems reasonable since one of the grounds for allowing disclosure in that case was to correct misleading circulars sent to the public and a newspaper was perhaps the best way of getting that information to the people affected.[28] Similarly, in Hubbard v Vosper,[29] where the defendant was proposing to publish a book, this might be the best way of reaching those likely to be affected by the offending information.

If the confidentiality was contractual only and the contract is held void as contrary to public policy, it appears that there is no restriction on who may be informed. In Howard v Odhams Press Ltd.[30] the ground of public policy which invalidated the contract was the need to allow injured third parties to protect themselves. But the disclosure was made to the plaintiff's trade union and not to any injured third party. Thus, if any restriction on the persons to whom disclosure should be made arises in breach of confidence actions, it arises only where there is a duty of confidence but a restricted publication is allowed in the public interest; it does not arise where the only duty of confidentiality is itself held void.[31]

Lord Denning M.R. also suggested in Putterill that the defence of publication in the public interest might not apply if the defendant had received payment for the information. He said

> "It is a great evil when people purvey scandalous information for reward."[32]

With respect, this should surely be irrelevant. If the disclosure is in the public interest then it is no less so if the defendant is paid. Indeed, since he may well lose his job for making the disclosure,[33] payment may not be unreasonable. The protection which the law gives to police informers[34] is not removed if they are paid. The only question which should be relevant is whether the disclosure is beneficial to the public interest.

c) Is disclosure a duty?

It might be thought, from some of the dicta, that where disclosure is authorised in the public interest it may also be required. In

Putterill Lord Denning M.R. quoted from the old case of Annesley v Earl of Anglesea

> "no private obligation 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."[35]

In Fraser v Evans Lord Denning himself said

> "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."[36]

It is clear that there are some circumstances in which information may have to be given in spite of its normally confidential nature. For example, there is a common law duty to give information to the police about treason;[37] some statutory provisions require disclosure;[38] the court may order disclosure of confidential information in legal proceedings. All these circumstances are based on the public interest and no action for breach of confidence would lie.[39] But it is submitted that the duty to disclose is not co-extensive with the defence of disclosure in the public interest. This would be to introduce a wider common-law duty to interfere than is justified. There may be many circumstances in which disclosure may be permitted though it could not be required. For example, in Frank Truman (Export) Ltd. v Metropolitan Police Commissioner[40] the police were allowed to keep, and use[41] for the purposes of a prosecution, documents which they had been given by the plaintiff's solicitor. But the court made it clear that the solicitor would have been justified in retaining the documents and claiming legal professional privilege for them.[42] Whether the owner of the documents could sue the solicitor for breach of confidence is uncertain. His difficulty would be that if they disclose no wrong he would probably suffer no detriment from the disclosure whereas if they do disclose a wrong he will be met by the defence of "no confidentiality as to the disclosure of iniquity."

Even where confidential information could be required, there may be no duty to disclose it without a court order, either where a claim of privilege might be made[43] or where no such claim could be made.[44] So it cannot be said that because publication of information would be justified such publication can be required. There must be a common law[45] or statutory duty or a court order before a person can be required[46] to disclose confidential information.

ii) Disclosure Of Information Useful To Society

In Philip v Pennell[47] the defendants were wishing to use the information contained in letters which they had received without any requirement of confidentiality. They were not intending to publish the text of the letters and so no question of breach of copyright arose.[48] Kekewich J refused an injunction on the ground that the recipient of a letter is entitled to use it for "any lawful purpose short of publication." In the course of his judgment, discussing whether the proposed use was within the writer's intention, he said that a man has a duty

"to make his life and experience useful to others"[49]

and so he should consent to such a use. In the earlier case of Thompson v Stanhope[50] the court had clearly considered that publication of letters of education from the Duke of Chesterfield to his son would be helpful to the public and recommended to the Duke's executors that they should consent to publication if there was nothing objectionable in the letters. There was no suggestion in the case that the executors were under a duty to allow publication, but the dictum in Philip v Pennell suggests that they might be.

In Slater v Raw, where an interlocutory injunction was sought to prevent a newspaper from publishing articles in breach of an alleged contract, Lord Denning M.R. is reported as saying

> "The freedom of the press to publish fair comment on matters of public interest was of the highest importance. No court should grant an injunction to restrict a newspaper publishing except in the most extreme circumstances."[51]

In relation to governmental information at least, the Crossman diaries case[52] seems to have not only reversed the burden of proof in relation to the public interest - the plaintiff must show that restraint is in the public interest and that there is no more compelling aspect of the public interest which would justify disclosure - but also to have widened the ambit of relevant public interest. Thus it may be that, at least in relation to governmental information, a defence that publication is for the benefit of the public[53] may lie.

> "Presumably defendants will be able to justify their actions according to the same broad criteria by which plaintiffs seek to enforce confidentiality."[54]

Can it therefore be said that there is a general defence to breach of confidence that disclosure is for the benefit of the public? This

may be important in many different areas. It may be that the plaintiff is said to be stifling an invention which it would be in the public interest to have known and available. Patent legislation protects the inventor but also the public interest in ensuring that the invention is thereafter generally available. Should an inventor - or purchaser from him - be able to stifle the invention by imposition of confidence?[55] The courts attack the edges of the problem by refusing an interlocutory injunction where the secrecy of the information is uncertain[56] or the duty of the defendant is in question[57] but have never gone so far as to suggest any such general defence. The Law Commission have suggested a defence of lack of good faith on the part of the plaintiff;[58] it is suggested that a better solution would be a statutory right subject to safeguards analogous to the compulsory grant of a patent licence.[59]

Another situation where a defence of disclosure for the public good may be raised concerns the publication of personal information about well-known people. It has been argued, for example,[60] that we should know about the dangers of poor judgment or rash actions by public men in a state of chronic ill-health. The Press Council Declaration on Privacy[61] has pointed out that there is a difference between stories of interest to the public and stories which need to be published in the public interest and states that publication of details about the private life of any person is only justified where it can be shown to have served an identifiable public interest. The Declaration has been endorsed by the report of the Royal Commission on the Press.[62] A defence to breach of confidence might lie on this ground if some 'iniquity' were disclosed but whether it would go further is doubtful. Such information might validly be reported if obtained without confidentiality but the protection of confidences would normally be as important as the revelations.

In cases where the defence expressly raised has been that publication would be of benefit to the public the court has been very cautious. In Fraser v Evans Lord Denning M.R. did not want to limit the defence to disclosure of iniquity but thought that publication of the plaintiff's report on the public relations programme of a foreign government would not come within any defence of "just cause or excuse for breaking confidence."[63] In Beloff v Pressdram Ltd the court expressly restricted the defence of public interest to the disclosure of misdeeds. Thus to tell the public certain ministers' views about possible future successors to the Prime Minister was not a disclosure justified in the public interest.[64]

These cases indicate the difficulty of propounding a defence of this nature for it would involve the court in weighing up various arguments about what is for the public benefit. Just as in criminal law the defendant's motive is normally irrelevant to his guilt, however public-spirited he may be,[65] so it would seem that a defendant's motive in breaching a confidence will normally not be a defence. The exception to this is Attorney-General v Jonathan Cape Ltd. Perhaps it can be said that the courts recognise a basic public interest in knowing information about government, just as it recognises a basic public interest in freedom of speech, and this will only be lost if the plaintiff can show a countervailing public interest in secrecy. Whether the courts will be prepared to recognise this basic public[66] interest in relation to other governmental bodies like local authorities and members' clubs, remains to be seen.

iii) Freedom Of Speech

It is well-established that the court will not grant an interlocutory injunction to restrain a libel if the defendant intends to plead justification.[67] The reason for this is that

> "the interest of the public in knowing the truth outweighs the interest of a plaintiff in maintaining his reputation."[68]

This rule cannot be side-stepped by framing an action in some other way, if it is essentially a matter of libel.[69] So the court has sometimes treated a claim of breach of confidence as so inter-twined with a claim of libel that the libel claim is the substantial one and an interlocutory injunction has been refused. For example, in Woodward v Hutchins Lord Denning M.R. said

> "I cannot help feeling that the plaintiffs' real complaint here is that the words are defamatory; and as they cannot get an interlocutory injunction on that ground, nor should they on confidential information."[70]

However, there is no absolute rule that the court will refuse an interlocutory injunction if libel is also claimed. In Fraser v Evans Lord Denning M.R. said

> "I can equally well see that there are some cases of breach of confidence which are defamatory, where the court might intervene, even though the defendant says that he intends to justify."[71]

It depends on what is the basis of the court's intervention. One can see that in a case like Argyll v Argyll[72] some incidential inaccuracies would not detract from the importance of protecting the confidentiality

of the relationship between husbands and wives in general, and such protection would be lost if the defendant were allowed to publish. Similarly, if part of the claim in the Crossman diaries case[73] had been libel that would not be a ground for an absolute bar on the granting of an interlocutory injunction if the public interest had required non-disclosure. But in commercial information cases, the public interest is in protecting property rather than the relationship of employer and employee as such and, as argued above,[74] a plaintiff is not entitled to the protection of his property if it is based on untruth. Just as the law will not protect a reputation which is undeserved so it will not protect undeserved property. In both Initial Services Ltd v Putterill[75] and Woodward v Hutchins[76] the contention of the defendant was that the goodwill of the plaintiff had a value based, to an extent, on misleading publicity. If this was so, although the defendant knew it because of his position as employee, there would be no public interest in protecting the plaintiff. He would obtain, at most, nominal damages for breach of confidence.[77] The public interest in knowing the truth would outweigh that of the plaintiff in trying to protect his property and so the court would be right to refuse an interlocutory injunction.

In Re.X[78] Lord Denning equated the importance of freedom of the press with the importance of circulation of true information, and the Court of Appeal emphasised that the existing restrictions on that freedom should not readily be extended.[79] Is this a ground for refusing to restrain a breach of confidence where the complaint is only the breach of confidence and not untruth? In other words, is truth a complete defence to an action for breach of confidence? If the purpose of an action for breach of confidence is only to prevent embarrassment, it would seem on analogy with Re.X that the court would at least refuse an interlocutory injunction. For that case concerned a child - and the court is assiduous in protecting the interests of children - and the risk of psychological injury was direct and likely. If the court was not prepared to prevent publication in such a case, would it do so merely because the information had been received in confidence? But, despite the width of some of the dicta, the basis of the court's intervention in breach of confidence is not simply that the information was received in confidence.[80] There is an intervention in the public interest which may be the protection of a type of relationship which it is in the public interest to protect, protection of property or protection of the security or well-being of society or protection of

the sanctity of contracts. In all these cases there is a public, not merely a private, interest to be balanced against the public interest in freedom of speech.

Sometimes, a duty of confidentiality is contractual and as a negative covenant an injunction would, on general principles, be granted automatically without reference to the public interest.[81] Such an agreement may, however, be held void on the ground of uncertainty or as an invalid restraint of an employee or ex-employee. It has been suggested that such an agreement may also be void as an excessive fetter on freedom of speech. Both the cases[82] have been ones where the court would wish to raise a public interest in knowing the information, and it is right that the court should be able to do so. But there is no judicial precedent for such an interference with the contract, perhaps because normally to restrain a party to a contract from making a disclosure does not restrain anyone else and so is not a significant restriction on freedom of speech. The courts have been very ready in breach of confidence cases to restrain third parties with knowledge of the confidentiality and so the extent of the restriction may become significant. It remains to be seen whether these suggestions will become law.

iv) Public Right To Know

The right of the public eventually to know information pertaining to central government is recognised by the Public Records Act 1958.[83] The Act requires every person responsible for public records to select those records "which ought to be permanently preserved"[84] and provides that, generally speaking, all such records will be available for public inspection thirty years after they were compiled.[85] Public records are widely defined under the Act[86] to include the records of government departments and other bodies as well as courts and tribunals, but the Act does not apply to local authorities.[87] Public access to documents kept by the Public Records Office may only be further restricted if the Lord Chancellor prescribes a different period for a class of documents[88] or the department concerned, with the approval of the Lord Chancellor , wishes to retain them for some " special reason."[89] Information which was obtained from members of the public

> "under such conditions that the opening of those records to the public ... would or might constitute a breach of good faith,"

may be kept secret for a longer period or made accessible to the public only on conditions.[90]

Thus, in the Crossman diaries case the Attorney-General could not argue that Cabinet information must always be protected since it would eventually become available under the Public Records Acts. The Lord Chief Justice rejected the thirty-year analogy as excessively restrictive and stated that the court should intervene to prevent disclosure

> "only in the clearest of cases where the continuing confidentiality of the material can be demonstrated."[91]

The Attorney-General would have to show not only that the publication would be a breach of confidence and contrary to the public interest but also

> "that there are no other facets of the public interest contradictory to and more compelling than that relied on."[92]

So the public right to know appears to be a sufficient defence for disclosure of confidential governmental information, without having to show why this is beneficial to the public, unless the plaintiff can show a supervening public interest in the maintenance of secrecy. The only areas of supervening interest in secrecy recognised in the Crossman diaries case are the maintenance of joint Cabinet responsibility and national security (and perhaps very recent advice by civil servants). Clearly this case shows that much information which may be discussed in confidence and which would in other contexts be treated as personal information and given a high level of protection is not so treated when in a government context. Thus discussion of the personal affairs of an individual and matters such as the promotion or dismissal of an employee are sufficient grounds for a local authority meeting to be held in private[93] and would normally be thought a solid basis for an action for breach of confidence.[94] But discussion of the capacity and suitability of public servants in the Crossman diaries "may amount to cowardice or bad taste"[95] but could not be enjoined in law. There is a public interest in knowing the abilities of public servants which was not overridden, in that case, by any other public interest.[96]

This defence of the public right to know in an action for breach of confidence appears not to be available in other areas. It is no defence to a breach of the Official Secrets Act. It was argued that the defence of communication to

> "a person to whom it is in the interest of the State his duty to communicate it"[97]

applied to disclosure in the Press indicating that false information had been given to Parliament but the Judge rejected the submission.[98]

The defence of a public right to know the full facts was also rejected by the Court in granting an injunction against use of documents disclosed on discovery in the Thalidomide case.[99] The court emphasised that the plaintiffs only had to show an arguable case[1] but indicated that it was not clear on the facts that publication would be in the public interest. However, the European Commission on Human Rights has held that the "contempt" injunction against an article on Thalidomide[2] violated the rights of free speech, in article 10 of the European Convention on Human Rights. The Commission said

> "If the public interest to clarify matters of great importance cannot be satisfied by any kind of official investigation it must, in a democratic society, at least be allowed to find its expression in another way. Only the most pressing grounds can be sufficient to justify that the authorities stop information on matters the clarification of which would seem to lie in the public interest."[3]

Thus it may be that the partial recognition of a defence of public right to know which appears in the Crossman diaries will receive an important boost from the interpretation of Article 10 of the European Convention on Human Rights. In the end it is a matter of balancing different aspects of the public interest but it is significant that the courts are at last recognising that a public right to know is an aspect of the public interest in relation to governmental information which should not be ignored.

b) The Position Of The Defendant

i) The original donee of the information.

The question whether the original recipient of the confidential information may say as a defence that he did not receive it in confidence has been discussed above[4] and it has been seen that an objective test should be used in deciding whether an obligation of confidence was implied.[5] An express contract not to be bound by confidentiality is permissible except where the public interest overrides private contractual rights.[6] In Seager v Copydex Ltd[7] the defendant company's employees had received the information in confidence but later used it, honestly believing it to be their own. The Court of Appeal refused to grant an injunction against further production of their product but awarded damages for breach of confidence, and indicated that on payment of the damages the property would vest in the defendant company[8] - a kind of compulsory sale by the plaintiff. This case has

been criticised on the ground that if liability for breach of confidence is based on a duty to be of good faith

> "a defendant who has acted reasonably in believing that he was not breaching the plaintiff's confidence in acting as he did should owe the plaintiff no duty"[9]

and also on the ground that if confidential information is to be treated as 'industrial property' an injunction should have been granted as it would have been for infringement of patent or copyright and no compulsory sale would have been forced on a patent or copyright owner in those circumstances.[10] It is suggested that the better decision would have been that payment allowed the defendant a right to use the information but did not destroy the plaintiff's right also to use it, a right which he could share with others or assign to another but no longer an exclusive right. This is similar to the compulsory licence which may be granted against a patent or copyright owner[11] and should not be enforceable for longer than the patent period. It enables the plaintiff to have a fair return for what he has done and the chance of improving on it and prevents the stifling of inventions.

Nevertheless it is clear that the donee of the information cannot say as a defence simply that he forgot, or did not know, that he had an obligation of confidentiality.

ii) A subsequent recipient of the information with knowledge of the confidentiality.

Where the defendant is not the original disclosee the question arises whether any action may lie against him for breach of confidence. The fact that the original obligation of confidence was contractual does not provide an automatic "third party" defence for a subsequent disclosee with full knowledge of the position. In these circumstances the wide dictum of Lord Greene M.R. in Saltman Engineering Co.Ltd. v Campbell Engineering Co is applicable.

> "If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights."[12]

A similarly broad statement has been made in a case where a newspaper had bought documents made available on discovery in an anticipated action. Talbot J said

"Those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed. I also consider that this protection can be extended to prevent the use by any person into whose hands they come unless it be directly connected with the action in which they are produced."[13]

In both these cases the defendant obtained the information in the knowledge that it was originally given in confidence; it is not surprising that he incurred liability.

iii) A subsequent recipient of the information with no knowledge of the confidentiality.[14]

In Morison v Moat[15] it was suggested that no action would lie against a bona fide third party purchaser of the information, a not surprising statement in view of the wholly equitable nature of the action and relief sought. Nevertheless, even in the nineteenth century cases, injunctions were granted against third parties who were honest purchasers on the ground that the information "must have" been procured surreptitiously or as a result of "a breach of trust, confidence or contract,"[16] by the original donee or someone in the chain. The court did not require proof of the breach. For example, in Tipping v Clarke Wigram V.C. said

"If the defendant has obtained copies of books, it would probably be by means of some clerk or agent of the plaintiff; and if he availed himself surreptitiously of the information which he could not have had except from a person guilty of a breach of contract[17] in communicating it, I think he could not be permitted to avail himself of that breach of contract."[18]

The defendant in that case could be said to know of the breach of contract as could perhaps the defendants in Abernethy v Hutchinson by whom the plaintiff's lectures

"must have been procured in an indue manner from those who were under a contract not to publish for profit,"[19]

and indeed Lord Eldon was careful to decide that case solely on the basis of the contract, saying

"If the pupil could not publish for profit, to do so would certainly be what this court would call a fraud in a third party."[20]

But the defendant in Prince Albert v Strange had an honest belief that the person who sold him copies of the Royal Family's etchings was legally entitled to do so. Nevertheless the court assumed, in the absence of evidence, that the defendant's possession must have originated in a breach and granted an injunction since

> "the matter or thing of which the party has obtained knowledge being the exclusive property of the owner he has a right to the interposition of the court to prevent any use being made of it."[21]

There are many ways today in which information may be obtained without illegality or breach of any duty, for example by photography,[22] so if information is sold to the defendant it may not be easy for the plaintiff to say that it "must have" originated in a breach.[23] If the defendant himself used reprehensible means to obtain the information no doubt the court will be ready to impose liability upon him,[24] but if he acquired the information bona fide and for value and it is not known whether or not it was acquired through a breach of confidence or other wrong the court will have to decide whether the basis of liability is protection of the plaintiff's property or the protection of relationships. It is suggested that if the information is commercial it should be protected as property on analogy with the torts of conversion and trespass to goods where innocence is irrelevant;[25] if the information is personal, in the absence of a general right of privacy,[26] liability should only lie if it "must have" been obtained by breach of a relationship which it is the policy of the law to protect;[27] if it is governmental it should only be protected if the public interest in non-disclosure outweighs the general public interest in knowing such information.[28]

iv) The effect of subsequent knowledge of a breach of confidence.

In Stevenson, Jordan & Harrison Ltd v Macdonald & Evans[29] the judge[30] was prepared to grant an injunction to restrain publication of a book although he accepted that the defendants had in good faith bought the material without knowledge of the breach of confidence. He said

> "The wrong to be restrained is not the entry into the contract to publish, but the act of publishing, and an innocent mind at the time of the former cannot overcome the consequences of full knowledge at or before the time of the latter."

In Printers and Finishers Ltd v Holloway and others[31] Cross J. granted an injunction against a company whose employees had, in breach of the

first defendant's duty, been given access to the plaintiff's secrets. The judge accepted that the company had not knowingly participated in the breach or induced it and refused to award damages but based himself on Prince Albert v Strange saying

> "There the court granted an injunction against a defendant who was not, or at all events was assumed by the court not to have been, implicated in the breach of confidence in question."[32]

In Fraser v Evans Lord Denning M.R., giving a brief summary of the law of breach of confidence, said

> "Even if he comes by it innocently, nevertheless, once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence."[33]

It is submitted that this rule is highly suitable for breach of confidence of the Argyll or Crossman type where the basis of restraint is the public interest and it would clearly be wrong to allow a person knowingly to flout the public interest. But the rule could produce unfairness where, for example, a bona fide purchaser has incurred much expense in preparation for use of the information.[34] It has been suggested[35] that the judge in Stevenson, Jordan & Harrison Ltd. v Macdonald & Evans was influenced, in deciding to grant an injunction, by the fact that the publishers had a contractual indemnity from the writer and could therefore sue his estate for their loss. If the duty on the defendant is not to take "unfair" advantage at least the plaintiffs should have been required to indemnify the defendants and then been subrogated to their claim against the writer.

North suggests[36] that different factors may be relevant in deciding whether to grant an injunction or damages against an innocent third party. An injunction should lie only if no real harm will be done to the defendant or if the nature of the confidentiality requires it. On the other hand

> "It may well be that where an interest in confidential information can be defined in terms of a property interest, then interference with that interest, albeit innocently, should sound in damages at common law."[37]

Jones, whose thesis is that all breach of confidence is based on "an equitable duty to be of good faith," rather surprisingly[38] rejects an absolute defence of bona fide purchaser on the ground that this may produce unfairness to the plaintiff but suggests a defence that

"he has irrevocably changed his position to his detriment so that it would be inequitable to grant the plaintiff any relief."[39]

It is submitted that the analysis of North rightly emphasises the different bases on which confidentiality is protected and by implication at least recognises the importance of the public interest in relation to the protection of personal and governmental information. If, as is suggested, commercial information is to be treated as property an automatic right to damages for tortious interference with that property follows. But if a defence of change of position were recognised generally in tort, then such a defence would be equally applicable in relation to breach of confidence in respect of commercial information.[40]

v) Subsequent recipient not bound by confidentiality.

In Philip v Pennell[41] an action was brought to restrain the defendants from using information derived from letters which they had acquired in a biography of Whistler. Kekewich J held that although the letters might be confidential in the hands of the receiver, because of the confidential relationship between the writer and the recipient,[42] this would not be a ground for restraining their use[43] by a third party who obtained them without fraud. He declared

"It cannot be said that the confidence runs with the letters."[44]

Since the judge made this decision expressly on the assumption that the original donees

"could not communicate them without breach of confidence, which would give the plaintiff a cause of action against them"[45]

this case is apparently in conflict with the decisions discussed above. It would be easy to dismiss it as anomalous but it may be of great importance. In Alilueva v Flegon[46] Stalin's daughter sought an injunction to prevent the publication of a book about her father on the ground that it contained information which must have been obtained by a breach of confidence by someone in Russia. The action was compromised but the judge expressed doubts whether an innocent recipient of the information could be enjoined.[47] There can be seen here a conflict between protection of confidence and freedom of speech. Almost any biography will contain information received from friends, neighbours or relatives of the subject. Can he, or his family if he is dead, prevent publication on the ground that the information was imparted in breach of

confidence? It was argued above that personal information, not obtained surreptitiously or under statutory powers, will only be protected from disclosure if the information is both confidential in nature and obtained only by virtue of the special relationship and there is a public interest in the protection of that type of relationship. These rules should be applied in these circumstances with the result that any information which was common knowledge or publicly obtainable[48] at the time will not be protected whatever the defendant's source. Other information will only be protected if the informer was a spouse, doctor or priest or a person in some analogous relationship to the subject and he only obtained the information by virtue of that relationship.[49] The public interest in protecting such relationships here outweighs the public interest in knowing about the lives of others.[50] But there is no public interest in protecting relationships of neighbours, friends[51] or other relatives. Kekewich J was right to say that the confidence does not run with the letters[52] but it does run with those relationships which it is the policy of the law to protect, and third parties in such circumstances will not be allowed to publish confidential information however innocently they have obtained it.

vi) Contractual liability for breach of confidence for disclosure by a third party.

It is a matter of construction of the contract whether it includes liability for disclosure by third parties. The contract with a bank clearly includes disclosure by employees of the bank[53] and that with a solicitor includes disclosure by his clerk.[54] But in Easton v Hitchcock,[55] although the private detective's contract with the client was held to include an implied warranty of secrecy, the term did not extend to warranting secrecy by employees after their employment had ceased. Thus the former employee who warned the suspect that he was being watched did not cause his ex-employer to breach her contract[56] though he obtained the information through the employment and she would have been in breach if she had herself made the disclosure. It may be[57] that the warranty could have included liability for employees and ex-employees causing reasonably foreseeable damage since this was clearly needed to protect the client's property.[58]

However, it is even less likely that the contract will be construed as warranting non-disclosure by unconnected third parties. Thus it would seem that the Greek government could not have sued Mr Fraser[59] nor could Mr Whitelaw have sued Miss Beloff[60] when in both cases the information which they had agreed to keep secret was

surreptitously taken by someone else and disclosed. Since these contractual donees would not be liable in contract the strict rule that a person not entitled to the benefit of confidence cannot sue[61] is reasonable; if they were to be liable in breach of contract they should not be unable to recover damages from the person primarily responsible for the loss.

c) The Behaviour Of The Plaintiff

If the law relating to breach of confidence is wholly equitable the plaintiff's behaviour is always relevant since "He who comes to equity must come with clean hands" and "He who seeks equity must do equity."[62] If it has to some extent become a tort[63] the plaintiff will be entitled as of right to damages for loss, but the grant of an injunction is still in the discretion of the court as an equitable remedy. The cases indicate that the court is prepared to take account of the plaintiff's behaviour.

Thus, in Argyll v Argyll there was much discussion as to whether the Duchess's earlier breach of marital confidence or her immoral attitude to marriage debarred her from relief. In deciding that they did not, the judge said

> "A person coming to equity for relief - and this is equitable relief which the plaintiff seeks - must come with clean hands; but the cleanliness required is to be judged in relation to the relief that is sought."[64]

In Hubbard v Vosper on the other hand Megaw L.J. in refusing an interlocutory injunction said

> "there is here evidence that the plaintiffs are or have been protecting their secrets by deplorable means . . . and, that being so, they do not come with clean hands to this court in asking the court to protect those secrets by the equitable remedy of an injunction."[65]

Similarlyin Woodward v Hutchins in refusing an interlocutory injunction the Court of Appeal were clearly influenced by the behaviour of the plaintiffs. As Bridge L.J. said

> "It seems to me that those who seek and welcome publicity of every kind bearing on their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light."[66]

So even if the plaintiff's behaviour is not so antisocial that its exposure is in the public interest within the defence of "no confidence as to the disclosure of iniquity," nevertheless the court may take account of it at least in deciding whether to grant an injunction. And in many of the, non-commercial, cases the refusal of an injunction is effectively the refusal of any relief because the plaintiff's concern is to prevent disclosure of his secrets rather than to ensure that he, rather than another, benefits from their exploitation. Where commercial information is concerned the plaintiff's past behaviour is less crucial except insofar as he may have been careless with his secret[67] or made it public[68] and so may not merit the protection of the court. In relation to future conduct, Cornish has suggested

> "It may well ultimately be that the courts will grant injunctions [to prevent the defendant getting a head-start] except in reasonably well-defined situations where the only result would be to keep new industrial ideas incold storage completely."[69]

The courts have been less sophisiticated in requiring a plaintiff to "do equity" than some would like. The 'compulsory sale' aspect of the damages award in Seager v Copydex Ltd[70] has been said to be unfair;[71] conversely Jones argued[72] that the plaintiff in Stevenson, Jordan & Harrison Ltd v Macdonald & Evans Ltd[73] would have been over-benefitted to the detriment of the defendant and should have had to indemnify him.

It is suggested that damages awards should allow the defendant a licence rather than purchase of the information, so not extinguishing the plaintiff's interest completely but preventing the stifling of inventions. Perpetual injunctions should not be granted in commercial cases unless the defendant had acted unconscionably (for example taking the information surreptitiously) and otherwise injunctions should not extend beyond, at latest, the patent period and should not be granted at all if it would be unfair to the defendant. Thus if the information was mixed with his own, the information would soon be generally available or the plaintiff had led him to believe that he would not use the information or would not object to the defendant's use and the defendant thereafter incurred expense, these are all grounds for refusing injunctions though damages should be available in commercial cases. But a misleading plaintiff should receive no more than nominal damages.

d) Benefit To The Plaintiff

It is doubtful whether it is a defence to an action for breach of confidence that the disclosure or use of the information was made for the benefit of the plaintiff, though it is clear that where a constructive trust is sought of profit made by the disclosure or use of confidential information by a fiduciary it is no defence that the plaintiff also benefitted[74] or that it was necessary in the interests of the plaintiff.[75]

A disclosure or use of confidential commercial information may not be actionable if the plaintiff has not suffered, and is not likely to suffer, any detriment.[76] The basis of the claim is the protection of the plaintiff's financial interest in the information so if he has suffered no loss there is no need for intervention.[77]

Where a person is seeking to disclose governmental information, benefit to the public may be an aspect of the public interest to be taken into account[78] but it is not an absolute defence.

The area where this defence is most likely to be of importance is that of disclosure of personal information. A doctor may wish to disclose his patient's weakness to his employer to prevent him being injured at work, or a student counsellor may wish to tell a tutor of the student's misfortunes so that he may be treated sympathetically by the Examinations Board. Or the employer or tutor may expect to be given such information but be refused on the ground that it would be a breach of confidence. In the present state of the law it cannot be said that the defendant's motive of helping the plaintiff would be an absolute defence and indeed the courts might say that the protection of relationships of confidence is of more importance than allowing disclosure for the benefit of an individual. Furthermore, in normal circumstances people should be allowed to make their own decisions on whether they prefer to have their information known or not. The doctor or student counsellor will no doubt try to persuade the patient or client to authorise disclosure, but in the end if he refuses the confidant is not entitled to overrule him. Nevertheless, there may be circumstances when it is impracticable to seek consent to disclosure and the person with the knowledge to prevent injury should be protected if he discloses it. In the inquiry into the death of Maria Colwell[79] it was said that as a result of

> "the fatal failure to pool the total knowledge of the child's background, recent history and physical

and mental condition, the last real opportunity of removing her [from the person who beat her to death] was missed."

The protection of confidentiality is a hollow gain in such circumstances; it should be a defence to an action for breach of confidence that the information was disclosed in a reasonable belief that disclosure was in the interests of the plaintiff.

e) Prevention of Injury To Third Parties

Unless provided by contract or by statute, there is no duty on the holder of confidential information to disclose it to prevent injury to third parties. Factory inspectors knew the dangers of asbestosis long before they were made public but under the Factories Acts they were not allowed to tell those most in danger. This situation has now been changed by statute.[80] One of the contributory causes to the death of Maria Colwell was the non-disclosure of information by the police and Department of Health and Social Security about her mother and step-father; both groups later took steps to amend the rules.[81]

Unrestricted disclosure for the benefit or possible benefit, of third parties would be so wide an exception as to make confidentiality almost meaningless but it is clear that there is a need, and increasing recognition of the importance of such disclosure in some circumstances. Foreseeable injury to another is more serious than the need to protect relationships or property. This is recognised in tort

"The necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property."[82]

There is some indication in Hubbard v Vosper[83] of a defence of disclosure for the protection of third parties, but emphasis was placed on the 'iniquity' or 'dirty hands' of the plaintiff. It is suggested that this is an inadequate basis for the defence. An individual with a history of mental instability may be a very unsuitable person to have charge of a child but he has committed no 'iniquity.' The basis should rather be foreseeable injury to a particular person or group and protection should depend on disclosure being made to a person in a position to prevent or mitigate the damage or the person or group directly concerned.

NOTES

INTRODUCTION

1. *Any general rule of this nature would be unworkable unless at least it excluded "idle tittle-tattle." Megarry J. in Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C. 41,47.*

2. *Potter: Historical Introduction to English Law 4th ed. 1958 pub. Sweet & Maxwell page 427, says that such actions were based on breach of confidence and stemmed from a history of mercantile custom. Maitland: Forms of Action Lecture VI, following Ames, points out that much of assumpsit similarly grew out of deceit, the plaintiff having suffered damage by reliance on the promise of the defendant.*

3. *Taylor v Blacklow (1836) 3 Bing. (N.C.) 236; 132 E.R. 401.*

4. *Millar v Taylor (1769) 4 Burr.2303; 98 E.R. 201,242. This case may be an example of the attempted fusion of law and equity in the time of Lord Mansfield, discussed by Holdsworth: 43 Harvard Law Review 1. This line of jurisdiction does not seem to have been pursued.*

5. *4 Inst. 84b.*

6. *Lord Eldon L.C. in Abernethy v Hutchinson (1825) 1 H. & T. 28; 47 E.R. 1313,1318. An injunction against printing notes surreptitiously taken had been granted in 1741: Forrester v Waller 4 Burr.2331.*

7. *Bacon employed the word 'confidence' for the equivalent of a special trust and 'use' for a bare trust: Uses 9.4.2.b and Coke described a Use as "a trust or confidence ... annexed to the estate and to the person": 1 Co.121a.Co.Litt.272.b.*

8. *Webb v Rose (1732) cited in Millar v Taylor (above).*

9. *Duke of Queensberry v Shebbeare (1758) 2 Eden 329; 28 E.R. 924.*

10. *Principles of Equity 2nd ed.1933 pub.Butterworths page 374.*

11. *Pasley v Freeman (1789) 3 T.R.51; Derry v Peek (1889) L.R.14 App. Cas.337; Potter op.cit. page 429.*

12. *Viscount Haldane L.C. in Nocton v Lord Ashburton [1914] A.C.954. Lord Eldon L.C. in 1801 had pointed out that equitable jurisdiction in fraud was fairer to defendants by allowing them to be heard: Evans v Bicknell (1801) 6 Ves.173,184 cited by Holdsworth loc.cit.*

13. *Nocton v Lord Ashburton (above): Street on Torts 6th ed. 1976 pub.Butterworths page 210.*

14. *[1964] A.C.465.*

15. *Anderson v Rhodes []967]2 All E.R.850; Mutual Life and Citizens Assurance Co.Ltd. v Evatt [1971] A.C.793 (P.C.). Street op.cit. pages 207-210. The limits of the tort have not yet been fully established.*

16. *North: Breach of Confidence: Is there a new tort? 1972 J.S.P.T.L.149. suggests that a new tort is based on "a developing concept of property in the commercial sphere." Heydon: The future of the economic torts. 12 U of West.Aus.L.R.1. includes breach of confidence.*

17. *For example in relation to passing off cases "the court will always interfere by injunction to restrain irreparable injury being done to the plaintiff's property" Romer L.J. in Samuelson v Producers Distributing Co.Ltd[1932] 1 Ch.201. (emphasis supplied).*

18. *Seager v Copydex Ltd [1967] 2 All E.R. 415 criticised by Gareth Jones (1970) 86 L.Q.R.463 on the ground that he could not be in breach of an equitable obligation unless he had acted unreasonably. Contra Winfield & Jolowicz on Tort 10th ed.1975 pub.Sweet & Maxwell page 494.*

19. *Seager v Copydex Ltd. (above)*

20. *Though Cornish 1970 J.B.L.44 (casenote) notes that a patent holder would not normally be refused an injunction once infringement is established and would not be forced to a 'compulsory sale.' The Law Commission Working Paper No.58: Breach of Confidence points to the anomaly that confidence protection may be unlimited in time.*

21. *As in Argyll v Argyll [1965] 1 All E.R. 611*

22. *As in Attorney-General v Jonathan Cape Ltd [1975] 3 All E.R.484.*

23. *The Law Commission Working Paper suggests a statutory tort to protect financially useful information and personal information, and the abolition of any equitable protection. It does not discuss governmental information.*

24. *[1969] R.P.C.41.*

25. *Lord Denning M.R. in Seager v Copydex Ltd. [1967]2 All E.R. 415, 417, accepted as the basis of jurisdiction by Jones: Restitution of benefits obtained in breach of another's confidence (1970) 86 L.Q.R.463.*

Confidential Nature

26. *Though in 1931 Professor Winfield thought that the "social exigencies at the present day" would justify the House of Lords in recognising a tort of offensive invasion of personal privacy: (1931)47 L.Q.R.23 at 34 and 41.*

27. *[1965]1 All E.R. 611, 625.*

28. *Ibid at 616.*

29. *(1970)86 L.Q.R. 463,473.*

30. *(1820) referred to in Prince Albert v Strange (1849)1 Mac & G 25; 41 E.R.1171.*

31. *(1889)40 Ch.D.345,349. The case was decided on both breach of an implied term of the contract and "breach of faith."*

32. *[1977]2 All E.R. 902,908. The Press Council is more likely to criticize the publication of photographs of people if they are taken surreptitiously (e.g.Annual Report for 1975 page 91 - a funeral) or without permission (e.g.Ibid, page 95 - a murdered man's widow).*

33. *Obiter in Wyatt v Wilson, quoted in Prince Albert v Strange (above).*

34. *cf. Lord Moran's book : Winston Churchill: The struggle for survival (1966) described in his obituary as "the major mistake of his life" The Times April 13 1977. No action was taken to prevent publication of the book, after the patient had died, but the British Medical Association censured the doctor.*

35. *Vinter: Fiduciary Relationship 1932 pub.Stevens page 10.*

36. *for an example in relation to a doctor see Zuckerman: Doctors and Patients 1974 pub.Royal Society of Medicine page 12.*

37. *all three relationships are, in varying degrees, recognised as confidential in legal proceedings.*

38. *for example a local authority or the N.S.P.C.C.*

39. *Report of Departmental Committee on Section 2 of the Official Secrets Act 1911 (1972) Cmnd.5104 para 197.*

40. *Discussed in Chapter 3 Discovery and Privilege.*

41. *[]973]2 All E.R. 943, 961.*

42. *(1849) 1 Mac. & G.25; 41 E.R.1171.*

43. *41 E.R. 1171 at 1178.*

44. *In Argyll the court disregarded the possibility of the information relating to earlier court proceedings being obtainable from affidavits since the Duke was in breach of his agreement: [1965]1 All E.R.611,629.*

45. *Lord Reid at 949; Lord Cross at 969.*

46. *except as a defence. See below.*

47. *(1970) 86 L.Q.R. 463, 466.*

48. *by analogy with the commercial case of Franchi v Franchi [1967] R.P.C. 149, discussed below.*

49. *The Rehabilitation of Offenders Act 1974 may affect the right of disclosure.*

50. *John Zink Co.Ltd. v Lloyds Bank Ltd and Airoil Burner Co.(G.B.)Ltd. [1975] R.P.C.385.*

51. *Turner: Trade Secrets 1962 pub.Sweet & Maxwell page 176. If the contract would prevent an ex-employee from using information acquired as part of his job it may be void as a covenant in restraint of trade: Commercial Plastics Ltd. v Vincent []964]3 All E.R. 546. And the court may refuse an injunction if the information is public knowledge: Newbery v James (1817)2 Mer.446.*

52. *for example Saltman Engineering Co.Ltd. v Campbell Engineering Co.Ltd. (1948) 65 R.P.C.203.*

53. *for example Printers and Finishers Ltd. v Holloway [1964]3 All E.R. 731.*

54. *for example Potters-Ballotini v Weston-Baker and others [1977] R.P.C.202.*

55. *for example an employee as in Amber Size & Chemical Co.Ltd. v Menzel [1913]2 Ch.239.*

56. *As in Yovatt v Winyard (1820)1 Jac. & W.393; 37 E.R.425.*

57. *this has been said to be a part of the contract of employment and not a separate requirement: Vokes Ltd v Heather (1945) 62 R.P.C.135.*

58. *(1948) 65 R.P.C. 203, 215.*

59. *[1969] R.P.C. 41, 46. cf Suhner v Transradio Ltd. [1967]R.P.C. 329 where Plowman J. said that confidential nature did not depend on whether the information in a document was available elsewhere but "whether it contains useful information which has been compiled by the plaintiff for a particular purpose." This would seem to be too wide for breach of confidence but was quoted with approval by Jacob & Jacob's Confidential Communications (1969) 119 N.L.J. 133.*

60. *[1966] R.P.C. 81, 90.*

61. *[1895] 2.Q.B.1.*

62. *[1939]1 All E.R.290,308.*

63. *[1972]2 All E.R. 759.*

64. *Turner op.cit. page 84.*

65. *[1897]2 Ch.48 - horse-racing results known to those who attended the races but not known to many others who were willing to pay the plaintiffs for the information.*

66. *as in Yovatt v Winyard (1820)1 Jac. & W.393; 37 E.R. 425; Robb v Green (above) and Floydd v Cheney [1970]1 All E.R.446.*

67. *as in Abernethy v Hutchinson (1825)1 H. & T. 28; 47E. R.1313; Prince Albert v Strange (1849) 1 Mac. & G.25 and Morison v Moat (1851)9 Hare 241; 68.E.R.492.*

68. *the difficulty of reconciling this case with dicta of the Court of Appeal in Trego v Hunt [1895] 1 Ch.462 is discussed in Chapter 5.*

69. *Newbery v James (1817) 2 Mer 446 and Williams v Williams (1817) 3 Mer.157; 36 E.R. 61 distinguished on this ground in Yovatt v Winyard. In United Indigo Chemical Co.Ltd v Robinson (1932) 49 R.P.C. 178 an injunction against use by an ex-employee was refused but would have been granted if he had obtained the information surreptitiously.*

70. *as in Morison v Moat (above).*

71. *as in Abernethy v Hutchinson (above)*

72. *It may be that the proposed new tort of disclosing or using information known to have been obtained by illegal means (Younger Committee Report para.632) could be extended by the courts from these cases.*

73. *op.cit. page 24.*

74. *[1967] R.P.C. 149, 152.*

75. *op.cit. page 82.*

76. *[1977] R.P.C. 202, at 206. But since the case was an application for an interlocutory injunction and was decided on American Cyanamid v Ethicon principles it is not a very satisfactory case on the substantive law: 1976 J.B.L. page 269.*

77. *Ackroyds (London) Ltd v Islington Plastics Ltd [1962] R.P.C. 97, 104. Turner op.cit. page 86 suggests that the extent of research in the industry is relevant in deciding whether a publication destroys secrecy. There is some support for this - for example Franchi (discussed below) - but it is submitted that Triplex Safety Glass v Scorah (1938) 55 R.P.C.28 cited by Turner does not support the proposition.*

78. *Turner's phrase.*

79. *[1963] 3 All E.R.416 decided by the House of Lords in 1928.*

80. *at 418. cf. Cranleigh Precision Engineering Ltd v Bryant [1966] R.P.C. 81 where the secret to be protected was not the invention disclosed in the patent but the existence of the patent and knowledge of its possible effect on the plaintiff's business.*

81. *[1967] R.P.C.149.*

82. *B.O.Morris Ltd. v F.Gilman (B.S.T.)Ltd. (1943) 60 R.P.C.20*

83. *[1967] R.P.C. 149, 153. If the "international-type search" under the Patent Co-operation Treaty (ratified by the United Kingdom in 1977) Article 15(5) becomes normal, 'relative secrecy' will probably disappear once a patent has been obtained in a contracting State.*

84. *Megarry V-C, "tentatively" in Thomas Marshall (Exports) Ltd. v Guinle [1978] 3 All E.R. 193. Reasonableness should be tested by the state of the art in the relevant area.*

85. *It has been said that value often lies in preventing rivals from knowing what one is doing, but this is not property which can be protected by action for breach of confidence: Whitford J. in Yates Circuit Foil Co. v Electrofoils Ltd [1976] F.S.R. 345.*

86. *(1954) 71 R.P.C. 321,324. Similarly in Yates Circuit Foil Co. v Electrofoils Ltd Whitford J. refused to hold confidential information which was in the literature or shown to visitors.*

87. *(1945) 62 R.P.C. 47 (Romer J.); 135 (C.A.) at 141.*

88. *Fraser v Evans [1969] 1 Q.B. 349; 1 All E.R. 8,11.*

89. *Seager v Copydex Ltd. [1967]2 All E.R. 415; R.P.C.349.*

90. *(1970) 86 L.Q.R.463.*

91. *It may also be questioned whether there is a tort of inducing a breach of a non-contractual duty of confidence. North loc.cit. suggests that there is an analogy with conversion.*

92. *1972 J.S.P.T.L. 149.*

93. *Commercial Plastics Ltd. v Vincent [1964] 3 All E.R. 546.*

94. *Vokes Ltd. v Heather (1945) 62 R.P.C. 135.*

95. *Robb v Green [1895] 2 Q.B.1.*

96. *Amber Size & Chemical Co.Ltd. v Menzel [1913] 2 Ch.239.*

97. *Tipping v Clark (1843) 2 Hare 393 (a counting house clerk). The extent of "confidential employment" is uncertain.*

98. *United Indigo Chemical Co.Ltd. v Robinson (1932) 49 R.P.C.178*

99. *at 186, Similar argument obtained in Bjorlow (Great Britain) Ltd v Minter (1954) 71 R.P.C. 321,322*

1. *John Zink Co.Ltd. v Lloyds Bank Ltd and Airoil Burner Co.(G.B.) Ltd.[1975] R.P.C. 385.*

2. *Printers & Finishers Ltd. v Holloway and others [1964]3 All E.R. 731, 735.*

3. *at 736.*

4. *(1943) 60 R.P.C. 20,24*

5. *cf. the John Zink case above and Herbert Morris v Saxelby [1915] 2 Ch.57.*

6. *as in Tipping v Clark (above and Amber Size & Chemical Co.Ltd. v Menzel (above).*

7. *M.W.Bryan (1976) 92 L.Q.R. 180 points out that Fraser v Evans [1969]1 All E.R.8 had already applied the law of breach of confidence to "politically sensitive" information.*

8. *[1975] 3 All E.R. 484, 495 (the Crossman Diaries case). The Spectator October 11 1975 commented "No ordinary layman would consider 'private' secrets as being on all fours with 'public' secrets and it is little difficult to see why the courts should."*

9. *this had been conceded by counsel.*

10. *at 495.*

11. *Section 1 if a prejudicial purpose was intended or communication was made to a foreign agent; Section 2 if he obtained it in his official capacity or from someone who had so obtained it.*

12. *Gouriet v Union of Post Office Workers [1977] 3 All E.R.70,83,H.L.*

13. *Both the Child Poverty Action Group and the National Council for Civil Liberties stated that government documents are frequently leaked: The Times June 25,26 1976.*

14. *(1972) Cmnd.5104 Chapters 9 and 10. The Crossman diaries case already gives some protection for Cabinet documents (Chapter 11) and personal information (Chapter 12) is within the protection of Argyll v Argyll [1965] 1 All E.R.611.*

15. *except perhaps for a short time after it is given (at 494).*

16. *"I can find no ground for saying that either the Crown or the individual civil servant has an enforceable right to have the advice which he gives treated as confidential for all time." (at 496). Thus the mere "candour" argument, discredited in relation to discovery (Conway v Rimmer [1968] 1 All E.R.874) is also insufficient to found a breach of confidence action.*

17. *Bryan loc.cit. suggests, or assumes, that the new preconditions for liability will apply generally, but it is submitted that this is inconsistent with the Court of Appeal cases on commercial information where no evidence of public interest has been required; those cases can, however, be distinguished where the information is of a different kind and the relevant considerations are therefore different.*

18. *[1975] 3 All E.R. 484, 495.*

19. *ibid.*

20. *ibid. This has been clearly shown by television reconstruction of the Cabinet discussion of the I.M.F. loan: Granada Television February 15 1977.*

21. *The Times July 23 1975. Similar arguments were put to, and accepted by, the Franks Committee on Section 2 of the Official Secrets Act 1911 (1972) Cmnd.5104 Chapter 11.*

22. *Marshall: [1975] Public Law page 279 (comment).*

23. *for example, S.A. de Smith: Constitutional and Administrative Law 3rd ed.1977 pub.Penguin pages 168-172.*

24. for example the evidence of the Cabinet Secretary to the Franks Committee.

25. said by Lady Violet Bonham Carter in 1967, quoted in Tester: The Wit of the Asquiths 1974 pub. Leslie Frewin page 76.

26. The Times, February 1 1975.

27. "The State of the Nation": Granada Television February 15 1977. Ministers were instructed not to co-operate with the programme.

28. for example Liverpool Education Sub-committee considering re-organisation of secondary schools: The Times November 5 1976.

29. for example Morison v Moat (1851) 9 Hare 241.

30. Fraser v Evans [1969] 1 All E.R.8.

31. R v Master & Wardens of the Merchant Tailors' Company (1831) 2 B. & Ad.115; 109 E.R.1086. Bristol Corporation v Cox (1884) 26 Ch.D.678.

32. Public interest privilege against disclosure on discovery or in court may still be granted on a wider basis e.g. documents "of a political character" (Conway v Rimmer [1968] 1 All E.R. 874,883) "all documents concerned with policymaking" (ibid, 888.) "deliberations about a particular case" (ibid.) Yet the public interest in disclosure for legal proceedings is clear.

33. (1922) 20 L.G.R. 625, 630. The jury had been trying a civil case. The power to bring a majority verdict should not affect the principle.

34. for example Mr Schreiber and The Economist who published a draft select committee report on Wealth Tax in 1975.

35. [1973] 3 All E.R. 569, 588.

36. although, as argued above, this is an excessive view of the doctrine of collective responsibility.

37. But so may a litigant who loses by a bare majority (or even a minority) of judges, or a defendant convicted by a majority jury verdict.

38. (1972) Cmnd.5104 para.185.

39. ibid. para 181.

40. although it was suggested (at 494) that there might be a public interest in restraining such disclosure "in the short run."

41. Shore: Entitled to know 1966 pub.MacGibbon & Kee, was a strong plea to abolish the rule. Abolition was proposed in 1978 by the Labour Party National Executive.

42. Information and the public interest (1969) Cmnd.4089, para.30.

43. for example De Smith op.cit. page 611.

44. [1975] 3 All E.R. 484,496.

45. in spite of the statement by Sir John Hunt, Secretary to the Cabinet, in evidence "I think the extent to which anyone has the right to be indiscreet when it involves confidential relationships with other people is questionable." The Times July 23 1975.

Given in Confidence

46. *Medical certificate received from Hull (A) Group Hospital management Committee 1973.*

47. *Officers of some local authorities require a similar undertaking from councillors to whom personal information from files is divulged, for the same reason.*

48. *The fact that the matter disclosed is defamatory is no defence against breach of confidence: Weld-Blundell v Stephens [1920] A.C.956 discussed below.*

49. *These circumstances are analogous to the commercial cases, such as Pollard v Photographic Co. (1888) 40 Ch.D.345 and Nicrotherm Electrical Co.Ltd. v Percy [1957] R.P.C.207 discussed below, but there is less likely to be a contractual relationship in the circumstances under discussion.*

50. *For example Franks Report on Official Secrets (1972) Cmnd.5104 para.197.*

51. *Conway v Rimmer [1968] 1 All E.R. 874 discussing a taxation case.*

52. *Examples are discussed in Chapter 5.*

53. *For example provisions in the Finance Act 1972 for the Inland Revenue and Customs to pool information. Assurances were given in Parliament that this would only be done on high level authorisation.*

54. *Disclosure under a public duty or by court order are excluded throughout this section. Grounds for disclosure of personal information are discussed in Chapter 4.*

55. *By analogy with the discovery cases of Rogers v Home Secretary [1972] 2 All E.R. 1057; Alfred Crompton Ltd. v Customs Commissioners [1973] 2 All E.R.1169 and D v N.S.P.C.C.[1977] 1 All E.R.589.*

56. *For example Adoption Agencies Regulations S.I. 1976/1796 Reg.10. Some of the information obtained, such as names, ages, occupations, numbers of children, (Schedule 4), is readily obtainable yet the restriction on disclosure is comprehensive.*

57. *The question whether advantage to the defendant or detriment to the plaintiff are necessary is discussed below.*

58. *Some universities have inspection schemes to ensure that no irrelevant information is recorded: Younger Report on Privacy (1972) Cmnd.5012 para.354. The American Orthopsychiatry Association have official files and semi-private notebooks for anything other than factual information.*

59. *They may have to do so to give information to outside bodies e.g. Adoption Agencies Regulations S.I. 1976/1796 Reg.8(g).*

60. *For example the reports on the deaths of Maria Colwell: The Times September 5 1974 and Steven Meurs: The Times January 16 1976.*

61. *[1930] 2 K.B.226.*

62. *as in Argyll v Argyll [1965] 1 All E.R.611.*

63. *Megarry J. in Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C. 41, 48.*

64. *ibid. Meagher, Gummow and Lehane: Equity Doctrines and Remedies 1975 pub. Butterworths para.4109 doubt the suitability of this test on the ground that 'equitable relationships often do not depend on reasonableness' But constructive notice is a well-established principle of equity on a similar basis.*

65. *op.cit. page 179.*

66. *unless, for example, the disclosee is an infant as in Williams v Williams (1817) 3 Mer.157; 36 E.R. 61.*

67. *(1851) 9 Hare 241.*

68. *[1913] 2 Ch.239.*

69. *as in John Zink Co.Ltd. v Lloyds Bank Ltd. [1975] R.P.C.385.*

70. *as in Triplex Safety Glass Ltd. v Scorah (1938) 55 R.P.C.21.*

71. *Law Commission Working Paper: Breach of Confidence para.51.*

72. *Peter Pan Manufacturing Corp. v Corsets Silhouette Ltd [1963] 3 All E.R.402; Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C. 41,49.*

73. *(1932) 49 R.P.C. 178,186.*

74. *op.cit. page 181.*

75. *(1888) 40.Ch.D.345.*

76. *[1957] R.P.C.207,215. How far such an implied promise covers also use or disclosure by the disclosee's employees and ex-employees, not acting as his agents, is raised in Easton v Hitchcock [1912] 1 K.B.535.*

77. *It is sufficient that the purpose is a future purpose, such as the agreement to form a partnership when the son became an adult in Williams v Williams (1817) 3 Mer.157 as explained in Morison v Moat (1851) 20 L.J.Ch.513 at 523.*

78. *If it is genuinely original the court is more likely to imply a contract not to disclose, as in Abernethy v Hutchinson (1825) 1 H. & T.28; 47 E.R.1313 (a course of lectures).*

79. *[1962] R.P.C.97.*

80. *[1969] R.P.C.41, 48. A good example is Seager v Copydex Ltd. [1967] 2 All E.R.415.*

81. *(1843) 2 Hare 383.*

82. *[19]3] 2 Ch.469.*

83. *[1964] 3 All E.R.731 discussed above.*

84. *[1970] 1 All E.R.446.*

85. *this was disputed by the plaintiff.*

86. *at 45o.*

87. *[1966] R.P.C.81.*

88. *in Cook v Deeks [1916] 1 A.C.554 at 563.*

89. *[1966] R.P.C. 81,91.*

90. *ibid. at 98.*

91. *[1967] 2 A.C.46.*

92. *ibid.at 128.*

93. There is some controversy whether constructive trust was originally based on loss to the plaintiff, but its basis is now firmly profit to the defendant.

94. [1972] 2 All E.R. 162.

95. This was expressly held in Canadian Aero Service Ltd. v O'Malley et.al.. (1973) 40.D.L.R. (3d.) 371.

96. (1948) 65 R.P.C.203.213.

97. op.cit.page 227.

98. page.232.

99. [1969] 1 All E.R.8,11.

1. Saltman Engineering case above.

2. In the court's discretion. Any detrimental change of position by him ought perhaps to be taken into account. Jones: 86L.Q.R. 463.484.

3. The statement in Turner that the owner cannot refuse consent but only acquiesce and therefore no liability arises seems wrong. The information remains the property of the owner and so once he claims it the finder may not continue to treat it as his own without incurring liability.

4. Lord Evershed M.R. in Blackpool Corporation v Locker [1948] 1 All E.R.85, 100 of both the local authority and the Ministry of Health. The decision by central government to disclose more policy information appears to have been designed to avoid a statutory obligation on the lines of the American Freedom of Information Act: Sunday Times September 25 1977.

5. Public Bodies (Admission to Meetings) Act 1960; Local Government Act 1972 section 100 discussed in Chapter 6.

6. The Council of the National Union of Teachers passed such a resolution in 1973.

7. Evidence to the Fulton Committee on the Civil Service, memorandum 16 (Association of First Division Civil Servants).

8. (1968) Cmnd.3638 para.279. In Sweden the policy discussions are known but authors of documents have a right of anonymity: Freedom of the Press Act Chapter 3.

9. A claim for non-disclosure on discovery on the ground that such documents are "by their nature privileged" was forcefully rejected by the Court of Appeal in Blackpool Corporation v Locker (above).

10. This may be a ground for excluding the public from a local authority meeting. See Chapter 6.

11. [1973] 1 All E.R.241.

12. They have since been restarted: The Times July 19 1977.

13. [1973] 1 All E.R. 241, 261.

14. The Times June 30 1977.

15. Attorney-General v Mulholland [1963] 2 Q.B.477.

16. Fraser v Evans [1969] 1 Q.B.349.

17. except perhaps for breach of copyright.

18. A local councillor cannot be prevented from receiving information which he needs to do his job as councillor: R.v Southwold Corporation ex parte Wrightson (1907) 5 L.G.R.888. This common law rule probably applies to any elected member of a governing group.

19. The Times July 26 1975.

20. The Times July 29 1975.

21. ibid.

22. ibid. A minister is "self-authorising" in relation to Departmental matters for the purposes of the Official Secrets Acts: Franks Report (1972) Cmnd 5104 para.18.

23. [1975] 3 All E.R.484.493.

24. ibid. at 495. It therefore included an obligation not to disclose his own views and statements.

25. The Times July 25 1975.

26. accepted in the Crossman Diaries case, ibid at 494. Anyway an agreement to commit a crime is illegal.

27. Ellis v Deheer (1922) 20 L.G.R. 625,630 Atkin L.J. Though a "solemn obligation" it should not be a criminal offence to disclose jury deliberations: Criminal Law Revision Committee 10th Report (1968) Cmnd.3750. But the question of civil liability was not discussed.

28. The Times July 29 1975.

29. Dissention in the armed forces would probably be said to be in breach of national security.

Unauthorised Use and Detriment

30. Doctors and probation officers have been reluctant to disclose information even when authorised, and hospitals have withheld medical records sought by the patient: Garner v Garner (1920) 36 T.L.R. 196; C v C [1946] 1 All E.R. 562; McTaggart v McTaggart [1949] P.94; Deistung v Southwest Metropolitan Regional Hospital Board [1975] 1 All E.R.573.

31. Fraser v Evans [1969] 1 All E.R.8. Or his successor in title: Webb v Rose 1732 (unreported).

32. [1924] 1 K.B.461,473 Bankes L.J; 481 Scrutton L.J.; 486 Atkin L.J.

33. (1867) 2 Ch. App.447.

34. [1968] 1 All E.R.177,180. The statute will not be construed in favour of non-disclosure: Hunter v Mann [1974] 2 All E.R.414.

35. A dictum in Fraser v Evans (above at 11) suggests that 'iniquity' may be not merely a defence but may create a duty to disclose. The extent of 'iniquity' as a defence is discussed below.

36. Ashburton v Pape [1913] 2.Ch.469; Tapper: (1972) 35 M.L.R.83.

37. Butler v Board of Trade [197]] Ch.680.

38. As in Tournier v National Provincial and Union Bank of England [1924] 1 K.B.461 where disclosure of the plaintiff's gambling habits cost him his job.

39. As in Pollard v Photographic Co. (1889) 40 Ch.D.345 "a lady's feelings are shocked."

40. *As in the breach of copyright case of Williams v Settle [1960] 2 All E.R.806; [1960] 1 W.L.R.1072.*

41. *Warren and Brandeis: The Right to Privacy (1890) 4 Harvard Law Review 193, 200.*

42. *41 E.R. 1171.1179. cf. Woodward v Hutchins [1977] 2 All E.R. 751 where an interlocutory injunction was refused.*

43. *(1818) 2 Swans.402; 36 E.R.670.*

44. *36 E.R.670, 678.*

45. *[1965] 1 All E.R.611.*

46. *[1964] A.C.814; [1962] 3 All E.R. 256.*

47. *Particularly Monroe v Twisleton (1802) Peake Add.Cas.219 and O'Connor v Marjoribanks (1842) 4 Man. & G. 435.*

48. *[1965] 1 All E.R.611. cf. Evidence Amendment Act 1853 section 3, making spouses non-compellable in civil cases for communications made during marriage, does not apply when the marriage has ended: Shenton v Tyler [1939] Ch.620.*

49. *[1960] 1 W.L.R.1072 at 1082 Sellers L.J.Flagrancy is a ground for additional damages under the Copyright Act 1956 section 17(3), which the court applied in that case.*

50. *ibid. at 1086.*

51. *[1969] R.P.C.41.*

52. *(1932) 49 R.P.C.178.*

53. *Bennett J. (at 186) drew a distinction between use and disclosure. Turner (op.cit. at page 157) suggests that the true distinction is between personal skill and protectable secrets which, it is submitted, is the better view. Later cases do not distinguish between use and disclosure.*

54. *[1946] Ch.169.*

55. *Turner op.cit.page 246.*

56. *[1895] 2 Q.B.315,319.*

57. *Subject to the willingness of the court to enjoin third parties, discussed below.*

58. *His loss may be indirect, in the form of a saving for his competitor. For example, a company saved £22,000 research money by discovering that another company had found that line of research fruitless: cited in Jacob & Jacob: Confidential Communications (1969) 119 N.L.J.133.*

59. *cf. Patent Act 1977 Section 2(4) for patent application within six months of a breach of confidence.*

60. *(1916) 33 R.P.C. 269.CA.*

61. *ibid. at 277.*

62. *Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41 at 48.*

63. *His example concerned personal information and was discussed above. But in an action for breach of confidence a plaintiff may elect to claim an account of profits rather than damages for his loss. This will be the whole profit if the confidential information was necessarily involved (Peter Pan Manufacturing Co. v Corsets Silhouette Ltd. [1963] 3 All E.R.402) but if the information merely saved time or money it will be the profit attributable fo that saving (Siddell v Vickers (1892) 9 R.P.C.152)*

64. [189]] 2 Ch.244.

65. (1726) 2 Eq.Cas.Abr.741. Cretney: The Rationale of Keech v Sandford (1969) 33 Conv.(N.S.) 161 shows that the customary tenant right of renewal was valuable trust property.

66. A common law action for deceit when an attorney diclosed defects in his client's title to another was based, not on profit to the attorney, but on the detriment suffered by the client: Taylor v Blacklow (1836) 3 Bing. (N.C.) 336; 132 E.R.401.

67. [1965] 1 All E.R.849,857.

68. [1972] 2 All E.R.162.

69. Meagher, Gummow and Lehane op.cit.para.4109 take the opposite view that detriment should not be necessary for either breach of trust or breach of confidence.

70. Initial Services Ltd. v Putterill [1967] 3 All E.R.145

71. Woodward v Hutchins [1977] 2 All E.R.751.

72. There may be criminal offences, for example, under the Fair Trading Act 1973 or breaches of the British Code of Advertising Practice but it is suggested that the defence to publication does not depend on any actionable wrongdoing.

73. The Times July 30 1975.

74. As a public interest matter the position of the individual is irrelevant (ibid.); cf. the suggestion of Lord Eldon in relation to personal information in the case of Wyatt v Wilson (1820) referred to in Prince Albert v Strange (1849) 1 Mac. & G. 25.

75. [1975] 3 All E.R.484,496.

76. Argyll v Argyll [1965] 3 All E.R.611.

77. Wyatt v Wilson (above).

78. Bryan: (1976) 92 L.Q.R. 180 (note).

79. Bryan loc.cit. suggests that this is implied in the dicta and shows that it accords with current developments in the United States of America. But in the course of argument the Lord Chief Justice suggested that an injunction would have to be for a fixed time or perpetual: The Times July 29 1975. A perpetual injunction with liberty to apply, as in contempt cases, might be suitable.

Defences

1. [1969] 1 All E.R.8, 11. Gareth Jones has said "Just cause is as unruly a horse as public policy.": (1970) 86 L.Q.R.463,472

2. (1856) 26 L.J.Ch.113,116. The 'iniquity' there was an allegedly fraudulent manner of carrying on business to the detriment of customers.

3. As in Weld-Blundell v Stephens [1920] A.C.956 and Howard v Odhams Press Ltd. [1938] 1 K.B.1.

4. An implied duty of fidelity may still exist (Triplex Safety Glass Ltd. v Scorah [1937] 4 All E.R.693) but information about 'iniquity' would not be "clothed with confidence" (Salmon L.J. in Initial Services Ltd. v Putterill [1967] 3 All E.R.145,151)

5. Greene L.J. in Howard v Odhams Press Ltd. (above) at 40; Southey v Sherwood (1817)2 Mer.435; 35 E.R.1006.

6. [1920] A.C.956.

7. Howard v Odhams Press Ltd.[1938] 1 K.B.1. although the defendants needed the information to protect themselves.

8. Ungoed-Thomas J. in Beloff v Pressdram Ltd. [1973] 1 All E.R.241, 259; Goff J. in Church of Scientology v Kaufman [1973] R.P.C.635.

9. The Law Commission suggested that it should not be limited to 'iniquity' but should be framed in a flexible way so the court could balance conflicting interests: Working Paper No.58 para.91

10. Initial Services Ltd. v Putterill [1967] 3 All E.R.145,148.

11. ibid. at 151. But in Distillers Co. (Biochemicals) Ltd. v Times Newspapers [1975] 1 All E.R.41,50 Talbot J. thought (obiter) that it would not extend to negligence.

12. Hubbard v Vosper [1972] 1 All E.R.1023,1029 (interlocutory injunction); Church of Scientology v Kaufman [1973] R.P.C.635 'pernicious nonsense' (final injunction).

13. Woodward v Hutchins [1977] 2 All E.R.751,754.

14. [1973] 1 All E.R.241,260.

15. (1972) J.S.P.T.L.149.

16. Anson: Law of Contract 24th ed.1975 pub.Oxford University Press pages 318,335.

17. Dwyer: Immoral Contracts (1977) 93 L.Q.R.386.

18. See above: The need for detriment and below: Freedom of Speech for the suggested basis of the court's refusal to intervene in this case.

19. Initial Services Ltd. v Putterill [1967] 3 All E.R.145,148.

20. Discussed, and rejected as a ground for striking out the defence by Salmon L.J. at 150.

21. ibid.

22. Winfield & Jolowicz: Law of Tort 10th ed.1975 pub. Sweet & Maxwell page 287. The discloser must also have a duty or interest: Watt v Longsdon [1930] 1 K.B.130.

23. At least not provably true.

24. In some cases both are pleaded and the court may treat the libel action as the substantial claim e.g. Woodward v Hutchins (above).

25. Lord Denning M.R. in Hubbard v Vosper [1972] 1 All E.R.1023, 1030.

26. Winfield & Jolowicz op.cit.page 290 citing Adam v Ward [1917] A.C.30 and Cutler v McPhail [1962] 2 Q.B.292.

27. [1967] 3 All E.R.145,148.

28. Woodward v Hutchins [1977] 2 All E.R.751 is a similar case.

29. [1972] 1 All E.R.1023.

30. [1938] 1 K.B.1.

31. *In Initial Services Ltd v Putterill (above) Lord Denning M.R. was suggesting the former; Salmon and Winn L.J.J. were doubtful whether there was any duty of confidentiality. An implied condition could be void on the same grounds as an express condition.*

32. *[1967] 3 All E.R.145,149. He had forcefully made the same point in his report on the Profumo affair (1963) Cmnd.2152 as had Warren and Brandeis in the seminal article The Right to Privacy (1890) 4 Harvard L.R.193."Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery."*

33. *For example Mr. Thornley, the employee who disclosed weaknesses in military aircraft.*

34. *Marks v Beyfus (1890) 25 Q.B.D.494.*

35. *17 State Trials 1139 at 1223. The 'design' in question was a plot to have a man framed for an offence and hanged.*

36. *[1969] 1 All E.R.8,11.*

37. *Misprision of treason is still a criminal offence. Whether the duty still exists in relation to other crimes, since the abolition of misprision of felony (Criminal Law Act 1967 section5) is more doubtful.*

38. *Examples are discussed in Chapters 4 and 5.*

39. *Parry-Jones v Law Society [1968] 1 All E.R.177.*

40. *[1977] 3 All E.R.431.*

41. *The judge held that an injunction against use would be impossible to enforce; one could enjoin only secondary evidence of the document: ibid. at 436.*

42. *A similar case is Butler v Board of Trade [1970] 3 All E.R.593. where the document was handed over by accident.*

43. *As in Norwich Pharmacal Co. v Customs Commissioners [1973] 2 All E.R.943.*

44. *Hopkinson v Lord Burghley (1867) 2 Ch.App.447 and Attorney-General v Mulholland [1963] 2 Q.B.477.*

45. *Including a special contractual duty as in Swan v West (Butchers) Ltd. [1936] 3 All E.R.261.*

46. *Except perhaps by the person to whom the information relates: C v C [1946] 1 All E.R.562 discussed in Chapter 4.*

47. *[1907] 2 Ch.577.*

48. *cf.Thompson v Stanhope (1774) 2 Amb.737; 27 E.R.476 where it was held that the writer and recipient have a joint property and publication of the letter itself requires consent.*

49. *[1907] 2 Ch.577,588.*

50. *(1774) 2 Amb.737; 27 E.R.476.*

51. *The Times October 15 1977*

52. *Attorney-General v Jonathan Cape Ltd [1975] 3 All.E.R.484.*

53. *Except if the matter is within the Royal prerogative when it is a matter for discretion of the executive not of the courts.*

54. *Bryan (1976) 92 L.Q.R.180.*

55. *The Law Commission Working Paper stated that this was a difficulty. Cornish: Protection of Confidential Information in English Law [1975] 1.1.C. page 55 suggests there should be more attractive remedies to encourage the taking of patents.*

56. *Newberry v James (1817) 2 Mer.446; 35 E.R.1011. John Zink Co.Ltd. v Lloyds Bank Ltd and another [1975] R.P.C.385.*

57. *Potters-Ballotini Ltd. v Weston-Baker and others [1977] R.P.C.202.*

58. *Working Paper No.58 para.112.*

59. *Patents Act 1977 section 48, superceding Patents Act 1949 section 37.*

60. *Larkin: Times Literary Supplement March 22 1974.*

61. *April 1976.*

62. *(1977) Cmnd.6810 para.10.134. The Declaration does not, of course, have legal force.*

63. *[1969] 1 All E.R.8,11. The injunction was refused on other grounds.*

64. *[1973] 1 All E.R.241,261. The action was in breach of copyright but the defence was recognised to be a general one.*

65. *Cross & Jones: Introduction to Criminal Law 8th ed.1976 page 46. R v Hicklin (1868) 11 Cox.19; R v Smith [1960] 2 Q.B.423.*

66. *The "public" in this context being the members of the club or residents of the locality.*

67. *Bonnard v Perryman [1891] 2 Ch.269.*

68. *Woodward v Hutchins [1977] 2 All E.R.751, 754. Lord Denning M.R.*

69. *For example Sim v H.J.Heinz Co.Ltd.[1959] 1 All E.R.547, a claim of passing-off.*

70. *[1977] 2 All E.R.751,755.*

71. *[1969] 1 All E.R.8,11.*

72. *[1965] 1 All E.R.611.*

73. *Attorney-General v Jonathan Cape Ltd. [1975] 3 All E.R.484.*

74. *The need for detriment.*

75. *[1967] 3 All E.R.145.*

76. *[1977] 2 All E.R.751.*

77. *ibid. at 755. And damages would be a sufficient compensation if the allegations were untrue.*

78. *[1975] 1 All E.R.697, an application to make a child a ward of court and restrain publication of a book which might seriously upset her.*

79. *By contrast, the Press sometimes voluntarily refrain from publication, for example in the case of a non-political kipnapping "one of the rare instances where the public interest is served by keeping the public in ignorance": The Times November 17 1975.*

80. *In Gee v Pritchard (1818) 2 Swans.402 Lord Eldon was at pains to say that mere embarrassment to the plaintiff was not enough for an injunction against publication. The Courts of the United States of America are approaching this view after a period of*

growth of privacy protection. It is now recognised that freedom of speech is a defence to breach of privacy in relation to public affairs of public figures and other matters of legitimate public interest and concern. Kidd: Freedom from unwanted publicity page 47 in Bridge (ed): Fundamental Rights pub. Sweet & Maxwell 1973.

81. Halsburys Laws of England 3rd ed. Vol 21 page 382.

82. Woodward v Hutchins [1977] 2 All E.R.751,754 and Slater and another v Raw. The Times October 14 1977, both suggestions by Lord Denning M.R.

83. As amended in 1967 The Public Records Office was originally set up in 1838.

84. Section 3(1). Concern has been expressed by historians that valuable information may be "weeded out". H.L.Deb (1977) Vol.382 col.199 and new guidelines will be produced: The Times September 21 1977 and The Times August 29 1978. There may still sometimes be suspicion that information has been deliberately removed or tampered with, for example Sunday Times February 26 1978 (identity of the person who authorised the return of non-Soviet Cossacks to Russia in 1945).

85. Section 5(1) as amended by the Public Records Act 1967.

86. Section 10(1) and First Schedule. They include evidence given in secret under promise of confidentiality in the Profumo investigation: The Times April 22 1977

87. A local records office may be set up under Local Government Act 1974. Access to records may be governed by statute, but otherwise collection and access varies. In Nottinghamshire welfare and social services files are kept secret for thirty years but other records may be immediately available.

88. Section 5(1).

89. Section 3(4).

90. Section 5(2).

91. [1975] 3 All E.R.484, 496.

92. ibid. at 495.

93. Public Bodies (Admission to Meetings) Act 1960 Section 1(2).

94. Mr Crossman was stating his own views and observations in this regard rather than statements made to him in confidence.

95. at 496.

96. It is sometimes argued that civil servants must be protected by anonymity since they cannot answer back.

97. Official Secrets Act 1911 Section 2(1)(a).

98. R v Cairns, Roberts and Aitken (1971) discussed in Chapter 2 cf. the justification given by Daniel Ellsberg for the disclosure of the Pentagon Papers: The Times November 4 1977.

99. Distillers Co. (Biochemicals) Ltd. v Times Newspapers [1975] 1 All E.R.41.

1. The case was decided shortly before the House of Lords decision in American Cyanamid v Ethicon changed the law relating to interlocutory injunctions.

2. *Attorney-General v Times Newspapers Ltd [1974] A.C.273*

3. *quoted in (1977) 127 New Law Journal page 749. The case was argued before the European Court in April 1978.*

4. *Section 2.2.*

5. *Printers & Finishers Ltd. v Holloway [1964] 3 All E.R.731; Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41.*

6. *Attorney-General v Jonathan Cape Ltd [1975] 3 All E.R.484.*

7. *[1967] 2 All E.R.415.*

8. *Seager v Copydex Ltd (No.2) [1969] R.P.C.250.*

9. *Jones: (1970) 86 L.Q.R. 463, 476.*

10. *Cornish: (1970) J.B.L.44. Meagher, Gummow and Lehane op.cit. para.4108 argue that the award of damages was mis conceived since the action is purely equitable.*

11. *Discussed in Chapter 5.*

12. *[1963] 3 All E.R.413,414.*

13. *Distillers Co. (Biochemicals) Ltd v Times Newspapers Ltd. [1975] 1 All E.R.41,48.*

14. *The Law Commission suggested that knowledge, actual or constructive, should be a pre-requisite of liability: Working Paper No.58 para.80. Jacob & Jacob: Confidential Communications (1969) 119 New Law Journal 133 suggest a defence of bona fide purchaser.*

15. *(1851) 9 Hare 241 affd. 21 L.J.Ch.248. The defendant was a volunteer.*

16. *Prince Albert v Strange (1849) 1 Mac. & G.25; 41 E.R.1171,1179.*

17. *The clerks had been held to be in confidential employment.*

18. *(1843) 2 Hare 393.*

19. *(1825) 1 H. & Tw.28; 47 E.R.1313,1317.*

20. *ibid. at 1318.*

21. *41 E.R.1171,1179.*

22. *Bernstein v Skyviews and General Ltd. [1977] 2 All E.R.902.*

23. *If the Younger Committee's recommendations for a new crime of surreptitious surveillance are enacted the problem will largely disappear: (1972) Cmnd.5012 para.562.*

24. *Jones loc.cit. at 479.*

25. *North: (1972-3) 12 J.S.P.T.L. 149, 160. Now wrongful interference with goods: Tort (Interference with goods) Act 1977 section 1.*

26. *Younger Report para.44.*

27. *as in Argyll v Argyll [1965] 1 All E.R.611.*

28. *it was accepted in Attorney-General v Jonathan Cape Ltd [1975] 3 All E.R.484, 494 that the court would not grant an injunction merely on the ground of the public interest except where national security or some equally compelling need were at stake.*

29. *(1951) 68 R.P.C.190.*

30. *Lloyd-Jacob J. The Court of Appeal reversed the decision on another ground: [1952] 1 T.L.R.101.*

31. [1964] 3 All E.R.731.

32. ibid. at 737,739. His statement that the defendant in Prince Albert could not claim to be a purchaser for value seems arguable.

33. [1969] 1 All E.R. 8,11. No authority was cited. Jones loc.cit. page 477 states a similar general rule.

34. This was one ground for refusing an interlocutory injunction in Potters-Ballotini Ltd v Weston-Baker [1977] R.P.C.202.

35. Jones loc.cit. page 481.

36. loc.cit page 160.

37. ibid at page 163.

38. surprisingly because if there is no legal wrong the purchaser buys the legal right to the property and a bona fide purchaser of a legal interest has always been an absolute bar to equitable interests: Pilcher v Rawlins (1872) 7 Ch.App.259, 268 James L.J. quoted with approval by Maitland: Equity Lecture IX.

39. (1970) 86 L.Q.R. 463, 477.

40. Payment of damages would give a right to use the information which would be fair to the purchaser who had mixed the information with his own.

41. [1907] 2 Ch.577.

42. Palin v Gathercole (1844) 1 Coll.565; 63 E.R.545.

43. apart from breach of copyright.

44. [1907] 2 Ch. 577, 587.

45. ibid.

46. The Times August 18 1967. Whether the action survives the plaintiff is uncertain.

47. In November 1977 Sir Harold Wilson applied for an injunction to prevent publication of a book about himself on the ground of breach of confidence. His solicitors admitted they were in "uncharted waters." The Guardian November 16 1977.

48. For example the incident in an aircraft mentioned by Lord Denning M.R. in Woodward v Hutchins [1977] 2 All E.R.751 as being "in the public domain."

49. There may be contractual breach of confidence, for example for disclosure by a banker: Tournier v National Provincial and Union Bank of England [1924] 1 K.B. 461.

50. Even if the particular relationship has ended: Argyll v Argyll [1965] 1 All E.R.611.

51. Friends of the royal family were considered to be under a duty of confidence in Prince Albert v Strange (1849) 1 Mac. & G.25.

52. though it may do so in relation to commercial information.

53. Tournier v National Provincial and Union Bank of England (above).

54. Lord Ashburton v Pape [1913] 2 Ch.469

55. [1912] 1 K.B.535.

56. the question of present employees was expressly left open.

57. Discussed in Chapter 5.

58. *The employee would be under a similar duty to his employer on analogy with the cases where the client's property is handed over for a contract: Ackroyds (London) Ltd. v Islington Plastics Ltd [1962] R.P.C.97.*

59. *On the facts disclosed in Fraser v Evans [1969] 1 All E.R.8.*

60. *On the facts disclosed in Beloff v Pressdram Ltd. [1973] 1 All E.R.211.*

61. *Fraser v Evans (above.)*

62. *Snell: Principles of Equity 27th ed. 1973 pub. Sweet & Maxwell page 27.*

63. *North loc.cit.*

64. *[1965] 1 All E.R.611, 626.*

65. *[1972] 1 All E.R.1023, 1033.*

66. *[1977] 2 All E.R.751,755.*

67. *Bjorlow (Great Britain) Ltd. v Minter (1954) 71 R.P.C.321; Yates Circuit Foil Co. v Electrofoils Ltd. [1976] F.S.R. 345.*

68. *Mustad v Dosen [1963] 3 All E.R.416; Franchi v Franchi [1967] R.P.C. 149.*

69. *[1970] J.B.L. 44, 47.*

70. *[1967] 2 All E.R. 415.*

71. *Cornish loc.cit. Though if the basis of the award is tortious questions of fairness may be irrelevant.*

72. *(1970) 86 L.Q.R. 463, 481.*

73. *at first instance (1951) 68 R.P.C.190. The Court of Appeal varied the decision.*

74. *Boardman v Phipps [1967] 2 A.C.46; [1966] 3 All E.R. 721.*

75. *Regal (Hastings) Ltd. v Gulliver [1942] 1 All E.R. 378.*

76. *Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41*

77. *Aas v Benham [1891] 2 Ch.244 has a similar basis.*

78. *discussed above.*

79. *The Times September 5 1974.*

80. *Health and Safety at Work etc. Act 1974 section 28(8).*

81. *Report of the East Sussex County Council into the implications of the death of Maria Colwell: The Times April 30 1975.*

82. *Devlin J. in Southport Corporation v Esso Petroleum Ltd. [1953] 3 W.L.R. 773,779.*

83. *[1972] 1 All E.R.1023.*

CHAPTER 2

OFFICIAL SECRETS

1. The History of Official Secrets Legislation

a) The 1889 Act.

The first Official Secrets Act was passed

> "in order to punish the offence of obtaining information, and communicating it, against the interests of the State."[1]

The Act was concerned as much with civil servants 'leaking' matters of government as with spies acting on behalf of foreign governments. Indeed

> "Foreigh spies were openly tolerated."[2]

That eminently patriotic soldier, Sir Robert Baden-Powell, describes how he sketched enemy fortifications while pretending to be a lepidopterist. When caught, he displayed his notebook full of sketches of butterflies and was released. The markings on the butterflies' wings showed with accuracy the position of the fortifications.[3] With such activities considered highly patriotic it would have been difficult to take a very high-handed attitude to similar activities on behalf of other nations.

While the 1889 Act provided penalties for being in government places or making sketches for the purpose of wrongfully obtaining information, this intention had to be proved by the prosecution as did an intention to communicate the information to a foreign agent in order to turn the offence from a misdemeanour to a felony. This proof of intention was thought to be too difficult to risk, and it was to be fundamentally changed in 1911.

Attitudes to the 'leaking' of government information by civil servants were ambivalent. Ministers liked to use the power of giving information to the press as a tool in achieving sympathetic coverage.

> "While [the newspaper] continued to give him general support, Lord Aberdeen authorised the Foreign Office to give The Times that information which, as the phrase went, may properly be given to the Press, and he himself also gave Delane (the editor) some startling pieces of exclusive information on general topics, as, for example, on the Corn Law question."[4]

But when Palmerston became Foreign Secretary, in June 1846, The Times had more difficulty.

> "It was impossible to secure information from Palmerston without giving him support."[5]

It must have been highly irritating for a Minister in such circumstances to find information being leaked by junior civil servants.

Some of the leaks, like that of Charles Marvin, a temporary Foreign Office copying clerk, who in 1878 sold details of a secret Anglo-Russian agreement,[6] were clearly damaging to foreign relations if not to security, but the complaint of The Times at the carelessness of the Foreign Office was probably caused more by jealousy that another paper had acquired the scoop than by any sense that information should not be leaked. After all, The Times had itself in 1854 published details of an ultimatum to Russia before The Tsar himself received it and justified the disclosure by saying[7]

> "To accuse this or any other journal of publishing early and correct intelligence when there is no possibility of proving that such intelligence has been obtained by unfair or improper means, is to pay us one of the highest compliments we can hope to deserve ... We hold ourselves responsible, not to Lord Derby or to the House of Lords, but to the people of England, for the accuracy and fitness of that which we think proper to publish. Whatever we conceive to be injurious to the public interests, it is our duty to withold; but we ourselves are quite as good judges of that point as the leader of the Opposition."

Until the 1889 Act, the only remedy used was to charge the discloser with larceny of the document. However, this was unsatisfactory as he may not have "intended permanently to deprive the owner thereof."[8] Anyway, this is not the substantive offence. It may have been possible at that time to sue at any rate a civil servant for breach of confidence on analogy with Prince Albert v Strange[9] but a civil remedy is not usually suitable in such a case. There might have been grounds for an injunction to prevent a leak where it was known beforehand, as when The Times published Lord Castlereagh's correspondence at the Treaty of Vienna after a lengthy series of articles on the subject and in spite of Government protest.[10] The law relating to breach of confidence was not well established, at least apart from contractual confidence, and it may have been difficult to establish an initial confidentiality and a chain without a bona fide purchaser[11]. Whatever the reason, no injunction was sought in any of these cases, though provision for the Attorney-General to seek an injunction was inserted in the 1908 Bill.

The 1889 Act applied to three groups of people, namely anyone who

had the purpose of wrongfully obtaining information, anyone having possession of certain kinds of information and persons holding (or having held) office under Her Majesty or holding a Government contract. Not surprisingly persons in the first category committed an offence if they wrongly entered "any place belonging to Her Majesty the Queen, being a fortress, arsenal, factory, dockyard, camp, ship, office or other like place" (hereinafter called a prohibited place) or being there (whether legally or illegally) obtained any information to which they were not entitled.[12] From the outside it was not an offence to sketch a ship or office, but with the necessary intent it was an offence to sketch any of the other buildings in the list.[13] All these offences were only misdemeanours unless the prosecution could show an intention to communicate the information so obtained to a foreign State.[14]

A person in possession of information would only commit an offence in limited circumstances.[15] Firstly, the information must either have been obtained in breach of the Act or it must be information relating to a prohibited place or to naval or military matters. Information obtained by being wrongly communicated within section 2 of the Act (see below) would not come within this provision[16] as it must have been wrongly obtained i.e. by someone who had no right to have it. Secondly some degree of "guilty knowledge" was necessary. Either the possessor must know of the illegal origins of the information, or he must have been entrusted with it in confidence by an officer under the Crown, or his communication of it must be with knowledge that it was contrary to the interest of the State. Thirdly the possessor must communicate the information wilfully to a person to whom, or when, in the interest of the State it ought not to be communicated. Thus this Act had very little effect on the freedom of the Press to publish in what they saw as the public interest information leaked to them, unless they knew it to be wrongly obtained or it was given in confidence. And as one editor had earlier said

> "I don't much care to have 'confidential' papers sent to me at any time because the possession of them prevents me from using that information which from one source or another is sure to reach me without any such condition of reserve."[17]

At least one Member of Parliament recognised this weakness of the Bill.

> "Instead of attacking the poor clerk, the Government should go further and attack the real offenders - the

people who obtain secrets and publish them for profit."[18]

This advice was to be remembered and followed later.

The 1889 Act did, however, attack the problem of leaks by civil servants by creating the offence of breach of official trust.[19] This was committed by an office holder (or former office holder) under Her Majesty who "corruptly or contrary to his official duty" communicated any document or information which he had obtained by means of his office to any person "to whom the same ought not, in the interest of the State, or otherwise in the public interest, to be communicated at that time."[20]

The offence was a felony if communication was made, or attempted, to a foreign State but otherwise was a misdemeanour. The section was applied also to Government contractors "where such contract involves an obligation of secrecy" and their employees.[21]

Although this Bill was in the Commons from March until June there was very little discussion of its provisions, and nearly none at all. Its Second Reading was introduced by the Attorney-General in a speech of two sentences, and after one protest at the lack of explanation it was carried.[22] It went through Committee without amendment because the persons moving amendments were not in their places. There was therefore no Report stage though Members had understood that matters could be raised at that stage.[23] It came up for Third Reading on the last day before the Easter recess, when Members were pressing for an adjournment debate on the conditions in Donegal. The Attorney-General tried to push it through saying

"There is no reason for postponing this Bill"

but after several protests it was stood over.[24]

In the adjourned debate it was pointed out that a civil servant could commit an offence even if he gave information to a Member of Parliament. The Bill proposed that the offence should be committed if the disclosure was contrary to the interest of "any Department of the Government" as well as the interest of the State or the public. As one Member said

"Everybody is agreed that nothing should be made known that is contrary to the interests of the State, but looking at the way Departments have been managed lately I do not think we should render it illegal to obtain information as to that management."[25]

The Attorney-General justified the words by telling of how the War

Department had decided to adopt a new system of guns and because this was made known they had had to pay more for the patent than they had expected, but in spite of his assurance that

> "the words were not inserted with the sinister design which [Mr Hanbury] suggested to prevent proper information being given,"

the amendment to delete Departmental interests was agreed.[26] This was the only change made by the House of Commons to the Government's Bill.

Thus for the first time honour was recognised to be insufficient to maintain traditional civil service secrecy. To secure a conviction the prosecution had to show that the communication was made corruptly or contrary to the defendant's official duty, and that it was contrary to the interest of the State or the public. The information could be of any kind.

b) The 1908 Bill

This Bill was an attempt to amend the 1889 Act and provide a complete code for the communication of official information.[27] Its aim was to provide that official information - widely defined - should only be disclosed with authority, but that authority would be given to publish information not harmful to the interest of the State. It has obvious weaknesses, such as the subjective attitude of the civil servant who would decide whether or not to authorise publication and the width of definition (for example a period of forty-two years for official documents), but it also had merits. The prosecution would have had to satisfy the jury that the communication was contrary to the interest of the State and that the publisher knew or ought to have known that fact, and it did say authority to publish "shall be given" where "there is no objection in the interests of the State." One feels, with hindsight, that since the Government was determined to lay some restraint on publishers of leaked government information, the Press would have been wiser to accept this Bill in principle, pushing for improvements such as an appeal on refusal of authority to publish, and a restriction of the categories of information covered. Once the principle embodied in clause 3

> "Authority shall be given to publish or communicate any document or information to which this Act applies if, in the opinion of the person giving the authority on behalf of His Majesty there is no objection in the interests of the State to that publication or communication"

had been accepted and embodied in a statute it would have been an easier

task to argue for further relaxation. As it was, the Press, like Aesop's frogs, destroyed this Bill,[28] and got one far more restrictive.

The criticism of the Bill, poured out to such good effect by the Press in 1908, could perhaps be applied with more force to the 1911 Act.

> "The Bill ... practically aims at the total prohibition of all communications between the official classes and representatives of the Press. Since it does so, it endeavours to build up a wall between officialdom and the public, and to shield every incompetent administrator from his just due of public resentment."

The Bill should define the words "secret" and "confidential" and the documents to which they could be applied.

> "Everyone, and particularly every official, has a different idea of what is meant by these terms, and to what documents or letters they should be applied. In official life the terms are indiscriminately applied to papers of unimaginable unimportance with the utmost nonchalance and by rule of thumb. The chief reason for doing this is to prevent official ignorance and incompetence from becoming known."[29]

c) The 1911 Act

This Act repealed the 1889 Act and replaced it by wider provisions in relation to both section 1 and section 2. Although the Bill passed through Parliament at great speed - two days only in the House of Commons - there is evidence that it had been discussed and prepared within the civil service over a long period of time. It was clearly seen not only as a check against espionage but also as a weapon against civil service leaks of all kinds.[30]

The passage of the Bill through the House of Commons indicates a fear of opposition and a determination to side-step it, perhaps based on the history of the 1908 Bill,[31] though the Press attack on that Bill had started as soon as it had been introduced into the House of Lords whereas this time the Press were occupied with the constitutional crisis. The First Reading of the Bill in the Commons was on August 17th and the Second Reading on 18th. That day should have been the last day of sitting before the summer recess, though in fact the House was adjourned only until August 22nd because of industrial unrest. There was some protest at the speed of the Bill's passage, but most members seem to have accepted that circumstances (unspecified) made it necessary

to have the Act. There is no doubt that criticism was allayed by the extraordinary statements of the Attorney-General and of Colonel Seely, the Under-Secretary of State for War, which are inexplicable in the light of the changes made by the Act, in particular by section 2 which was not once mentioned in the Debates in the Commons.[32]

The Attorney-General said

> "It was a very difficult thing to administer the old Act, and it is essential to have this provision. The sense of justice in this country is perfectly fair to all persons, and there would be no danger to anyone engaged in something perfectly innocent."[33]

Colonel Seely went further

> "This Bill is not aimed at anybody in particular, but it is highly necessary that it should be passed. Every other country has legislation of this kind, I understand, and in no case would the powers be used to infringe any of the liberties of His Majesty's subjects."[34]

and on Third Reading he said

> "It is undoubtedly in the public interest that this Bill should be passed, and passed at once ... If my Honourable Friends will read the Bill they will see that though the actual change in the law is slight, and it is perfectly true to say that none of His Majesty's loyal subjects run the least risk whatever of having their liberties infringed in any degree or particular whatever, nevertheless there are circumstances which may arise and have arisen which, in the opinion of His Majesty's Government, make it very necessary that this Bill should be passed into law."[35]

In fact the new Act made very considerable changes in the law, and curtailed, to a notable extent, the liberties of loyal subjects. For example, entry into a prohibited place became an offence not only when it is for the purpose of wrongly obtaining information but "for any purpose prejudicial to the safety or interests of the State," and the House of Lords has recently given this phrase a wide interpretation.[36] The shift in the burden of proof in section 1(2) was the most striking instance.[37]

Section 2 of the new Act gathered together, and amended, all the provisions relating to disclosure of information from the old Act and effected considerable changes. Two separate, though related,

questions are relevant to the criminal sactioning of disclosure of information, namely how secret or important must the information be, and why is its disclosure to be prevented. The earlier Act had answered these clearly, by creating two different categories of offence. If the information relates to a prohibited place or military matters it is likely to need protection in the interests of national security. If communication is known to be contrary to the interest of the State, the discloser will be punished because he knows he is harming the national interest.[38] (The potential width of definition of information was effectively limited by the need for harm to the interests of the State). The second category of offence was created for a different reason, namely to prevent breaches of official trust by civil servants and government contractors. The argument that civil servants are like confidential employees and have a fiduciary duty to protect their "master's" secrets was in line with nineteenth century case-law on master and servant.[39] The same attitude was voiced by the Press in 1908.

> "The State should have ample powers to protect its real secrets and to inflict due punishment on those who betray them out of malice or through carelessness ... The men whom the State ought to punish are its own paid servants who have broken their trust."[40]

This attitude ignored the very real difference between the ordinary employer's secrets and those of government, and the right of the public to know what is done, or not done, in their name and with their money.[41] The problem had been raised briefly by Opposition members in 1889, concerned for disclosures about Departmental mismanagement to Members of Parliament, but they seemed to think they had done enough by deleting the interests of Departments from the section.[42] At least no offence was committed, even by a civil servant, unless the disclosure was contrary to his official duty and contrary to the public interest. This limited the importance of the fact that the categories of information covered were unlimited.

The 1911 Act does not clearly separate the two questions and so effectively creates far wider categories of offence than can apparently be justified. The information of which disclosure is an offence is any information relating to or used in a prohibited place[43] or anything in such a place,[44] information obtained in contravention of the Act,[45] information entrusted in confidence to the holder by an office-holder under the Crown,[46] and information obtained by the holder through his

position as an office-holder or contractor under the Crown.[47]

Instead of making separate categories of information to be protected for different reasons, as under the old Act, and perhaps adding other categories such as publication for profit (as was suggested in 1889) or contrary to the interests of national security, the 1911 Act simply lumped together all the different types of information and circumstances of obtaining it and made it an offence to communicate it to anyone unless communication is authorised or a duty in the interest of the State.[48] Retaining the information wrongly became an offence[49] and even the mere receipt of such information with knowledge is an offence unless the receiver can prove that he did not want it.[50] Other new provisions of this Act relate to the power of arrest,[51] the offence of harbouring[52] and the granting of search warrants.[53] While such restrictions may well be justified in relation to those acting "for any purpose prejudicial to the safety or interests of the State," in no cases are the sections limited to section 1 offences, but they apply equally to offenders under section 2 whose only 'disloyalty' may be that they passed on information which they were not authorised to transmit.

d) The 1920 Act

The Press and Parliament having made very little fuss over the major changes made by the 1911 Act made great efforts to restrict the provisions of the 1920 Bill, which was designed largely to bring certain Defence of the Realm Regulations into regular peacetime use.[54] The efforts were largely misguided, showing a lack of understanding both of the Bill and of the original Act. For example, Sir Donald Maclean, strongly opposing the Bill, said

> "The original Act is very limited in its purpose ... The original Act was obviously aimed at what was definitely spy work,"[55]

while he criticized the Bill as attacking the legitimate functions of the Press and imposing on the liberty of individuals. Some of the confusion seems to have arisen from the use of the phrase "official document" which was widely used in the Bill, but had a limited definition relating to passports and official passes and similar documents. Section 1 of the 1920 Act is a 'spying' section concerned with matters preparatory to getting into a prohibited place or getting access to official documents. The prophetic words of one of the few attackers of the 1911 Act might have been recalled when in Committee an attempt was made to remove Clause 1(3), shifting the burden of proof to the defendant as in section 1(2) of the 1911 Act. In 1911 Sir W.Byles had said

"Everything this House does becomes a precedent of what it may do in the future ... I draw attention once more to these words. I say their being in this Bill will be quoted against us in some other Bill proposed by some other Attorney-General years hence."[56]

In 1920 the Attorney-General, Sir G. Hewart, said

"How can it be unreasonable that the provision regarding the mode of proof which is contained in the principal Act shall be carried forward to those other matters, similar to the matter of the principal Act, which this Bill provides for?"[57]

In fact most of the 1920 Act is concerned with what will normally be national security matters, and it would have caused great confusion if Parliament had, as was sought in Committee, removed from clause 1 the words "or for any other purpose prejudicial to the safety of interests of the State." Some of the statements made in Committee seem to suggest that some Members were unaware that these words were already in section 1 of the 1911 Act.

Section 6 of the 1920 Act, however, was of general application and required anyone to give information when any offence had or might have been committed under the 1911 Act. This section was much attacked in Committee (largely on the ground of inconvenience and expense!) but the Attorney-General was misleading when he said

"We are dealing only with offences or suspected offences under the principal Act or this Act. In other words, to put it shortly, we are dealing with spying and attempts at spying."[58]

This section was later to be used to try to compel a journalist to disclose his source of a newspaper article based on a police report.[59] This led to the amendment of the section in 1939, bringing it more into line with what the Attorney-General said was its effect in 1920.

The 1920 Act[60] also increased the number of preparatory activities which constitute attempts, such as "endeavours to persuade another person to commit an offence;" the section has been further extended by a judicial interpretation of "or" for "and".[61]

Amendments to section 2 of the 1911 Act made by the Schedule included a new offence of failing to take reasonable care of information within the Act.[62]

An interesting aspect of the Commons debates on the 1920 Bill is the general statements by Members about the importance of limiting

secrecy. For example, on Second Reading, Commander Bellairs said

> "You cannot allow people to work in the interests of the enemy or a possible enemy, because in that case the safety of the State is in danger; but the safety of the State is never in danger by real honest criticism ... This Bill will promote secrecy, and secrecy, as we found in the late war, ruins the connection between the Army, the Navy and the people. It also leads to industrial unrest ... The Government have all through been too much afraid of the public."[63]

It was unfortunate that these statements were made nine years too late; they were apposite to the Act which had been passed in 1911, but inapt for the Bill then before the House.

e) The 1939 Act.

This short Act substituted a new, and more restricted, section 6 for that of the 1920 Act. Both the journalist case[64] and the Duncan Sandys case[65] had led to widespread dissatisfaction with the powers to compel people to give information about suspected Official Secrets Acts offences. As Mr Dingle Foot said

> "The House passed Section 6 in the belief that it would and could be used only against enemies of the State. That belief turned out to be ill-founded .. it should be a lesson to us all never to entrust to those in authority or to any Minister or Government powers in excess of what they strictly need, because if we do we may be fairly certain that sooner or later the time will come when those powers will be used in a way never contemplated on intended by the House of Commons."[66]

The Home Secretary pointed out that the section had in fact only been used six times, resulting in two prosecutions, but accepted that

> "that is a drastic power and it has been generally recognised that it is a power which should be used only in rare and exceptional cases."[67]

The effect of the changes made by the new section are threefold. First, it removes the duty to give information from all offences other than offences under section 1 of the 1911 Act i.e. spying offences. Secondly, it gives the protection that the Chief Officer of Police who seeks the information must have reasonable grounds for suspecting

both that an offence has been, or is about to be, committed and that the person can give relevant information. Thirdly, it gives the protection that normally the police officer must obtain the consent of the Secretary of State before using the powers under the section. This does not apply if the police officer has reasonable grounds for believing that an emergency exists, but even here he must report the matter to the Secretary of State.[68]

2. Criticisms of the Official Secrets Acts.

As early as 1939, during the House of Commons Debate on the Bill to amend section 6 of the 1920 Act, Dingle Foot had called for a complete reconsideration of the Official Secrets Acts as soon as the war should have ended.[69] He singled out for attention the provisions relating to the harbouring of offenders and power to grant search warrants as being too wide in their scope. No such reconsideration took place but from time to time various criticisms have been made, usually when the Acts have been invoked to prevent what seemed innocuous information or co-operation being obtained or, more vociferously, when a prosecution has taken place. There was disquiet at the use of section 1 to convict members of the Campaign for Nuclear Disarmament,[70] but most of the criticism has centred on section 2 of the 1911 Act, culminating in a Departmental Committee, the Franks Committee,[71] set up as a result of public anxiety at the trial of a journalist who disclosed a report about British involvement in the Nigerian civil war.[72] Many of the proposals of the Franks Committee were foreshadowed by a report in 1965 called "The Law and the Press."[73] This was the report of a joint working party of Justice, the British section of the International Commission of Jurists, and the British Committee of the International Press Institute who met as a result of the conviction of journalists who refused to disclose their sources to the Vassall tribunal.[74] Since the report of the Franks Committee successive governments have stated that they will reform the Acts, and a White Paper, inviting comments and public discussion was published in July 1978.[75] It is, however, useful to collect the various criticisms which have been made and analyse the various proposals for reform in the light of relevant principles.

a) Weaknesses of the Acts.

It is sometimes argued that the very width of the provisions is a weakness in that there is great uncertainty over the likelihood of prosecution. As Mr Ian Gilmour said

> "It is one of the great blunderbusses that can seldom be used."[76]

It was this uncertainty which led to the formation of the "D-notices" committee, through which the Press get guidance about matters which it is felt particularly important that they should not disclose. But, as was seen in the Aitken case, the lack of a veto by the committee is no protection against a prosecution under the Acts.

In spite of the width of provision, there are still some surprising gaps. For instance there is no provision making it an offence for a Crown servant to use official information to make a profit for himself rather than disclosing it to someone else, and there is doubt whether the provisions of the Acts apply to the executors of a deceased Crown servant who made no unauthorised disclosure in his lifetime.[77]

Another aspect of the Acts which is increasingly considered a weakness is the control of prosecutions by the Attorney-General, lending an unfortunate political shade to the decision whether to prosecute.

> "Prosecution under the Official Secrets Acts depends entirely on the length of an Attorney-General's foot."[78]

As was recently said by eminent constitutional lawyers

> "to create criminal offences wholesale out of innocent and indeed desirable activity, and then to prosecute selectively at the government's discretion, is as bad a form of law as could be devised."[79]

Although section 2 of the 1911 Act allows for publication to "a person to whom it is in the interest of the State his duty to communicate it"[80] this seems to be of very little, if any, practical effect. In a House of Commons Debate arising out of the Duncan Sandys affair it was said that there would be an onerous burden to prove the duty even in making disclosure to a Member of Parliament,

> "because prima facie if anybody has received information under a pledge of secrecy that pledge cannot be lightly broken."[81]

The journalist Aitken pleaded the defence on the ground that the information, which he disclosed in a reputable newspaper, showed inaccuracies in Ministerial statements in Parliament, but the judge discounted it[82] though the fact of inaccuracies was accepted. Both the Lord Chief Justice[83] and a former Attorney-General[84] have described offences under section 2 as "absolute" in the absence of authorisation.

b) Excessive nature of the provisions

The major criticism made of the Acts is that they provide a blanket of secrecy over official information - there is no public right

to information which does not need protection (as would have been provided under the 1908 Bill and as is provided, for example, in the American Freedom of Information Act.[85]) The result of this is that public discussion of matters of public interest depends for its information on what government chooses to disclose and the chance of 'leakage.' So, for example, research projects cannot get information about what goes on in prison - even when there is no possible threat to prison security.[86] Individuals may be affected by unnecessary secrecy, as was seen when the Supplementary Benefits 'A' Code was disclosed showing that in at least three circumstances individuals were frequently refused benefits because they did not know the relevant part of the Code to quote.[87] The assumpton of secrecy, which is buttressed by the blanket provisions of the Acts, can sometimes produce comical results. A researcher read in America a document on the testing of cars which had been sent by the British government to their American counterparts, and was available there as a matter of routine. On returning to Britain he asked for a copy only to be told that it was so secret he could not even be told its title.[88] Apologists of the Acts point to the small number of prosecutions as indicating that only disclosures damaging to "national Security or some other major public interest" are in practice prevented,[89] but the effect of the Acts is far more pervasive. Crown servants and contractors are warned of the dangers and may be threatened with prosecution or even lose their jobs, as was admitted in the case of Mr Stephen Thornley who published in a newspaper evidence suggesting weakness in part of Nato defence.[90] In his oral evidence to the Franks Committee Sir Burke Trend, the then Secretary of the Cabinet, made clear the importance of the Acts as a deterrent to leakage, saying

> "I think it is very easy to underrate the psychological effect of the mere existence of this Act."[91]

Another aspect of its effect is that civil servants may, on occasion, find it useful to threaten prosecution so as to stifle criticism. Chapman Pincher recounted how he had heard about a serious fault in the building of a large atomic reactor. The newspaper were warned of prosecution and so did not print the story. He added

> "The civil servant concerned later told me, with some hilarity, that we could never have been prosecuted. He was astonished that the paper had given in so easily."[92]

It may be, as the Fulton Committee said[93]

"healthy for a democracy increasingly to press to be consulted and informed;"

the wide provisions of the Acts ensure that to a large extent such pressure goes unanswered.

> "The Acts not only deter mischievous 'leaking of information' but also underpin the traditional secrecy of the workings of the State on the part of the Civil Service. By this means information is so restricted as to guarantee an ill-informed Parliament, Press and people on the central issues of the day."[94]

As well as a general democratic "right to know" there is the question of disclosing abuses. This has worried Members of Parliament at least since 1889. Then an offence was only committed if the communication was made to a person "to whom the same ought not in the interest of the State or otherwise in the public interest to be communicated at that time."[95] Now, unauthorised publication is only not an offence if made "to a person to whom it is in the interest of the State his duty to communicate it."[96] There has been no case where the defence has succeeded, though several where it might have been expected to succeed.[97]

Many of the provisions of the Acts have been considered as excessive infringements of individual liberty, particularly when applied to disclosure of official information as opposed to espionage. For example, the mere receipt of information is prima facie an offence; the definition of attempt is much wider than in relation to other criminal offences; powers of search and seizure are also wider than usual. Although these provisions may be acceptable when applied to spying, they are equally available in relation to disclosure. The only exception to this is section 6 of the 1920 Act which, having been amended in 1939 after much complaint by journalists required to disclose their sources, now only applies to section 1 offences. Indeed, the juxtaposition, in the same Act, of spying offences and other disclosure offences causes much disquiet.

> "If we are to have legislation on the Press, let it not be mixed up with penal provisions aimed at spies and revolutionaries."[98]

And not only the Press, but others who have made disclosures in what they saw as the public, or a legitimate private, interest feel also a distaste for being stigmatized as enemies of the State.

3. Principles Applicable To The Protection By The Criminal Law Of Official Information.

a) General Principles for Protection of Information

In deciding on the protection of any information the two basic criteria are the definition of the information to be protected and the purposes of its protection. The ascertainment of these premises will determine the further questions against whom the information is to be protected and for how long.

The capacity in which a person holds the information is not a relevant matter if the importance is the protection of the information. If the information by its nature ought to be kept secret, then the duty to keep it secret should be imposed on the holder whatever his capacity; conversely, if the nature of the information does not require that it be kept secret the criminal law should not impose such a duty on a person because of the capacity in which he holds it.

A third element, of basic importance, is the question whether there is a contrary interest, public or private, in disclosure of the information. If there is such an interest, then a tension situation exists between the interests in protection and the interests in disclosure. The purposes of protection may be definable in terms of interest, public or private, or they may be of a lesser nature not recognised as an interest in law. (For instance it is arguable that since there is no general right to privacy in English law a desire for protection on that ground alone does not constitute an "interest.") Similarly by an "interest in disclosure" is meant an interest recognised by law, not merely, for example, curiosity. This distinction is clearly recognised, for example in the law of libel in relation to qualified privilege, and has been applied to a defence to an action for breach of confidence.[1]

Possible ways of resolving this conflict between interests are a strict delineation of the information to be protected, thus giving effect so far as possible to the interest in disclosure; providing exceptions to the rule of non-disclosure, which may be exceptions of people or of purposes for disclosure depending what the interest in disclosure is; or there may be granted a discretion in someone, usually the court, to allow disclosure inspite of the general rule of non-disclosure. Normally if one interest is a public one and the other a private one the public interest will take precedence. Alternatively if the loss of one interest will cause actual damage and the other is of a general nature, the one preventing more certain damage will

prevail. It is where both are of equal weight that a judicial discretion is most appropriate. If there is no conflicting interest in disclosure there is no tension and so the protection can be wide.

Legal protection may be by criminal or civil law (or contempt of court which is perhaps a third category). If the criminal law is to be used the normal rule of "nulla poena sine lege" will be applied and the law will be construed strictly in favour of the individual. The attitude of the courts in these matters is indicative of a public feeling that since criminal conduct is the subject of penalties and opprobrium the criminal law should not be employed where it is not necessary.[2] This is an additional reason for limiting the use of the criminal law in the protection of confidential information.

The interest in protection of official information has been described in wide and general terms, particularly by Ministers seeking non-disclosure of official documents of all kinds in litigation. For example, in Re Grosvenor Hotel (London) (No.2) the disclosure of memoranda between officials of the Ministry of Transport and the Railways Board was rejected by the Minister on the ground that

> "All the documents ... relate to the framing of the policy of Her Majesty's Government ... and as such are within a class of documents which in my opinion on the grounds of public interest ought to be withheld from production."[3]

In Conway v Rimmer the Home Secretary merely claimed that production

> "would be injurious to the public interest."[4]

It is, however, possible to separate various heads under which protection has been claimed for official information.

i) National Security

Some aspects of this are obvious candidates for protection, such as defence secrets and diplomatic relations. The major question which may arise is who decides on the needs of national security.

> "There is no rule of common law that whenever questions of national security are being considered by any court for any purpose it is what the Crown thinks to be necessary or expedient that counts and not what is necessary or expedient in fact."[5]

Nevertheless

> "However wide the power of the court may be held to be, cases would be very rare in which it could

be proper to question the view of the responsible Minister that it would be contrary to the public interest to make public the contents of a particular document."[6]

There may sometimes be tension between the needs of national security and the freedom of the press[7] or the rights of individuals,[8] but the needs of national security are paramount. Within this heading may also come matters of relations with other states and with international bodies.[9]

ii) Maintenance of Internal Security

This is the ground on which the secrecy of police information and activities and information relating to prisons is justified.[10] Internal security is as potentially wide a concept as national security and alarm is sometimes expressed, particularly at the extent of surreptitious political surveillance both by Special Branch activities and by listing on the police computer. In the Profumo Report Lord Denning confirmed that the Security services were not to be concerned with peoples' political opinions

"except insofar as they are subversive, that is, they would contemplate the overthrow of the Government by unlawful means."[11]

But a Home Office Minister has since defined subversive activities as

"those which threaten the safety or well-being of the State, and which are intended to undermine or overthrow Parliamentary democracy by political, industrial or violent means"[12]

thus including lawful as well as unlawful activities. A car-owner's connection with the Anti-blood Sports League was ascertained from the police computer.[13] Plain clothes police photographed mothers in Bletchley marching in protest at closure of a school.[14] It has been said that

"To link protest with potential treason is the great blunder of security services."[15]

Protection of society against subversion in the Lord Denning sense and against other crime is clearly important and some information must be kept secret for those purposes.[16] But this is no justification for wholesale gathering of irrelevant information or a blacket refusal of disclosure.

iii) Secrecy in decision making

a) Collective responsibility

The argument against disclosure of any information relating to Cabinet discussions or differences of opinion between Ministers on

matters of policy is based on the need to preserve the "united front" of collective government responsibility.

In his evidence in the Crossman diaries case Lord Diamond, a former Member of Parliament and senior civil servant, said

> "I believe it to be essential in the public interest and for the proper functioning of the Government that when a Minister gives his views as to the policy to be followed in Cabinet, and Cabinet Committee, he should be free from every kind of pressure except the force of the arguments about the decision to be taken and the interest of the nation. I do not believe he will be free from extraneous pressure if he knows or fears that what he says will be disclosed within a period of time when he is still a Minister."[17]

The Radcliffe Report on Ministerial Memoirs saw the need for secrecy as

> "the relation of confidence which necessity imposes upon any group engaged in proposing, discussing, formulating and agreeing upon a common course of action."[18]

Lord Reid in Conway v Rimmer saw the reason for non-disclosure not as preserving candour but because

> "disclosure would create or fan ill-informed or captious public or political criticism."[19]

b) Ministerial responsibility

From an early stage protection has been claimed for advice given by Crown servants to Ministers. This is taken so seriously that there is a convention that an incoming Government is not given access to advice given to the previous Administration.[20] The ground for claiming protection is sometimes said to be that the advice would be less free and frank if it might be disclosed,[21] though this argument has been much criticised by judges in recent years.[22]

Another ground is that the Minister or civil servant might be embarrassed by the disclosure that advice was rejected. This was suggested as a ground for refusing publication of planning inspectors' reports, but was rejected by the Franks Committee as being outweighed by other considerations.[23] But even the Fulton Committee on the Civil Service, which favoured more public participation in decision-making, stated that

> "there must always be an element of secrecy in administration and policy-making ... it is difficult to see how on any other basis there can be mutual trust between colleagues and proper critical discussion of

different hypotheses."[24]

and the Government White Paper, 'Information and the Public Interest,' approved this statement and added that otherwise

> "the collective responsibility which is a cardinal feature of our system of government could hardly continue".[25]

Ministerial responsibility, in the sense that civil service advice is anonymous and the Minister carries any blame, is perhaps no longer a reality. Select Committees sometimes insist on interviewing the particular civil servants concerned in a decision;[26] the Tribunal inquiring into the collapse of the Vehicle and General Insurance Group in 1972 criticized individual civil servants.[27]

The protection of advisers is not the only aspect of decision-making. If the public are to play any realistic part in the formulation of policy it is necessary that at least the information on which decisions are made and the various policy options are not kept secret. It has been said that

> "No reform of the Official Secrets Acts which leaves undisturbed this insulation of policy-making from public scrutiny should be mistaken for a liberalising measure."[28]

iv) Official Trust

Much information is given to Government departments either voluntarily or under compulsion. It is sometimes stated that it is necessary to keep such information confidential or trust between government and governed would be undermined, people would be reluctant to give information or would give false information. This is the reason why some statutes limit the uses to which such information may be put.[29] An example is the Statistics of Trade Act 1947. In debate the government were warned that the co-operation of industry with the proposed censuses would

> "be given in proportion to its confidence in the secrecy of facts and figures supplied."[30]

This argument may be of great weight in discovery cases. In Norwich Pharmacal Co. v Commissioners of Customs and Excise[31] the House of Lords granted discovery in spite of the argument because it seemed highly unlikely that false information could be given or that honest traders would object to the disclosure. On the other hand, in both Rogers v Secretary of State for Home Department[32] and Alfred Crompton v Commissioners of Customs and Excise[33] the House refused discovery.

In the former case individuals might be in difficulty and the supply of information might dry up; in the latter, resentment might be caused and make the collection of information difficult. Sometimes a distinction is drawn between information given voluntarily and under promise (express or implied) of confidentiality and that given under compulsion with no such promise,[34] but if (as in the Alfred Crompton case) the argument is based on resentment rather than loss of the information the distinction seems irrelevant.

v) Confidences of the citizen

Much information obtained by government is personal either to an individual or an undertaking. Disclosure of the latter may cause financial loss, disclosure of the former may cause embarrassment or distress. It is often argued that government has a duty not to disclose such information. Several statutes, such as the Statistics of Trade Act 1947 and the Sex Discrimination Act 1975, make provisions to ensure that information shall not normally be published in such a way that individuals can be identified. In the Norwich Pharmacal case the court was concerned that the information was not of a personal nature before ordering its disclosure.[35] It may be thought more difficult to justify a rule of non-disclosure of personal information in government hands in a society which has no developed law of the protection of privacy in other circumstances, and seems to have set its face against any such law,[36] than it would be if there were such a general law. The information may have been given in confidence by the subject of it, or it may have been received elsewhere or under no seal of confidence. A problem which may arise in this context is whether protection should lie against the subject of the information or only against third parties.

b) Grounds for Disclosure of Official Information

Any of these heads may be advanced as reasons for preventing disclosure of official information. The arguments advanced in favour of disclosure may take the form of public or private interests. There may be said to be a public interest in knowing information generally as a characteristic of a healthy democracy; control over the executive, whether by Parliament or the Courts may require disclosure in particular cases. Private interests may consist in the need of the information in order to bring or defend an action in court; fairness may involve a right to know the reasons for a decision or the case one has to meet; or there may be the simple argument that the information relates

to me and therefore I am entitled to see it.

c) Freedom of Information

In English law, even if there were no Official Secrets Acts at all there would be no general right to receive information relating to the conduct of public affairs. By contrast, the Scandinavian countries and United States of America have statutory provisions giving general rights of access to such information though of course there are exceptions.

1) Sweden[37]

Sweden, which has had some provisions on access to public records since 1766, has evolved an elaborate system of registration and filing of all official documents and all citizens[38] have free access to any document which is not secret. Broad categories of secrecy are provided. These relate to security of the realm and foreign relations, public order and control of crime, the protection of the economic interests of the State, communities and individuals and the maintenance of "privacy, security of the person, decency and morality."[39] Internal deliberations are not official documents unless they are later made part of the public record, but submissions to a Minister would be official documents in the Ministry.[40] Details of what items come within these basic heads are "closely defined"[41] by statute and the official concerned decides whether a document is within the exceptions. There is a right of appeal from his decision usually to the Minister who in Sweden is not legally or politically responsible for the working of the administration.[42]

2) United States of America[43]

> The Freedom of Information Act
> "has attacked the whole problem of the availability of public information and the executive's tendency to deny access to documents and other records merely because they are in the custody of government officials who prefer to keep them confidential."[44]

The Act follows a broadly similar pattern to the Swedish legislation requiring registration and a general right of access by the public to information held by the executive branch of government except that within nine categories. These[45] include defence and foreign policy, trade secrets and commercial or financial information obtained from a person and privileged or confidential, memoranda subject to protection in litigation, personal privacy, law enforcement and matters

exempted from disclosure in other statutes.[46] The courts decide whether classification, even of national security information, was correct[47] and may require the agency to pay the applicant's costs if information was unreasonably refused. The provisions are not yet, as in Sweden, accepted as a normal part of life; critics say that they are unduly expensive and hinder efficiency[48] while protagonists argue that openness deters inefficiency.[49]

3) Norway and Denmark[50]

These countries, which introduced freedom of information provisions in 1970, do not rely on registration to enable the public to know what to ask for. In Denmark the provisions apply to "cases which are or have been under consideration by government administration" and the applicant must simply indicate the case about which he wants to know.[51] Norway's provisions apply to documents "relating to all administrative activity which a public organ undertakes on behalf of state or local government, apart from "commercial activity." Anyone may demand information and again he must just indicate the case.[52] Thus both are concerned with administration but not with policy-making and internal documents are not made available[53] until the decision has been made. In each case the exceptions to disclosure are set out in broad categories which include defence, cabinet minutes, economic and personal interests. Only Denmark has a blanket clause

> "the protection of other interests, where secrecy is required by the special character of the circumstances."[54]

The decision whether an item of information is within one of the categories of exemption rests within the organisation and appeal lies to the Minister.[55]

4) United Kingdom

Although the exceptions in all these provisions are, by and large, the same as those discussed above as grounds for the protection of information, these statutes contrast markedly with the United Kingdom position where no information is made available unless the relevant Minister or senior civil servant authorises disclosure.[56] There is no duty on government or administration to justify the withholding of information. This basic fact remains however much information is disclosed - what is authorised today may be refused tomorrow.[57]

There are some limited common law rights to information. Corporators are entitled to see information in the possession of the corporation:

"in a matter affecting the members of the corporation."[58]

A person who has a public duty to perform may not be refused information which is

"reasonably necessary to enable him properly to perform his duties."[59]

A person who can show a

"direct and tangible interest"

is entitled to information of a public nature relating to that matter,[60] and a person whose interests are affected by the exercise of a discretion is entitled to know the limits of that discretion.[61]

These common law rights, based as they are on public duties and proprietorial rights, are not enough to encourage disclosure of information which need not be protected against a civil service renowned for secrecy and conservatism.

"Just as the House of Lords' earlier doctrine of unfettered Crown privilege[62] was an invitation to abuse, so the Official Secrets Acts have inculcated an official mentality of restrictiveness. They have implanted the pernicious idea that all disclosure and use of official information, unless expressly authorised, is a criminal offence."[63]

A more satisfactory balance of openness and protection would be to provide a general right to information, as in the 1908 Bill, with clear exceptions. The exceptions could be broad categories but the details of classification should be subject to some control outside the administration. Similarly there should be control over declassification. The courts are quite capable of deciding whether a document is within a classification[64] but to achieve general openness a body capable of regular review would be more satisfactory. This could be placed within the terms of reference of the Parliamentary Commissioner for central government but if the principle is to be extended a new Commissioner to provide consistency would be required. There could be circumstances when disclosure ought to be made to people directly affected before the information is suitable for general disclosure.

d) Conclusion

Criminal law protection of information should be limited to that which is necessary. The reason for the protection is the public interest which will be injured if that information, or information of that type, is disclosed. Since it is the quality or content of the information which matters the identity of the holder of the

information is not relevant.[65] The use of the criminal law to reinforce master and servant-type rules is inappropriate. If the content of the information will not harm the public interest it should not be a criminal offence to disclose it; if it will, it should be equally an offence (with the same standard and burden of proof[66]) whoever discloses it. It follows also that it is illogical to limit criminal law protection to information held by or emanating from, central government; if equally damaging information is held by other bodies or people its disclosure should be restricted in the same way.[67]

Criminal law protection should be limited both as regards types of information and time[68] so as to ensure adequate protection for information the disclosure of which will harm the public interest for so long as this harm will remain, but so as to ensure also that no-one is convicted of an offence where there was in fact no danger to the public interest. In accordance with normal common law principles also he should not be convicted without the necessary guilty intent.

Freedom of information has been characterised as

> "a fundamental human right"

and

> "the touchstone of all freedoms to which the United Nations is consecrated",[69]

and, in this country, as

> "the natural and reasonable expectation of the citizen."[70]

Information relating to policy-making and administration should, except so far as it must be kept secret, be made available to those in the broadest sense affected by it. This principle should apply not only to central but also to local government as is increasingly recognised.

> "No doubt it will always be necessary to impose some limitation on the principle that in a democracy all decisions should be 'open decisions openly arrived at' but in a mature democracy these limitations must clearly be kept to an absolute minimum"[71]

and in relation to local government

> "The second essential safeguard for honesty in local government is ... that of maximum openness ... Certainly there are cases which it is genuinely in the public interest to treat confidentially; but these are far fewer than is often thought."[72]

The principle of maximum openness should also be applied to the various other bodies whose policies and administration affect the public and to the membership of private associations. It could be argued that some of these bodies are even more in need of such invigilation than central government since there is little or no control over them by Parliament or any other elected bodies.[73] Common law and statute have gone a little way towards such provision; a general statutory right to information subject only to limited exceptions, is the next step.

4) Proposals for Reform

a) Before the Franks Report

In 1965 a joint working party of members of Justice (the British section of the International Commission of Jurists) and of the British Committee of the International Press Institute published a report called "The Law and the Press."[1] In relation to the Official Secrets Acts and other legislation limiting disclosure of governmental information the report found that there are basically five main types of information. Information prejudicial to the security of the state and to the national interest (such as foreign relations and currency) should clearly continue to be protected by the criminal law. The working party considered recommending that all other information should be protected only by the contract of service and the threat of dismissal, but decided that this would be unfair since the sanction would affect the giver but not the receiver or subsequent publisher of the information. They decided that it was reasonable for the criminal law to continue to protect information whose premature disclosure could provide opportunity for private gain, and information confided to government departments on promise of non-disclosure. They did not, however, feel that it was "in the interests of good government" that disclosure of information not prejudicial to the national interests or to legitimate private interests and relating solely to the efficiency or integrity of a government department or public authority should be treated as a criminal offence. Merely to exclude such information from the ambit of the Acts might lead to the unfairness referred to above. They therefore recommended

> "that it should be a valid defence in any prosecution under the Official Secrets Act (sic) to show that the national interest or legitimate private interests confided to the state were not likely to be harmed and that the information was passed and received in good

faith and in the public interest."[2]

The significance of this proposal lies in the categorisation of types of official information which was adopted and refined by the Franks Committee. A defence of publication in the public interest had existed in the 1889 Act, in that the prosecution had to show that disclosure was to a person to whom it ought not in the public interest to be made.[3] This was reversed in section 2 of the 1911 Act and, as has been seen, the defence that the disclosure was a duty in the public interest has been almost ignored in the cases. The weakness of the proposed defence lies in the fact that the public interest could require disclosure in spite of the fact that some harm might be caused to legitimate interests, and also the uncertainty of a judge's decision as to the public interest. A defence of a reasonable belief that disclosure was in the public interest would lessen the uncertainty for defendants and allow the jury to decide on reasonableness.

Much criticism has centred on the scope and operation of section 2 of the 1911 Act and Jonathan Aitken gathered some of the proposals in his book "Officially Secret."[4] He raised the suggestion of a defence that disclosure was in the national and public interest but was sceptical about the attitude of judges in the light of their treatment of the "duty" under the present section. It had been proposed that section 2 should simply be abolished, leaving only the national security offences under section 1 (and the miscellaneous offences like giving a false poste restante address).[5] Mr. Aitken pointed out that this would leave unprotected such matters as budget secrets, currency arrangements and trade secrets which still need protection. His own proposals were that section 1 should be limited to "the safety or defence of the State" (rather than "the interests of the State"): that section 2 should be abolished; that the power to initiate proceedings should be transferred from the Attorney-General to the Director of Public Prosecutions, thus taking the decision to prosecute out of the political arena[6]; and that the various offences should be clarified and tidied up. It may be said that his own proposals do not appear to answer his criticisms of the proposals of others.

b) The Franks Report

The Franks Committee, which was concerned only with section 2 of the 1911 Act, recommended the repeal of the section and its replacement by a new statute - the Official Information Act. The Committee attempted to distinguish those areas of governmental information

which need protection by the criminal law from those which do not.

Thus in respect of the two criteria outlined above, the Committee decided that the law should protect information whose disclosure would be harmful to the national interest, and attempted to list those areas of information which would be likely to come within this category, The Committee set up broad headings _ Defence and internal security, foreign relations and currency and the reserves - and specified in some detail the kinds of information which would come within this list. Even within these limited heads some innocuous information could be included (for example under "military weapons, stores and equipment of all kinds" could come the contracts for officers' clothing which led to the conviction of Crisp and Homewood in 1919). The Committee therefore proposed a careful system of classification with a review of that classification by the Minister himself before any prosecution is instituted. Remembering the criticism made in 1908 that civil servants are apt to classify as "secret" or "confidential" "papers of unimaginable unimportance," and even recently-stated official views such as

> "the whole structure of government would fall down if people had complete freedom to communicate any document that was not a document useful to an enemy"[7]

it is perhaps surprising that the Committee concluded that the Minister's certificate should be conclusive evidence of the classification.[8] It is perhaps right that the Court should not be concerned with whether any actual harm to the interests of the nation has resulted from the disclosure, and it is obvious that the Minister is in a better position to assess such matters as diplomatic relations and the secrecy of military equipment than the Courts. But the arguments used by the Committee[9] are very similar to those used in the Crown Privilege case of Duncan v Cammell Laird[10] and later shown to be of little weight. On a claim by the executive to prevent disclosure of documents in court on the ground of "public interest privilege" the Court itself is prepared to look at the document in question and weigh the public interest sworn by the appropriate Minister against the public interest in disclosure to allow justice to be done in the case.[11] It is true that, as Lord Reid said,

> "However wide the power of the court may be held to be, cases would be very rare in which it could be proper to question the view of the appropriate Minister that it would be contrary to the public interest to make public the contents of a particular document,"[12]

yet the pressure on a Minister to support his Department by certifying a classification as correctly made (though it is widely admitted that over-classification is widespread) and the importance to the liberty of the subject of the decision (especially since the Committee recommended no defence of a belief that disclosure would be in the public interest[13]) is such that it is submitted that an ultimate discretion should lie in the hands of the judges.[14]

Apart from the two weaknesses of the finality of the Minister's certificate and no defence of disclosure in the public interest, the Committee's proposals thus far are satisfactory in accordance with principle. They define the reason for criminal protection as being "the security of the nation and the safety of the people," and they catalogue the types of information covered as coming within that category. Since the reason for sanction is the damage to the public welfare, it is right that the groups of people by whom disclosure is sanctioned should not be in any way limited. As the Committee themselves said

> "Our general approach has been to identify that official information which requires protection because it is genuinely secret. Whoever lets out such a secret, the same damage is done to the nation."[15]

Yet the Committee drew a distinction between the primary responsibility of Crown servants for the protection of secrecy, and that of the private citizen who "has no comparable public duty,"[16] and provided that disclosure by a private citizen should only be an offence if the prosecution can prove that he knew it to be communicated to him in breach of the Act. The Crown servant, however, commits an offence by disclosing contrary to his official duty. The prosecution do not have to show his guilty knowledge, though he has a defence that he believed that disclosure was not contrary to his official duty or he did not know that the information was within the Act. Government contractors and persons to whom the information is entrusted in confidence are equated for this purpose (subject to certain safeguards such as the Act being drawn to their attention) with Crown servants; thus the Committee returns almost to the position under the 1889 Act where the offence was described as "breach of official trust" and was not based on danger to the State but on a breach of fiduciary duty,[17] more suited to civil remedies than to criminal sanctions. It is submitted that all citizens have a public duty to safeguard secrets in the interest of the State, and the extent of mens rea required and defences available should be the same for all.

A criminal statute should not be concerned with breaches of a contract of employment, even in the public service, but only with injury to the national interest. It can hardly be argued that civil servants alone would become indiscriminate 'leakers' if there were no criminal sanctions when the employees of local government and the nationalised industries, let alone private industry, manage to conduct their affairs satisfactorily without the criminal sanctions of the Official Secrets Acts. There is, it is submitted, no justification for altering, in the case of Crown servants, the normal principle that the prosecution must prove guilty intent; if it is felt that the public interest demands that the prosecution should not have to prove such an intent then that rule should apply equally in the case of the private citizen, since the requirements of the public interest are identical.

In the case of the categories of information discussed above, the Committee recognised

> "the tension between the right of the public to know as much as possible and the need of the Government to keep certain information secret"[18]

and they resolved this tension by careful limiting of the information to be protected by the criminal law. In respect of other areas, however, the Committee was less convinced of a conflicting "right to know" and the clear objective and limitation seen in the earlier proposals becomes more hazy. In respect of information concerned with law and order a distinction was drawn between information of public interest - such as general police methods and prison treatment - and other information which "there is no public right to know."[19] No single disclosure of such information would be likely to do severe injury to the national interest but such disclosure may nevertheless be harmful even in circumstances falling short of corruption, incitement to crime or conspiracy or any other provision of the criminal law. Categorisation here was more difficult than in the earlier heads, partly because there is no suitable system of classification (much of the information would be non-documentary anyway) and partly because seemingly innocuous facts may be useful in planning an offence or counteracting the police or prison officials. The Committee contented itself with general definitions of the types of information to be protected by the criminal law, namely information likely to be helpful in the commission of offences; information likely to be helpful in facilitating an escape from legal custody or other acts prejudicial to prison security; information the disclosure of which would be likely to impede the prevention or detection of

offences or the apprehension or prosecution of offenders. The Committee described this approach by way of general definitions as "in the same way as with the majority of criminal offences," but in the case of Crown servants at least the effect is very different from the majority of criminal offences. The prosecution would only have to prove the disclosure contrary to his duty, leaving the defendant to prove if he could his lack of mens rea - his non-realisation that the information came within the relevant category. In the case of the private citizen the burden of proof is placed on the prosecution in the normal way.

One of the areas of great disquiet has been the inability to discuss publicly anything concerned with prisons - for example the prison teacher who disclosed the existence of control units lost her job; no prison officer, prison visitor, welfare officer or chaplain was allowed by the Home Office to give evidence to the Justic Committee on Criminal Appeals about the difficulties experienced by prisoners in preparing their grounds of appeal.[20] Although the Franks Committee expressly stated that the categories of protected information would not include information about treatment and discipline in prison, the words "other acts prejudicial to prison security" are so wide as to include, presumably, such things as the holiday arrangements for the staff at Broadmoor[21] as well as the difficulties of preparing an appeal. As with the other categories discussed above the committee would provide no defence based on disclosure in the public interest; at least a minimal defence of this nature is provided in the existing section 2. Thus in relation to the criteria of what is to be protected and why, these proposals are rather less satisfactory. The reason for protection is likelihood of injury to "the domestic life of the nation" but the information is less clearly delineated. Since admittedly any injury would be less grave[22] and also the categories of information are less clear, there is even more ground for arguing that the normal principles of criminal law should be adhered to, giving the prosecution the task of proving that the defendant knew he was committing an offence.

With regard to the process of government the Committee decided that the documents of Cabinet and Cabinet committees should be protected "not on account of the contents of those documents but to safeguard the collective responsibility of the Cabinet."[23] This being the ground for protection, it was clear that protection would begin at the moment of circulation to members of the Cabinet. Such documents are marked under the control of the Secretary of the Cabinet so there is no difficulty

about the knowledge of the discloser. But to safeguard collective responsibility requires the contents of the document not to be disclosed either; the Committee provided that this too would be an offence. The prosecution would have to prove knowledge on the part of the private citizen; the Crown servant would have a defence of no knowledge, but in both cases the prosecution would have to prove the status and marking of the document or of the document of which the disclosure was a substantial part.

It is arguable that collective responsibility is sufficiently safeguarded if the document is protected during the lifetime of that Parliament. In the Crossman diaries case, where the cause of action for disclosing Cabinet secrets was breach of confidence, the Lord Chief Justice held that fifteen years would be quite long enough for protection (half the period prescribed by the Public Records Act 1956 after which most official documents are open to public inspection). The collective responsibility of the Cabinet is responsibility to Parliament; that responsibility cannot be threatened by what is disclosed after that Parliament has been dissolved, even if virtually the same people take office again. To hold otherwise would be to require all prominent members of any party with a possibility of governing to hide their personal views at all times, even to their own electors; disclosure of a Cabinet split in a previous Parliament is no more harmful to collective responsibility than knowledge of the different views, previously expressed, of the various members of the present Cabinet. In the case of information harmful to national security the committee propose that it must be still harmful at the time of disclosure to constitute an offence; "law and order" information must be "likely" to cause injury when disclosed; yet Cabinet information must not be disclosed at any time regardless of its age or relevance to the collective responsibility of the Cabinet at the time of the disclosure. Thus for a son to use Cabinet documents retained by an ex-Minister in order to write a biography of his father[24] would still be an offence, as would Mr Crossman's diaries at least if he had still been alive.[25] Presumably the Act would no longer apply when the documents had become public records, though there is nothing in the report to suggest that that would be so.

The Franks Committee also decided that there should be criminal law protection, under the proposed Official Information Act, for all information about individuals and organisations given to the Government. The reason for this protection is not so much injury to the State or the

confidential nature of the particular information but the relationship between Government and people.

> "The Government cannot function effectively without this information. The people have a right to expect their confidences to be safeguarded by the Government. Any breakdown of this trust between Government and people could have considerable adverse repercussions on the government of the country."[26]

The Committee felt that this "trust" applied as much to information communicated voluntarily and under no seal of confidentiality as to that given under compulsion or with express or implied promise of confidentiality. Although many statutes provide restrictions on the disclosure of officially-received information[27] the Committee felt that an overall protection should still be given. Thus applying the two criteria of what is to be protected and for what reason, the content of the information is immaterial - all is equally given on trust that it will be used only for the purposes for which it was disclosed - and all Crown servants must be required to respect that trust. The trust would not, however, be broken by a private individual so the Committee recommended that disclosure by him of such information should not be an offence.[28] Similar arguments have always been raised in relation to discovery of such information for legal proceedings. The courts now have a clear discretion here, and weigh the desire for secrecy against the importance of justice being done. Such matters as the confidential nature of the information and the likelihood of harm to the relationship between government and governed[29] or to individuals[30] become of major importance. In making their recommendations for a blanket criminal law protection, but limited to Crown servants, the Committee were much influenced by their conclusion that

> "There is no tension in this sphere between openness and secrecy. Everything points to the need for full and effective protection."[31]

There is, however, one important aspect which the committee appear to have overlooked. Much of the information relates to the individual but is not given by him. Examples given by the Committee itself are

> "information acquired by social security officers in the course of dealing with claims for benefit of all kinds; information about prisoners and other criminals, or suspected criminals; information about those seeking the exercise of the Royal Prerogative of Mercy or complaining against the police."[32]

There is here a tension between the desire of Government for secrecy and

the desire of the individual to see what is said about him - ability to check the accuracy of factual statements at least, if not an ability to challenge value-judgments. The Committee made no recommendation in this sphere, so the civil servant who helped an individual to see her own social security file[33] would still commit a criminal offence though the justification of preserving the relation of trust between government department and individual would hardly seem to apply to this case. Under the Consumer Credit Act section 158 one is allowed to check the accuracy of information about oneself in the hands of a credit agency because the information may be used in deciding whether one shall be granted credit; is it less important that discretions exercised by government servants in relation to individuals should be made on the basis of accurate facts? It is arguable that the individual has a basic right to see information relating to himself, simply because he is its subject. This view has the support, in the area of discovery, of the case of C v C.[34]

The argument against allowing the individual to see his own file may be the need to protect those expressing views about him,[35] but this is not the ground which the Committee have used and so in line with their own principles they should have made an exception for disclosure to, or at the request of, the person about whom the information relates.

The final basis on which the committee recommended protection was that it should be an offence for a Crown servant or an individual to use or disclose any official information for his own or another person's private gain. This is seen as a breach of government's duty of acting impartially and fairly in its dealings with all citizens. Obvious examples are currency information and information relating to land development, and the proposals reasonably cover Crown servants as well as others. However, no mention is made in this context of the Press. It would seem that any information published by a newspaper could come within this category, since everything a newspaper publishes is for "private gain," however honestly the editor may consider publication to be in the public interest.[36] Thus all the careful delineations of information which must be protected as against that which need not in the earlier sections of the proposals would go for nought as soon as a newspaper was involved. It is suggested that this problem would be obviated if there were to be, as suggested above, a general defence that the person disclosing the information believed, on reasonable grounds that such disclosure would be in the public interest.

c) Since the Franks Report

In a debate in the House of Commons[37] the then Home Secretary, Mr Robert Carr, gave the government's provisional views of the Report

Basically, while the general approach of the Committee was accepted the various categories of protected information should be drawn more widely than the Committee had thought necessary. For instance, all information obtained by, or relating to, the intelligence and security services should be protected; almost all decisions taken by Ministers, even within their own Departments, are relevant to the convention of collective responsibility and so protection for Cabinet documents alone would not go far enough in this sphere; confidences of the citizen however acquired should be protected. Some arguments were perhaps over-cautious such as that we would receive less information from our allies if they knew it might be disclosed (one wonders how little we give to Sweden or the United States of America[38]). Another major area of discussion in the debate was the question who should classify information. The Government accepted the Committee's view that it should be for the Minister; other suggestions were a judge in chambers, the Privy Council or the Parliamentary Commissioner. Several members underlined the principle that there should be a firm commitment to a general right to information whatever the details of the limits of protected information might be.

Shortly before the debate the Liberal party had put forward their proposals.[39] There should be a Committee appointed by the Prime Minister with a High Court judge as chairman to continuously look at the classification of documents and from whom newspapers or individuals could seek a ruling on the right to disclose; a state secret would be defined as information which

> "would assist a person, agency or foreign power in subverting or otherwise damaging the security of the state, the economy or diplomatic relations."

and only the disclosure of such information would be covered by the criminal law.

Mr Jenkins, the Home Secretary under the next government,[40] made clear his intention at least to repeal section 2. On the question how far criminal law protection should go, he said

> "My own view is that the areas can and should be very substantially reduced in size, that the onus of proof should be changed so that it should be up to the authorities to justify the withholding of information, and that the criminal law should, to the greatest possible extent, be kept out of this whole field."[41]

In spite of his clear desire to limit the ambit of protection, Mr Jenkins

appears to have had doubts on the vexed question of secrecy in decision-making. In the same lecture he said

> "I do not want the whole process of decision-making to be carried out under a public searchlight ... I believe that before a decision is announced the right to change one's mind in private is a fundamental liberty."[42]

Later in the year when a spokesman said he would produce

> "a measure of extreme liberality *[which]* will open up to the Press the power, more or less, of total investigation"[43]

nothing was expressly said about secrecy of decision-making but the spokesman added

> "If you have to defend every single change you make in successive drafts of a proposal it is very difficult. It requires an enormous amount of briefing, and the scarcest commodity in Whitehall is the time and attention of Ministers."

The following year a report appeared that the proposed new legislation had "run into difficulties in Whitehall, where civil servants have urged caution."[44]

Meanwhile, the pressure for a statutory right to information developed and draft Bills and other proposals have been put forward. A private member's Bill "Freedom of Information and Privacy"[45] which failed to obtain a second reading would have applied to local authorities and nationalised industries as well as central government. Authorities would have to provide indexes of all information prepared or compiled by them and retained except that classified by the Secretary of State as secret or confidential within five categories. Individuals would have a right to know about information held relating to them and to see it, but others would not. The other exceptions related to national security, the physical safety of individuals, foreign relations and commercial information given in confidence or the disclosure of which would place a public body at a competitive disadvantage. Appeal against refusal of information would lie to the Secretary of State. Thus the provisions, though carefully delineating exceptions, would not include working papers unless they were retained and would not provide any exterior constraint on the Secretary of State.[46]

The Outer Circle Policy Unit's discussion paper 'An Official Information Act' (1977) by contrast proposed considerable constraint

on the department in deciding on exemptions. Details of information within the six categories of exemption would be made by statutory instrument and so subject to Parliamentary control and a system of automatic declassification would be provided. The courts would be empowered to decide whether a document was properly classified and there would be an Information Commissioner to investigate cases of refusal to disclose information and report to parliament. Criminal sanctions would only apply to disclosure of some of the information protected against a right of disclosure. The categories of exemption in the discussion paper are wide[47] but it has since been suggested that Cabinet documents would only be protected for five years,[48] Individuals would have a right to see information relating to themselves. The important question of whether the public should have access to advice and departmental thinking before a decision is finalised is answered in the negative by defining official information as documents which have taken a final form only. The group admit that the Swedish law is in this respect more open; it might have been valuable to consider incorporating part of the Swedish right of anonymity.[49] Some at least of the argument for non-disclosure is the embarrassment of the adviser whose advice was not heeded, whereas what the public want to know is what advice was given rather than who gave it.

The Liberal party produced a 'shadow' White Paper[50] which would apply to local authorities and 'quangos' as well as central government. These bodies would have to produce a public record of all documents produced or received by them and the public could see all except those within eight categories. These are more restricted categories than in any other proposals; for example foreigh affairs information is restricted to that which could damage relations with other countries and Cabinet documents are only exempt from disclosure insofar as they relate to matters in the other categories. Furthermore, criminal sanctions would only apply to disclosures of defence and law and order, personal and commercial matters.[51]

It is known that the government declined to accept the Liberal proposals as "too radical"[52] and since 1976 government emphasis has been on

> "the release of a great deal more of the factual information contained in internal departmental reports."[53]

This is in line with the process, already undertaken to some extent and praised in the report 'Information and the Public Interest,'[54]

and an extension of which was forcefully advocated by Lord Armstrong, the former Head of the Home Civil Service. His suggestions were for Green Papers on proposals followed by open discussion but the government would still

> "reserve the right to reach its final decisions in strictest confidence with its officials."[55]

In July 1977 a letter was sent to all civil service departments by Sir Douglas Allen, the then Head, on the implementation of the new policy of disclosure of information about policy-making.

> "Henceforth the working assumption should be that such material will be published unless *[the Ministers]* decide it should not be,"

He suggests that in writing policy papers they should prepare

> "an identifiable separate part of the report appropriately written"

for the purpose of publication. A leak of the letter[56] showed that the intention of the policy is to avoid a Freedom of Information Act on the American model. The Times monitored such disclosures and describes the result as

> "a fairly dismal response."[57]

The newspaper compiled lists of the information made available by each Department; fourteen had disclosed nothing. Attempts to see background papers to three recent White Papers produced nothing; two had been produced without any background papers![58]

In this climate, reformers may understandably see the Justice proposals: 'Freedom of Information'[59] as a disaster or even an "establishment fraud."[60] Justice proposed no legislation but a Code of Practice which could be immediately implemented. Departments would produce lists of what they would disclose and Members of Parliament would be expected to exert pressure on Ministers to increase the lists. The Parliamentary Commissioner would police the Code,[61] though only to see that what was on the list was disclosed. There should be pre-decision access to papers but civil service advice and Cabinet information would be wholly excluded and clause 1 of the Code indicates that the aim is not to enable people to influence decisions but only to understand them.[62] Even an individual's access to information about himself would exclude information given in confidence and internal advice[63] as well as security information.

The committee expect that this first step would encourage governments to extend openness by legislation; experience indicates to the contrary. The supply of Green Papers dried up after the initial fanfares until Harold Evans made a fuss;[64] White Papers on important matters

like the use of the North Sea Oil revenues are prepared without background papers. The Committee expect repeal of section 2 of the 1911 Act to change the civil service "habit of secrecy"[65] but they do not advert to the fact that even if repealed it will be replaced by other, more stringent albeit more restricted, criminal law provisions.

The long-awaited White Paper on reform of section 2 was published, just after the Justice report, in July 1978.[66] Although embodying the government's proposals, it invited further comment and public discussion. The White Paper recognises the

> "inescapable tension between the need to keep some information secret and the requirements of openness if people are to participate in government as they should."

and it largely endorses the proposals of the Franks Report, limiting the items of information to which the Official Secrets legislation should apply rather than reconsidering the principles on which protection and disclosure should be based. Thus, although changes of detail are made, the "main offence" would still be committed by Crown servants with lesser responsibility for those "who have no kind of special relationship to central government,"[67] though a new offence of not returning information is proposed,[68] which one might think not so very different from the present, universally criticised, offence of receiving.

Another aspect of the proposals which is more extensive than those of the Franks Committee is the provision of a new category of security and intelligence information, liability under which would not depend on the information being classified as secret. As the White Paper says,

> "this is pre-eminently an area where the gradual accumulation of small items of information, apparently trivial in themselves, could eventually create a risk for the safety of an individual or constitute a serious threat to the interests of the nation as a whole."[69]

But this is also an area where it may be felt that the public have a right to know. As in the American concern over the Central Intelligence Agency and the National Security Agency, problems of information and of control are closely connected. Where

> "there is a recurring danger that the sophisticated technology will run away not only with the enemy's secrets but with liberties at home"[70]

a wide-ranging embargo on information will not be in the interest of the people, however much it may be in the interest of the government of the day.

The White Paper emphasises that it is in some respects a more liberal proposal than that of Franks. Thus it is proposed that economic information should not be within the Act,[71] and a Minister's review of a classification should also require endorsement by the Attorney-General.[72] The most notable change is the proposal that discussion in Cabinet and Cabinet committee should only be within the Act if it comes within one of the other categories. For the preservation of Cabinet collective responsibility it is

> "enough to rely on special distribution and handling procedures, the sanctions of civil service discipline and on the judgement of Ministers."[73]

This change no doubt reflects the tightening up of procedure advocated by the Committee of Privy Counsellors on Cabinet Documents[74] who felt it unnecessary to discuss why such documents should be kept confidential or to distinguish between serious and non-serious matters but called for "constant vigilance."

Useful changes proposed by the White Paper are that legislation on disclosure or use for gain should be part of the legislation on corruption,[75] which will prevent the blanket liability of newspapers suggested above; and the widening of protection of "the confidences of the citizen" to all information of a personal nature held by government rather than limiting it to that given by the citizen. This is said to be

> "an important contribution towards safeguarding privacy."[76]

This would be a much better protection of privacy if the individual were given a right to see his own file; the proposal alone, as it stands, makes that possibility even more remote.

The aspect of the White Paper which caused the greatest disappointment and resentment, not least among government supporters,[77] was the failure to propose any public right to information. This would

> "completely change the nature of the government's obligations"[78]

though the White Paper recognises and accepts the developing practice of disclosing more background information on major policy decisions. But the White Paper declares[79] that the government has an open mind on whether such legislation would be desirable; the debate is not yet ended.

NOTES

History

1. *Sir Richard Webster A-G. moving the Second Reading: H.C.Deb. 3rd Series Vol.334 Col.1110.*

2. *Williams: Not in the public interest 1965 pub. Hutchinsons page 23. He gives a good description of the incidents before and after the Act.*

3. *The story is told in "The adventures of a spy" published by Pearsons and referred to in "Baden-Powell" by E.E.Reynolds pub. Oxford University Press 1942.*

4. *History of The Times vol.2 page 93. The time referred to was 1845.*

5. *ibid. page 100.*

6. *The case is discussed in Williams op.cit. page 17 and in Appendix III of the report of the Departmental Committee on Section 2 of the Official Secrets Act 1911 (the Franks Report) (1972) Cmnd.5104 Vol.I.*

7. *The Times March 18 1854 quoted in History of The Times Vol.2. page 159.*

8. *As in the case of Guernsey: Williams op.cit. page 16.*

9. *(1849) 1 Mac. & G. 25. A civil servant would have a contractual duty of confidence at least after 1880.*

10. *The Times December 10 1846 to January 9 1847. The correspondence was more than thirty years old but the issue, the independence of Poland from Russia, was still very live.*

11. *Morison v Moat (1851) 9 Hare 241; 21 L.J.Ch. 248. The locus standi of the Attorney-General to prevent illegal acts likely to cause injury to the public was established by Attorney-General v Shrewsbury (Kingsland) Bridge Co.(1882) 21 Ch.D.752. For the modern position see Edwards: The Law Officers of the Crown 1964 pub. Sweet and Maxwell page 287 et.seq.*

12. *Official Secrets Act 1889 section 1(1)(a)(i) and (ii).*

13. *ibid. section 1 (1)(a)(iii).*

14. *ibid. section 1(3). Herbert Stephen advocated that they should all be felonies: The Times May 9 1908.*

15. *ibid. section 1(1)(b) illegally obtained information; section 1 (1)(c) information received in confidence; section 1(2) information knowingly communicated contrary to the interest of the State.*

16. *Except if a civil servant wrongly obtained information (in an office) to which he was not entitled, and then leaked it. But the receiver would have to know that he was not originally entitled to it.*

17. *History of The Times Vol.2 page 162. Editor Delane writing to Sir. John Rose in 1860.*

18. *Sir G. Campbell in Third Reading: H.C.Deb. 3rd Series Vol.337 col.1322.*

19. *Official Secrets Act 1889 section 2.*

20. *ibid. section 2(1).*

21. *ibid. section 2(3).*

22. *H.C.Deb. 3rd Series Vol.334. Col.1110.*

23. *ibid. Vol.335 Col.588. The missing Members later said they had been called out of the Chamber for a few minutes!*

24. *ibid. Vol.335, col.658. The Government were probably not too sorry since when it was recommitted the Attorney-General himself moved several amendments: ibid. Vol.336.col.907.*

25. *ibid. Vol.337 co.321. Mr. Hanbury.*

26. *ibid. col.322.*

27. *The terms of the Bill are set out in an article "The Official Secrets Bill": The Times May 7 1908.*

28. *The Franks Report para. 46 suggests that lack of time was another reason why the Bill was abandoned.*

29. *The Times May 7 1908.*

30. *Franks Report Appendix III para.13.*

31. *The Cabinet Committee minutes indicate that the Government intended to take advantage of the more sympathetic public attitude to a restrictive Bill: Quoted in The Times July 11 1978.*

32. *The section was passed in committee without amendment because the Speaker failed to see those who offered to be tellers for the Noes, though they stood up and waved their hats!*

33. *H.C.Deb. (1911) Vol.29. col.2254.*

34. *ibid. col.2252.*

35. *ibid. col.2257.*

36. *Chandler v Director of Public Prosecutions [1964] A.C.777. The appellant would not have committed any offence under the 1889 Act. Even in 1920 the then Attorney-General thought these words could only apply to spying: H.C.Deb. Vol.136 col.946.*

37. *In R v Aubrey, Berry and Campbell (1978) criticism by the judge led to dropping of charges under section 1 after the judge had refused a prosecution offer to discharge the burden of proof.*

38. *Official Secrets Act 1889 section 1(2).*

39. *For example, Robb v Green [1895] 2 Q.B.1. where the information was not secret in nature.*

40. *The Times May 7 1908 (leading article). Even in newspaper circles there are still many people who feel that Government and the civil service should be veiled in secrecy. Hugo Young: The Crossman Affair 1976 pub. H.Hamilton page 30.*

41. *Even private employers may now be seen to owe a duty to the public to disclose their activities, for example Health and Safety at Work etc. Act 1974.*

42. *Official Secrets Act 1889 section 2(1); H.C.Deb. Vol.337 col.322. The problem of the position of a Member of Parliament was to be raised in 1938 (Duncan Sandys). The possible defence that disclosure is "in the interests of the State his duty" under the 1911 Act has never been tested, but is thought to be a difficult defence to sustain.*

43. *Defined by section 3. The definition is wider than under section 1 of the previous Act, but the extensions cover broadly "national security" information.*

44. *Official Secrets Act 1911 section 2(1). It therefore applies to any information used in a civil service office.*

45. *Rather wider than the old section 1(1)(b).*

46. *Rather wider than the old section 1(1)(c).*

47. *As in the old section 2(1) and (3).*

48. *Official Secrets Act 1911 section 2(1)(a).*

49. *ibid. section 2(1)(b).*

50. *ibid. section 2(2). This offence must be frequently committed by members of many reforming bodies: The Times June 25, 26 1976, statements by Child Poverty Action Group and National Council for Civil Liberties.*

51. *section 6.*

52. *section 7. The marginal note speaks of harbouring spies, but the offence is not limited to section 1 offenders.*

53. *section 9.*

54. *Franks Report page 123.*

55. *H.C.Deb. Vol.135, col.1542.*

56. *H.C.Deb. Vol.29, col.2260.*

57. *H.C.Deb, Vol.136, col.953.*

58. *ibid. col.966.*

59. *Lewis v Cattle [1938] 2 All E.R.368.*

60. *section 7.*

61. *R v Oakes [1959] 2 All E.R.92. Lord Parker C.J.*

62. *Official Secrets Act 1911 section 2(1)(c).*

63. *H.C.Deb. Vol.135 Col.1553.*

64. *Lewis v Cattle [1938] 2 All E.R.368.*

65. *This young Member of Parliament as a Territorial Army Officer was given military information which indicated weaknesses in the defence of London. He informed the Secretary of State for War that he intended to ask a Question in Parliament based on the information. He was asked to reveal his source. The case raised issues of Parliamentary Privilege and section 6 and was debated in December 1938: H.C.Deb. Vol.342 col.342,889. A Select Committee was set up, and its report was debated in 1939: H.C.Deb. Vol. 353 col.1075.*

66. *H.C.Deb. 5th Series. Vol.353 col.788.*

67. *ibid, col.783.*

68. *The Criminal Law Revision Committee 7th Report (1967) Cmnd.2659 para.42 rejected the provision of a criminal offence of failure to inform the police of crime on the ground that it would give the police powers like those in section 6 and "public opinion would be unlikely to agree."*

Criticisms

69. *H.C.Deb. Vol.353 col.788.*

70. *Chandler v Director of Public Prosecutions [1964] A.C.777.*

71. *The Report is Cmnd.5104 of 1972.*

72. *R v Cairns, Roberts and Aitken (1971). In his final statement Caulfield J. said parts of the law "should be pensioned off." Mr Aitken subsequently wrote a book: Officially Secret, 1971 pub. Weidenfeld & Nicolson.*

73. *Published by Stevens.*

74. *Attorney-General v Mulholland [1963] 2 Q.B.477*

75. *(1978) Cmnd.7285.*

76. *The Times August 20 1975.*

77. *Young: The Crossman Affair page 33 reveals that government lawyers thought the Sunday Times could not be prosecuted for serialising Crossman's Diaries on this ground, though the newspaper's lawyers had thought otherwise.*

78. *New Law Journal May 14 1970.*

79. *Schwartz & Wade: Legal Control of Government, 1972 pub. Clarendon Press page 82.*

80. *Official Secrets Act 1911 section 2(1)(a).*

81. *H.C.Deb. Vol.353 col.1080.*

82. *Aitken op.cit. page 219 and his evidence to the Franks Committee: Volume 4 page 287, cf Chapman: Your Disobedient Servant 1978 pub. Chatto & Windus. A former civil servant revealed inter alia that a Select Committee had been misled by a senior civil servant on the question of possible government economies. There was no prosecution and the senior civil servant publicly apologised so the Select Committee took no further action.*

83. *In a case in 1962, referred to in the Franks Report page 118.*

84. *Sir Lionel Heald Q.C. The Times March 20 1970 quoted by Aitken op.cit. page 130.*

85. *The Act is reproduced in Schwartz & Wade op.cit. and the 1974 amendments in Outer Circle Policy Unit : An Official Information Act 1977 Appendix II.*

86. *The Times January 30 1975; Justice report 'The Law and The Press' 1965; Howard League for Penal Reform Newsletter Summer 1976.*

87. *The Times June 28 1976.*

88. *The Times July 1 1976.*

89. *Information and the Public Interest (1969) Cmnd.4089.*

90. *The Times September 15 1976.*

91. *Franks Report Vol.3. page 319.*

92. *Quoted in Smith: Press Law 1978 pub. Sweet & Maxwell page 146.*

93. *Fulton Committee Report on the Civil Service (1968) Cmnd.3638.*

94. *Bunyan: The History and Practice of the Political Police in Britain 1976 pub. Friedmann page 11.*

95. *Official Secrets Act 1889 section 2(1).*

96. *Official Secrets Act 1911 section 2(1)(a).*

97. *See above. Duncan Sandys, Aitken.*

98. The Times December 12 1920, quoted in Aitken op.cit. page 28.

Principles

1. Initial Services Ltd. v Putterill [1967] 3 All E.R.145.

2. A similar point is made by the Criminal Law Revision Committee 10th Report (1968) Cmnd.3750 para.5 in relation to the duty not to disclose juryroom information.

3. [1964] 3 All E.R. 354, 359.

4. [1968] 1 All E.R. 874. The House of Lords rejected the claim.

5. Chandler v Director of Public Prosecutions [1962] 3 All E.R. 142, 151 (Lord Radcliffe) and 158 (Lord Devlin).

6. Conway v Rimmer [1968] 1 All E.R. 874, 882 (Lord Reid)

7. For example the need of the Army to win the propaganda war in Northern Ireland and the need for the press to give full and accurate information: The Times February 27 1976.

8. For example the claim of an alien to know the reasons why his deportation has been ordered : R. v Home Secretary ex parte Hosenball [1977] 3 All E.R.452.

9. It is rare to hear serious argument against this ground for secrecy. An exception is Bertrand Russell: Justice in War-time 1916 pub. Bertrand Russell Peace Foundation 1978 page 95.

10. For example Auten v Rayner [1958] 3 All E.R. 566 but cf. Conway v Rimmer (above) for routine reports.

11. (1963) Cmnd. 2152 para.230.

12. quoted in The Observer May 28 1978.

13. The Times December 3 1977.

14. The Times June 25 1976.

15. Brian Walden M.P. in BBC 2 Horizon programme: Half-way to 1984: Political surveillance and privacy, December 13 1976.

16. It has been argued that Special Branch and Secret Intelligence Services files should be made public after 75 years. Stevens: Operation Splinter Factor pub. Hodder & Stoughton 1974 page 11.

17. Quoted in Young op.cit.page 75.

18. Report of Committee of Privy Councillors on Ministerial Memoirs (1976) Cmnd.6386 para.31.

19. [1968] 1 All E.R.874,888.

20. This convention has been much criticized. For example, Shore: Entitled to know 1966 Pub.MacGibbon & Kee. It may give civil servants a convenient opportunity to forget unpopular Ministerial instructions: ibid page 12 and Chapman op.cit. The Labour National Executive Committee has recommended abolition: The Times July 5 1978.

21. Smith v East India Co. (1841) 1 Ph.50; 41 E.R.550

22. Lord Radcliffe in Glasgow Corp. v Central Land Board [1956] S.L.T. 41; Lord Salmon in Rogers v Home Secretary [1972] 2 All E.R. 1057, 1071. They argue that the law of qualified privilege would be sufficient to protect the adviser against any libel action unless he was malicious.

23. *Report of the Committee on Administrative Tribunals and Enquiries (1957) Cmnd.218 paras.336,343.*

24. *(1968) Cmnd.3638 para.279.*

25. *(1969) Cmnd.4089 para.27.*

26. *Select Committee on Parliamentary Commissioner for Administration 2nd Report (1967-68) paras.29,30.*

27. *Witnesses before the Crown Agents Tribunal may be in a similar position and have insisted on legal representation: The Times May 19 1978.*

28. *Outer Circle Policy Unit: An Official Information Act page 5. But Lord Reid in Conway v Rimmer thought that all information on policy-making should be protected: [1968] 1 All E.R.874,888.*

29. *Discussed in Chapter 5.*

30. *H.C.Deb. Jan 2 1947 col.99.*

31. *[1973] 2 All E.R.943.*

32. *[1972] 2 All E.R.1057.*

33. *[1973] 2 All E.R.1169.*

34. *The Justice report draws the distinction but the Franks Report does not. See below.*

35. *Lord Reid at 949; Viscount Dilhorne at 961.*

36. *Younger Report on Privacy (1972) Cmnd.5012.*

37. *Herlitz: [1958] Public Law 50; Franks Report Appendix IV; Outer Circle Policy Unit op.cit. Appendix II; New Law Journal May 19 1977; Justice: Freedom of Information 1978 Annexe I.*

38. *Foreigners have been given access to information, for example on immigration: Herlitz loc.cit. page 54.*

39. *Freedom of the Press Act Chapter 2 Article 1.*

40. *Outer Circle Policy Unit op.cit. page 38.*

41. *Freedom of the Press Act Chapter 2.*

42. *The 1978 Justice report, page 14, distinguishes the Swedish system on the ground that the legislation was designed to ensure accountability of civil servants in law by judicial control.*

43. *Reports cited above, note 37; Schwartz & Wade op.cit. A background of statutory rights in many states and judicial decisions in favour of rights to inspect public records preceded the Act: Herlitz loc.cit. (writing before the Act).*

44. *Schwartz & Wade op.cit. page 77.*

45. *Freedom of Information Act 1966 amended 1974 section 552(b),*

46. *This category was limited in 1974 since many pre-1966 Acts, as in Britain, were very restrictive.*

47. *A 1974 amendment.*

48. *Factors which apparently impressed Mr Jenkins: The Times January 11 1975. See below: proposals for reform.*

49. *Schwartz & Wade op.cit. page 79; Michael: Sunday Times November 13 1977.*

50. *Outer Circle Policy Unit op.cit. Appendix II.*

51. *Law on Publicity in Administration. Chapter I section 1.*

52. *Law on Publicity in Administration. sections 1, 2.*

53. *except to persons affected by the decision in Denmark: Law on Publicity in Administration Chapter II.*

54. *ibid. Chapter I section 2.4. The original draft of the 1966 American Bill said "to the extent that there is involved a function of the United States requiring secrecy in the public interest": Schwartz & Wade op.cit. page 78.*

55. *who is not separate from the administration as in Sweden: Outer Circle Policy Unit op.cit. page 40.*

56. *or, rarely, it is required by statute. For example Industry Act 1975 section 27.*

57. *Failure to give information to a person affected by administrative action could be maladministration within the Parliamentary Commissioner Act 1967. Foulkes: [1974] J.B.L. 23, 34. But failure to give information to the public would not be an "administrative function" nor would anyone usually have "sustained injustice" within section 5.*

58. *R. v Master & Wardens of the Merchant Tailors' Company (1831) 2 B. & Ad.115; 109 E.R.1086.*

59. *R v Southwold Corp. ex parte Wrightson (1907) 5 L.G.R. 888; R v Barnes Borough Council ex parte Conlan [1938] 3 All E.R.226.*

60. *R v Justices of Staffordshire (1837) 45 Rev.Rep.412.*

61. *Blackpool Corporation v Locker [1948] 1 All E.R.85*

62. *Duncan v Cammell Laird & Co. [1942] A.C.624.*

63. *Schwartz & Wade op.cit. page 82.*

64. *Conway v Rimmer [1968] 1 All E.R.874 though they have been self-denying on national security. cf. United States of America since 1974.*

65. *The only apparent exception is personal or commercial information given only for a government purpose and on the understanding that it will not be further disclosed. The public interest in non-disclosure here is to preserve the flow of such information. But as much damage may be done for example by disclosure of an informant's identity by an NSPCC official; it would not be a criminal offence. Damages and an injunction are sufficient remedies. Conversley, disclosure or use for advantage should be a crime by anyone: Royal Commission on Standards of Conduct in Public Life (1976) Cmnd.6524.*

66. *Though of course knowledge of the potential danger may be relevant in deciding on intent.*

67. *It has been argued that the Franks Report proposals should be applied to local government. Foulkes: [1973] Local Government Chronicle page 1080.*

68. *This requires a system of declassification with independent oversight or a review of classification before prosecution, or both.*

69. *United Nations General Assembly Res.59(I) December 14 1946 quoted in Goodrich: The United Nations in a changing world. 1974 pub. Columbia University Press.*

70. *Kenneth Warren M.P. Committee for Freedom of Information supported by 200 Members of Parliament: The Times June 27 1978.*

71. *Lord Crowther-Hunt and Prof. Peacock: Memorandum of Dissent to the Report of the Royal Commission on the Constitution (1973) Cmnd.5469 quoted in Jacob: [1974] Public Law 25.*

72. *Report of the Committee on Conduct in Local Government (1974) Cmnd 5636 para. 23.*

73. *This absence of Parliamentary control was the ground used by the Justice Report (1978 page 15) for distinguishing the freedom of information provisions in Sweden. This reasoning could apply to an increasing number of bodies in this country.*

Proposals for reform

1. *Published by Stevens.*

2. *Paragraph 74.*

3. *Official Secrets Act 1889 section 2.*

4. *1971 pub. Weidenfeld & Nicolson.*

5. *Official Secrets Act 1920 section 5.*

6. *In his oral evidence to the Franks Committee his arguments on this point were unconvincing: Franks Report Vol.4 page 284.*

7. *Mr John Mathew, Senior Treasury Counsel, arquendo in R. v Cairns, Aitken & Roberts (1971), quoted in Aitken op.cit. page 171.*

8. *Franks Report para. 161.*

9. *ibid. para 149.*

10. *[1942] A.C.624.*

11. *Conway v Rimmer [1968] 1 All E.R.874.*

12. *ibid. at 882.*

13. *Franks Report para. 158.*

14. *cf. De Smith: Constitutional and Administrative Law 3rd ed. 1977 page 611 arguing that judicial discretion is not necessarily a surer guide to public interest than executive discretion, and the latter is at least applied on settled lines.*

15. *Franks Report para.230.*

16. *ibid. para.231.*

17. *Professor Kahn-Freund: (1977) 93 L.Q.R. 508 traces the attitude of English law to employer-employee situations in part at least to Blackstone's treatment of this area of law as a matter of status.*

18. *Franks Report para.170.*

19. *ibid. para.172.*

20. *cited in Justice: The Law and The Press 1965 page 21.*

21. *A newspaper was threatened with prosecution after seeing this list: Justice loc.cit. page 19. Cohen & Taylor: Prison Secrets 1978 pub. N.C.C.L. indicate the extent of the secrecy both for prisoners and for outsiders and call for an end to the "gross and indefensible" secrecy.*

22. *Franks Report para.170.*

23. *It is interesting that leaks of Cabinet information and discussions are seen by politicians as evidence of a divided government; the absence of leaks is seen as evidence that the government is solidly united on the issue: Sir Harold Wilson in The Wilson Interview, Independent Television October 22 1976, discussing the Rhodesian decision to accept majority rule.*

24. *As did Mr Edgar Lansbury in 1933. He was fined £10 under section 2 but his father was not prosecuted.*

25. *There is doubt whether the 1911 Act can apply to the executors of a deceased holder of information who did not disclose it in his lifetime. Young: The Crossman affair. The Franks Report would apply the provisions to retired or removed Crown servants but did not mention the problem of the deceased.*

26. *Franks Report para. 197.*

27. *The various levels of restrictions and their justification discussed in Chapter 5.*

28. *It was recognised that civil remedies might be applicable here.*

29. *Norwich Pharmacal Co. v Commissioners of Customs & Excise [1973] 2 All E.R.943.*

30. *Rogers v Home Secretary [1972] 2 All E.R.1057.*

31. *Franks Report para.197.*

32. *ibid. para.193.*

33. *Referred to in H.C.Deb. Vol.858 col.1963. But under the Committee's proposals the individual receiving the file would not commit an offence as she might at present.*

34. *[1946] 1 All E.R.562. Discussed in Chapter 4.*

35. *This argument was discussed in Conway v Rimmer [1968] 1 All E.R. 874 but countervailed by the public interest in disclosure for litigation. Qualified privilege should be a sufficient defence to a possible libel action.*

36. *When the suggestion of making publication for profit an offence was raised in 1889, it was intended as an attack on the Press.*

37. *H.C.Deb. Vol. 858 col.1885 et.seq.*

38. *Indeed the Sunday Times has several times used the American Freedom of Information Act to obtain information about British companies, and even a 1945 British Intelligence Report still classified as secret here: Sunday Times November 13 1977.*

39. *State Secrets Bill drafted by the Association of Liberal Lawyers: The Times May 27 1974.*

40. *The Labour manifesto of October 1974 promised to "replace the Official Secrets Act by a measure to put the burden on the public authorities to justify withholding information" so that "the process of government should be more open to the public."*

41. *Granada Guildhall Lecture quoted in The Times March 11 1975.*

42. *He had earlier made a similar point in America: The Times January 11 1975.*

43. *The Times August 2 1975.*

44. *The Times January 3 1976*

45. *H.C.Deb. Vol.925/6 col.522. Members of the House of Commons Committee for Freedom of Information have since put forward two further Bills. The Royal Commission on the Press (1977) Cmnd.6810 para.19.28 called for an increased right of access to information.*

46. *The experience of post-Duncan v Cammel-Laird claims of Crown privilege is surely relevant here.*

47. *Unlike Litterick's Bill they include internal security, law enforcement, Cabinet documents and information which would be privileged in legal proceedings but not the physical safety of individuals.*

48. *The Times June 6 1978.*

49. *Freedom of the Press Act Chapter 3.*

50. *The Times July 11 1978.*

51. *Rather wider provisions than their earlier State Secrets Bill.*

52. *The Times July 11 1978.*

53. *The Times January 3 1976. It has been suggested that the "strange constitutional phenomenon" of implied authorisation, the continuance of which is presupposed in the Franks Report, should be given statutory form. Smith: The right to information about the activities of the government, page 147 in Bridge (ed.): Fundamental Rights 1973 pub. Sweet & Maxwell.*

54. *(1969) Cmnd.4089.*

55. *The Times June 30 1975; BBC Radio 4 March 4 1976: The Secrets of Government.*

56. *The Sunday Times September 25 1977.*

57. *The Times May 5 1978 and articles each day that week.*

58. *The Times May 2 1978: 'On the Civil Service' and 'The Challenge of North Sea Oil.'*

59. *1978. Chairman Anthony Lincoln Q.C.*

60. *The Observer July 9 1978.*

61. *The Committee fail to deal with the jurisdictional difficulty that an individual would be unlikely to have 'sustained injustice' as a result of non-disclosure.*

62. *In para. 1 of the Report they suggest with disapproval that campaigners for open government "are ultimately concerned with a shift of power."*

63. *like the civil service comments on Commander Marten of Crichel Down perhaps?*

64. *BBC Radio 4 March 4 1976: The Secrets of Government.*

65. *Para.14.*

66. *Cmnd.7285.*

67. *Para.36.*

68. *Para.37.*

69. *Para.31.*

70. *The Observer February 1 1976*

71. *Para.12.*

72. *Para. 24.*

73. *Para.13. 'Questions of procedure for Ministers' emphasises non-disclosure of discussion between Ministers - 'essentially a domestic matter': New Statesman July 21 1978.*

74. *The Houghton Report (1976) Cmnd.6677.*

75. *Para.14.*

76. *Para.28.*

77. *The Times July 20 1978. The Home Secretary was given a "notably abusive" reception. He retorted to one back-bencher that he doubted whether more than two or three of his constituents cared about the issue.*

78. *Para.46. It has aptly been said that implementation of the Franks Report would not involve substantial changes in government practices. Jacob: [1974] Public Law 25,48; the same statement could be made about this White Paper.*

79. *Para.48.*

CHAPTER 3

DISCOVERY AND PRIVILEGE

A. DISCOVERY

1. Provision of Information for Legal Proceedings

a) Obtaining information before trial

There is a public interest in ensuring that legal proceedings are conducted fairly and comprise a full examination of the matters at issue between the parties. It would be possible for one party to hamper unfairly the other by his possession of information vital to the other's case; trial of an action could be unnecessarily protracted and expensive because one party spent time and effort proving a matter which the other party was ready to concede or fighting an allegation which he would recognise to be unarguable once he saw his opponent's evidence. Equity therefore produced wide powers to order disclosure of information between the parties before trial as a means of clarifying and defining the matters at issue between them and preventing one party taking unfair advantage of the other. The methods of ascertaining information may be discovery of documents, interrogatories or the inspection of property.

Discovery has become a normal step in procedure, not requiring a court order in actions begun by writ.[1] The duty is in two parts; to disclose by list the existence of all documents which are or have been in the possession custody or power of the party and relate to the matters in question in the action,[2] and to allow the other party to inspect and take copies of those which are not privileged from disclosure.[3] Normally the duty applies only to parties themselves, though documents in the party's custody but owned by another may have to be disclosed,[4] and it only applies once the action has been started. There is thus no danger of the procedure being used to allow a person to "fish" for causes of action.

Interrogatories require a court order[5] and are generally not allowed until after the defence has been served so the issues between the parties are clear. They may be disallowed for irrelevance or on the ground that they are oppressive or fishing.[6]

An order for inspection of property which is the subject matter of an action or as to which any question may arise in the action also requires a court order[7] and is normally confined to property in the

possession of a party. Under the Bankers Books Evidence Act 1879 section 7 the court has wide powers[8] to allow a party to litigation to inspect and take copies of relevant entries in a banker's books for the purposes of the litigation. The entries normally relate to a party to the litigation and he is entitled to the same defences as he would have to discovery.[9] The provision may be used in criminal proceedings also, where it has been said the court should treat an application like an application for a search warrant, ensuring that it is not oppressive or 'fishing.'[10]

Recent statutory reforms and judicial decisions, however, have much broadened the basic duty of giving information before the hearing. The reasons for the extensions have been to prevent the stifling of justice and judges have endeavoured not to open the floodgates to more litigation either by allowing "fishing expeditions" or by allowing subsequent use elsewhere of the information thus obtained.

b) Obtaining information before action.

The report of the Winn Committee on Personal Injuries Litigation[11] pointed out the difficulty for a person injured, for example in an operation, but who has no way of knowing how he was injured or by whom. If he brings his action he can then get discovery and learn, for example from a medical report, what happened but he cannot bring his action until he knows what has happened. As a result section 31 of the Administration of Justice Act 1970 was enacted allowing the court to make an order of discovery against a person "likely to be a party" to a claim in respect of personal injuries or death. In Dunning v Board of Governors of the United Liverpool Hospitals[12] the Court of Appeal (Stamp LJ dissenting) held that this section applied to an application for disclosure of hospital records without which it could not be ascertained whether the applicant had a cause of action against the hospital board or not.

Lord Denning, MR considering whether a claim was "likely to be made" within the terms of s 31 stated[13]

> "I think we should construe 'likely to be made' as meaning 'may' or 'may well be made' dependant on the outcome of the discovery. One of the objects of the section is to enable a plaintiff to find out - before he starts proceedings - whether he has a good cause of action or not. This object would be defeated if he had to show - in advance - that he had already got a good cause of action before he

saw the documents."

James LJ agreeing in the result, did not perhaps go so far as the learned Master of the Rolls when he construed 'likely' as meaning 'a reasonable prospect.[14]

"In order to take advantage of the section the applicant

But he also stated[15]

> "I cannot conceive that the power of the court under section 31 is so restricted that it will not order discovery of documents ... if the only basis for saying that a claim is not likely is the absence of the documents which are sought to be discovered and which will be of assistance in determining whether there exists a genuine basis for making the claim."

In his dissenting judgment Stamp LJ said[16]

> "The section does not provide that the court may make the order if it appears possible that the discovery may provide material on which subsequent proceedings against the party may be founded; but in my judgment enables the order to be made when there are already grounds for thinking it likely that proceedings will be brought."

All the learned judges in the case accepted that the section could sometimes be used where the applicant did not know, without the evidence which was being sought, whether he had a good claim or not. The Master of the Rolls seemed to suggest that it could always be used in such a case; James LJ felt that

> "there is no simple unequivocal answer to the questions."[17]

Stamp LJ using the analogy of a fishing expedition, stated

> "In a case where the applicant for the discovery has not already grounds for bringing proceedings, the fishing expedition is only to have the approval of the court if the court is persuaded on the facts before it that the fisherman is likely to find a worthwhile and catchable fish."[18]

It is clear that the power is not free from difficulties and there may well be many cases in which a prospective defendant will still

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refuse to make discovery hoping that the applicant has insufficient other evidence to persuade the court to make an order on his behalf.

In Shaw v Vauxhall Motors[19] the Court of Appeal stated that where a party to a proposed action would be claiming legal aid and the evidence sought to be disclosed would be crucial to the viability of the plaintiff's case the court should readily grant pre-trial discovery in the public interest as this might well lead to a saving of costs to the legal aid fund. On the 'fishing' point, the court stressed the importance of the plaintiff formulating the nature of his allegation and claim in writing before requesting disclosure.[20] It could be argued that the saving of costs would be just as likely and relevant in the case of parties paying their own expenses as in the case of legally-aided parties, and this argument might be used in later cases to persuade the court to a liberal use of the powers under section 31.

A similar power had already been given to the court to make an order for the inspection or custody of property "which may become the subject matter of subsequent proceedings."[21]

c) Obtaining information from a non-party.

Discovery cannot normally be obtained from a person not party to the proceedings.[22] If such a person might be a witness he can be compelled by subpoena duces tecum or the equivalent county court summons to produce the documents at the trial but not before.[23]

On the other hand, it was early recognised that in some circumstances discovery might be obtained against a potential defendant before an action was begun, for example, to discover the identity of other defendants.[24] The applicant did not apparently have to undertake to proceed with the action against the person from whom he was seeking discovery.

In Orr v Diaper[25] it was held that, the plaintiff establishing that a wrong had been committed against him, he could obtain discovery against a person who was not a 'mere witness' to ascertain who was responsible for the wrongdoing. In that case the plaintiff could have taken some action against the defendant.

The point at issue in the Norwich Pharmacal case[26] was whether discovery could be obtained against the Commissioners of Customs and Excise to ascertain the identity of importers of a chemical compound, the patent for which was held by the plaintiffs, it being conceded by the plaintiffs in the House of Lords that they had no

cause of action against the Commissioners. The House of Lords unanimously held, reversing the Court of Appeal,[27] that discovery would be ordered

> "If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did."[28]

This case has been used as authority to order[29] the owners of boats to state the names of the persons fishing in their boats, and in another boat, when the plaintiff showed that his fishery was in great and imminent danger from unlawful fishing, although many older cases had shown that interrogatories of this nature would not have been allowed. Action had been started against the owners but the main aim was clearly to find the true culprits.

In claims arising in respect of personal injuries or death, following a recommendation of the Winn Committee on Personal Injuries Litigation[30] discovery may now be ordered against a person who is not a party to the action.[31] This was designed to enable such information as medical records held by a hospital relating to the plaintiff or an expert's report on a machine which the plaintiff was operating at the time of the accident to be made available to the parties sooner than would be the case on a subpoena duces tecum. The then Attorney-General stated that the provisions might later be extended to cover actions other than those relating to personal injuries. In Paterson v Chadwick[32] it was held that the words "in respect of personal injuries" in section 32 were to be given a wide meaning conveying "some connection or relation" between the claim and personal injuries. They were sufficient to include a claim for professional negligence against a solicitor who was alleged to have allowed a personal injuries claim to become statute-barred. It would be unfortunate if such limiting words were to produce much litigation especially in view of the probably temporary nature of the limitation.

A similar power, though not limited to actions in respect of personal injuries,[33] applies to the inspection of property which is the subject of the action or as to which a question may arise in the

action but which is not the property of, or in the possession of, the party.[34]

The Bankers Books Evidence Act 1879 section 7 is sufficiently wide to allow inspection of the accounts of persons not party to the litigation. This is a departure from the normal rules of discovery and the courts have treated it with caution. In Howard v Beall Mathew J stated that[35]

> "it is the duty of the judge to satisfy himself that the entries of which inspection it sought will be admissible in evidence at the trial".

He upheld the order on the basis that

> "although the other accounts were not kept in the name of the litigant they were in substance and in fact kept on his behalf."

However in South Staffordshire Tramway Co v Ebbsmith[36] the Court of Appeal expanded this test

> "If the court were satisfied that in truth the account which purported to be that of a third person was the account of the party to the action ... or that, though not his account it was one with which he was so much concerned that items in it would be evidence against him at the trial, and there were no reasons for refusing inspection, then they might order the inspection ... the plaintiff ought to be able to show the Court very strong grounds for suspicion, almost amounting to certainty, that there are items in the account which would be material evidence."[37]

In that case the court refused inspection, fearing that the application was of a fishing character. A different reason for refusing the application arose in Pollock v Garle,[38] Lord Lindley MR pointed out that

> "Where an account is the account of a person who has nothing to do with the litigation, the court ought to look to the effect in practice of such an order on the rights of third parties and to take care that this section is not made a means of oppression."

In Williams v Summerfield[39] the summonses had been issued against the male appellants only and the respondent police officer admitted that he had no evidence to support any charges against the female appellants, their wives. Yet the court allowed inspection of separate and joint

accounts of all the appellants inter se and with others. This could include both a sole bank account of a person against whom there was no evidence, and a joint account of that person and another complete stranger to the case. It would seem that the court was less cautious in protecting third parties in this criminal case than it has been in civil cases.

d) Taking the other party by surprise

There is always some danger that a forewarned party might take steps to destroy evidence. To do so once litigation has commenced would be a contempt of court, and perhaps even once litigation appears likely. In Rockwell Machine Tool Co. Ltd. v Barrus (Concessionaires) and another[40] the court made clear the duty of the solicitor "from the earliest stage of litigation" to ensure that his client is aware of the nature and possible extent of the duty to disclose and to ensure that routine destruction of old documents is suspended. This positive duty will not be discharged by merely informing the managing director of a company if subordinates fail to receive the necessary instructions. Sanctions could take the form of an order for costs or dismissal of an action or defence.

Since 1974 the courts have gone further in exceptional cases, making an order on an exparte application, without notice, and after hearing the application in camera,[41] to be served immediately on the other party sometimes at the same time as the writ. In EMI v Pandit,[42] a breach of copyright action, the court made such an order to allow the plaintiffs to inspect and remove infringing articles, test the typewriter and remove documents vital to the plaintiff's case. There the action had already been started and the defendant had put in an affidavit which the plaintiff showed was false. But in Anton Piller KG v Manufacturing Processes Ltd.[43] the Court of Appeal upheld the validity of such orders though in that case no writ had yet been issued. Ormrod LJ laid down three essential pre-conditions

> "First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.[44]

The order in that case allowed inspection of documents, files or things and seizure of infringing copies and documents relating to the sale or

supply of copies. More recent cases[45] have added orders to disclose names and addresses of other likely injurers of the plaintiff.

It was emphasised in the Anton Piller case that the defendant must be sufficiently safeguarded. The two main safeguards were that he could apply to the court if he wished rather than allowing the inspection and that the information to be given "would do no real harm to the defendant or his case."[46] But the adequacy of both safeguards is questionable. In Hallmark Cards Inc v Image Arts Ltd.[47] an Anton Piller order had been granted but the defendants refused access and applied ex parte to the court for suspension of operation of the order and a date for a hearing inter partes. The Court of Appeal held that the judge was wrong to suspend the order though admittedly it could not be carried out if entry was refused. The difference was that the defendant would then be in continuing contempt, though doubtless if he succeeded in having the order revoked he would not be punished for contempt. Presumably the Court of Appeal hoped that the continued pressure would persuade a defendant to allow inspection; certainly he would be in contempt if he destroyed evidence once a writ had been served whether an Anton Piller order was in existence or not. The defendant's main complaint was that the order was very wide, requiring him to authorise disclosure of all his documents and his manufacturing processes. Normal discovery limits disclosure to relevant documents and allows privilege[48] for some, and a normal order for inspection of property does not include a manufacturing process[49] so the order was not only unexpected and an authorisation of 'do-it-yourself' choice of information but it could also widen the extent of information to be disclosed and could do "real harm" to the defendant. The Court of Appeal said that the order should include an undertaking that the plaintiff would not make use of anything discovered, copied or taken away except for the purposes of the action. It is submitted that such an undertaking would any way be implied[50] but in many cases such an undertaking is of little value. If the parties are business rivals (which is likely) an item seen will be remembered and may be used years later; it has been pointed out[51] that an injunction against use of information derived from documents may be impossible to enforce. It is more important to ensure that people do not see what they are not entitled to see than to try to stop them using what they have learned.

It has been emphasised that these orders "should seldom be sought

and more seldom granted"[52] but it has also been said that they are "in daily use."[53] It is clearly important to have some safeguard against blatant disregard of legal requirements and to be able, in an exceptional case, to step in and prevent destruction of goods and evidence but many cases have carefully established protection for parties to litigation against oppressive exposure of their personal or commercial interests, and the upholding of privilege and the right to disclose some information only on a court order are equally important. It is suggested that the proper person to enter premises and look around is not the adverse party but an impartial person, a court official or solicitor,[54] who could ensure that nothing is destroyed while the proper procedures for discovery and inspection take their course.

2. Disclosure Of Confidential Information

The Court of Appeal suggested in Crompton (Alfred) Amusement Machines Ltd v Commissioners of Customs and Excise (No.2)[55] that a party to an action was under no duty to disclose documents not belonging to him but entrusted to him in confidence. The House of Lords rejected this suggestion as

> "combining if not confusing two quite different considerations - the property in the document and the confidential nature of its contents. If once any objection based on property is out of the way there seems no logic in this alleged exception to the general rule."[56]

The general rule remains that stated in Bray on Discovery in 1885, that

> "the mere fact that the giving of discovery will involve a breach of confidence as against some third party ... does not constitute of itself an independent objection to giving the discovery, a disclosure under the compulsion of the court being for this purpose distinguished from a voluntary disclosure out of court."[57]

However the fact that the information is confidential may have certain consequences:-

a) a party may be entitled to refuse to disclose without a court order;

b) special undertakings may be required from the party to whom the information is disclosed;

c) inspection may be limited to certain persons;

d) the fact of confidentiality may bring the information within one of the categories of privilege against disclosure.

a. Refusal to disclose without a court order.

If a party to proceedings wrongfully and unreasonably refuses to allow inspection so that the other party is put to the expense of getting a court order he will normally be required to pay the costs of the application. However in some cases the court has stated that it is quite reasonable to refuse disclosure unless ordered by the court. In this case the party applying for the order may have to pay the costs, and the court's discretion not to order inspection either on some ground of privilege or on the ground that "it is not necessary either for the disposing fairly of the cause or matter or for saving costs,"[58] comes into play. The fact that the information was given in confidence seems to be a sufficient ground for refusal to disclose without a court order.[59] Hopkinson v Lord Burghley[60] concerned the discovery of certain letters marked "private and confidential" which had been sent to the defendant by a third party who objected to the defendant disclosing them to the plaintiff. The Court of Appeal in Chancery held that they must be disclosed in Court proceedings but Lord Cairns LC stated that the defendant was quite entitled to refuse to produce them without a court order. The costs of the application in this case were to be costs in the cause. (Turner LJ seems in one report[61] to suggest that the writer could, if he had filed a bill, have prevented the disclosure, but Lord Cairns LC based his decision on the ground that the writer of a letter intends the receiver to use it for all lawful purposes and "if there is a lawful purpose for which a letter can be used it is the production of it in a court of justice for the furtherance of the ends of justice," thus suggesting that the writer could not have prevented discovery. It seems illogical to suggest that a court of Equity would insist on disclosure in spite of clear evidence of the writer's objection - he had objected in writing to the defendant - and yet would sustain that objection if the writer had come to court. The law seems now to be clear[62] that the writer's objection, however early or often stated, is not by itself a ground of privilege).

Information about a person's financial affairs is generally considered to be confidential. It was suggested in Emmott v Star Newspaper Co[63] that a banker might properly refuse to allow inspection of his client's account under the Bankers Books Evidence Act 1879

section 7 without a court order. There may be a particular reason for a refusal, as in Pollock v Garle[64] where an application to ascertain the bank balance of a company at a particular date would involve inspection of the transactions of the company over a period of several months as the balance could not otherwise be ascertained. Or a bank may have a well-publicized policy of strict confidentiality in relation to its clients' accounts or the particular client might have refused to authorise disclosure of his account without his consent.[65] It would seem that the bank would not be penalised in costs for requiring a court order before allowing inspection.

In the Norwich Pharmacal case the House of Lords held that the Commissioners of Customs and Excise were bound to disclose the names of importers and that the public interest did not require all information collected by the Commissioners to be privileged from disclosure, as the Commissioners had claimed. Concern was expressed that to allow disclosure in one case would lead to "fishing requests." In the course of their judgments four of their five Lordships made it quite clear that

> "If the respondents have any doubts in any future case about the propriety of making disclosures they are well entitled to require the matter to be submitted to the court at the expense of the person seeking the disclosure, The court will then only order discovery if satisfied that there is no substantial chance of injustice being done."[66]

b. Special undertakings

Whenever discovery is made the party inspecting impliedly undertakes that the documents disclosed "will not be used for any collateral or ulterior purpose."[67] In some cases however the Court has required a special undertaking before allowing inspection. The limits of such undertakings were discussed in Alterskye v Scott, where Jenkins J pointed out the difficulties of trying to frame a suitable restriction which would not unduly hamper the inspecting party in the conduct or preparation of his case. He held that a special undertaking should not be ordered in general terms on an order for further and better affidavits of documents, as requested in the case before him, but should be sought if necessary as a condition of having production of particular documents. Such an undertaking should be "directed to certain specific ends or concern a particular document and be framed to do

what is necessary to protect the person producing those documents from their being improperly used." He suggested that the basis for such an undertaking would be "that those documents are, for this or that reason, especially confidential and that he objects to producing them except on an undertaking."[68]

It may be that the fact that the document in question is confidential is sufficient reason for the court to order a special undertaking, though in most of the cases where such an order has been made there has been some likelihood of injury either to the disclosing party or to a third party, resulting from unrestricted disclosure.

a) Injury to disclosing party.

Richardson v Hastings[69] was one of several actions which arose out of the dissolution of a club. The plaintiff in this action was an attorney for creditors bringing other actions against the defendants, who were afraid he might use documents disclosed to assist the creditors in the other actions. The court accepted an undertaking by the plaintiff not to use the documents for any such purpose. It would appear that the implied undertaking would have sufficiently covered this case but perhaps a warning was timely in view of the difficulty of proof of improper use.

Williams v Prince of Wales Life, etc. Co.[70] was an action by a shareholder to make directors of the company personally liable for several large losses on life policies. The defendants objected to disclosure on the ground, inter alia, that the plaintiff had only a small interest in the company, and wished to damage it, and had pending suit published prejudicial statements about the Company. Sir John Romilly MR said

> "it is not the right of a plaintiff, who has obtained access to the Defendant's papers, to make them public. The Court has granted injunctions to prevent it and I myself have done so to prevent a Plaintiff, a merchant, from making public information obtained under the order for production. I shall only make the order in this case, upon the Plaintiff's undertaking not to make public or communicate to any stranger to the suit the contents of such documents, and not to make them public in any way."

So wide an undertaking as this could be effective to make "discovered" documents safer from publication at any time thereafter than any docu-

ments not connected with litigation since disobedience would be contempt of court. Like a "gagging writ" we might have "gagging discovery." This problem was seen in relation to documents about the drug Thalidomide. The Sunday Times purchased the documents from an expert who had received them in relation to proposed actions on behalf of injured children. Although the actions were compromised or not proceeded with the court granted an injunction [71] against publication of the information which was not lifted when the 'subjudice' injunction against discussion of the issues was removed. The judge recognised that a public interest in disclosure might in a proper case override the implied undertaking but held that in this case the public interest in the proper administration of justice, which required such undertakings, was not overridden by a public interest in disclosure. The European Commission on Human Rights later asserted[72] that the injunction was a breach of Article 10 of the European Convention of Human Rights.

A suggestion of justified disclosure arose, perhaps, in Alterskye v Scott. Information disclosed by the defendant in his first affidavit of documents had allegedly indicated that the defendant had acted in breach of the food regulations in running his hotel. The defendant was visited by representatives of the Ministry of Food and of the police, and the defendant swore that one of the Ministry men had a copy of the affidavit as originally filed. The court refused to order a special undertaking at that stage, stating that the defendant could bring any substantiated instance of improper use to court on contempt proceedings or for an injunction. Counsel for the plaintiff had strongly argued the difficulty of deciding whether or not any given use of the documents was ulterior or collateral in its purpose. This case may be some indication of the wider public interest which there may be in disclosure to the proper quarter of information however received[73] though no such suggestion was made in the judgment.

b) Injury to a third party

Schneider v Leigh[74] concerned the discovery of a medical report which was admittedly privileged in other proceedings for which it had been prepared. The plaintiff had been injured by an employee of P. Company and had issued a writ against the company claiming damages for personal injuries. The company instructed the defendant to make a medical examination of the plaintiff for the purposes of its defence. Parts of the medical report were communicated to the plaintiff who

thereupon sued the doctor for damages in libel. The plaintiff sought discovery and inspection of the whole medical report. The Court of Appeal, Singleton LJ dissenting, held that an order for discovery should be made to take effect only when the action against P.Company had been disposed of, thus protecting the Company's privilege against disclosure.[75]

Coni v Robertson[76] was an action to recover money lent or to enforce the security of a legal charge against the defendant. A second line of defence, criticized by the judge as "not a very meritorious plea," was that the plaintiff had acted illegally as a moneylender, making the charge unenforceable. The defendant sought discovery of documents relating to loans made by the plaintiff before and after the transaction in question. Cross J made an order but stated that

> "there must be some safeguard against disclosure of the names of any clients of the firm who may have borrowed money ... It may be that the best way to deal with that would be to insert an undertaking that these matters shall be disclosed only to the legal advisers of the defendants."

A breach of a special undertaking came before the National Industrial Relations Court in the case of Association of Licensed Aircraft Engineers v BEA.[77] The court had ordered the Association to produce its roll of membership to another union, making it

> "clear beyond peradventure to all present that the nominal roll was to be treated as a confidential document to be used for no other purpose than the presentation by the parties of their cases."

However the court did not apparently stipulate a clear undertaking in this case.

> "The suggestion which all parties seemed to have accepted was that the nominal roll should be retained at national level because the dangers of its abuse lay in its use at local level."

The undertaking given was in more general terms -

> "The President warned all parties of the grave view that the court would take of any abuse of the nominal roll and the secretary gave his assurance that they would handle the nominal roll in an ethical way."[78]

The abuse which in fact occurred was exactly that which had been contemplated, but on contempt proceedings the court accepted that it was

the result of incompetence and negligence rather than bad faith, and as little damage had been done an apology was accepted. It would perhaps have been possible to require an undertaking in more precise terms which, as in Richardson v Hastings above, would have underlined the duties of the party receiving the information, and could have prevented abuse.

c) No injury contemplated.

While likelihood of injury is a clear ground for special undertakings it may be that the fact the document was confidential in the hands of the person ordered to disclose is also a sufficient ground, even though no injury is contemplated. Thus in Hopkinson v Lord Burghley[79] Turner LJ holding that the letters marked "private and confidential" must be disclosed stated

> "There must however be an undertaking not to use the documents, or any copies of them, for any collateral purpose."

There was no indication of injury arising from production in this case, although the writer had objected to production. It could be argued that this case merely expressed the undertaking which is now normally implied and so was not requiring a "special" undertaking at all. However Jenkins J was basing himself on this case when he said in Alterskye v Scott above that the person making discovery could say that certain documents

> "are, for this or that reason, especially confidential and that he objects to producing them except on an undertaking."[80]

The other case in which there did not appear to be any likelihood of injury is Chantry Martin v Martin.[81] This was an action brought by a firm of chartered accountants against an employee for breach of his contract of service. The defendant counterclaimed for wrongful dismissal. Documents relating to the auditing of accounts of a client company were sought on discovery but the plaintiff objected to producing them

> "because they embodied information which was the subject of professional confidence as between the plaintiffs and the client company and their production and the consequent disclosure of their contents would be a breach by the plaintiffs of their duty to the client company."

Following the general statement of the law in Bray on Discovery above, the Court of Appeal ordered that the documents be produced but on an undertaking by the defendant and his solicitor

> "not to divulge their contents to any person otherwise than for the purposes of the present litigation and not to use the information contained therein for any collateral purpose."[82]

Again, the undertaking is not really more restrictive than the implied undertaking except insofar as a casual communication of the contents to a third party is prevented. The main reason for such an undertaking in these cases seems to be to underline the confidential nature of the documents and to emphasise that they are disclosed for the purposes of litigation only.

c) Limited disclosure

If inspection is refused, the other party may apply under Order 24 Rule 11 for an order for production of the documents. The court may not make such an order unless of the opinion that it is necessary for disposing fairly of the cause or saving costs[83] but otherwise its discretion is widely expressed as allowing for production

> "at such times and place and in such manner as it thinks fit."[84]

Orders have been made under this Rule limiting inspection to particular people. Thus in Coni v Robertson,[85] to protect the financial affairs of third parties, inspection was limited to the legal adviser of the defendant, and in Warner Lambert & Co. v Glaxo Laboratories Ltd,[86] to protect a secret process, inspection was confined to selected specialist advisers who also had to give special undertakings and to the chief executive of the plaintiff company. In several cases[87] under the Administration of Justice Act 1970 sections 31 and 32 the Court of Appeal confined inspection of hospital records, in the first place at least, to the party's medical advisers. However, in McIvor v Southern Health and Social Services Board[88] the House of Lords has held that in spite of the fact that the court's power to order inspection is discretionary the statutory wording

> "to produce to the applicant"[89]

does not allow a discretion to order production to someone else instead of the applicant. The point was neatly put by Lowry LCJ of the Court of Appeal in Northern Ireland:

> "The High Court has an inherent jurisdiction to attach conditions to most orders in the interests of justice,

but I do not think that it has any jurisdiction to order disclosure to the applicant on condition that disclosure is not made to the applicant (or his legal adviser)."[90]

This case raises two difficulties. Firstly, Lord Diplock, with whom all the other Law Lords agreed, seems to suggest[91] that there may be circumstances when the court might order the information to be given to the legal adviser and he might properly keep it from his client. The problem of distressing information may be "dealt with by common sense and humanity" but there is as great an inherent illogicality in confining information (even if only part of it) to the legal adviser as in confining it to the medical adviser. Cases have arisen where the client refuses th accept that his lawyer may see a document but he may not;[92] Lord Diplock's words suggest that the objection could not be sustained, even in a case under the provisions of Administration of Justice Act 1970, though the logic of his argument reaches the opposite conclusion. It is submitted that the party who has legal representation should not be in any different position from the party who acts for himself;[93] a solicitor may receive a document as agent of his client but as agent he is not entitled to keep part of it from a client who wishes to see it.[94]

The other problem is that the decision casts doubt on the validity of orders limiting inspection to someone other than the party in other cases. It is clearly applicable to other statutory provisions such as the Bankers Books Evidence Act 1879 section 7.

"a judge may order that such party be at liberty to inspect;"

does it apply also to non-statutory orders of discovery? The terms of Order 24 itself are equivocal. Rule 9 (the general duty to grant inspection) speaks of allowing "the other party" to inspect. But Rule 11 (provision for a court order if Rule 9 is not obeyed or privilege is claimed and challenged by the other party) allows the court

"on application by the party entitled to inspection"

to order production of the documents

"at such time and place and in such manner as it thinks fit."

It is suggested that the reasoning of the House of Lords in McIvor is equally applicable here. Discovery is part of the procedure in the action between the parties. The parties may act through agents, and it is a matter for the court's discretion whether an expert adviser

may inspect[95] but it is the party who is "entitled to inspection" and inspection cannot be granted to him on condition that someone else, but not he, may see the documents.[96]

The unfortunate result of the non-acceptance of inspection limited to advisers may be the refusal of inspection at all in some cases. It was hinted in McIvor that this might be done on an undertaking to make the information available in some other way, but with the comment that

> "occasions appropriate for taking this course are likely to be very rare."[97]

It is known that hospitals are unhappy with the decision in McIvor and are still refusing to release records other than to doctors without both legal and medical advice.[98] If a court is impressed by arguments against disclosing to the party, as the Court of Appeal has been impressed both in medical and in employment[99] cases, it will be faced with the alternatives of refusing inspection under Rule 13 as not necessary or refusing it under Rule 15 as injurious to the public interest. It is submitted that it would be quite wrong for the court to refuse an order simply because disclosure of the information is offered "in some other way."

d) Public interest privilege

Not surprisingly, information the content of which should not be made public in the interests of national security is protected from disclosure on discovery or in court. But the courts have long protected also many routine documents to ensure "the proper functioning of the public service." From the nineteenth century,[1] though with exceptions until the rule was confirmed by the House of Lords in Duncan v Cammell-Laird,[2] until the case of Conway v Rimmer[3] the court allowed the Executive to decide whether disclosure would be contrary to the public interest. In the result

> "privilege was claimed as a matter of principle for most classes of communications within and between central government departments and many types of communications between departments and outside bodies."[4]

The reason for claiming protection in many of these cases was not the content of the documents but the need to preserve freedom and candour in communication, whether the writer was giving advice or assessment. The possibility of publication might intimidate the writers of such matters and

> "render them more cautious, guarded and reserved."[5]

Although this aspect of the privilege was widely used by central government, it was not applied to other bodies, such as local government authorities.[6] Nevertheless, the "candour" argument was felt to be of great importance in many circumstances where people were giving advice or making assessments and the courts strove in other ways to prevent such documents being disclosed. In R. v St.Lawrence's Hospital Statutory Visitors[7] Lord Goddard CJ criticized the disclosure of a medical report which had been used by the visitors in making their report on a patient. He said

> "it should be understood that such reports are of a highly confidential nature. I do not suggest that Crown privilege can be claimed for them, but these are reports which persons holding official appointments are directed to make ... it is most desirable that they should be able to do so quite frankly and freely without the fear that their reports will be disclosed in court of law or shown to various people in circumstances which might lead to action of libel."

By deciding that the function of the visitors was not a judicial proceeding he was able to hold that natural justice, which would have required production of the report, was not applicable.[8]

In Re D (infants)[9] the Court of Appeal considered the effect of Boarding-out Regulations which required records to be kept by the County Council and provided for disclosure to anyone authorised by the Secretary of State. A mother in a custody suit sought disclosure of the record relating to her child and the judge at first instance examined the documents and said she should see them. The Court of Appeal criticized his conduct. Lord Denning MR held that the provision for limited disclosure

> "shows that the case record is regarded as private and confidential"

and construed the statute as not allowing any other disclosure.[10] Karminski and Harman LJJ decided that she could not see the documents for

> "otherwise a public authority with a statutory duty to keep records might find it difficult to do its duty fully and properly without some degree of apprehension"[11]

and the compilers of records would be

> "looking over their shoulders in case they should be attacked for some opinion which they may feel it their duty to express."[12]

The House of Lords in Conway v Rimmer[13] decided that the question whether documents should be protected under Crown privilege should not in all cases be left to the Executive, but judges should if necessary examine the documents in question and decide for themselves on the proper balance between the public interest in non-disclosure and the public interest that the administration of justice should not be frustrated.[14] Some categories of "class" documents would still be privileged, such as Cabinet discussions and high level advice to Ministers on the formulation of government policy[15] and the court would probably accept the relevant Minister's certificate,[16] but there would no longer be virtually automatic privilege for government communications. A genuine need for non-disclosure in the public interest would have to be shown.

In Rogers v Home Secretary[17] the House of Lords emphasised that the ground for non-disclosure is not a privilege held by central government but a duty based on the needs of the public interest. Thus the House of Lords was able to apply the rule to the Gaming Board, a statutory agency not part of central government though performing a public service, and in D v National Society for the Prevention of Cruelty to Children[18] it was able to apply the rule to a private organisation performing a public service. There is no doubt that public interest privilege can now be applied to documents emanating from or relating to a local authority or private body, not only if the content of a document must be kept secret on grounds of national security[19] but also if the document is one of a class which should be kept secret in the public interest.

In both Rogers v Home Secretary and D v NSPCC the public interest in obtaining information from informers for the performance of a public function and the likelihood of loss of such information or danger to the particular informant was held to outweigh the public interest in disclosure for litigation.[20] The position of people giving information to a government department was raised in Norwich Pharmacal Co v Customs & Excise Commissioners[21] and Crompton (Alfred) Amusement Machines Ltd v Customs & Excise Commissioners (No.2).[22] The House of Lords held that the informants in the Norwich case (who were bound by statute to give the information) would not be likely in future to give false information as a result of disclosure and, if honest, would not object to the disclosure, but the informants in the Alfred Crompton case, (who gave the information voluntarily though it could have been

ordered) might well object in the future to co-operating with the Commissioners. The latter case has been followed in Burmah Oil Co. Ltd. v Bank of England[23] for commercial information given in confidence by companies in discussion with government Departments. Foster J is reported as saying that

> "once it was known that what had been imparted in confidence might be revealed publicly, there would be a grave danger that such information would not be as readily forthcoming as it was now. There was no doubt that that would be detrimental to the public interest."

The question arises how far the fact that information has been given "in confidence," whether to central government or to another body, raises a public interest in its non-disclosure.[24] Lord Denning MR has suggested in the Court of Appeal, both in the Alfred Crompton[25] case and in D v NSPCC[26] that such information is prima facie privileged, but the House of Lords has firmly said

> "confidentiality is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest."[27]

Viscount Dilhorne has made the point that not all such information is of a confidential nature and he thought that protection should be confined to

> "information of a personal character, obtained in the exercise of statutory powers, information of such a character that the giver of it would not expect it to be used for any purpose other than that for which it is given, or disclosed to any person not concerned with that purpose."[28]

Some examples of such information, though not obtained under statutory powers, have recently arisen where the possibility of grave difficulties arising from disclosure has been seen. An industrial tribunal ordered the National Coal Board to disclose attendance records in a claim for unfair dismissal by a miner dismissed for absenteeism.[29] The Board were willing to show the records without the names of individuals[30] but the worker claimed that others with worse records had not been dismissed so he wished to see the names. The Board refused disclosure

> "because of the very real risk of industrial action."

The case was settled, the Board compensating the worker for unfair dismissal.[31] Disclosure of records and reports on other people has been

sought in cases alleging racial and sexual discrimination in employment, and the Court of Appeal has held that

> "industrial tribunals should not order or permit the disclosure of reports or references that had been given in confidence except in the very rare cases where, after inspection of a particular document the chairman decided that it was essential in the interests of justice that the confidence should be overridden."[32]

This case suggests that, at least where the information is confidential in nature, the fact that it was given in confidence is sufficient to raise public interest privilege (and make it almost irrebuttable) whether or not there is a public interest in the purpose for which the information was given or any danger of loss of information in the future or injury to informers. Whether the House of Lords will hold that the chance of resentment[33] against the compiling of information for a private purpose is a sufficient public interest to outweigh that in the obtaining of information for litigation remains to be seen.

There may be good reason for a third party to object to personal information about himself being disclosed in litigation to which he is not a party[34] but the Court of Appeal decision is stated more widely and has been followed in respect of references on the party to the litigation himself, where this objection is clearly irrelevant.[35] The person who "gives in confidence" information in a reference is the referee not the subject and if the basis of protection is the preservation of the confidence the document is being protected to enable him, and other referees, to write with candour without fear that what he says may ever become known to the subject.

As well as breaching current standards of "fairness" in decision taking,[36] this basis of old Crown privilege was castigated by two Law Lords in Rogers v Home Secretary, when it was suggested for police reports. Lord Salmon said

> "It smacks of the old fallacy that any official in the government service would be inhibited from writing frankly and possibly at all unless he could be sure that nothing he wrote could ever be exposed to the light of day. I am certain that even without the immunity the police would do their duty undeterred by fear of actions or even prosecutions for libel."[37]

The fear of a libel action is a very weak ground for protecting such reports or references. The law of qualified privilege would be sufficient to protect the compiler from a libel action except in the case of malice, and there is no justification for protecting the compiler of an untrue and malicious report. Indeed there is excellent reason for ensuring that such a report is not acted on. Nevertheless it is the view of many[38] that general disclosure at least would make such references and reports valueless and this view is clearly shared by the Court of Appeal.

On the other hand, it has been held that a routine school report on a pupil, though considered confidential and not disclosed to parents, was not privileged from disclosure in an action by another pupil against the education authority for injury sustained at school.[39] There may be a distinction drawn between routine internal reports and reports or references expressly received in confidence from an outsider. From the point of view of the subject the information is equally confidential in either case, and if he is not a party to the action he may be equally resentful of disclosure, but if privilege is to be based not on his attitude but on that of the compiler of the report or reference the only justification would be that disclosure would destroy or weaken valuable sources of information. Journalists are not allowed privilege for information disclosed to them in confidence by their sources;[40] there is no reason why an employer should be allowed privilege on this ground alone either. Public interest privilege requires a public interest to be served by the non-disclosure. The prevention of unnecessary dissemination of personal information, or commercial information,[41] may be such a public interest[42] as may be the need to protect children; protecting the sensibilities of the compilers of references or reports where there is no particular public interest to be served by the receipt of such information is not, it is submitted, such a public interest.

Conclusion

The law of discovery must always hold a careful balance. If too much information is required there is a danger of non-cooperation and contempt; if too little is required justice may not be done. If documents disclosed on discovery may be used for other purposes there is a danger of unfairness and resentment; if restrictions on subsequent use are too strict legitimate public knowledge may be frustrated or injuries may remain unredressed.

The balance is held partly by confining discovery to the parties themselves; this is not wholly the rule but extensions are treated

cautiously. Third parties would more understandably resent their affairs being known in litigation to which they are strangers. Another important aspect of the balance is the recognition by the court of the confidentiality of some information. Simply to allow non-disclosure of "confidential" information or information "given in confidence" would be far too wide and would render discovery almost valueless. But the courts have recognised as sufficiently confidential to require a court order and, or, special undertakings information of a personal nature[43] and of a commercial nature.[44] The reason for a reluctance to disclose in these cases may relate to the content of the document ("why should others know about me or my business?") or to the circumstances of its receipt ("my clients/fellow clubmembers/employees will not trust me if I disclose"). The court demonstrates its recognition of the private concern by expressly considering the necessity for the information, imposing special warnings against abuse, allowing costs.

Relevant information should only be excluded from disclosure for litigation if there is a public interest which so requires. The maintenance of sources of information which are needed for a public purpose and the protection of such informers may be an aspect of the public interest, as may be the protection of children and perhaps others in a special position of vulnerability. There may be a public interest in protecting the personal and commercial information of third parties (and even of the litigants) from undue exposure. But it can no longer be said that the public interest requires non-disclosure simply to protect the candour of advisers, referees, informers or persons making assessment. If policy discussions in government are protected it is because central government policy-making must not be subject to scrutiny,[45] not because advisers would not speak frankly. Similarly, if the givers of information or advice are to be protected from disclosure it is because there is a public interest in that protection, not because the information was given in confidence, or was given to some official body or they may fear a libel action.

On the other hand, the desire to respect the confidences of another is a reasonable aspiration and it is suggested that a litigant, concerned about his sources of information or his relationship with the donor, or subject, of the information, should readily be allowed to disclose the information only if required to do so by a court order.[46] In such a case the party requiring the information should normally pay the costs of the application to court.

B. PRIVILEGE

1. Introduction

Equity's order of discovery of documents was designed to prevent one party to the action from unfairly hampering, or even destroying, the other party's case by withholding information in his possession. Privilege is the limit imposed by equity on its own requirement of disclosure, though of course both discovery and privilege have now hardened into fixed rules. The duty to disclose did not include a duty to show information relating solely to one's own case for non-disclosure of such matters did not unfairly hamper the other party.[1] This restriction led to the rule of privilege for everything connected with one's own case in litigation, including legal advice, and this led to the recognition of privilege for all disclosures within the relationship of lawyer and client.[2]

It has been argued, from time to time, that other relationships, quite as confidential as that of lawyer and client, should receive the same privilege of non-disclosure.[3] Examples are doctor and patient, priest and penitent,[4] journalist and source of information, social worker and client, accountant and client.[5] Although Lord Brougham suggested that such privilege should attach at least to the doctor and patient relationship,[6] the law is clear that there is no such privilege although the court will be loath to require disclosure or the giving of evidence unless it is "proper and indeed necessary,"[7] and the confidante is right to refuse to disclose without a court order unless the confider requires the information to be given.[8]

The privilege of communications between lawyer and client is granted

> "out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings."[9]

The public interest in the unimpeded conduct of legal proceedings extends to a public interest in the settlement of disputes. This has led to privilege being accorded to "without prejudice" negotiations[10] and this has been extended by analogy to communications made with third-party mediators, whether professionals or not.[11]

In relation to criminal liability higher considerations of personal liberty are involved. The privilege against self-incrimination

probably originated in the hatred of the Star Chamber;[12] it has been held that legal professional privilege must give way to the right of a defendant to have evidence for his defence;[13] and it has been suggested in United States of America that if evidence needed by a defendant for his defence is withheld on the ground that its disclosure would be contrary to the public interest then the prosecution must withdraw the charge.[14] A 'concession' to the same effect was announced in 1956.[15]

The privileges so far mentioned are in all cases the privilege of the party to the litigation. The effect of this is that the party can waive the privilege and insist on disclosure[16] and no other person can prevent disclosure even if he is the writer of the document and may be sued for libel[17] or a doctor operating under a scheme which requires secrecy.[18] Whether a solicitor may waive privilege on behalf of his client without express instruction is uncertain.[19]

Discovery is also an order primarily against the other party to the litigation, as was seen above. Inability to obtain discovery before trial against a third party (unless he is 'involved'[20] or statute has intervened[21]) may result in an inability to make out a case, but this is not unfairly caused by the other party, and so equity does not intervene. Conversely, if a party to the litigation acquires in some other way information which would have been privileged in the hands of the other party he may be allowed to use it.[22]

These privileges, which may be called private privileges,[23] differ in nature and effect from public interest privilege, formerly called Crown privilege. In the latter case

> "There is no question of any privilege in the ordinary sense of the word. The real question is whether the public interest requires that the *[information]* shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence."[24]

The overriding importance of the public interest is recognised by the courts in diverse areas. It is sufficient ground for an injunction to prevent publication of information which would affect national security;[25] it may require the disclosure of information which would otherwise have to be kept secret.[26] The approach of the court to a claim for non-disclosure on the ground of public interest is different from that in relation to other privileges, since in this case the court will

balance the public interest in non-disclosure against the public interest in allowing evidence to be produced for litigation, whereas once information is within the ambit of legal professional privilege, for instance, it may not be produced however inconvenient the result for the party seeking it.[27] Conversely, once the court has decided that the information may not be produced the ban covers all other sources of the information including evidence in the hands of the other party to the litigation and the testimony of witnesses.[28] Also, unlike other areas of privilege, the parties cannot waive public interest privilege and agree that the evidence be produced.[29]

In relation to all types of privilege, whether private or public, the court itself decides whether the information is within the privilege or should be disclosed. The court may sit in camera since to hear argument in open court might defeat the privilege,[30] and the court may privately inspect the documents and require further information as to the relevant public interest.[31] The court may raise the question of privilege if the parties do not.[32]

It was seen above that in relation to public interest privilege the fact that information is of a confidential nature or was received in confidence is not a bar to disclosure but may be "a very material consideration to bear in mind when privilege is claimed."[33] In this part of the chapter consideration is given to how far confidentiality is relevant in the private privilege.

2. Privilege In Aid Of Litigation

Privilege from disclosure on discovery is accorded as a matter of public policy

> "to facilitate the obtaining and preparation of evidence by a party to an action in support of his case."[34]

It includes information given by the client to his solicitor since it is necessary

> "that he should be able to make a clean breast of it to the gentleman whom he consults."[35]

(It will be seen below that this aspect of the privilege has been widely extended.) It was readily decided that the privilege would still exist if the communication were made through an agent, even if there was no necessity for the employment of an agent.[36]

a) Information from third parties

Since the purpose of the privilege is to enable

> "the legal adviser to advise or act with regard to the litigation."[37]

it extends to information collected by him for the purpose of the litigation. Thus, for example, the proofs of evidence of witnesses are privileged from disclosure to the other side. It is of course the basis of the privilege that litigation is taking place, or at least contemplated,[38] so that information obtained from third parties will not be privileged if it was obtained before litigation was considered. This was decided in Wheeler v Le Marchant[39] by the Court of Appeal reversing the Vice-Chancellor. The action was one for specific performance of an agreement to grant a lease when the plaintiff erected buildings and to make advances of money to him as the building proceeded. The defendants were trustees of an estate being administered by the court in another action and they resisted discovery of inter alia communications between their solicitor and surveyor in connection with that administration and when no litigation was contemplated. Bacon VC refused production of the documents saying

> "A man is not to be so impeded in his business transactions, whether he is, or is likely to be, engaged in litigation or not, as to prevent him from employing a solicitor, for the purpose, first of obtaining his advice, and next of collecting evidence; or from employing any agent, not being a solicitor, who is engaged for the like purpose; and if the Defendant takes upon himself to say that these were all confidential communications what right have I to say that his confidential communications should be disclosed?"[40]

The Court of Appeal unanimously reversed his decision on the grounds that it would be an extension of privilege if it were not limited to the preparation of material for an action and such extension

> "does not appear to me to be necessary, either as a result of the principle which regulates this privilege or for the convenience of mankind."[41]

This rule, though clear and logically within the purpose of the privilege, has perhaps one odd result, that it may encourage a change of solicitor when litigation becomes likely.[42] Had the defendants in this case had a new solicitor for the litigation, he would probably have sought information from the surveyor about the estate (perhaps obtaining it through the old solicitor who already had the information for the other purpose of administering the estate). The information would then, in the hands of the new solicitor, have been privileged as being obtained

for the purpose of the litigation. This difference of result would be unsatisfactory and it is submitted that the rule should be extended to include information which would have been reasonably necessary for the solicitor to obtain for the action had he not already had it.

If the information is privileged in the hands of the solicitor the court will refuse both discovery and interrogatories on the matter. It is clear that one cannot make information privileged merely by passing it through the solicitor.[43] Thus

> "the mere circumstance that a solicitor or client obtains by means of confidential communication information about a fact, does not protect him from disclosing what he already knew about that fact."[44]

And privilege will not prevent the answering of questions about "facts patent to the senses," such as the state of a book when the solicitor saw it.[45] In Kennedy v Lyell[46] the plaintiff was asked interrogatories about the pedigree of his predecessor in title and whether he had made enquiries about the title. He refused to answer on the ground that enquiries had been made by his solicitor (for the purpose of the litigation) and so were privileged. The defendant accepted that the solcitor's report would be privileged but argued that he was merely asking him facts. The Court of Appeal refused the interrogatories. Cotton LJ said

> "The information which a solicitor employed to obtain materials for his client's defence communicates to the client is privileged, if it is not merely the statement of a fact patent to the senses, but is the result of the solicitor's mind working upon and acting as professional adviser with reference to facts which he has seen or heard of ... the client is not bound to disclose any information given him by his solicitor as to the inferences drawn by him, or as to the effect on his mind of what he has seen or heard."[47]

In Watson v Cammell Laird[48] when litigation for personal injuries was contemplated the plaintiff's solicitor was allowed to make a copy of the hospital treatment notes in relation to his client. The hospital refused to allow the defendant to see the notes and so the defendant sought disclosure of the plaintiff's copy on discovery. The maker of the notes could be sub-poenaed as a witness to produce the notes at the trial, so the defendant argued that a copy of the notes could not be privileged since the original would not be. The Court of Appeal rejected this argument and held that the copy had come into being for

the purpose of the litigation and

> "it was part of [the solicitor's] skill in assisting his client to go to the hospital to get it."[49]

This justification would seem to produce the ridiculous result that the document is privileged if the solicitor fetches it but not privileged if the hospital sends a photo-copy through the post. The "use of skill" argument is seen to be artificial and it is submitted that the better test, as submitted above, is that the information was reasonably necessary to be obtained for the proper preparation for action. There is some confirmation that this is the true test in The Palermo,[50] the case relied on by the court in Watson v Cammell Laird, where copies of Board of Trade depositions were obtained by the plaintiff's solicitors and were held to be privileged as having been obtained for the purposes of the action although the originals may have been made for another purpose. Nothing was said in that case about the solicitor's skill in making the copies.

b) Information obtained for the solicitor

Just as information collected for the litigation by the solicitor is privileged, so is information collected by the client for the litigation and given to the solicitor. But in the same way it must be obtained for the litigation; it will not be privileged merely because it is relevant to the litigation or because it was given in confidence. In many cases the question has arisen whether an accident report should be disclosed or is privileged. Such a report may be prepared as a matter of internal routine in a place of work or on the instructions of the employer.[51] It may be made for the purpose of obtaining information with a view to preventing further accidents, or it may be with a view to litigation. In some cases there may be a statutory duty to prepare such a report. Can such a report be said to be information collected for the purpose of litigation with a view to laying it before solicitors?

It used to be thought that if the report were made as a matter of routine and in the ordinary course of employees' duty the report could not be said to be made in contemplation of litigation,[52] but this is clearly not so.[53] Indeed some employers may be presumed to contemplate litigation when their employees are injured at work.[54] Similarly it is not a bar to privilege that there was a statutory duty to make the report, or that it would be used for purposes other than obtaining legal advice in relation to the contemplated litigation. In

order to claim privilege the affidavit must state that the report was obtained for the purpose of being laid before solicitors. It is not necessary to state that it was "solely or merely or primarily" for that purpose;[55] it is sufficient to state that it was "wholly or mainly" for that purpose;[56] but it is not sufficient to state that it was "for the purpose inter alia of obtaining for and furnishing to the solicitor."[57] In some cases, where the affidavit does not clearly show grounds for privilege (the court will always assume what is stated in the affidavit to be true, inaccuracies giving rise to an action for perjury later), the court will inspect the document.[58] This may clarify the question. For example an accident report form headed "Confidential report for the information of the authority's solicitor" was held to be privileged.[59] Conversely, the statement in the body of another report that

> "it was then explained to the injured men the purpose of the inquiry, that it was not so much convened to establish guilt or attach blame ... [but] with a view to safeguarding against any possible similar happening in the future,"

was taken to indicate that the report was outside the ambit of privilege.[60] It is established that the intention of the person making statements which are recorded is irrelevant,[61] but Diplock J in Longthorn's case suggested that if such a person were misled into giving evidence the other party would be estopped from claiming privilege in respect of that part of the document which contained his evidence.[62]

c) Information obtained for other purposes.

A report which was not prepared with a view to litigation but for some other purpose will not be privileged from discovery in the hands of the party or his solicitor.[63] The principle is clear, since the report did not come into existence for the purpose of enabling the solicitor to give legal advice, but it is difficult in practice to reconcile this line of cases with those discussed above for in many cases the report will be used for the preparation of the case as well as for the other purpose. The House of Lords has not yet had to consider fully the question of documents coming into being for different purposes;[64] the basis of their eventual rationalisation will depend on whether the judges give more weight to the disclosure before trial of all evidence which may be made available at the trial (such reports will usually be available on subpoena duces tecum if not produced by the other party), or to the protection of each party in the preparation of his case. Havers J in Seabrook v British Transport Commission[65] saw

the trend of wide disclosure before 1913 reversed since that date. It may be that the trend is now[66] returning towards fuller disclosure.

The case of Jones v Great Central Railway[67] concerned a member of a trade union who, having been injured at work and hoping for the assistance of his union in bringing an action, acted in accordance with union rules and sent a report of the accident to union officials. The rules of the union provided that the consent of the executive committee or general secretary was needed before engaging a solicitor. The communications were held not to be privileged in the litigation which ensued.

In Crompton (Alfred) Amusement Machines v Commissioners of Customs and Excise[68] a disagreement arose between the parties as to the method of valuation of certain goods for the payment of purchase tax. In accordance with the statutory procedure, the Commissioners proceeded to prepare an assessment, gathering for the purpose information from third parties and keeping in correspondence with their solicitor. The House of Lords held that since they could anticipate from the beginning that their assessment would be challenged and lead to litigation all the correspondence with their solicitor was privileged. But despite the anticipation of litigation the information gathered from third parties was obtained for the purpose of making the assessment which the Commissioners were bound to make before any litigation could ensue, and so that information would not be privileged as being obtained in aid of litigation.[69]

On the other hand, in Westminster Airways Limited v Kuwait Oil Company Limited[70] the Court of Appeal held that a report of an accident made to the insurers who would describe whether to admit liability was privileged as being part of the chain of preparing evidence for the solicitor in anticipated litigation.

In Jones v Great Central Railway Lord Loreburn LC stated the relevant principle thus.[71]

> "Both client and solicitor may act through an agent, and therefore communications to or through the agent are within the privilege, But if communications are made to him as a person who has himself to consider and act upon them, then the privilege is gone."

Lord Cross in the Alfred Crompton case made a similar point when he said

> "the Commissioners had to form their own opinion as to value on the evidence available to them, including these documents, before any arbitration could take place."[72]

In the Westminster Airways case Jenkins LJ said

> "The insurers, after all, are concerned in the matter only because they have agreed by the contract of insurance to indemnify their assured against claims of the character in question ... That being so, the very fact that the insurance company is communicated with at all indicates that a claim is anticipated. Prima facie, in such circumstances a communication between the assured and the insurance company, whether direct or through the assured's brokers, would be directed to the question whether the claim should be disputed or admitted, and if it was to be disputed, how best to conduct the defence. If the communications were of that character then, in my judgment, they would be well within the privileged area."[73]

The relevant distinction between these cases is not the fact that litigation was, or was not, anticipated since clearly it was anticipated in all three cases.[74] It was not necessary for a firm decision to litigate to have been taken before a privileged communication may be made since, the decision to litigate will often depend on the solicitor's recommendation after considering the information. It may also depend, for example, on the willingness of the legal aid fund to provide assistance. It has never been suggested that in such a case no communication with the solicitor will be privileged until after a legal aid certificate has been obtained.

Is the relevant distinction that the person receiving the information must make a decision of his own on that information? The wording used in Jones and in Alfred Crompton would suggest that this is so, but it is equally true of the insurers in the Westminster Airways case, who would have to decide whether or not to admit liability.

It would seem that the important factor is whether the person receiving the information has to make a decision in relation to it which is independent of the litigation. In Jones the plaintiff could litigate (in theory at least) whether or not the union backed him and the decision of the union was whether they should support him; in Alfred Crompton the Commissioners had to decide on an assessment which was clearly not a part of the litigation; in the Westminster Airways case the party and the insurer were already contractually bound to act together in accepting or disputing the claim. In the Irish case of Coss v National Maternity Hospital[75] the judge decided that the moment

when privilege would arise was then

> "the insurance company ceased to be interested or concerned in the matter from the point of view of their own liability to their insured, and acquired instead the character of agents, even prospectively, for the legal advisers of the defendants."

This test was rejected by the Court of Appeal as too narrow as a foundation for a general rule. It is, however, clearly in accordance with the general principle on which the privilege is based and would provide a rationalisation of the cases. Its disadvantages are that it may be difficult to decide at what time the relevant change of interest had taken place (the Court of Appeal were reluctant to examine the documents on such a quest)[76] and it calls into question the validity of such cases as The Palermo and Watson v Cammell Laird.

An alternative test would be that proposed above, namely that privilege should apply to information which it was reasonably necessary for the solicitor to acquire in order to advise the client and prepare the case. He would have to obtain from the client a report of the incident and that would clearly be privileged on the basic ground of "making a clean breast of it." If the client made such a report initially to the insurer, or another third party, on principle it seems wrong that the other party should be able to obtain that report on discovery when he would not obtain the later report made to the solicitor. The same would apply to the testimony of witnesses, which the solicitor would have to obtain to prepare the case and which are privileged.[77] A report made previously, for some other purpose, by the witness cannot be obtained from him before trial (no discovery against a mere witness); if the solicitor acquires a copy[78] of such a report in preparing the case, the copy is privileged. Thus on this basis the cases like The Palermo and Watson v Cammell Laird are seen to be in accordance with principle as is the Westminster Airways case. In the Alfred Crompton case there was no subject matter of litigation until the assessment had been made. The case which, on this basis, seems to be wrongly decided is Jones v Great Central Railway where it appears that the defendants obtained before trial the plaintiff's version of the accident simply because both he made a report to the trade union and the report was then transmitted to his solicitors. Had the solicitors asked for a copy after the decision to litigate rather than being given the original at the time of instruction it appears that the case would have

been like The Palermo; the copy would have been privileged and the original obtainable only at the trial.

It must be remembered that a decision that information is privileged removes that evidence from the other party, at least until trial, and perhaps from the court entirely, for the party with the privileged information may choose not to produce it at the trial. Recent statutory changes in personal injuries cases have been designed to mitigate this difficulty, by allowing for discovery pre-action against a person "likely to be a party"[79] and pre-trial against a third party.[80] But although the Act expressly retains public interest privilege[81] and makes no mention of any other privilege, the Rules of the Supreme Court have retained all privilege in relation to such disclosure.[82] So the tendency of the courts in recent years to hold that routine reports may be presumed to have been made in anticipation of litigation and for submission to the solicitor, as well as for other purposes, removes from the parties and the court what may be very valuable first-hand evidence of the occurrence, in spite of the intention of Parliament to make such evidence available. It may even, as in the case of Seabrook v British Transport Commission,[83] an action by a widow under the Fatal Accidents Acts, disable the plaintiff from bringing the action at all. The courts should be reluctant to imply that a routine report, or a report made for some purpose other than the litigation, was made in anticipation of litigation simply on the ground that litigation often ensues in such circumstances, and they should be careful to limit privilege in aid of litigation to the area where it is really needed, namely the protection of information which it was reasonably necessary for the solicitor to obtain in order to enable him to advise and act for his client.

d) Waiver of privilege

A disadvantage of the fact that privilege applies to expert reports prepared for the litigation is that much expert time may be wasted in court on facts which could have been agreed, and knowledge of the evidence held by the other side could facilitate settlement of many personal injury cases.[84] Attempts were made to persuade parties to agree a medical report to save doctors having to attend court, but in spite of a Court of Appeal direction that this meant only a report with agreed facts[85] the Winn Committee found that "agreed" reports were often simply two conflicting reports and no expert oral evidence to help the judge decide between them. The committee proposed joint medical examination to facilitate agreement.[86] If, however, separate examination

is made, the reports are privileged and one party cannot force the other to disclose his report.[87] However, the Civil Evidence Act 1972 section 2(3) requires parties to waive privilege for expert reports if they wish to produce oral expert evidence in court.[88] In personal injuries cases, medical reports must be exchanged unless "there is sufficient reason for not doing so."[89] In other cases expert reports must be disclosed before trial if the court considers it "desirable"[90] and in collision cases on land engineers' reports must be disclosed if it is wished to call the engineer as a witness.[91]

Conclusion

There is good reason for the privilege to enable the lawyer on behalf of the litigant to prepare his case. It is clear that the fact that information is received in confidence is not sufficient if litigation is not anticipated,[92] but that conversely the information is only privileged if it can be said to be confidential. Thus no privilege arises for information which the recipient already knew or which was public knowledge.[93] But it is not necessary to show that it was given expressly in confidence; the anticipation of litigation and the relationship of lawyer and client are sufficient to indicate that the information was given in confidence, that is for a particular purpose only, being information which would not otherwise have been ascertained by the recipient. This assumption is stretched in relation to documents coming into being for several purposes; privilege in this area has become a fixed rule (though of uncertain ambit) based rather on the fact of receipt by the lawyer than on the confidentiality of the circumstances.

3. Conciliation Privilege

Admissions may be made or facts conceded during negotiations which, when the negotiations fail and litigation ensues, the party making them may wish to deny and the other party may wish to use. The question of privilege may arise in relation to a claim for discovery[94] or the issue of a subpoena ad testificandum.[95]

a) The reason for the privilege

Bray on Discovery[96] states

> "The right to discovery may under very special circumstances be lost by contract as where correspondence passed between the parties' solicitors with a view to an amicable arrangement of the question at issue in the suit on a stipulation that it should not be referred to or used to the defendant's prejudice in case of a failure to come to an arrangement."

Basing himself on this statement Denning LJ in Rabin v Mendoza & Co. held

> "if documents come into being under an express or, I would add, a tacit, agreement that they should not be used to the prejudice of either party, an order for production will not be made."[97]

This would suggest that a mere contract not to disclose to the prejudice of the party is enough to render a document privileged from disclosure. This is clearly too wide, since it would render inadmissible the letter stated to be "private and confidential" in Hopkinson v Lord Burghley.[98] It has clearly been held on many occasions that an agreement of confidentiality as such does not make the information privileged from disclosure for the purposes of litigation.[99]

A second justification given for the rule is "the public interest in achieving an agreed settlement of disputes."[1] The public interest may be an uncertain ground as was seen in R v Nottingham County JJ ex. p.Bostock[2] an application in affiliation proceedings for an order to hear the evidence of a moral welfare worker who had interviewed the putative father before the birth of the baby. To the argument that her evidence should be excluded in the public interest, the Divisional Court replied that the public interest demands that a man should not evade his responsibilities.

The best explanation for the rule seems to be that it is a logical extension of the solicitor performing his function of advising and assisting in relation to a legal dispute. In civil matters the attempt to resolve the dispute by negotiation is as important as preparation for trial. Refusal to order disclosure will not unfairly prejudice the other party because the information was only given for the purpose of trying to resolve the dispute and the other party agreed that it would not be otherwise used. Thus the basis is seen to be a contractual agreement, limited to the existence of an actual dispute between the parties, coupled with the public interest which encourages the settlement of disputes just as it encourages frank communication with a legal adviser. Romer LJ in Rabin v Mendoza & Co.[3] decided that the document in question, a report from a third party obtained in pursuance of a "without prejudice" interview, was within the limits of the contractual protection, but held that there was nevertheless a discretion in the court to allow its production. In the result he held that

> "It would be monstrous to allow the plaintiff to make use - as he certainly would - for his own purposes as

against the defendants of a document which is entitled to the protection of 'without prejudice' status."

This approach shows the dual nature of the privilege - a private contract, which may have to be set aside in favour of the public interest in disclosure,[4] and a balancing of the public interests for and against the privilege.

The privilege under discussion covers also negotiations between estranged spouses. In McTaggart v McTaggart[5] Denning LJ indicated that this was an extension of the "without prejudice" rule.

> "The rule as to 'without prejudice' communications applies with especial force to negotiations for reconciliation. It applies whenever the dispute has got to such dimensions that litigation is imminent."[6]

In Mole v Mole[7] Bucknill LJ emphasised the public interest side of this branch of privilege.

> "One must bear in mind that in matrimonial disputes the State is also an interested party; it is more interested in reconciliation than in divorce, and if the rule as to privilege tends to promote the prospects of reconciliation I think it ought to be applied."

The reason why such a privilege may be valuable was spelled out in Bostock v Bostock[8]

> "otherwise if the parties discussed their affairs with the probation officer, knowing that evidence could afterwards be given of the conversations in court, they would be much less likely to be frank with him and therefore his function would be much less likely to be successful."

b) Presumption of privilege

In McTaggart v McTaggart the spouses had visited a probation officer to discuss their marital problems. Nothing had been said about the confidentiality of the discussion but the Court of Appeal held that

> "if they are genuinely seeking his assistance they must be taken to negotiate on that understanding even though nothing is expressly said."[9]

On the other hand when the spouses and their solicitors met together with a view to arranging a reconciliation, and nothing was said about the discussions being "without prejudice," it was held that no privilege attached to their discussions, and one party to the ensuing

litigation could adduce evidence of what was said although the other objected.[10] This case perhaps lays too much emphasis on the contractual aspect of the privilege and insufficient on the public interest side. It is considered that it would not be followed at least in matrimonial cases.[11]

In Theodoropoulas v Theodoropoulas[12] it was held that the privilege extends beyond professional conciliators.

> "Where it is proved that any private individual is enlisted specifically as a conciliator in my judgment the law will aid his or her efforts by guaranteeing that any admissions or disclosures by the parties are privileged."

Here the public interest aspect of the privilege is seen to be all-important.

On the other hand, the courts will not imply privilege to statements made when no proceedings were contemplated. Thus discussions with a putative father four months before the birth of the baby were held not privileged in subsequent affiliation proceedings.[13] There must be a genuine dispute to be negotiated.

c) Effect of the privilege

Once "without prejudice" negotiations are held to be in existence the privilege applies to all information referable to the negotiations. Thus other parts of a correspondence begun under a "without prejudice" heading may also be protected,[14] as will information collected from a third party in pursuance of the negotiations.[15]

The privilege has clearly been held to belong to the parties, not the conciliator. In McTaggart v McTaggart this was said to be unfortunate

> "as the success of attempts at reconciliation might be prejudiced if it became known that the probation officer could be called subsequently to give evidence."[16]

In that case both parties wished to call the probation officer who, acting on a Home Office memorandum, refused to give any evidence unless required by the court. The Court of Appeal held that since both parties wished to call the witness they had jointly waived the privilege and she must give evidence.

The government made a further attempt to ensure unwaivable privilege for conciliators in the case of Broome v Broome.[17] The War Office had obtained documents received by a representative of the Soldiers, Sailors

and Airmens Families Association when involved in conciliation work between husband and wife. The Secretary of State claimed Crown privilege for

> "all letters received by, copies of letters sent by, and memoranda and records made by"

the conciliator on the ground that disclosure was "not in the public interest," and that claim was allowed.[18] It was also claimed that the representative should not be allowed to give any evidence, although both spouses wished her to be called. The judge admitted her evidence on the procedural ground that the claim for privilege had not differentiated between evidence which might affect the public interest and that which could not, such as evidence relating to housing conditions in Hong Kong. But the judge also doubted whether the court should admit new heads of public interest (here the interest was said to be preserving the morale of the forces), simply on the basis of a Minister's certificate.

The Royal Commission on Marriage and Divorce[19] recommended that facts discovered by a marriage guidance counsellor in conciliation between husband and wife should not be admissible in evidence. This was not for the benefit of the spouses, for whom waivable privilege is sufficient, but for the protection of the marriage guidance service. The likelihood of appearance in court might deter would-be counsellors from undertaking the work; experience of cross-examination might make them leave; the public might lose confidence in the service if they saw many counsellors in court testifying to the failure of their efforts at conciliation. These arguments would not apply to other conciliators, for whom waivable privilege was sufficient protection, since the numbers concerned would be too large and the evidence excluded

> "might well result in preventing a husband or wife from being granted the relief to which he or she was entitled."[20]

The evidence of probation officers should not be inadmissible because this might cause difficulties in presenting their reports on other matters, such as the custody of children. Not surprisingly the recommendation of the Royal Commission was not implemented.

Since the privilege is always (apart from the possibility of public interest privilege) waivable, the question may sometimes arise whether it has been waived. In Pais v Pais[21] the husband issued a subpeona ad testificandum to the priest who had attempted to reconcile

the spouses. The wife wished to give in evidence[22] letters she had sent to her parents giving her version of some of the meetings and advice given. As required by rules of court[23] her solicitors sent copies of the letters to her husband's solicitors before seeking the consent of the court. The husband claimed that this amounted to a waiver of the privilege and so the priest could be called. Baker J said

> "In my judgment there can be no waiver of the privilege in marriage guidance cases until the spouse, or counsel or solicitor on behalf of the spouse, says in unmistakable and unequivocal terms: 'I want the evidence to be given to the court of all that happened before the marriage guidance counsellor and therefore I am waiving the privilege.' That is not what has happened here and in my view the privilege remains."[24]

The court pointed out in that case that the rules concerning privilege between solicitor and client were not necessarily applicable to conciliation privilege. Thus in the former situation if the party seeking disclosure manages to obtain a copy of the document in question by whatever means, he can use that document,[25] and communications between the parties are not subject to privilege.[26] But in marriage guidance cases the parties are often both present, or the one may tell the other what advice was given. To make such evidence admissible simply because the other spouse knows would "defeat the whole object of marriage guidance counselling."[27]

Further, the emphasis of the court on the public interest side of this privilege has led to the rule that if a third party obtains the information he cannot give it in evidence unless the privilege is waived. In Theodoropoulas v Theodoropoulas[28] a third party was fortuitously present during the attempted reconciliation and overheard what was said. It was held that his evidence could not be given in the absence of a waiver by both parties.

d) Limits of the privilege

Although, as has been seen, the privilege is wide, the courts are careful to ensure that it is only available for its true purpose of protecting statements made during negotiations for the purpose of achieving a settlement or conciliation. Thus the privilege is not applied retrospectively to communications made before the dispute arose, or to a person who had no authority to try to effect a conciliation. Both rules are illustrated by the case of R v Nottingham County JJ exp. Bostock.[29] Four months before the birth of a child, a moral welfare

worker cating on behalf of an Adoption Society, interviewed the putative father in the presence of his solicitor. Later, proceedings were taken under the Affiliation Proceedings Act 1957 claiming that he was the father of the child, and the moral welfare worker was called as a witness. Objection was taken to her giving evidence of what had been said at the meeting, but the Divisional Court granted an order of mandamus to the justices to hear her evidence. To the claim that the statements made at the meeting were privileged because it was recognised that the meeting was with a view to adoption, the court held that the witness had no authority from the mother to attempt to compromise possible proceedings. It was also argued that the Rules made under the Adoption Act 1958[30] precluded the court from hearing the evidence. Rule 30 provided

> "Any information obtained by any person in the course of, or relating to, proceedings [under the Act] shall be treated as confidential."[31]

The court accepted that the words "or relating to" should be widely construed but they must relate to adoption proceedings. At the time when the meeting in question was held the child was not even born and so no "proceedings" for adoption were in being. Furthermore, the restriction only limited disclosure within adoption proceedings. Several questions arise out of this case. In relation to the authority of the conciliator, must he be accepted in that role by both parties, or would a reasonable belief that he had been given such a role by the other party be sufficient, or would a belief induced by the other party (like ostensible authority in the law of agency) be effective? Exp. Bostock seems to suggest he must have been appointed as agent by the other party; this is right if the purpose of the privilege is the possible obtaining of a settlement, because without such actual authority he could not finalise a settlement. If however, the purpose is protecting the informant's information because he only gave it on the understanding that a settlement might thereby be effected, then his mental state is seen as the important factor, and a reasonable belief, on his part, that the discussions were for the purpose of negotiating a settlement of the dispute should be sufficient, and necessary, to make his statements privileged. It is suggested that, although such a reasonable belief might be sufficient for an action in breach of confidence if the recipient disclosed what he said elsewhere, the public interest in the availability of information for litigation can only be displaced by another public interest which in this case is the real possibility of a settlement.

Just as, in ex.p.Bostock, a later dispute could not make earlier communications privileged, so one cannot make earlier communications privileged simply by passing them through a conciliator. The Industrial Relations Act 1971 made provision for conciliation officers to try to settle industrial disputes. The Act provided[32]

> "any thing communicated to a conciliation officer in connection with the performance of his functions ... shall not be admissible in evidence in any proceedings before the Industrial Court or an Industrial Tribunal, except with the consent of the person who communicated it to that officer."

A complaint was made of unfair dismissal. Minutes of a meeting of the employers and shop stewards before the dismissal and internal memoranda after the complaint had been made were submitted to the conciliation officer. In the later proceedings[33] it was claimed that they were privileged from disclosure. The Court[34] held that the statute

> "is not intended to render inadmissible evidence which could have been given if there had been no communication to the conciliation officer"

and ordered the documents to be produced.[35]

Conclusion

To obtain privilege from disclosure on this ground the party need not have stated expressly that he was giving information in confidence but it must have been given to a person specifically performing the function of attempting conciliation so it is presumed to have been given in confidence, for that purpose alone and because of that relationship. Here it is not confidentiality alone which is the reason for protection but the public interest in that kind of confidential communication being made for the settlement of disputes and matrimonial dissention which outweighs the public interest in the availability of information for litigation. The fact that the privilege is waivable indicates that it is not protection of the conciliator which is required but the assurance for those who give information in such circumstances that it will not be revealed without their consent.

4. Legal Professional Privilege

The importance of protecting confidential information given by a client to his lawyer is recognised by many legal systems to extend beyond information given when litigation is anticipated. Protection may be by making the information inadmissible in court proceedings or by

providing criminal or civil liability for disclosure. All Member States of the European Economic Community protect information given by the client to the lawyer (as to other professionals), usually by providing criminal penalties for disclosure, but it is doubtful how far communication from the lawyer is protected.[36] English law, however, goes further and gives wide protection both for information given to the lawyer and for information and advice given by him.

a) The basis of privilege

The right, or duty, of a professional legal adviser to refuse to produce documents or give evidence of communications from his client in the course of their professional relationship apart from pending litigation was recognised in Greenough v Gaskell.[37] The decision is perhaps surprising on the facts. In the course of the administration of an estate the Court had ordered that some money be paid to D on his executing a bond as security for the sum. Part of the money was paid out to the defendant, his solicitor, on his account without any bond being executed. The Court required repayment and D was attached and committed. The plaintiffs were persuaded by the defendant to sign and deliver to him a promissory note for the money. The defendant then advanced the money to be repaid and D was released from prison. D then became bankrupt. The plaintiffs brought the action seeking to have the promissory note delivered up and cancelled and an injunction against any legal proceedings upon it. The ground of their action was that the defendant, in pressing them to give the promissory note, had fraudulently concealed that D was insolvent, saying that his financial difficulties were only temporary when he knew this to be untrue. The defendant would have been personally liable to repay the money to the court, since he had improperly obtained payment without a bond. In equity the defendant should be seen as the principal debtor and the plaintiffs as his sureties. The plaintiffs sought discovery of entries in the defendant's accounts, memoranda and letters to show that as D's solicitor the defendant knew the true state of his client's affairs. Lord Brougham LC refused the application for discovery, saying[38]

> "To force from the party himself the production of communications made by him to professional men seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wider violation of professional confidence, and in circumstances wholly

> different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of ... they are not only justified in witholding such matters but bound to withhold them."

The decision is perhaps surprising because the privilege was used to shield the solicitor rather than his client and was applied in a case where fraud was alleged. The plaintiffs' case turned on the state of knowledge of the defendant's mind, and the loss of the evidence would make their task very hard. If they sub-poenaed the client as a witness the privilege would still apply, though there are hints in the case that the defendant could be required to "answer upon oath, even as to his beliefs or his thoughts." Thus the plaintiffs would be able to ascertain whether the solicitor believed his client to be solvent, but not the details of the client's affairs. The reason for the privilege is the protection of the client who gives information to facilitate obtaining legal advice, and needs the assurance that it will not be disclosed elsewhere. In this case it is arguable that disclosure would not injure the client (as a bankrupt, his affairs would become public knowledge anyway[39]) and so it should have been allowed, particularly in view of the allegation of fraud against the defendant. On the other hand, a rule which based privilege on actual injury to the client would be almost unworkable;[40] the fraud alleged was not in relation to the transaction of which disclosure was sought; and the client in this case was not a party to the action. The courts are particularly careful to prevent, so far as possible, disclosure of a person's financial affairs if he is not a party to the action.[41]

Whatever the reasons for, or origins of, the privilege, it appears to be settled that there is no room for a general discretion or balancing of conflicting interests. As Lord Lindlay said

> "the grounds *[for non-production]* whatever they are, are legal as well as equitable. There is no equitable doctrine, as distinguished from a legal doctrine, involved in the matter. Prima facie, if a witness swears ... to circumstances which give rise to the privilege, the privilege must prevail unless there is a good answer."[42]

So legal professional privilege is more than an implied contractual agreement not to dislose[43] coupled with a discretion in the court to order disclosure;[44] the public interest in

"An ignorant man safely resorting to professional advice"

prevails over any other possible arguments for disclosure.[45] There is no privilege, however, between a fiduciary and his beneficiary for legal advice in relation to the trust property, as opposed to advice in relation to litigation between them, and this rule is interpreted broadly. It has potential for growth in the field of public bodies.[46]

b) Confidential communications

The privilege is limited to confidential disclosures made in the course of the relationship of lawyer and client. At an early stage in the development of the privilege communications were only protected if they came from the solicitor and contained legal advice or opinions,[47] but later it was recognised that any communication for the purpose of obtaining or giving legal advice should be deemed to be confidential and within the privilege.[48] Nevertheless,

> "Letters are not necessarily privileged because they pass between solicitor and client; in order to be privileged there must be a professional element in the correspondence."[49]

Similarly, information learned by the solicitor will only be privileged if it was confidential and learned within the relationship. Thus the client's name cannot be privileged because it is common knowledge and similarly his address will usually be commonly known.[50] But if the client confidentially discloses a secret address to the solicitor for the purpose of obtaining legal advice that disclosure is privileged even though there is no other way for the bankrupt client's creditors to find him.[51]

A statement made in open court cannot be said to be confidential and so notes of such proceedings cannot be privileged, even if made by a lawyer in anticipation of other litigation.[52] But examination of a witness by a trustee in bankruptcy or company liquidator under statutory powers is treated as a private interview and so may attract privilege.[53] It is probable that a statement made before a third party cannot normally be said to be confidentially made to the lawyer and so cannot be privileged,[54] though the situation may be different if a third party is fortuitously present (for example, walks into the room unexpectedly and hears what is said) or is not known to be within earshot.[55]

c) Communication within the relationship

Privilege does not arise where the communication was made to, or by, the lawyer not as legal adviser but in some other capacity.[56] The case of Wilson v Rastall[57] was explained by Lord Brougham in Greenough v Gaskell on the basis that the lawyer refused to act and so the communication was effectively made to him as a friend and not as a legal adviser.[58] But in Minter v Priest[59] it was recognised that if the person making the disclosure intends to seek the legal advice of the lawyer to whom he makes it, and the disclosure is made for the purpose of indicating what advice is required, the disclosure will be privileged even if the lawyer declines to act. But if the lawyer has several functions the communication will only be privileged if it was made to, or by, him in his capacity as legal adviser,[60] and the affidavit claiming privilege must make this clear.[61] The problem of excessive claims of legal professional privilege made possible by passing everything through the salaried legal adviser was raised by the Law Reform Committee[62] but not answered. Information entitled to privilege

> "must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship."[63]

It is suggested that, as well as insisting on a clear indication in the affidavit of the basis of the privilege claimed, as suggested by the Law Reform Committee, the court should be more ready to examine the particular document than it has been in the past. This readiness to examine is now apparent in cases where privilege is claimed on the ground of the public interest; the court should not be less ready to intervene on behalf of the litigant where a merely private privilege is claimed. However, until the court is prepared, as in the case of other privileges, to balance the interest in the obtaining of full information for the action at the earliest opportunity against the interest of the client in being able to communicate freely with his legal advisers, a willingness to examine the document in question is unlikely to be helpful in limiting privilege in view of the wide words quoted above. One could apply the same test as proposed above for privilege in aid of litigation, namely that the information was reasonably necessary to be obtained or given for the purpose of obtaining or giving legal advice, but without the possibility of the court nevertheless admitting such evidence this privilege is still seen to be wider in ambit than any other.

d) Communications excluded

Privilege will not, however, arise for communications made in order to facilitate the commission of crime or fraud. The reason for this is the obvious public policy one of not encouraging or assisting people in the commission of such anti-social activities.[64] On this basis it is obvious that a letter from the solicitor to his client warning him that certain conduct could lead to prosecution is not outside the ambit of privilege.[65] A client is clearly entitled to ask his lawyer the extent of his legal rights and liabilities; it may be difficult in a particular case to decide whether that information was sought with a view to committing a crime or fraud but the court will not readily remove the privilege in a doubtful case, or construe the word fraud widely for this purpose.[66]

If the lawyer is a party to wrongful action he is no longer acting as legal adviser[67] and so communications between him and the client do not attract privilege. This is the reason why privilege may be refused for wrongful conduct of a lesser nature than crime or fraud,[68] though it was not refused where breach of contract and inducement of breach of contract were claimed in Crescent Farms Ltd v Sterling Offices Ltd a case in which the lawyer was not a party to the scheme. If crime or fraud is alleged as a ground for displacing privilege, it is necessary that a definite charge with prima facie evidence be given rather than a mere allegation of the crime or fraud.[69] And a claim that a conveyance was made "with intent to evade" the payment of tax, within the wording of the relevant statute, is not a sufficient indication of crime or fraud since "evade" does not necessarily indicate an illegal act.[70]

e) Waiver of privilege

Once a communication is privileged it remains privileged, for the benefit of the holder's successors in title.[71] The privilege is only lost if it is waived. It is not waived by communicating the information to a judge in chambers for the purpose of approving a compromise on behalf of children since

> "such a use was not a public disclosure but was in its nature confidential."[72]

Privilege is not waived by a communication to a particular prospective purchaser[73] though presumably disclosure generally to prospective purchasers, such as in a circular or statement made at a public auction, would constitute waiver. A privilege belonging to two people is not waived on behalf of the other by a disclosure by one.[74] In spite of

a strong dissenting judgment by Lord Denning, waiver of privilege for medical reports is not to be inferred from acceptance of the other party's unconditional production of his report.[75] Thus the court takes a wide view in granting legal professional privilege, on the ground of the public interest in enabling lawyer and client to communicate freely, and is very chary in removing the privilege.

f) Information obtained by the other party.

It is perhaps surprising, therefore, that if the adverse party manages to get hold of the information or document in some way, or gets a copy of it, the court will allow that information or copy to be produced in court, thus nullifying the privilege. The leading case is Calcraft v Guest[76] a dispute over fishery rights. After judgment had been given for the plaintiff, the defendant gave notice of appeal relying on documents which he had since found. They included proofs of witnesses and other materials prepared for the defence of an action relating to his fishery rights by the plaintiff's predecessor in title more than a hundred years earlier and had been found by chance by the grandson of the earlier defendant's solicitor and shown to the present defendant. He took copies, but handed over the originals to the plaintiff under threat of legal action. The Court of Appeal held that the originals were still privileged[77] and so the plaintiff was under no duty to disclose them, but that the defendant could produce his copies as secondary evidence of the contents of the documents. The authority relied on by the Court was a dictum of Parke B in Lloyd v Mostyn.[78] It is arguable that that case was not really one where a document was protected by legal professional privilege but where the person having possession of the document held it as an agent and not as principal. The document in question was a bond of indemnity upon which the plaintiff sought to bring his action. The bond had been given by the defendant in 1815 and was discovered in 1839 in a box of old papers by the executrix of the defendant's former solicitor. It was now held on her behalf by her son-in-law. The defendant's solicitor had inspected it and a copy had been given to the plaintiff's agent and examined against the original. Parke B held that the son-in-law should not produce the original as he held it in the same capacity as the former solicitor would have done. But the plaintiff could produce his copy, since sufficient notice to produce had been given. It is suggested that the proper ground for the decision in this case would have been that the son-in-law could not be ordered to produce the document as he held

it only as an agent,[79] and that the copy was therefore producible under the rule of evidence allowing secondary evidence where production of the best evidence cannot be ordered.[80] But Parke B said

> "Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?"

and Calcraft v Guest was decided on the basis of this dictum. The tendency of the English law of evidence is always to allow the reception of relevant evidence however obtained.[81] The argument on the other side was raised by Bayley B in the earlier case of Fisher v Heming[82] when he held inadmissible a copy of a privileged document which had been made by the former solicitor.

> "He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or verbal communication. It is the privilege of his client, and continues from first to last."

But in Lloyd v Mostyn this was peremptorily dismissed, the judge merely saying

> "I have always doubted the correctness of that ruling."

The undesirability of a litigant being enabled to gain an advantage by his own or another's misconduct worried the Law Reform Committee[83] who would have preferred a rule that privilege was not lost if the document or copy were obtained by a crime or deliberate tort.[84] But they rightly saw the problem as part of the whole question of improperly obtained evidence and preferred to await a decision by the Criminal Law Revision Committee. That Committee recommended[85] no change as any other rule might limit the evidence in the hands of the prosecution in criminal cases. The increase in possible ways of eavesdropping and stealing information throws doubt on whether legal professional privilege is the protection to persons seeking legal advice that it is said to be. A determined adverse party may well be able to obtain the information somehow.

g) Protection of confidences

The Court is, however, prepared to protect confidential information and privileged information is confidential. Furthermore the Court has jurisdiction to ensure that solicitors do not act improperly.[86] In

Davies v Clough[87] The Court ordered the plaintiff in the action not to employ as his solicitor in the action a person who had formerly acted for the defendant in a transaction which the plaintiff was now seeking to set aside. The solicitor was also restrained from communicating to the plaintiff any information about the transaction which he had learned confidentially as solicitor for the defendant. The ground for the order was stated thus.

> "I cannot consider anything to be a greater breach of professional duty than for a solicitor ... to carry on a negotiation ... and afterwards to act as the solicitor for other parties in order, by his own personal knowledge of the transaction, to destroy that which he had done for his former client."

In this case the solicitor was deliberately trying to cause trouble for his former client, in others he may be careless,[88] Nevertheless it is clear that the disclosure of the information is a breach of confidence whether deliberate or not. In Ashburton(Lord) v Pape[89] the Court of Appeal unanimously granted an injunction against any use of copies[90] of documents disclosed in breach of confidence. Since the defendant wished to use them in his bankruptcy proceedings he argued that the rule in Calcraft v Guest[91] precluded the Court from enjoining him,[92] but all the judges held that the two questions are distinct. Swinfen Eady LJ said

> "The fact ... that a document, whether original or copy, is admissible in evidence is no answer to the demand of the lawful owner for the delivery up of the document, and no answer to an application by the lawful owner of confidential information to restrain it from being published or copied."[93]

However, the issue of an injunction to restrain a breach of confidence is a matter of equity, and therefore discretionary. This limitation was seen in the case of Butler v Board of Trade[94] where Goff J. accepted that the original letter was privileged and therefore the copy was confidential, but declined to issue an injunction since it was intended to use the copy in a public prosecution. The private right of the individual was here in conflict with "the interest of the state to apprehend and prosecute criminals"[95] and the public right must prevail.

The cases of Calcraft v Guest and Ashburton v Pape are in fundamental conflict. If the evidence is admissible in the case one party

should not be able to frustrate the proceedings of the court by collateral proceedings; if the owner of the information may prevent disclosure the court should refuse disclosure whether he has an injunction or not. To require proccedings to be instituted in order to obtain a right is also regressive. If the plaintiff in Calcraft v Guest had taken proceedings for the return of his originals rather than merely threatening to do so he could presumably have obtained an injunction against use of the copies also. Ownership of information is meaningless if others may do what they wish with copies. The conflict does not only apply in the case of legal professional privilege but is inherent in the rule allowing reception of illegally obtained evidence. If A steals B's document, B may claim its return. Is it a defence to that claim that A intends to use it in legal proceedings? Presumably not, if B gets his claim in soon enough.[96] Sometimes the court may refuse to accept wrongly obtained evidence on the ground that it is in effect a confession obtained under duress, and so unreliable evidence.[97] It could be argued that a statement made to a legal adviser, in circumstances where the maker believed that his words would not be repeated elsewhere, would be such a confession, since the duress may be either threat or promise. The courts seem to draw a distinction between the admissibility of oral statements and documents, whose contents would not be affected by any duress.[98] It is recognised that, at least in criminal cases, the court has a discretion whether to allow the wrongly obtained evidence;[99] in civil cases the court should be prepared to raise of its own motion the question of breach of confidence and so exercise a similar discretion, balancing the interest of full information for the action[1] against the interest in retention of privilege and protection of ownership of the information.

It has been suggested[2] that since the area of breach of confidence is wider than that of legal professional privilege the injunction procedure could be used to restrain the use of other confidential information, not protected by privilege, in subsequent legal proceedings. The procedure is

> "a massive equitable bolster to the protection afforded by privilege"

and could be used to protect other confidential relationships. However, it would not, it is submitted, be possible to use the procedure simply to prevent the doctor or priest giving evidence. The confidentiality of such a relationship is basically contractual and it is clearly established that the contract impliedly allows disclosure for legal proceedings.[3]

h) Statutory exclusion of privilege

Legal professional privilege is, of course, subject to statutory exclusion. Though in the past the privilege has usually been expressly retained,[4] taxation statutes have begun making inroads into the principle.[5] The European Commission has wide powers of investigation of breaches of the Treaty of Rome[6] and there is no protection for the professional secret or legal professional privilege. In the case Re Quinine Cartel it is clear that the record of legal advice was searched to ascertain that

> "the members of the cartel were aware of the fact that the whole of the agreements were as illegal as it was possible to be."[7]

Thus information which both lawyer and client consider confidential and expect to be privileged from disclosure may in the end be disclosed either under a statutory duty or because the other side manage to obtain a copy.

Conclusion

It has been said that

> "the rights, duties and privileges of lawyers are not simply a peculiarity of the law relating to lawyers but are specifically designed to protect the liberty and privacy of the individual, the proper administration of justice and the right to a fair trial."[8]

For the purposes of legal professional privilege any communication made within the relationship of lawyer and client is considered to be confidential and presumed to have been given only for that purpose, unless it is in the public domain.[9] The protection of that relationship is much greater than the protection accorded to other confidential relationships where the court weighs the need for the information against the importance of protecting the confidence. If protection is so important in the public interest it should not, in principle, be affected by the chance acquisition of the information by the other party; if the basis is the public interest in "an ignorant man safely resorting to professional advice" it is not self-evident that the privilege should last long after the man has died[10] or should apply in all its rigour to protect, for example, government departments. It is suggested that by its automatic nature the privilege is both too sweeping and too narrow; a more satisfactory basis would be provided by a judicial discretion to admit the information notwithstanding the privilege, or to

exclude it where the interest in enabling people safely to confide in and receive advice from a lawyer outweighs the interest in the receipt of the information. This discretion should be applicable whether the document in question is the original or a copy and whether it is held by the party to the relationship or by his adversary.

The protection afforded by legal professional privilege (and the other private privileges) is not a comprehensive protection of the confidentiality of the relationship or the purpose of the communication. Unlike the comprehensive protection of the "professional secret" in some European countries, privilege applies only to the availability and admissibility of information in litigation. Thus arise the anomalies presented by the acquisition of the information by the adverse party or a claim for breach of confidence or return of property by the owner. In the former case discovery is not needed and so its rules are irrelevant; in the latter case the question of admissibility is not raised but the case turns on ownership or implied contract. Only the discretionary nature of an injunction allows the public interest to be considered. Confidential information communicated within the relationship of lawyer and client would be better protected by a comprehensive set of principles relating to that information or that relationship rather than by different principles depending on the circumstances in which the information is sought or sought to be withheld.

NOTES

PART A

Provision of information for legal proceedings

1. *cf a summons is required for actions begun by originating summons R.S.C. Order 24 Rule 3; Coni v Robertson [1969] 2 All E.R.609.*

2. *R.S.C. Order 24 Rule 1(1). "Document" may include a tape-recording: Grant v Southwestern and County Properties [1974] 2 All E.R.465.*

3. *R.S.C. Order 24 Rule 9. Conversely a subsidiary company in litigation need not disclose documents in the possession of the parent company since they are not under its control.*

4. *cf. before the Rules were changed in 1964. Hadley v McDougall [1872] L.R.7 Ch.312.*

5. *R.S.C. Order 26*

6. *Barham v Lord Huntingfield [1913] 2 K.B.193.*

7. *R.S.C. Order 29 Rule 2.*

8. *Inspection had been granted by the Court of Chancery in 1833 simply on the ground that there was no statute preventing it: Hesbp v Bank of England (1833) 6 Sim.192; 58 E.R.566*

9. *South Staffs. Tramway Co v Ebbsmith [1895] 2 Q.B.669 C.A; Waterhouse v Barker [1924] 2 K.B.759 C.A. (privilege against incrimination, though the evidence would be available in court): Emmott v Star Newspaper Co.(1892)62 L.J.Q.B.D. 77. (no order in a libel case where the defendant pleads justification).*

10. *Williams v Summerfield [1972] 2 All E.R.1334. There is no privilege against self-incrimination here. Pollard: (1972) 122 New Law Journal 602.*

11. *(1968) Cmnd.3691. The committee were also concerned about provision of police and factory accident reports. Health and Safety inspectors now have power to give a written statement of facts observed to a person likely to be a party to civil proceedings: Health and Safety at Work etc. Act 1974 section 28(9) added by Employment Protection Act 1975 section 116 and Schedule 15 para.9.*

12. *[1973] 2 All E.R.454. On this point the case is not affected by McIvor v Southern Health & Social Services Board [1978] 2 All E.R.625.*

13. *at 457.*

14. *at 460.*

15. *ibid.*

16. *at 458.*

17. *at 460.*

18. *at 458.*

19. *[1974] 2 All E.R.1185.*

20. *R.S.C. Order 24 Rule 7A(3).*

21. *Administration of Justice Act 1969 section 21. This power is not now limited to actions for personal injuries: R.S.C.Order 29 Rule 7A.*

22. Queen of Portugal v Glyn (1840) 7 Cl. & Fin.466.

23. A subpoena duces tecum normally issues as of right but may be set aside by the court.

24. Moodalay v Morton (1785) 1 Bro.C.C.469.

25. (1876) 4 Ch.D.92.

26. Norwich Pharmacal Co. v Commissioners of Customs & Excise [1973] 2 All E.R.943.

27. [1972] 3 All E.R.813.

28. Lord Reid at 948. See also Lord Morris at 954 "not mere outsiders"; Viscount Dilhorne at 960 "involved in the transaction"; Lord Cross at 968 nature of the relationship between defendant and tort feasors; Lord Kilbrandon at 974 relationship between defendant and plaintiff or his property.

29. Loose v Williamson [1978] 3 All E.R.89

30. above note 11.

31. Administration of Justice Act 1970 section 32(1).

32. [1974] 2 All E.R.772.

33. R.S.C.Order 29 Rule 7A.

34. Administration of Justice Act 1970 section 32(2).

35. (1889) 23 Q.B.D.1.

36. [1895] 2 Q.B.669.

37. at 675, Lord Esher M.R.

38. [1898] 1 Ch.1.

39. [1972] 2 All E.R.1334.

40. [1968] 2 All E.R.98 Practice Note.

41. The judge himself suggested this in Vapormatic Co.Ltd. v Sparex Ltd.: The Times May 21 1976.

42. [1975] 1 W.L.R.302 the first reported case though there had been three earlier unreported ones.

43. [1976] 1 All E.R.779. There are useful articles Dockray: 1977 Public Law 369; Russell: 1977 New Law Journal 753.

44. at 784.

45. E.M.I. v Sarwar and Haidar [1977] F.S.R.146; Loose v Williams [1978] 3 All E.R.89.

46. [1976] 1 All E.R.779 at 783 Lord Denning M.R.

47. [1977] F.S.R.150.

48. discussed below. A claim of privilege made after the document had been read would be of little value.

49. Tudor Accumulator Co.Ltd. v China Mutual Steam Navigation Co.Ltd. [1930] W.N.200 C.A.

50. Alterskye v Scott [1948] 1 All E.R.469; Riddick v Thames Board Mills Ltd [1977] 3 All E.R.677 discussed below.

51. Truman (Frank) Exports Ltd. v Metropolitan Police Commissioner [1977] 3 All E.R.431, 436.

52. Templeman J in Universal City Studios Inc. v Mukhtar & Sons [1976] 2 All E.R.330 at 333.

53. Lord Denning M.R. in Ex parte Island Records Ltd and others [1978] 3 All E.R.824 at 828 a case which extended the orders to defendants who had committed, if anything, criminal offences but not civil wrongs.

54. Or a person nominated by the Leader of the Bar as suggested in a slightly different context by Edwards: Law Society Gazette September 27 1978.

Disclosure of Confidential Information

55. [1972] 2 All E.R.353, 380 Lord Denning M.R.

56. [1973] 2 All E.R.1169,1180 Lord Cross (majority judgment). Before 1964 the ownership of the entruster would have been a bar to inspection (above note 4).

57. cited with approval in Chantry Martin & Co. v Martin [1953]2 Q.B. 286,294.

58. R.S.C. Order 24 Rule 8.

59. To protect the confidentiality of untransmitted television news-film the Court of Appeal has held that the normal procedure for subpoena duces tecum does not apply to film or tape recordings and production is solely at the discretion of the judge: Senior v Holdsworth [1975] 2 All E.R.1009.

60. (1867) 2 Ch.App.447; 36 L.J.Ch.504.

61. (1867) 2 Ch.App.447,448. The point is not made in the Law Journal report.

62. McCorquodale v Bell (1876) 1 C.P.D.471.

63. (1892) 62 L.J.Q.B.D.77; 9 T.L.R.111.

64. [1898] 1 Ch.1.C.A.

65. as suggested in the Report of the Younger Committee on Privacy (1972) Cmnd.5012 para.307.

66. [1973] 2 All.E.R.943 at 949 (Lord Reid). Also 954 (Lord Morris); 962 (Viscount Dilhorne); 970 (Lord Cross). The plaintiffs had been trying for ten years to persuade the Commissioners to give the information: The Times November 12 1973.

67. Alterskye v Scott [1948] 1 All E.R.469 applied in Riddick v Thames Board Mills Ltd [1977] 3 All E.R.677.

68. [1948] 1 All E.R.469,471.

69. (1844) 7 Beav.354; 49 E.R.1102.

70. (1857) 23 Beav.338; 53 E.R.133.

71. Distillers Co.(Biochemicals) Ltd. v Times Newspapers [1975] 1 All E.R.41.

72. discussed in 1977 New Law Journal page 749.

73. Initial Services Ltd. v Putterill [1968] 1.Q.B.396; Butler v Board of Trade [1970] 3 All E.R.593.

74. [1955] 2 All E.R.173

75. If the report had been communicated to him on discovery he could not use it for a libel action: Riddick v Thames Board Mills Ltd. [1977] 3 All E.R.677.

76. [1969] 2 All E.R.609.

77. [1973] 1 C.R.601.

78. at 603.

79. (1867) 2 Ch.App.447.

80. [1948] 1 All E.R.469,471.

81. [1953] 2 All E.R.691.

82. at 696.

83. R.S.C.Order 24 Rule 13.

84. R.S.C. Order 24 Rule 11.

85. [1969] 2 All E.R.609 discussed above.

86. [1975] R.P.C.354.

87. Dunning v United Liverpool Hospitals' Board of Governors [1973] 2 All E.R.454; Davidson v Lloyd Aircraft Services Ltd [1974] 3 All E.R.1; Deistung v Southwest Metropolitan Regional Hospital Board [1975] 1 All E.R.573.

88. [1978] 2 All E.R.625 (an appeal from the Court of Appeal in Northern Ireland).

89. Administration of Justice Act 1970 section 31(b); 32(1)(b).

90. quoted by Lord Russell of Killowen at 629.

91. at 628.

92. Official Solicitor v K. [1965] A.C.201 where the point was side-stepped because it was held that the court could see a confidential report in wardship proceedings without disclosing it to the parties.

93. In Nasse v Science Research Council [1978]3 W.L.R. 754, the Court of Appeal suggested Industrial Tribunals should limit disclosure of references to lawyers,but frequently a party before an Industrial Tribunal has no legal representation.

94. It is recognised that some clients may prefer not to know and so would be happy not to see a medical report. This does not affect the principle.

95. Swansea Vale Railway Co. v Budd (1866) L.R. 2 Eq.274.

96. The Court of Appeal in Warner-Lambert Co. v Glaxo Laboratories Ltd. [1975] R.P.C.354,360 would accept this as the general rule but make an exception against disclosing a trade secret to a competitor.

97. Lord Diplock at 628, doubted by Lord Scarman at 629.

98. D.H.S.S. Circular HN (78) 95; B.M.A. News (1978) Vol.4 No.8 page 598.

99. Nasse v Science Research Council; Vyas v Leyland Cars Ltd. [1978] 3 W.L.R. 754.

1. Beatson v Skene (1860) 5 H. & N.838

2. [1942] A.C.624.

3. [1968] A.C.910.

4. S.A. de Smith: Constitutional and Administrative Law pub. Penguin Books 3rd ed. page 609.

5. *Smith v East India Company (1841) 1 Ph.50.*

6. *Blackpool Corporation v Locker [1948] 1 K.B.349.*

7. *[1953] 1 W.L.R.1158.*

8. *The much wider ambit of natural justice, or the requirements of "fairness", today runs counter to the desire to protect confidentiality. If information is so confidential that it (or the gist of it) cannot be shown to the person affected it should not be used against him: Re Pergamon Press [1971] Ch.388.*

9. *[1970] 1 W.L.R.599.*

10. *This approach to construction was rejected by the House of Lords in Norwich Pharmacal Co v Commissioners of Customs [1973] 2 All E.R.943.*

11. *Karminski L.J. at 602.*

12. *Harman L.J. at 601. The case has been followed in relation to local authority records in a custody case in R. v Greenwich Juvenile Court ex parte Greenwich London Borough Council.The Times May 10 1977.*

13. *[1968] A.C.910.*

14. *Lord Reid at 950.*

15. *Lord Reid at 952; Lord Hodson at 973; Lord Upjohn at 993.*

16. *In Burmah Oil Co.Ltd. v Bank of England, the Attorney-General intervening. The Times July 29 1978 the judge refused to read the documents and accepted the Minister's certificate.*

17. *[1973] A.C.388.*

18. *[1978] A.C.171 (hereafter D. v NSPCC).*

19. *as for example in Asiatic Petroleum Co.Ltd. v Anglo-Persian Oil Co. Ltd. [1916] 1 KB.822 and Duncan v Cammell-Laird [1942] A.C.624.*

20. *cf. Tapper: (1978) 41 M.L.R.192 doubting this conclusion on the facts.*

21. *[1973] 2 All E.R.943.*

22. *[1973] 2 All E.R.1169 criticized by Prior: (1973) 123 N.L.J.920.*

23. *The Times July 29 1978.*

24. *Before 1960 it was argued that police officers should never be subpoenaed to give evidence before disciplinary tribunals because their information received for criminal investigations should all be treated as confidential: Report of Departmental Committee on Powers of Subpoena of Disciplinary Tribunals 1960. para.27.*

25. *[1972] 2 All E.R.353,380.*

26. *[1976] 2 All E.R.993,999.*

27. *Lord Cross in the Alfred Crompton case [1974] A.C.405 at 433.*

28. *[1973] 2 All E.R.943 at 961.*

29. *The Times June 14 1977.*

30. *This is made clear in the Daily Telegraph report June 14 1977.*

31. *This was not reported in the national newspapers but was stated by National Coal Board executives.*

32. Nasse v Science Research Council; Vyas v Leyland Cars Ltd. (heard together) [1978] 3 W.L.R.754,768 Lord Denning M.R. agreed by Browne L.J. at 776. Lawton L.J. placed more emphasis on the applicant's right to see necessary documents at 773.

33. In Nasse one of the people concerned protested at the earlier decision to disclose his record.

34. The Courts have always been careful to limit such disclosure to what is strictly necessary: Pollock v Garle [1898] 1 Ch.1 (discussed above).

35. Busfield v University of Essex; McCormack v University of Reading (both unreported decisions of the Employment Appeal Tribunal) Information supplied by the Equal Opportunities Commission. Though in Nasse the employer disclosed the report on the applicant herself.

36. There has not been a recent case on natural justice and references; if one were to come before Lord Denning M.R. he would have to face the fundamental conflict between two causes which he has strongly advocated: "Putting the gist of" a reference, as suggested in Re Pergamon Press Ltd [1970] 3 All E.R.535 may not be sufficient.

37. [1972] 2 All E.R.1057 at 1071 and Lord Reid at 1061. It is significant that in Conway v Rimmer the police themselves wanted to disclose the reports but the Home Secretary claimed privilege.

38. for example Professor S.A.de Smith op.cit. page 612; Younger Report on Privacy (1972) Cmnd.5012 para.323.

39. Thompson v Inner London Education Authority 1977 Law Society Gazette page 66.

40. Attorney-General v Mulholland [1963] 1 All E.R.767 (though they may be entitled to require a court order before disclosing).

41. Burmah Oil Co.Ltd. v Bank of England The Times July 29 1978

42. 1978 New Law Journal page 746 editorial. But the majority in Nasse rejected public interest privilege in that case.

43. for example Hopkinson v Lord Burghley (1861) L.R.2 Ch.App.447; Association of Licensed Aircraft Engineers v BEA [1973] 1 C.R.601; Nasse v Science Research Council [1978] 3 W.L.R.754.

44. for example Richardson v Hastings (1844) 7 Beav.354; Coni v Robertson [1969] 2 All E.R.609; Chantrey Martin v Martin [1953] 2 All E.R.691.

45. The proposition is arguable but accepted in Conway v Rimmer [1968] A.C.910; Attorney-General v Jonathan Cape Ltd [1975] 3 All E.R. 484 (Cabinet discussions at least); Burmah Oil Co.Ltd. v Bank of England The Times July 29 1978.

46. Similarly, the fact that a document was received in confidence, even on express terms that it was not to be given up without the consent of the depositor, is no ground for refusing to produce it on subpoena duces tecum but the holder may require a court order. R.v Daye [1908] 2 K.B.333; Report of Departmental Committee on Powers of Subpeona of Disciplinary Tribunals 1960. In Vyas Lawton L.J. suggested that the documents should be brought to the hearing where the chairman could consider whether they were necessary.

PART B

Privilege against Disclosure

1. *Indeed it would unfairly assist him. Re Strachan [1895] 1 Ch. 439,445; Re Duncan [1968] 2 All E.R.395,399 Ormrod J. But this rule of law was abrogated by Civil Evidence Act 1968 section 16(2).*

2. *The Law Reform Committee 16th Report (1967) Cmnd.3472 states that legal professional privilege was the latest privilege to be recognised. Problems arise today because the legal adviser may be an employee of the organisation.*

3. *See generally Nokes: Professional Privilege (1950) 66 L.Q.R.88. Some Americans states have statutory physician#patient privilege waivable by the patient. Huffman: Medical Records Management 6th ed. 1972 pub. Physicians' Record Co. page 389.*

4. *Nokes loc.cit. suggests no privilege but contra. Langan: Civil Procedure and Evidence 1970 pub. Sweet & Maxwell page 229 for the confessional.*

5. *Chantrey Martin & Co. v Martin [1953] 2 Q.B.286.*

6. *Greenough v Gaskell (1833) 1 My & K.98; 39 E.R.618.*

7. *Lord Denning M.R. in Attorney-General v Mulholland [1963] 1 All E.R.767.*

8. *C v C [1946] 1 All E.R.562*

9. *Greenough v Gaskell 39 E.R.618,621.*

10. *Cory v Bretton (1830) 4 C. and P. 462.*

11. *for example Theodoropoulas v Theodoropoulas [1964] P.311*

12. *Cross: Evidence 4th ed.1974 pub.Butterworths page 243. The privilege is discussed in Chapter 7 in relation to the subsequent use of incriminating information.*

13. *R v Barton [1972] 2 All E.R.1192.*

14. *The Times May 28 1974 (President Nixon's claim of executive privilege for tapes needed for their defence by Haldeman and Ehrlichman.)*

15. *H.L.Deb. Vol.197 col.741 (Lord Kilmuir L.C.).*

16. *Conciliation privilege must be waived by both parties.*

17. *as in Schneider v Leigh [1955] 2 All E.R.173*

18. *Garner v Garner (1920) 36 T.L.R.196*

19. *in Causton v Mann Egerton (Johnsons) Ltd. [1974] 1 All E.R.453 there are conflicting dicta.*

20. *as in the Norwich Pharmacal case discussed above.*

21. *as in relation to medical records discussed above.*

22. *Calcraft v Guest [1898] 1 Q.B.759; a copy may be restrainable by breach of confidence action: Butler v Board of Trade [1971] Ch.680 discussed (1972) 35 M.L.R.83; (1974) 37 M.L.R.601.*

23. *though it has been said that they are all aspects of the public interest: Lord Simon in D v NSPCC [1977] 1 All E.R.589,608.*

24. *Rogers v Home Secretary [1973] A.C.388,400 Lord Reid.*

25. *Attorney-General v Jonathan Cape Ltd [1975] 3 All E.R.484,494*

26. *for example disclosure in a serious criminal case. Norwich Pharmacal Co. v Customs and Excise Commissioners [1974] A.C. 152,175 Lord Reid.*

27. *subject to the need to disclose to assist a defendant in a criminal action: R. v Barton [1972] 2 All E.R.1192*

28. *for example Hennessey v Wright (1888) 21 Q.B.D.509.*

29. *Duncan v Cammell Laird & Co.Ltd. [1942] A.C.624,641 Lord Simon. It may be that some of the wider circumstances of public interest privilege will not require this as a strict rule: Lord Cross in Alfred Crompton [1973] 2 All E.R.1169,1185.*

30. *Mellor v Thompson (1885) 31 Ch.D.55.*

31. *Conway v Rimmer [1968] A.C.910.*

32. *Rogers v Home Secretary [1973] A.C.388 (public interest privilege); McCorquodale v Bell (1876) 1 C.P.D.471 (privilege in aid of litigation. Disclosure had been resisted on the insufficient ground of confidentiality).*

33. *Lord Cross in Alfred Crompton [1974] A.C.405 at 433.*

Privilege in aid of litigation

34. *Law Reform Committee 16th Report para.20.*

35. *Anderson v Bank of British Columbia (1876) 2 Ch.D.644,649.*

36. *Reid v Langlois (1849) 1 Mac. & G.627*

37. *Cross op.cit. page 251.*

38. *It may be that foreign litigation is contemplated when the information is collected. It will be privileged whether the English or the foreign case is heard first: Re Duncan [1968] 2 All E.R.395.*

39. *(1881) 17 Ch.D.675.*

40. *ibid. at 678.*

41. *at 681 Jessell M.R.*

42. *cf. the sudden change of solicitor which led to the case of Truman (Frank) Export Ltd. v Metropolitan Police Commissioner [1977] 3 All E.R.431.*

43. *Grant v Southwestern and County Properties Ltd [1974] 2 All E.R.465 (tape-recording of discussion between plaintiff and defendant); Grazebrook (M. & W.) Ltd. v Wallens [1973] 2 All E.R.868 (information passed to a conciliation officer).*

44. *Lewis v Pennington (1860) 29 L.J.Ch.670 cited in Kennedy v Lyell (below).*

45. *Brown v Foster (1857) 1 H. & N.736*

46. *(1883) 23 Ch.D.387.*

47. *at 407.*

48. *[1959] 2 All E.R.757. C.A.*

49. *at 759 Lord Evershed M.R. The plaintiff had already offered reciprocal disclosure which was rejected by the defendant. Now the hospital record would be available under Administration of Justice Act 1970 section 32.*

50. *(1883) 9 P.D.6.*

51. In Patch v United Bristol Hospitals Board [1959] 3 All E.R.876 a report had been made by the surgeon and submitted to the solicitors on the advice of a Ministry of Health memorandum, before there was any indication of litigation. The report was held privileged.

52. Woolley v North London Railway Co. (1869) L.R.4 C.P.602,613. Neither was it relevant that it was stated to be a confidential report.

53. Seabrook v British Transport Commission [1959] 2 All E.R.15.

54. Smith v British Transport Commission (unreported) cited in Seabrook; The Hopper [1925] P.52.

55. Birmingham & Midland Motor Omnibus Co.Ltd. v London & North Western Railway Co. [1913] 3 K.B.850. Followed by the Court of Appeal in Waugh v British Railways Board, The Times July 29 1978, Lord Denning M.R. dissenting.

56. Seabrook v British Transport Commission (above)

57. Longthorn v British Transport Commission [1959] 2 All E.R.32

58. R.S.C. Order 24 Rule 13(2); Westminster Airways v Kuwait Oil Co. [1950] 2 All E.R.596. The Law Reform Committee recommended that the affidavit should specify more clearly the documents concerned where privilege is claimed: 16th Report (1967) Cmnd.3472 paras.28,29.

59. The Hopper [1925] P.52. The fact that it is said to be confidential does not appear to be relevant.

60. Longthorn v British Transport Commission (above)

61. Feuerheerd v London General Omnibus Co. [1918] 2 K.B.565.

62. [1959] 2 All E.R.32,37.

63. Though if the solicitor obtains a copy of such a report in preparation for litigation the copy may be privileged: The Palermo (1883) 9 P.D.6.

64. Lord Cross in Alfred Crompton.

65. [1959] 2 All E.R.15.

66. Administration of Justice Act 1970 sections 31,32; Civil Evidence Act 1972 section 2; the Alfred Crompton case.

67. [1910] A.C.4.

68. [1973] 2 All E.R.1169.

69. it was held to be privileged in the public interest.

70. [1950] 2 All E.R.596.

71. [1910] A.C.4,6.

72. [1973] 2 All E.R.1169,1183.

73. [1950] 2 All E.R.596,604.

74. though this is the tenor of both judgments in the Westminster Airways case. Jones was dismissed as "quite different" at 600.

75. unreported. Cited in Westminster Airways at 605.

76. though examination of documents by the court has since been advocated by the Court of Appeal: D v NSPCC [1976] 2 All E.R.993.

77. *Anderson v Bank of British Columbia (1876) 2 Ch.D.644*

78. *or, presumably, the original. The point is not the copying but the purpose in obtaining it.*

79. *Administration of Justice Act 1970 section 31.*

80. *ibid. section 32(1).*

81. *ibid. section 35(3).*

82. *R.S.C. Order 24 Rule 7A(6)*

83. *[1959] 2 All E.R.15.*

84. *Report of the Winn Committee on Personal Injuries Litigation (1968) Cmnd.3691 para.130.*

85. *Harrison v Liverpool Corporation [1943] 2 All E.R.449.*

86. *para.289.*

87. *Causton v Mann Egerton (Johnsons) Ltd. [1974] 1 All E.R.453, Lord Denning M.R.dissenting.*

88. *Following the recommendations of the Law Reform Committee 17th Report: Evidence of opinion and expert evidence (1970) Cmnd.4489.*

89. *R.S.C.Order 38 Rule 37; Practice Direction [1974] 2 All E.R.966.*

90. *R.S.C. Order 38 Rule 38.*

91. *R.S.C. Order 38 Rule 40 replacing, and removing the discretion from, the previous Rule 6 which implemented a recommendation of the Evershed Committee on Supreme Court Practice and Procedure (1953) Cmd. 8878.*

92. *Wheeler v Le Marchant (1881) 17 Ch.D.675.*

93. *Lewis v Pennington (1860) 29 L.J.Ch.670*

Conciliation Privilege

94. *As in Rabin v Mendoza & Co. [1954] 1 All E.R.247 and Grazebrook (M & W) Ltd. v Wallens [1973] 2 All E.R.868.*

95. *As in McTaggart v McTaggart [1949] P.94*

96. *1885. Quoted by Denning L.J. in Rabin v Mendoza & Co.*

97. *[1954] 1 All E.R.247, 248.*

98. *(1861) 2 Ch.App.447; 36 L.J.Ch.504.*

99. *Crompton (Alfred) Amusement Machines Ltd. v Customs & Excise Commissioners [1973] 2 All E.R.1169.*

1. *Grazebrook (M. & W.) Ltd. v Wallens [1973] 2 All E.R.868. N.I.R.C.*

2. *[1970] 2 All E.R.641.*

3. *[1954] 1 All E.R.247,249.*

4. *Parry-Jones v Law Society [1969] 1 Ch.1.; Hopkinson v Lord Burghley (above).*

5. *[1949] P.94.*

6. *at 97. cf. Cross op.cit. page 262 "A reconciliation between estranged spouses is not the same thing as the compromise of a disputed claim."*

7. *[1951] P.21,23.*

8. [1950] P.154,156.

9. [1949] P.94, 97 Denning L.J.

10. Bostock v Bostock (above).

11. Cross op.cit. page 262; Mole v Mole [1951] P.21.

12. [1964[P.311,314 Simon P.

13. R. v Nottingham Justices ex parte Bostock [1970] 2 All E.R.641.

14. Paddock v Forrester (1842) 3 Man. & G. 903.

15. Rabin v Mendoza & Co. [1954] 1 All E.R.247.

16. [1949] P.94,96 Cohen L.J. A similar argument was used by the Royal Commission on Marriage and Divorce (the Morton Commission) (1956) Cmd. 9678 para.340 in recommending that the evidence of marriage guidance counsellors be inadmissible (para.357); But they would have excluded probation officers (para 359).

17. [1955] 1 All E.R.201.

18. It is unlikely that such a claim would now be accepted since Conway v Rimmer [1968] A.C.910.

19. (1956) Cmd. 9678 para.357.

20. ibid. para 359. Presumably the spouses who contacted a marriage guidance counsellor would also run this risk.

21. [1971] P.119.

22. Civil Evidence Act 1968 section 2(1).

23. R.S.C. Order 38 Rule 22.

24. at 123.

25. Calcraft v Guest [1898] 1 Q.B.759.

26. Grant v Southwestern & County Properties [1975] 1 Ch.185.

27. [1971] P.119.123.

28. [1964] P.311.

29. [1970] 2 All E.R.641.

30. Adoption (Juvenile Court) Rules 1959 and 1965; S.I.1959/504; S.I.1965/2072.

31. certain exceptions, irrelevant to this discussion, are made.

32. section 146(6).

33, Grazebrook (M. & W.) Ltd. v Wallens [1973] 2 All E.R.868.

34. National Industrial Relations Court.

35. A similar rule applies in privilege in aid of litigation: Grant v Southwestern & County Properties Ltd. [1974] 2 All E.R.465 (tape-recorded conversation between the parties passed to the solicitor not privileged).

36. Edwards: Law Society's Gazette September 27 1978. Useful discussions have been held with the European Commission on harmonisation: Annual Statement of Senate of the Inns of Court and the Bar 1977-78 page 32.

37. (1833) 1 My. & K.98; 39 E.R.618. The need for pending litigation was mooted as late as Minet v Morgan (1873) L.R.8 Ch.App.361 but the argument received short shrift from Lord Selborne L.C.

38. 39 E.R.618,620.

39. There is a public interest in publicity in these circumstances: Re Paget ex parte Official Receiver [1927] 2 Ch.86.

40. It would be possible to balance likelihood of injury against loss caused by non-disclosure as is done in public interest privilege.

41. Pollock v Garle [1898] 1 Ch.1.C.A. and other cases on Bankers Books Evidence Act 1879 section 7.

42. Bullivant v Attorney-General for Victoria [1901] A.C.196,206.

43. as with a banker: Tournier v National Provincial and Union Bank of England [1924] 1 K.B.461.

44. as suggested for conciliation privilege in Rabin v Mendoza & co. [1954] 1 All E.R.247.

45. though the tenor of much of Lord Brougham's judgment suggests that it is the employment of the solicitor as professional man that needs protection - much the same argument as social workers, doctors and priests would make today.

46. Bristol Corporation v Cox (1884) 26 Ch.D.678; cf.O'Rourke v Darbishire [1920] A.C.581.

47. Kay L.J. in O'Shea v Wood [1891] P.286,289.

48. Minter v Priest [1930] A.C.558,581 Lord Atkin.

49. O'Shea v Wood [1891] P.286,289 Lindley L.J.

50. Re Cathcart (1870) 5 Ch.App.703. cf. a doctor's attempt to keep his patient's name secret: Hunter v Mann [1974] 2 All E.R.414.

51. Re Arnott (1889) 60 L.T.109. Though statutory provisions may require his address to be given e.g. Companies Act 1948 section 175.

52. Re Worswick (1888) 38 Ch.D.370.

53. Learoyd v Halifax Joint Stock Banking Co. [1893] 1 Ch.686.

54. Heydon: Cases and Materials on Evidence 1975 pub. Butterworths page 399.

55. cf. Theodoropoulas v Theodoropoulas [1964] P.311.

56. But the intention of the person making the statement is not apparently material. In Feuerheerd v London General Omnibus Co.Ltd. [1918] 2 K.B.565 the plaintiff made a statement to a person whom she believed to be a representative of her solicitor but who was the defendant's claims inspector. In the absence of deceit on his part the defendant was entitled to privilege.

57. (1792) 4 T.R.753.

58. 39 E.R.618 at 623.

59. [1930] A.C.558,584 Lord Atkin.

60. for example Blackpool Corporation v Locker [1948] 1 K.B.349 (town clerk acting in his executive capacity).

61. Moseley v Victoria Rubber Co. (1886) 55 L.T.482 would be decided differently today because communications with a patent agent in relation to patent proceedings attract privilege: Civil Evidence ACt 1968 section 15.

62. 16th Report (1967) Cmnd.3472. In the Alfred Crompton case it was suggested at first instance that employed lawyers had no privilege but this was reversed on appeal [1972] 2 All E.R.353 C.A.

63. Minter v Priest [1930] A.C.558,568 Lord Buckmaster L.C.

64. R. v Cox and Railton (1884) 14 Q.B.D.153. The wider exception of any communication relevant to the crime or fraud, suggested in Williams v Quebrada Railway Land & Copper Co. [1895] 2 Ch.751 appears to be wrong: Butler v Board of Trade (below).

65. Butler v Board of Trade [197]] 1 Ch.680.

66. Crescent Farm Ltd. v Sterling Offices Ltd. [1971] 3 All E.R.1192.

67. Minter v Priest [1930] A.C.558,573 Viscount Dunedin

68. such as slander in Minter v Priest.

69. Bullivant v Attorney-General for Victoria [1901] A.C.196; O'Rourke v Darbishire [1920] A.C.581

70. Bullivant v Attorney-General for Victoria (above). Similarly, presumably, a claim of "intent to defraud creditors" within Law of Property Act 1925 section 172; Lloyds Bank Ltd. v Marcan [1973] 2 All E.R.359.

71. Minet v Morgan (1873) 8 Ch.App.361.

72. Goldstone v Williams Deacon & Co. [1899] 1 Ch.47.

73. Crescent Farm Ltd. v Sterling Offices Ltd. (above) (counsel's opinion of the validity of another's right of pre-emption.)

74. Minter v Priest [1930] A.C.558.

75. Causton v Mann Egerton (Johnsons) Ltd [1974] 1 All E.R.453.

76. [1898] 1 Q.B.759. C.A.

77. Minet v Morgan (above)

78. (1842) 10 M. & W.478; 152 E.R.558.

79. The law is different on this point since the change in Rules in 1964.

80. This rule also applies to criminal cases: R v Nowaz The Times April 17 1976 where diplomatic immunity prevented disclosure of the original.

81. Unlike the "fruits of the poisoned tree" rule in United States of America: Cross op.cit. page 277; in Scotland the court balances the conflicting interests: Mitchell: Constitutional Law 2nd ed. 1968 Pub.Green page 335; it has been recommended that Australia should follow the Scottish system: [1976] Criminal Law Review page 608.

82. 1809 Leicester Assizes, quoted in Lloyd v Mostyn

83. 16th Report. Others have made the same point, e.g. Heydon: (1974) 37 M.L.R.601 "To permit a litigant to win his case by stealing documents is regressive."

84. para.32.

85. 11th Report (1972) Cmnd.4991 paras.17,20.

86. and trustees, though the court was reluctant to make orders in relation to trust documents in general in Re Londonderry's Settlement [1964] 3 All E.R.855.

87. (1837) 8 Sim.262; 59 E.R.105.

88. In Ashburton v Pape the solicitor's clerk felt unwell so gave the documents to the defendant; in Weld-Blundell v Stephens he dropped them in the office of the other party; in Butler v Board of Trade the letter was overlooked when the file was handed over.

89. [1913] 2 Ch.469.

90. The judge had also ordered the originals to be returned. There was no appeal against this since the defendant had copies. cf.Tapper: (1972) 35 M.L.R.83.

91. [1898] 1 Q.B.759.

92. the trial judge had excepted use in the bankruptcy proceedings.

93. [1913] 2 Ch.469,476.

94. [1971] Ch.680.

95. ibid. at 690. Similarly the court refused an injunction against the police who had, with the consent of the solicitor, taken documents for which legal professional privilege could have been claimed: Truman (Frank) Export Ltd. v Metropolitan Police Commissioner [1977] 3 All E.R.431.

96. In Calcraft v Guest the proceedings were already taking place; in Ashburton v Pape they were at least pending; in Butler v Board of Trade they were already instituted.

97. Customs and Excise Commissioners v Harz [1967] A.C.760.

98. The matter is further discussed in Chapter 7.

99. R v Kuruma [1955] A.C.197. Heydon loc.cit. argues that the evidence should only be admissible if necessary to the action or the wrong in obtaining it was trivial.

1. The question whether the action is a public prosecution (as in Butler) or a private prosecution (left open in Butler) or some other hearing in the public interest (for example bankruptcy) or a civil action will clearly be relevant here.

2. Tapper: (1972) 35 M.L.R.83.

3. Hopkinson v Lord Burghley (1861) 2 Ch.App.447; Parry-Jones v Law society [1968] 1 All E.R.177

4. for example Companies Act 1948 section 175 (though only in relation to information given by the client to the lawyer).

5. Income and Corporation Taxes Act 1970 section 481; Finance Act 1975 Schedule 4 paras. 4 and 5. Though the information to be given is more limited than had been proposed in the latter Bill.

6. by Regulation 17.

7. [1969] C.M.L.R.D41 at D71.

8. Edward: Law Society's Gazette September 27 1978 page 942.

9. Re Worswick (1888) 38 Ch.D.370.

10. It has been suggested that it was wrong of a lawyer to disclose the confession in the Patrick Meehan case although his client had died and another was in prison for the offence: Young (ed): Privacy 1978 pub. Wiley page 225. It is equally arguable that on the authority of R v Barton [1972] 2 All E.R.1192 it should have been disclosed earlier.

PART II

CHAPTER 4

MEDICAL CONFIDENTIALITY

1. Duty Not To Disclose The Patient's Confidence

A doctor's Hippocratic oath[1] requires him not to disclose information which he receives in confidence from his patient. This rule, which has no legal force in England,[2] is designed to protect the relationship between doctor and patient. If the doctor is not told all that is relevant (and he may receive much that is not, since the patient as layman is not skilled to distinguish), he cannot adequately diagnose or treat; if the patient cannot trust the doctor he will not tell him the secrets which may be at the heart of his trouble, or may not consult him at all. The principle is not merely traditional but of immediate relevance; in 1975 in the course of discussion in The Times correspondence column about alchoholism a doctor in an alcoholic unit wrote that two judges were his patients and he was contemplating informing the Lord Chancellor. A barrister replied that

> "Anyone reading that report will have second thoughts about seeking help from that particular alcoholic unit"

and

> "It is a grim outlook for those unfortunate alcoholics, whether judges or bricklayers if they run the risk of losing their jobs as a result of seeking help."[3]

The question in what circumstances a doctor is entitled, or indeed ought, to discuss information about his patient or obtained from his patient receives clear answers in a few cases, but in most circumstances is a question of balancing competing interests. The question arises whether, in the absence of a ground on which the information should be disclosed, the professional standard embodied in the doctor's Oath is enforceable. If the doctor proposes to disclose information given to him within the relationship of doctor and patient can he be prevented; if he has disclosed, is there a remedy available to the aggrieved patient?

a) Breach of Contract

The relationship between doctor and patient, at any rate in the private sphere, is one of contract. May it be said that the doctor's Oath is incorporated by implication into the contract? If this were accepted, an action could be brought for injunction to prevent disclosure without the hurdle of the Court's discretion, since this would be breach

of a negative contract) or damages for any financial loss caused by the disclosure. It is possible to imply terms into a contract in order to

> "give the transaction such efficacy as both parties must have intended that at all events it should have".[4]

In Easton v Hitchcock it was held that a warranty of secrecy could be implied in a contract whereby a private enquiry agent agreed to watch the client's husband, since

> "it is obvious that if a considerable degree of secrecy was not observed her services would be altogether ineffective."[5]

(It was held, however, that such a warranty could not include the enquiry agent's former employees, and the judges were divided as to whether it could include existing employees).

In Tournier v National Provincial and Union Bank of England[6] the defendant bank had expressly contracted that

> "the officers of the bank are bound to secrecy as regards the transactions of its customers."

The question arose whether the bank was liable for disclosing to the plaintiff customer's employer information which the bank received as banker for another person, as a result of which disclosure the plaintiff lost his job. The Court of Appeal held that the bank would be liable unless it could show that the interests of the bank itself required disclosure or it was within another exception.[7] Bankes LJ said

> "The privilege of non-disclosure to which a client or customer is entitled may vary according to the exact nature of the relationship between the client or customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor, the doctor and the banker, though the underlying principle may be the same."

Thus it is clear that a contractual duty of secrecy may be implied, and may exist in the case of a doctor and patient.[8] It is not of course clear that it will be implied in the normal relationship of doctor and patient. If, however, such a duty were to be implied, it is clear that damages may be obtained in contract for physical inconvenience and discomfort and even distress caused by the breach,[9] though not normally for loss of reputation.

It is arguable that there is no contractual relationship between doctor and patient within the National Health Service. The Secretary

of State is under a statutory duty to provide health services;[10] the Local Family Practitioner Committee administers on behalf of the Area Health Authority the arrangements made in pursuance of the Health Service Acts for the provision of general medical services,[11] and employs and pays doctors for providing the services. A patient may choose his doctor but subject to that doctor's consent. The doctor is under a duty to render "all proper and necessary treatment" to his patients, but that is a duty owed to the Health Authority rather than the individual patient. It seems that whatever other remedy may lie, the National Health Service patient has no contractual relationship with his doctor and so no contractual right to secrecy. The contract between the doctor and the Health Authority perhaps creates a trust for the patient but it is thought that the courts would not enforce so intangible a trust.

b) Breach of Confidence

An alternative ground might be to bring an action for breach of confidence. It is clear that not every piece of information given in confidence raises a duty enforceable at law, but it is also clear that there are some situations where such a duty does exist and will be enforced. In commercial cases involving the use of such things as the plaintiff's unpatented inventions a duty may be placed on anyone receiving the information in confidence, and anyone receiving it through him, not to use it without paying for it.[12] Once paid for, it is his. However, information received in a doctor-patient relationship is unlikely to be of this kind. The patient may suffer damage, financial or mental, as a result of its disclosure; it is not simply a question of who gets the profit from its exploitation; if the law is to intervene at all it must be to prevent disclosure. Prince Albert v Strange[13] and Duchess of Argyll v Argyll[14] are both cases of this kind where an injunction was granted, in the former case to prevent publication of a catalogue of private etchings belonging to the Royal family, and in the latter case to prevent disclosure of matters relating to the private life of the duchess communicated to her husband during their marriage.

It may be argued that the essential basis of the cause of action in the latter case (the former is arguably interference with property) is the relationship between the parties to the confidence. What relationship would give rise to such a duty? In Fraser v Evans[15] it was said that the duty not to disclose

> "is based not so much on property or on contract as on the duty to be of good faith."

Is a doctor under such a duty to his patient? In that case the Master of the Rolls added

> "No person is permitted to divulge to the world information which he has received in confidence unless he has just cause or excuse for doing so."

Yet clearly the duty is not so wide as to cover every situation where information is given "in confidence." The important matter may be the relationship of the parties, within which the confidence was imparted, or perhaps the nature of the information concerned. In Argyll it could be argued that the information was only given because of the relationship of trust between the couple (Gareth Jones[16] speaks of "the confidences of the double bed" rather than the marriage status); it was information which perhaps would not otherwise have been given to anyone at any time.[17] Is the same true of confidences within the doctor-patient relationship?

In Prince Albert v Strange Lord Cottenham LC refers to a statement of Lord Eldon[18]

> "If one of the late King's physicians had kept a diary of what he heard and saw, this Court would not in the King's lifetime have permitted him to print or publish it."

This is referred to in Argyll with the comment

> "If such information can be regarded as within the protection afforded to property then similar confidential information communicated by a wife to her husband could also be so regarded."

In his lecture "Doctors and Patients"[19] Lord Zuckerman quotes from a statement by Lady Violet Bonham Carter about a serious illness.

> "I was blessed to have the care of a remarkable doctor ... Now I know, looking back, that I've made confidences to him in the stress of illness which I should never have dreamed of breathing to my nearest and dearest."

Which would suggest that the occasion for confidence may be remarkably similar to that in Argyll.

The problems of framing an injunction would seem to be dealt with here by restraining publication during the life of the patient. However, it is arguable that there is no justification for allowing the doctor to profit from his breach of confidence, for example by writing a book about a famous former patient, even after the death of the patient. There may still be friends and relatives to be upset by the publication

and such public interest as there may be in knowing details of a famous person's life may be outweighed by the public interest in the protection of medical confidence.[20] A trustee is not allowed to profit from his breach of trust at all; perhaps a doctor should be enjoined perpetually[21] against profiting from breach of confidence. Information acquired in his character as doctor may be distinguished from information acquired in another capacity, such as a friend of the family.

c) Breach of Statutory Duty

In some cases the doctor may be under a statutory duty to maintain secrecy, for example under the Venereal Disease Regulations. If such secrecy is breached the patient may perhaps be able to sue the doctor for breach of statutory duty. In such a case the duty would seem to be owed to the patient (to encourage sufferers to seek help). It might, however, be said that the injury caused to a particular patient by disclosure - loss of work, opprobrium or mental suffering perhaps - is not the kind that the statute was designed to prevent, since the aim of the statute is to ensure that patients seek treatment, which this patient had done. It may be that others will refuse to seek help as a result of this patient's experience, and so the aim of the statute will be frustrated, but it may be that this patient will not be able to sue for breach of statutory duty.[22] (In theory another potential patient who is deterred thereby from seeking treatment and so suffers damage should be able to sue, but it may well be said that the chain of causation is too tenuous to found a claim).

d) Professional ethics

The British Medical Association handbook for the guidance of practitioners states that

> "A doctor should refrain from disclosing voluntarily to a third party information which he had learned professionally or indirectly in his professional relationship with a patient."

subject to stated exceptions. There is no doubt that a blatant disregard for the obligation of confidentiality would lead to professional disciplinary action against the doctor. This obligation, and the doctors' wish to abide by it, is recognised by the court in so far as a judge will think twice before requiring a doctor to disclose in court.[23] However, it is not possible in law either to obtain damages for breach of a moral as opposed to a legal duty or to obtain an injunction to prevent such a breach.

2. Exceptional Cases Where Disclosure May Be Made

However widely the duty of confidentiality may be stated, it is

always accepted that there are exceptions. Even Hippocrates limited the duty of secrecy to those matters

"which ought not to be noised abroad."

The British Medical Association's handbook states exceptions to the general rule.

There are clear exceptions on the ground of public policy, where disclosure is required by statute or for legal (or similar) proceedings. Here the law is clear, though since the court balances conflicting interests in relation to disclosure for legal proceedings there may be argument about a particular case.

The law is far less clear in the other areas where disclosure may be desired. These relate broadly to disclosure for professional purposes and disclosure which is thought to be for the benefit of the patient. There may be another area, namely disclosure to a third party who is thought to have a right to receive the information. There is much uncertainty whether a doctor may, or even should, disclose or whether he may be in breach of his duty in disclosing. There is great variety in practice, and tension between a natural caution on the part of the doctor and an impatience on the part of those who feel they should be told.

a) Disclosure under a statutory duty

It is clear that a statutory duty to disclose may override any contractual duty not to disclose. In Parry-Jones v Law Society[24] Diplock LJ said

> "Such a duty of confidence is subject to, and overriden by, the duty of any party to that contract to comply with the law of the land. If it is the duty of such a party to a contract, whether at common law or under statute, to disclose in defined circumstances confidential information, then he must do so, and any express contract to the contrary would be illegal and void."

The disclosure provision may expressly apply to the person in question, as in Parry-Jones itself (Solicitor's duty to disclose to the Law Society information relating to client's account), in which case the law is clear. An example is the duty of a doctor to inform the local authority that his patient is suffering from a notifiable disease or food-poisoning.[25] Suppose that the provision of disclosure is in general terms. May it be said that a person in an admittedly confidential situation is impliedly excluded from the statutory requirement? In Hunter v Mann[26] this was the contention. The Road Traffic Act 1972 section 168 requires, in the circumstances referred to in the section,

"any other person" to "give any information which it is in his power to give and may lead to the identification of the driver." The appellant, a general practitoner, gave medical assistance to two persons who he understood had been involved in a car accident. Later he refused to tell the police the names and addresses which they had given him, arguing that this would be a breach of his professional duty. The justices found him guilty of an offence under the section and he appealed to the Divisional Court. His counsel argued that the words "any other person" should be construed as not applying to a doctor in respect of professional communications, since the law recognises and respects the duty (subject to requiring disclosure in court if the judge so orders) and the statute should not be taken to alter the common law unless it is clear that this is intended. Further, he argued that the words "in his power" should be taken to mean both in his physical and in his legal power and so should not apply to disclosures which would be in breach of his duty of confidence. The court, however, held that the words of the statute were clear and unambiguous and could only be given their normal meaning.[27] Once accepting that a doctor is within the words "any other person" and so may be bound to disclose in spite of a contractual duty, the words "in his power" clearly only refer to his physical power. If a doctor were asked such a question in court, or on discovery or pre-trial interrogatories, he would be entitled to refuse to answer unless ordered to do so by the court. It seems strange perhaps that a refusal to tell the police should lead to a conviction. Boreham J found consolation in the fact that the section gives the police wide powers to detect persons who may cause damage to others, and that the only information to be disclosed in this way by the doctor was that of identity.

It has been argued that the information given in this case is not truly confidential information, and even that no true relationship of doctor and patient existed on the facts of the case.[28] However, if the protection of confidentiality is based on the need for sick people to seek help without fear of exposure, this was exactly the kind of case anticipated. But the statute is clear and the decision right. Parliament has balanced the public need to get information about dangerous drivers against any possible grounds for secrecy and decided that the proper balance is total disclosure of identity but not of anything else. Other examples of this compromise by Parliament may be found e.g. Income and Corporation Taxes Act 1970 S490 - duty of a solicitor only to give the name and address of his client whereas other agents or professional advisers may have to give full details of a transaction.

b) Disclosure in, or for the purposes of, legal proceedings

In spite of earlier suggestions to the contrary[29] the law does not recognise the doctor-patient relationship as a ground of privilege from discovery in legal proceedings or from giving oral evidence in court.[30] This duty to make discovery or give evidence when so required by a judge applies even where a duty of confidentiality is expressly placed on the medical man.[31] Schemes for the treatment of venereal disease have always included a duty of confidentiality. The present regulations[32] impose a duty on the Area Health Authorities to ensure that any information relating to persons being examined or treated for venereal disease "shall be treated as confidential" except between medical persons in connection with treatment of such persons or prevention of spread of the disease. In Garner v Garner[33] a wife petitioned for divorce on the ground of cruelty and sought medical evidence that she had contracted syphilis. The doctor claimed that he was forbidden to give such evidence under the statutory regulations but nevertheless the court held that he must give evidence in court since

> "in a court of Justice there are even higher considerations than those which prevail with regard to the position of medical men."

The judge stressed however, the importance of the doctor retaining confidentiality in other situations. Furthermore the court will not direct the answering of a question unless

> "not only it is relevant but also it is a proper and indeed necessary question in the course of justice."[34]

A medical practitioner may be called as a witness in proceedings and asked to give evidence of medical matters. In such a case he may make use of his contemporaneous notes to refresh his memory.

If the doctor or hospital is a party to proceedings the medical record may have to be produced on discovery. Furthermore, where a claim in respect of personal injuries or death is likely to be made the court has power to order disclosure of relevant documents before such an action is begun.[35] The Court of Appeal, on appeals by hospital boards, limited disclosure to medical advisers,[36] being impressed by arguments that only doctors could properly evaluate the record and disclosure to the patient himself might be disturbing to him. There was also perhaps an underlying alarm that disclosure of medical records might increase the possibility of negligence claims as has happened in United States of America. However, the House of Lords has held[37] that there is no statutory

basis for this restriction and disclosure must not be so limited.

If the doctor or hospital is not, or is not likely to be, a party to the proceedings, a medical record may, like any other document, be producible at the trial on a subpoena duces tecum to a witness. However, in an action in which a claim in respect of personal injuries or death is made the court may order disclosure of relevant documents before the trial.[38] The words "in respect of personal injuries" are to be widely construed.[39] Disclosure of medical records under this section was also limited to medical advisers[40] until the House of Lords decision in McIvor.

c) Disclosure within his profession.

Under the National Health Service Regulations a general practitioner is under a duty to keep records of the illnesses and treatment of his patients, and to send those records to the Family Practitioner Committee when required. He must also give any clinical information if required about a patient for whom he has issued, or refused to issue, a medical certificate. The 1974 Regulations provide that such information shall be given to "a medical officer."[41] Earlier editions of the Regulations had provided for the giving of such information to "the Medical Officer for the District." Changes in organisation of the National Health Service do not seem to explain this change; the opportunity was apparently taken to widen the number of people who could require information. The records are the property of the Secretary of State and it has been suggested[42] that such ownership gives an unlimited right to use or disclosure of the information contained therein. It is thought, however, that ownership of the material is irrelevant to rights in the information. The law has long distinguished between ownership of a letter and rights in its contents[43] and the legal owner of a document may be a trustee of its contents.[44]

A doctor must also send particulars of the patient to a hospital or specialist service where the patient is to be treated, and the specialist must send information back to the referring doctor.[45] When a patient is treated by a team, whether it be a partnership of general practitioners or a team of doctors and nurses in a hospital, information about the patient is freely transferred among the team.

If disclosure is to be made, it is important that the record be accurate and not misleading, and the wider the possibility of disclosure the more chance there is of incidental inaccuracy being significant. For example, in Nottingham until 1973 unclear cases of self-poisoning were recorded by the hospital casualty department as "attempted suicide;" since that date they have been recorded as "adverse reaction to drugs."[46]

A doctor, writing on the same point, has said

> "the unhappy patient should be described as unhappy and not as depressed"[47]

and suggested that, to prevent excessive disclosure, some information might be kept with the patient's record envelope but not as part of it, so that it would not be passed on.[48] An entry "confidential information received" with the doctor's name but no details would enable him to control subsequent use of the information,[49] but if he suddenly died it would be of little help to the patient or his new doctor. Such a level of control by the doctor is only possible with manual records kept by him alone.

Some information about patients is already stored by computer and there are undoubted benefits which computers can provide. For example, in some areas immunisation information is recorded enabling postal reminders to be sent with resulting higher immunity rates than in other areas.[50] Experimentally, full general practitioner records are being computerised in part of Devon. This scheme allows full access to the general practitioner and the consultant to whom the patient is referred with more limited access to others.[51] The Department of Health and Social Security have proposed a Standard Child Health System Pre-School Health Module whereby full information will be held on children in identifiable form in a central computer. The British Medical Association are opposed to the scheme unless the confidentiality of the information can be fully safeguarded,[52] and have warned doctors that if they feed clinical details into the proposed new information storage computer they could be guilty of professional misconduct.[53] The Secretary of State has pointed out that the new system would replace and standardise the various systems of holding information on children hitherto used by local authorities without criticism.[54]

The matters which greatly worry doctors are loss of control over what information is given for a purpose and loss of control over the dissemination of the information. An example of the first arises in the Devon experiment where a consultant will see the patient's full record rather than only such information as the general practitioner chooses to send to him. It is usually agreed by doctors that information given in such a way that the patient is not identifiable is not a breach of confidentiality.[55] This is borne out by a report of the Scottish Health Service Privacy Committee who recommend that identifiable medical information on computers should only be released for accepted routine medical purposes or with the doctor's consent but statistical information[56]

may be made more freely available provided that

> "small numbers in cells of statistical tables do not in effect reveal the identity of an individual."[57]

On dissemination, a similar problem is seen as that which arose on the transfer of hospital social workers to local authorities. There is a lack of trust between one professional group and another; it has even been said that

> "with the present state of employment legislation it [is] unlikely that confidentiality clauses inserted into employment contracts of NHS staff would be enforceable."[58]

Computerised information is particularly vulnerable to unauthorised taking unless precautions are inbuilt. It has been pointed out that visual display units are more controlled than is paper print-out.[59] It has been suggested[60] that the information could be divided into primary, identified, records to be available only for the care of the patient and secondary, unidentifiable, records to be available for research and planning purposes.[61] Alternatively it has been suggested, and carried out in the Devon scheme, that

> "instead of coding the patient it is possible to code the person seeking information."[62]

Each part of the computer record is then made accessible or inaccessible on that basis. For example, the local authority is given 'read only' aceess to registration data; the doctor's receptionist is given 'read and add' access to medication but no access to clinical data.[63] This example shows how computerised records may be subject to closer control than are conventional written records.

Evidence about patients is widely used in medical research, and doctors are usually willing to give such information where no identification of individuals is made though a patient may be unaware of the possible uses of his information. For example, in Nottingham the casualty department records are kept in triplicate and that information goes to the Health Authority "for research purposes" as well as to the patient's general practitioner.[64] Doctors in a hospital may consider that they are entitled to access to all records for research purposes.[65]

Some research requires information which does identify individuals. It has been strongly argued[66] that such information should be freely available for research even if it does breach a duty of confidentiality. Society should place the benefits achieved by scientific research higher than the benefits of confidentiality. However, under the law as it stands

if a doctor were to disclose such information in breach of a duty of confidence, such a defence would not avail him. The public interest may be a defence to an action for breach of confidence but probably not only on the basis that the information would benefit the public.[67]

Many patients would be glad to assist in valuable research projects and, of course, disclosure with the patient's genuine consent is not culpable. It has been pointed out[68] that it may be impossible to seek consent to the use of notes on thousands of patients stored in a hospital basement. It may be that a patient's consent should be able to be implied at least for uses of the information for the public benefit and which do not reveal his identity. Careful safeguards would be needed if a central system were used to co-ordinate data from the National Census, for example, with medical records, though this could be very useful in epidemiological research. But although the Younger Committee found that nearly half their survey did not mind anyone knowing their medical history,[69] it is not thought that general consent to use of identified information for research should be implied.

d) Disclosure to another who has a right to know.

i) Disclosure to an employer.

If the doctor is employed, for example as a company doctor, it may be his duty to disclose information about employees' health. It may be a term of employment that the employee undergo a medical examination by the company doctor. Here it is clear that the contract between the doctor and patient is on the understanding that the information will be disclosed.[70] (This is similar to the patient who asks his doctor to examine him for the purposes of an insurance policy[71]).

In other circumstances the position of the factory or company doctor may be less clear. If an employee comes to him for assistance, is he bound to inform the employer if requested (on the basis that this is part of his job, and the consultation was in company time and on company premises[72]) or should he refuse on the ground that the confidential relationship of doctor and patient is sacrosanct? This is a situation, like that of the "employed" social worker and client, where clarification of the legal relationship is urgently needed.[73]

It is suggested that information may be divided for this purpose into three categories; that which affects the safety of other employees in the employment, that which concerns the patient's own safety at work and any other information. The first category would, it is submitted, have to be disclosed by the doctor, without the patient's consent if

necessary, on analogy with the accepted public duty (referred to in Hunter v Mann[74]) to disclose the identity of the murderer still manic. This category would include, for example, the fact that the patient suffers from epilepsy if an attack might endanger his fellow-workers, for example if he drives an overhead crane. It might also include the fact that he suffers from a serious contagious or infectious disease if proximity to other workers may cause their infection. Difficulty inevitably arises in deciding whether the patient is still a danger, or a real danger, to his colleagues. An employee who has been discharged from Broadmoor after poisoning people may be cured or may still be a menace; an employee whose record shows treatment for kleptomania in the past may still have an urge to steal, but disclosure of such a record might lead to unjustifiable refusal of employment or dismissal.

A more serious weakness of this form of disclosure is that it requires knowledge of the employment situation which the doctor may not have, and it can only relate to past employment not future. If the epileptic is employed in a sedentary job sorting goods the doctor may well consider his epilepsy irrelevant to the employer; if he is then moved to cranedriving it becomes relevant but the doctor does not know. It is suggested that the onus is on the employer, when placing an employee in a potentially dangerous situation, to check with the doctor whether there is any medical reason against it. This obviates the need for the doctor to give unnecessary information which places his relationship with his patient in jeopardy. There is, after all, no reason why an employer may not make a satisfactory medical report a condition of a new appointment.

This limited duty to disclose might also, it is suggested, include a duty where it can be seen that the patient may cause injury to others directly through his employment, for example if he is a carrier of disease and works with food or with children or old people. This duty must, however, be restricted to injury related to his employment or it would constitute an unlimited interference with the patient's personal life unrelated to the employment.

The second category would include the fact that the patient's weak heart is adversely affected by the heavy manual work he is doing, or that his unduly sensitive skin makes him allergic to substances used in his job. The information in this category should not, it is submitted, be disclosed to the employer without the consent of the employee. (It should, of course, always be disclosed to the employee). He may wish it

to be disclosed to enable him to be moved to more congenial employment, but he may not. If he wishes to continue in his job in spite of the risk it is not the function of the doctor to prevent him.[75] It may be that the susceptibility to injury of the workman may require a higher standard of care towards him by the employer, but this can only arise if he knows, or ought reasonably to have known, of the susceptibility.[76] The knowledge of the doctor should not be imputed to the employer. The employer should make a medical check a condition of the employment, thus ensuring that he legitimately and openly obtains relevant information, rather than relying on disclosure as a result of a chance visit to the factory doctor by the employee.

There may, however, be some circumstances where a statutory duty to disclose that an employee is in danger arises. Here the extent of disclosure may be very wide. Under the Health and Safety at Work etc. Act 1974[77] medical advisers appointed by the Secretary of State for Employment must inform and advise the Secretary of State and "others concerned with the health of employed persons" on matters "concerning the safeguarding and improvement of the health of those persons."[78] The "others" include organisations representing employers, employees and occupational health practitioners respectively.[79] Where the advising is on matters of general concern, such as the danger of asbestosis or of bladder cancer from certain industrial processes, this level of disclosure is surely welcome. If one employee has contracted such an injury at work, his colleagues may also be at risk and should be warned of the danger. However, one of the functions of the advisers (inherited from the "appointed Factory doctors" under the Factories Act 1961) is to examine medically any employee under 18 who may be at risk in his employment. To assess whether such examination is needed the adviser receives information about the young person's medical record and past medical history from the Area Health Authority.[80] Under the 1961 Act all employees under 18 were medically examined; now only where it is thought advisable. Thus any advice given by the employment medical adviser will not relate to the suitability of this kind of employment for persons under 18, but only to the suitability of this employment for this young person. Within the categories outlined above, this information would normally be of the second group. It is probably right not to leave the decision to remain in unsuitable employment to the young person himself; his parents or guardians would seem the persons to know. Yet under the Act, the employer and other potential employers as well as trade union or other groups may be told of his weaknesses. It is even arguable that

his parents or guardians would be refused access to the information.[81] Section 60(1) forbids disclosure of the school records by the adviser "otherwise than for the efficient performance of his functions" without the consent of the young person in question. It depends how widely the employment medical advisers construe the "others concerned." It is hoped that in this type of situation those concerned with the particular young person will be told, and others will not.

The third category of medical information is that which does not affect the safety at work of either the employee or his fellow-workers. It may be information which an employer would like to know, but it is submitted that he is not entitled to be told by the doctor without the consent of the patient. Examples might be the fact that the employee is addicted to alcohol - which may well impair his performance at work but not affect the safety of himself or his colleagues - or non-medical information such as the fact that the employee's marriage is breaking or he is working at another job in his spare time. The latter could be a breach of the employee's contract of employment, but nevertheless it is submitted that it is not the function of the doctor to act as watchdog for the employer.

The more difficult question is whether a doctor who is not employed by the company may be under a duty to tell an employer that his patient's health makes him a danger to his colleagues at work. Here the principle laid down in relation to solicitor and client in Parry-Jones v Law Society is the relevant one. The doctor is under a general duty of confidence to his patient which is

> "subject to, and overridden by, the duty of any party to that contract to comply with the law of the land."[82]

There may be a duty at common law to disclose information about crimes. The offence of misprision of treason clearly indicates a duty to disclose evidence of treason. It is less clear whether there is still a duty, as there was before misprision of felony was inferentially abolished,[83] to disclose serious crime. The tenor of the Criminal Law Revision Committee report was that the old offence was unsatisfactory and any new formulation would give the police unacceptably wide powers.[84] They did not expressly state whether they proposed abolition of the duty to disclose. To remove criminal sanctions does not necessarily destroy a duty and, for example, the Preamble to the Judges' Rules states

> "citizens have a duty to help a police officer to discover and apprehend offenders."

It was accepted in Hunter v Mann[85] that one must disclose the murderer still manic who is a menace to society, and it is clear from many cases that disclosure of serious crime would be a defence to an action for breach of contract[86] or confidence.[87] The duty to disclose may be a moral or social one though not a legal one, but if there is such a duty it is to disclose to the police and not to the employer.

The Health and Safety at Work etc. Act 1974 puts a general duty on employers to guard the health and safety at work of their employees;[88] and a general duty on employees to take reasonable care of their own health and safety and that of their colleagues insofar as they affect them, and to co-operate with their employer.[89] But even this wide-reaching Act does not put a duty on outsiders to inform the employer[90] and neither, it is submitted, does the common law. So the doctor who fears that his crane-driving patient will injure others in the course of an epileptic fit will endeavour to persuade his patient to change his job or allow the doctor to inform his employer, but if such consent is not forthcoming then the doctor's paramount duty, subject only to statutory requirements or order of the court, is to preserve the confidence of his relationship with his patient.[91]

ii) Disclosure to parents or guardians.

Before a doctor examines or otherwise treats an infant patient he should normally have the consent of a parent or guardian, since any treatment would, without consent, constitute a trespass to the person of the patient, and an infant is not normally competent to consent on his own behalf.[92] An exception has, however, been made by Family Law Reform Act 1969 section 8, which provides that a minor who has attained the age of sixteen may validly consent to medical treatment, and no other consent will then be needed. The section preserves the validity of parental consent however.[93] There are difficulties in the application of the section - suppose the minor refuses consent can he be overruled by his parents? Suppose the parents are consulted first but refuse consent, can the minor then overrule them? There are difficulties also in its implications - if a doctor treats a sixteen year old patient, should he (even may he) inform the parents what he is doing? Is the young person in the same position for all purposes as if he were an adult, so that he can refuse permission for his parents to be told, or is the section limited to the one matter of consent to treatment? The Department of Health clearly consider that the effect of the section is to allow for treatment of the young person without his parents' knowledge.[94] Indeed

the Department has now gone further and advised doctors that they may prescribe contraceptives for girls under sixteen without informing the parents.[95] While this advice may be merely a recognition of current practice in birth-control clinics, and may be beneficial in intent and result, it is submitted that any action by the doctor which would constitute a trespass would still be illegal, and the parents would at any time be entitled to insist on being informed what is being done to their child.

The statutory authority to obtain consent from an over sixteen patient makes it clear that such a consent would prevent an action for trespass. It is arguable that it also obviates the need for disclosure but it is submitted that parents[96] must have a general right to know what is happening to their children unless this is expressly removed by statute. Parents remain liable in law to care for their children[97] until the children attain majority. How can they take care if they are denied access to information about their children? Knowledge is not only needed where consent is needed. This is seen for example in the Employment and Training Act 1973 where by section 9 parents or guardians are entitled to a copy of vocational advice[98] given to the child, though no question of consent arises. Similarly a copy of a social enquiry report under the Criminal Justice Act 1948 must be given to the parents or guardians of an infant. Again no questions of consent arises. Blackstone said

> "The power of parents over their children is derived from ... their duty : this authority being given to them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it."[99]

At common law a person with a public or even a private duty to perform may not be refused information which he needs to carry out that duty.[1] The duty of parents to care for their children is imposed and upheld by law; it is suggested that the common law right to necessary information is an important corollary of that duty.

An argument to the contrary appears from the provision[2] of the Health and Safety at Work etc. Act 1974, whereby a school medical record on an infant employee, sent by the Area Health Authority to an employment medical adviser, may not be disclosed by the latter, other than for the efficient performance of his functions, without the consent of the infant. It was argued above that parents may be within the class of

those who must be informed by the medical adviser, but this is not clear. Anyway the provision for consent by the infant (who must be over sixteen to be in full-time employment) is startling.

e) Disclosure in the patient's interest.

Where a doctor considers that his patient is at risk if others are ignorant of his condition, may the doctor disclose the information? It was argued above that normally a patient (who should always himself be fully informed) is entitled to choose for himself whether to risk injury by non-disclosure of his ailments. The doctor may seek his consent but must abide by a refusal. Suppose, however, that the doctor says nothing. A doctor failed to inform a school that his patient, a pupil at the school, suffered from diabetes because he

> "considered that information about her medical condition was too confidential to be given to teachers."[3]

When she fell into a diabetic coma the school teachers thought she was asleep. It would seem that the decision whether to inform the school, in the absence of a statutory duty, should be one for the parents. The Declaration of Geneva of the World Medical Association binds doctors with the words

> "The health of my patient will be my first consideration."

It would seem that in such a case the doctor's ethical duty would be to seek to persuade an adult patient, or the parents of an infant patient, of the wisdom of disclosing such information. In the last resort the decision is theirs, but he would seem to have an ethical, though not a legal, duty to raise the question.

In one case a car driver had caused an accident when suffering from an attack of petit mal. When his general practitioner gave evidence to the court of his condition, he admitted that he had never told the patient that he should not drive a car. The judge was very critical, saying that the doctor had failed in his overriding public duty to prevent a patient from driving when subject to an illness which made him dangerous to others. If the patient had refused to take the advice the doctor should at least have considered informing the licensing authority of his condition.[4]

Several recent cases have underlined the need for information to be pooled when a child is in danger of injury. Here there is no question of seeking the child's consent but it is suggested that the law in fact sufficiently allows information to be passed between persons and organisations caring for the child. A doctor should readily give information

about the child's injuries to the social worker caring for her, and the social worker should alert the doctor for signs of maltreatment. The Secretary of State for Social Services gave guidance on the exchange of information between agencies after the death of Susan Auckland who was killed by her father.[5] The law could reinforce such guidance by a statutory provision of a defence to breach of confidence that the information was disclosed in the reasonable belief that it was in the interests of the subject.[6] Disclosure would have to be made to an appropriate person or agency and the defence would not apply if the subject had been asked and refused consent or could have been asked and would have been likely to refuse consent.

f) Disclosure in the public interest.

It is clear that there is in some circumstances an obligation, or at least a right, to disclose in the public interest which overrides the duty of confidence.[7] In Initial Services Ltd. v Putterill Lord Denning MR rejected the earlier suggestions that the obligation related only to disclosure of crime or fraud, and stated[8]

> "The exception to the duty of confidence should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always - and this is essential - that the disclosure is justified in the public interest."

Before the Criminal Law Act 1967 a doctor might be in danger of prosecution if he failed to notify the police of an illegal abortion or a battered baby (or wife) which had come to his attention.[9] That Act has removed the risk of criminal liability (unless he accepts a bribe for silence) but the common law duty to disclose may still remain in relation to arrestable offences.

Apart from the notification of crimes to the police it is doubtful whether there is actually a duty to disclose wrongdoing[10] or whether it is merely a defence to a breach of confidence. In all the cases referred to in Putterill the information had been disclosed and the "wrongdoer" claimed redress, his claim being met by the defence.

"There is no confidence as to the disclosure of iniquity."[11] The right to disclose does not imply a duty to disclose. Nevertheless in Fraser v Evans[12] Lord Denning MR stated

> "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."

And in Putterill he quoted from the old case of Annesley v Earl of Anglesea[13]

> "No private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare."

It would not be a surprising assertion to say that if it is in the public interest that something be disclosed, then there is a duty to disclose it; the difficulty is to ascertain how far such a duty goes. The murderer still manic, referred to in Hunter v Mann,[14] is a menace to society (he has also committed an arrestable offence so perhaps must be exposed whether still manic or not). So may also be the person who has venereal disease, refuses treatment and to the knowledge of his doctor continues having sexual intercourse. Is the doctor under a duty of disclosure, for example to the patient's spouse or known associates? The question whether the patient thereby commits an arrestable offence is a difficult question in law,[15] and it is unsatisfactory to impose a liability on the doctor on this basis. The National Health Service Venereal Disease Regulations 1974[16] allow for disclosure by the hospital staff

> "to a medical practitioner, or to a person employed under the direction of a medical practitioner in connection with the treatment of persons suffering from such disease or the prevention of the spread thereof, and for the purposes of such treatments or prevention."

Otherwise the Regulations impose a duty of confidentiality on the hospital in relation to such information. Nothing is said in the Regulations about what the medical practitioner may do with the information, or with information which he obtains first-hand, for example if he makes a routine examination of the patient for the purposes of an insurance policy, or if the patient comes directly to him for treatment. The Departmental memorandum "Contact Tracing in the Control of Venereal Disease" contemplates disclosure only with the consent of the patient.[17] If the doctor were to disclose, it seems unlikely that a court would award damages to the patient for breach of confidence, the 'iniquity' of his conduct being sufficient to raise the defence. If the doctor fails to disclose, has the injured third party any right of action against him? It would seem that the only possibility would be in the tort of negligence when liability would depend on whether the doctor ought to have foreseen that his neglect would be likely to cause injury to that plaintiff.[18]

Other circumstances where disclosure could avoid injury to others have been pinpointed by the inquiry by the East Sussex County Council into the death of Maria Colwell.[19] Police records and social security records should be made available concerning adults in a household where a child might be at risk. It is suggested that other records might also be thought relevant and disclosure should not be culpable where it was made to prevent foreseeable harm to a third party, even if there was no "iniquity" disclosed. Mental instability, for example, is no "iniquity" but may be very relevant to the care of a child.

If there is a duty to disclose, or if the defence of disclosure is to succeed, it seems that disclosure must be to a suitable recipient. This was accepted by Lord Denning in Putterill, disclosure out of malice or for gain would not be defensible - but Salmon and Winn LJJ were more doubtful. They argued that an express agreement not to disclose an "iniquity" would be void, as contrary to public policy, even if it did contain an exception allowing disclosure to certain official persons. An implied agreement in a contract of service could not be in a different position. Perhaps the test should be similar to that in relation to qualified privilege in libel - that the recipient has a duty or interest in receiving the communication.[20] This would cover the cases of disclosure to an official (for example the registrar of restrictive practice agreements in Putterill) and to a person injured by the "iniquity" (accepted in Putterill) and also wider communication, such as to the press, where the "iniquity" is of a general or public nature or the identity of the wrong-doer makes public exposure suitable in the public interest. It is submitted that Lord Denning's suggested test depending on the motive of the disclosure is irrelevant. If the matter should be disclosed in the public interest, then it should be disclosed whatever the motive of the discloser. To make the defendant's liability depend on whether the Daily Mail paid him for the information seems in principle wrong in the context of public interest.

3. Duty To Give Information To The Patient

Whereas the medical profession are usually united in the desire to protect the confidences of their patients from disclosure to outsiders, the question of disclosure to the patient himself is more controversial.[21] The problem concerns information about the patient's present and probable future state of health, information about what is proposed to be done to him and information about what has been done. Some of the information is factual and some is judgmental and may be speculative or uncertain. The patient may seek the information for a particular purpose, such as

ascertaining whether he has a cause of action in negligence or deciding whether or not to consent to treatment, or he may seek it solely on the basis that it concerns himself and therefore he is entitled to know. Alternatively, the patient may wish the information to be given to someone else. Doctors are usually ready to pass on information on the patient's authority, for example to an insurance company, though some doctors require express authorisation. They may fear that the patient has not realised that he has given authorisation or how wide the questions asked may be.[22] From the patient's point of view, refusal to give wide authorisation may result in a refusal of benefits or services.[23] While it is right that the patient should have control over his information, there could perhaps be limits to the circumstances in which he is required to provide it. Thus, the reluctance of medical persons to disclose information to, or on behalf of, the patient may stem from a desire to protect themselves or from a desire to protect the patient.

a) Information required for the patient's consent to treatment

It is clear law that an operation or other form of treatment performed on a patient without his consent (or that of his parents if he is under 16) is a trespass, though it would be a defence that the treatment was urgently necessary to save his life and his consent could not be obtained.[24] Consent will only be a defence if it is

> "consent freely given with proper understanding of the nature and consequences of what is proposed."[25]

In many circumstances consent may be implied from the conduct of the patient. For example, by attending a doctor while pregnant a woman will impliedly consent to such examination and other treatment as is normally required in pregnancy and childbirth. By attending the hospital out-patient department with a broken arm the patient impliedly accepts external examination, X-ray examination and the setting of his broken bone. Thus in the case of normal, accepted treatment for an obvious condition the law is clear.

The question arises whether consent may be implied to unusual or little-tried treatment for the condition and to the use of the patient in experiments such as the testing of new drugs. It is submitted that in attending his doctor, or a hospital, for treatment the patient impliedly consents to being treated in such a way as the doctor reasonably believes to be for his benefit. Thus this will include consent to the use of new or little-tried methods of treatment where the doctor has reasonable grounds for a belief that the treatment is likely to be beneficial. It

will not include consent to treatment which the doctor knows, or ought reasonably to know, may have harmful effects outweighing the likelihood of benefit, or treatment the usefulness of which he has no means of knowing. In these cases express informed consent is needed. Even in the case of normal treatment, if harmful side-effects are anticipated or serious side-effects are possible, informed consent to the treatment should be obtained.[26]

May a doctor assume that his patient, by seeking his help for a condition, impliedly consents to being used in experiments, such as the testing of new[27] drugs? Where this is done in hospitals any experimentation is controlled by the ethical committee, but no such committees as yet supervise such experiments elsewhere, such as by general practitioners.[28] The experiment may involve being given the drug or being used as a control - being given a placebo and so not having any treatment at all. Even where a drug is known to be effective research is sometimes done to test the effectiveness by replacing doses of the drug by a placebo. A recent example is the proposed testing of the effectiveness of the drug Inderal on schizophrenic patients by taking some patients on whom it clearly seems to work and giving them inert injections without their knowledge, thereby perhaps suddenly precipitating them back into their illness.[29] The World Medical Association produced in June 1964 a code of ethics on human experimentation, known as the Declaration of Helsinki. In the section headed "Clinical Research combined with Professional Care" it states

"1. In the treatment of the sick person the doctor must be free to use a new therapeutic measure if in his judgement it offers hope of saving life, re-establishing health, or alleviating suffering.
If at all possible, consistent with patient pyschology, the doctor should obtain the patient's freely given consent after the patient has been given a full explanation. In case of legal incapacity consent should also be obtained from the legal guardian; in case of physical incapacity the permission of the legal guardian replaces that of the patient.

2. The doctor can combine clinical research with professional care, the objective being the acquisition of new medical knowledge, only to the extent that clinical research is justified by its therapeutic value for the patient."[30]

In reply to a question on the clinical testing of new drugs the Secretary of State for the Social Services quoted with approval a recommendation of the Royal College of Physicians that

> "If clinical research investigations were not expected or intended to benefit the patient his informed consent should be obtained. Where the research was intended to benefit the patient ... consent should ordinarily be sought but it was recognised that there were sometimes circumstances in which it would be inappropriate or even inhumane to explain the details and seek consent, and it was suggested that such cases should be examined with particuler care by ethical committees."[31]

Both these statements refer to ethical rather than to legal duties. The Department of Health have stated that drug companies pay doctors, often general practitioners, to try out certain drugs on patients with a view to getting further information about their efficacy. Neither the Department nor the British Medical Association know how many of such clinical trials are carried out in a year.[32] The Department stated that

> "The doctor certainly has no legal obligation to tell the patient. But in practice he probably would."[33]

It is submitted that this statement is wrong in law.

It is clearly accepted by the medical authorities that a distinction must be drawn between experimentation which is intended to benefit the particular patient and procedures undertaken, either on patients or on healthy persons, solely for the purpose of contributing to medical knowledge.[34] In the latter case informed consent must always be obtained.

> "Clinical research which is non-therapeutic on a human being cannot be undertaken without his free consent, after he has been fully informed."[35]

Thus where the testing of the drug is not expected to be of therapeutic value to that particular patient it would be a breach of professional ethics by the doctor to administer it without the patient's consent.[36] More seriously, it would also be a breach of the doctor's legal duty to the patient and a trespass. The public interest would be no defence to such an action.

It is also submitted that the implied consent to treatment cannot be relied upon simply on the ground that the patient himself may benefit, in the short or long term, from the experiment. If there is some other,

non-experimental, form of treatment which would normally be used in his case then he is entitled to that, rather than an experimental treatment, unless he expressly consents to the latter. He attends his doctor not in order to take part in experiments, however useful, but in order to be treated for his ailment, and is entitled to expect that his doctor will be putting his best interests above any other claim.

The argument put forward for not telling the patient is that his knowledge or fear may sometimes affect the validity of the testing, or he may not be in a physical or mental condition to understand. It is suggested that consent could be obtained in general terms for such tests to take place from time to time.[37] Provided that this was limited to tests which would not be harmful, and it was obtained without pressure, the consent would be valid (Consent in general terms would probably not be taken as valid consent to totally unspecified and potentially harmful treatment of no therapeutic value to the patient). Consent could be obtained in the same way to the tape-recording of consultations, which is increasingly used in medical teaching but which, it is submitted, is a breach of the doctor's duty to his patient if done without consent.[38]

In the case of a patient unfit to consent for himself e.g. by reason of youth or mental incapacity, it is submitted that no non-therapeutic experiment is permissible, parents and guardians having no authority to consent for a child under 16 to anything which is not in his interest.[40]

If consent is needed it must be informed consent, and this involves full information being given to the patient. Here the difficulty is whether to mention possible deleterious effects which are unlikely to occur. Doctors prefer not to do so.[41]

> "To warn a patient of such minimal risk without the patient himself raising the question could not but be unsettling to even the most level-headed patient, for such a patient would inevitably assume that the risk was much greater than it really was and that by being referred to as a slight risk it was being played down."[42]

In Smith v Auckland Hospital Board[43] the patient had to have a leg amputated following an unusual but not unknown complication after an investigation of his aorta. He sued the hospital for damages in negligence, basing his claim on the fact that when he had asked the surgeon whether there was any risk in the investigation the surgeon had replied merely "You will be back home in two days." The jury held the hospital negligent in not informing him of the risk, and the Court of

Appeal upheld the decision. The Court stressed that

> "the Court's decision turns on the particular fact that it was an answer to a question which was specifically asked of him. On no account must it be thought that we are laying down any general rule as to what a doctor should tell his patient before performing an operation or carrying out an exploratory procedure. Still less are we saying what information should be volunteered by the doctor if he is merely explaining the nature and purpose of what is proposed and no question is asked of him as to the risks involved."[44]

It was held that his question should have been answered honestly and accurately and that the defendants were liable under Hedley Byrne & Co.Ltd. v Heller & Partner Ltd.[45] since if the doctor had accurately answered that there was a slight risk the patient would probably have asked further questions and elicited the danger which in fact occurred, and might well have refused consent.

Only one judge (T.A.Gresson J) made the point that the action might have been brought in assault and not negligence, based on absence of consent.

> "It is not unreasonable to infer that in giving his consent ... the appellant would tend to place reliance upon the doctor's earliest answer ... as to the absence of any risk."[46]

The whole question of the legal need for consent is overlooked in many of the cases[47] which are based on negligence, one head of which is failure to give warning of risks. Thus McNair J summing-up to the jury in Bolam v Friern Hospital Management Committee said that they must decide

> "First - does good medical practice require that a warning should be given to a patient before he is submitted to electro-convulsive therapy. Secondly - if a warning had been given what difference would it have made."[48]

When one of the medical experts pointed out the need for informed consent by the patient, the judge himself asked him. "Other competent people might think that it is better not to give any warning at all?" thus turning the question back to one of good medical practice.

If judges take this line, then it is not surprising that doctors tend to consider it a matter for their discretion whether to inform the patient of risks.

"If they are unduly nervous I don't say too much. If they ask me questions I tell them the truth ... it would be a great mistake if they refused to benefit from the treatment because of fear."[49] "If they don't ask me anything I don't say anything about the risk."[50] "He would have been the last person I would have gone into the risks of the investigation with. I would accept those risks on his behalf."[51]

Thus an impression appears to have grown up that doctors must answer truthfully any questions they are asked,[52] but need do no more. The question whether they can rely on the patient's consent to treatment where the consent was given without full information has not been answered. The question of negligence is a different matter, with a different standard.[53] Here medical practice is relevant; on the need for genuine consent it is not.[54]

In Kenny v Lockwood[55] it was held that the duty of the surgeon is

"to deal honestly with his patient as to the necessity, character and importance of an operation and its probable consequences ... But such duty does not extend to warning a patient of the dangers incident to or possible in any operation, nor to details calculated to frighten or distress the patient. If a surgeon expresses his own honest belief he ought not to be ... found derelict in his duty ... providing he is not guilty of negligence in word or economy of truth."

In Natanson v Kline,[56] after stating that a positive misrepresentation might vitiate consent, the court added

"So long as the disclosure is sufficient to ensure an informed consent, the physician's choice of plausible (sic) courses should not be called into question, if it appears, all circumstances considered, that the physician was motivated only by the patient's best therapeutic interests, and he proceeded as a competent medical man would have done."

While it may be difficult sometimes to draw the line, the law is clear. There must be sufficient truthful disclosure to provide informed consent. It is not enough for the doctor only to reply to questions asked. If he fears that the patient faced with the risk may refuse the treatment, that is no justification for telling him reassuring lies or hiding the truth. The doctor will no doubt put the argument in favour

of treatment as cogently as he can; the patient is entitled to know both sides of the argument before making up his mind.

The better view is, it is submitted, that of the doctor witness in Bolam who, when asked whether it helps a patient to be told all the risks, replied

> "In the outcome I think that it does, because the patient takes the decision whether or not to have a treatment which may affect his whole future and at that point he has the chance of deciding whether he will do it or whether he will not ... I think that it is not right to give no warning of the risks to a patient who can understand the import of the warning."[57]

Apart from the question of trespass, it has been held by the Health Service Commissioner that when medical staff of a hospital "went farther than was appropriate in getting the patient to sign a consent form against his real wishes" the hospital were guilty of maladministration.[58]

b) Information about the patient's health

A patient who has received medical treatment but gets worse rather than better, or who wakes up after an operation to find the wrong limb missing, may well want to know what went wrong. Parents of a child who died after his heart stopped in an operation felt bitterness that the hospital tried to ensure that they were not told what had gone wrong.[59] The patient may need the information in order to decide whether he has a claim in damages, or he may just be curious to know what happened. The patient who has undergone tests may wish to know what was discovered about himself, whether any further treatment is to be recommended or not. (A patient who had undergone various tests in a Canadian hospital asked, for his own interest, what his blood cholesterol level was. The information was refused on the ground of "hospital policy"). The patient whose treatment appears to have gone well may wish to know the prognosis.

All this information is available either from the medical records or the information of those who under-took the treatment.[60] Some of it the patient may be given as a matter of course by his doctor; the important question is whether he may insist on being given the information if it is not offered. It is hard to see what justification there could be for refusal to produce the medical record or other information at the patient's own request.[61] It is clearly established that where the law recognises a privilege against disclosure (legal professional privilege,

conciliation privilege) it is the privilege of the parties, so that if the parties wish the information to be given the holder of it must produce it.[62] Where, however, disclosure is refused on the ground of public interest, the attitude of the particular donor of the information is irrelevant. The public interest would suffer if information received in these circumstances were to be revealed. But even in these cases the court weighs the hardship to the applicant of non-disclosure against the risk to the public interest.[63] On either basis it would seem that a patient's own medical record should be produced if he requires it in litigation. If confidentiality is for his benefit, to enable him to communicate freely with his doctor, then he has waived the "privilege". If it be the public interest in maintaining full communication between patients and doctors in general, this is outweighed by the hardship to the particular patient of having no other source of information as to his medical history. No-one else's secrets are sought; only those relating to the patient himself. One wonders whether the reason behind a noticeable reluctance to disclose medical records is not rather that the doctors' fear of disclosure would "render them more cautious, guarded and reserved."[64] Whatever the reason hospitals have shown themselves unwilling to produce a medical record unless clearly bound to do so, even when it is required by the patient.

The further question arises whether the patient may insist on knowing the information even if he is not contemplating litigation. (It is clear from the arguments in Davidson v Lloyd Aircraft Services Ltd.[65] that medical men find reasons for non-disclosure after treatment very much in the same way as they do in relation to obtaining consent to treatment. But at least in relation to consent they usually accept that if asked they will reply truthfully). In C v C[66] a patient being treated in a venereal disease clinic asked the doctor to give her and her husband certain information concerning her illness, since it would form the basis of his divorce petition or her defence. The doctor replied that he would only answer in court,[67] which meant that the parties had to prepare their cases "in the dark." The judge said

> "It is of course, of the greatest importance from every point of view that proper secrecy should be observed in connection with venereal disease clinics, and that nothing should be done to diminish their efficiency or to infringe the confidential relationship existing between doctor and patient. But in my opinion these considerations do not justify a doctor in refusing to divulge confidential information to a patient or to any named person or persons when asked by the patient to

do so. In the circumstances of this case the information should have been given."

It might appear that the judge is laying down a general rule that if the patient asks for the information he must be given it. The case clearly concerned medical information - such as the likely time of onset of the disease - and not just information imparted by the patient to the doctor. Thus on the basis of this case any patient should be entitled to require the doctor or hospital to give him, or any other named person,[68] any medical information about himself. Thus the decisions limiting disclosure to medical advisers in cases where the patient himself is seeking the information would be wrong, at least insofar as the information relates to the health of the patient rather than the activities of the doctors. (It is unclear whether such matters would come within the "confidential information" referred to in C v C).

Perhaps the better view is that in spite of the wide wording of his direction the judge was only referring to the particular circumstances where the information is required "to assist the course of justice." If so, then the decision is still useful but does not help to answer the basic question whether the patient has a right to the information apart from in the context of litigation.

It is arguable that the doctor's duty to keep secret information about his patient corresponds with a right in the patient.

"What you have a right to have me made do, is that which I am liable according to law upon a requisition made on your behalf to be punished for not doing."[69]

"To ascribe a right to one person is to imply that some other person is under a corresponding duty."[70] Hart states that it is

"Characteristic of those laws that confer rights ... that the obligation to perform the corresponding duty is made by law to depend on the choice of the individual who is said to have the right, or the choice of some person authorised to act on his behalf."[71]

Thus if the duty of secrecy, recognised by the law as being owed by the doctor, is a duty owed to the patient, then the patient has the right to decide whether it shall be kept or broken. Thus the patient may decide that the doctor must inform himself or his spouse (this is sometimes erroneously assumed by doctors) or some other person. The decision in C v C taken in its widest meaning, is correct. It is not for the doctor to decide whether it is in the interests of the patient

(or anyone else) that he should or should not be told information about himself;[72] this is a matter for the patient himself, or if he is under legal incapacity for his guardian.

Where the information sought relates to the activities of others, the court rightly has a role to play in ensuring that the public interest in information being available in litigation is balanced against the risk of "fishing" enquiries. But where the information relates to the state of health of the patient himself,no such matters are relevant. The patient has a right to the secrecy; he has a corresponding right to receive the information simply because he wants it.

It is increasingly becoming recognised that the patient, or his advisers, must be able to have more information. The Pearson Commission noted[73] that participants at a 1975 Council of Europe Colloquy were agreed that, in circumstances of possible civil liability at least, information should be made more readily available to a patient's advisers. This would include not only factual information but matters of assessment by doctors. The Data Protection Committee have gone cautiously further. One of the basic principles which they recommend for the control of computerised information is that data should be accurate and complete, relevant and timely for the purpose.[74] They do not see subject access as an end in itself but as one of several possible means of ensuring compliance with the principles. They note[75] that "it seems to be generally accepted" that patients should be allowed to see factual data (a surprising view in the light of the vehement criticisms of McIvor v Southern Health and Social Services Board[76] in the medical press and elsewhere[77]) and recommend that such a right be given. However, they would except information about diagnosis and prognosis on the two grounds of possible harm to the patient and the speculative nature of the data, but even here they express the view that

> "the climate of opinion is moving in the direction of greater openness."[78]

The Data Protection Agency could amend Codes of Practice "in consultation with the professions" as the climate of opinion changes. (It is to be hoped that representatives of patients will also be consulted.)

The fact that diagnosis and prognosis may turn out to be wrong is no more reason to hide the opinion from a patient than for a lawyer to hide his viewsof the law, or counsel's opinion, from his client. Doctors will be greatly assisted when they cease to be treated as magicians and their professional judgements can receive the weight and respect which they deserve.

NOTES

Duty not to disclose.

1. *Now the Declaration of Geneva - "A doctor shall preserve absolute secrecy on all he knows about his patient because of the confidence entrusted in him." The General Medical Council gives disclosure as an instance of "infamous conduct": Function, Procedure and Disciplinary Jurisdiction, General Medical Council.*

2. *The European Convention on Human Rights and Fundamental Freedoms Article 8 provides "Everyone has the right to respect for his private and family life."*

3. *The Times September 2 1975.*

4. *The Moorcock (1889) 14 P.D.64,68; Trollope & Colls Ltd. v North West Metropolitan Regional Hospital Board [1973] 2 All E.R.260.*

5. *Easton v Hitchcock [1912] 1 K.B.535,537.*

6. *[1924] 1 K.B.461.*

7. *These were compulsion of law, duty to the public and express or implied consent of the customer: Bankes LJ at 473.*

8. *Parry-Jones v Law Society [1968] 1 All E.R.177 at 178 (Lord Denning M.R.) and 180 (Diplock L.J.).*

9. *Jarvis v Swans Tours Ltd. [1973] 1.Q.B.233.*

10. *National Health Service Act 1946 section 1; National Health Service Reorganisation Act 1973 section 2(2).*

11. *1973 Act section 7(3).*

12. *For example Seager v Copydex Ltd. [1967] 1 W.L.R.923.*

13. *(1849) 1 Mac. & G.25; 41 E.R.1171.*

14. *[1967] 1 All E.R.611.*

15. *[1969] 1 All E.R.8.*

16. *(1970) 86 L.Q.R.463. Though it is thought that an element of public interest in the relationship is also necessary.*

17. *The affidavit of the Duchess speaks of "things which one would never have discussed with anyone else."*

18. *In Wyatt v Wilson (1820) unreported*

19. *Edwin Stevens Lecture for the Laity 1974 pub. Royal Society of Medicine.*

20. *There may be a legitimate public interest in knowing the dangers of poor judgement or rash action by national leaders suffering from ill-health: Larkin Times Literary Supplement March 22 1974, cited by Zuckerman.*

21. *The British Medical Association guide Medical Ethics (1974) promises "I will respect the secrets which are confided in me, even after the patient has died."*

22. *The Law Commission Report No.21 on Interpretation of Statutes recommended a presumption that where a person had been harmed as a result of a breach of a statutory duty he should have a civil cause of action. The proposal has not been implemented.*

23. *A psychiatrist who voluntarily gave evidence for his patient's husband in custody proceedings was required by the British Medical Association to express regret; he should have awaited the judge's order: Medical Defence Union Annual Report 1968. But cf. the duty to give information to the patient: C v C [1946] 1 All E.R.562 discussed below.*

Disclosure under statutory duty

24. *[1968] 1 All E.R.177,180.*

25. *Health Services and Public Health Act 1968 section 48.*

26. *[1974] 2 All E.R.414,*

27. *It is noteworthy that the section does not provide, as is sometimes done, a defence of "lawful authority" or "reasonable excuse." Had it done so, a reasonable belief that he was not entitled to disclose might have been a defence, on analogy with cases under the Road Safety Act 1967 section 3(3) - failure to provide a breath sample.*

28. *Zuckerman loc.cit.*

Disclosure for legal proceedings

29. *By Buller J. in Wilson v Rastall (1792) 4 Term Rep.753 and by Lord Brougham L.C. in Greenough v Gaskell (1833) 1 M & K 98; 39 E.R.618. The Law Reform Committee (16th Report para.52) and Criminal Law Revision Committee (11th Report para.276) have recommended no change.*

30. *Nokes: Professional Privilege (1950) 66 L.Q.R.88,92 argued that crown privilege might be claimed for communications between doctor and Ministry. National Health Service Act 1946 section 13(2), expressly retaining Crown privilege, has now been repealed: National Health Service Reorganisation Act 1973 section 57, Schedule 5. If public interest privilege is claimed, the court will weigh the hardship to the patient against the public interest in secrecy: Norwich Pharmacal Co. v Commissioners of Customs and Excise [1973] 2 All E.R.943; D v NSPCC [1977] 1 All E.R.589.*

31. *Unless disclosure is prohibited by criminal sactions: Rowell v Pratt [1938] A.C.101; case cited by Marshall: (1966) 6 Medicine, Science and Law 68,69.*

32. *National Health Service (Venereal Disease) Regulations S.1. 1974/29.*

33. *(1920) 36 T.L.R.196. cf C v C [1946] 1 All E.R.562.*

34. *Attorney-General v Mulholland [1963] 2 Q.B.477,489. cf. Samuels: Confidentiality and the Law: Social Services Quarterly 1977 page 14 suggesting that the judge has no discretion to disallow a question unless it comes within the public interest privilege of D v NSPCC (above).*

35. *Administration of Justice Act 1970 section 31; R.S.C. Order 24 Rule 7A discussed in Chapter 3.*

36. *Dunning v Board of Governors of United Liverpool Hospitals [1973] 2 All E.R.454. and Deistung v South West Metropolitan Regional Hospital Board [1975] 1 All E.R.573.*

37. *McIvor v Southern Health and Social Services Board [1978] 2 All E.R.625*

38. *Administration of Justice Act 1970 section32(1); R.S.C.Order 24 Rule 7A.*

39. *Paterson v Chadwick [1974] 2 All E.R.772.*

40. *Davidson v Lloyd Aircraft Co. [1974] 1 W.L.R.1042.*

Disclosure within his profession

41. *National Health Service (General Medical and Pharmaceutical Services) Regulations S.1. 1974/160. Schedule 1 para.39.*

42. *H.L.Deb. vol.354 cols.1028-30. In a debate on the uses of Social Services Reports.*

43. *Gee v Pritchard (1818) 2 Swans.402.*

44. *O'Rourke v Darbishire [1920] A.C.581: Bristol Corporation v Cox (1884) 26 Ch.D.678.*

45. *It has been pointed out that it may be as important for a hospital specialist to tell the referring general practitioner what he has said to the patient as what treatment he has given: Inside Medicine: BBC2 Television August 30 1976.*

46. *Self-Poisioning: Management of Patients in Nottingham (1976) British Medical Journal 1978 page 1023.*

47. *British Medical Journal 1978 page 365.*

48. *Some social workers have similarly suggested a dual system of records with some information not officially on the record.*

49. *ibid. Any right given to a subject to see his own record would become meaningless if such methods were used for information not given by him. It has been suggested that the case of McIvor could lead to doctors keeping two sets of notes: B.M.A. News Vol.4 No.7 July 1978.*

50. *Pulse: May 20 1978.*

51. *Journal of Royal College of General Practitioners March 1978*

52. *British Medical Journal July 22 1978.*

53. *B.M.A.News Vol.4 No.7 July 1978.*

54. *Letter to all Members of Parliament October 27 1978.*

55. *Though some think the doctor should still be consulted: Jones & Richards: Journal of Royal College of General Practitioners March 1978 page 139.*

56. *In evidence to the Royal Commission on the National Health Service, the Christian Medical Fellowship emphasised the danger to confidentiality caused by the use of medical records for administrative and statistical purposes: The Times April 4 1977.*

57. *N.H.S. Circular No.1978 (Gen) 23.*

58. *B.M.A. News Vol.4 No.7 July 1978.*

59. *Dr. John Dawson: Personal Computer World 1978 page 56. Display units are used in the Devon experiment but are said to be too costly for the Child Health Scheme.*

60. *Crombie: Journal of Royal College of General Practitioners 1973 page 863.*

61. *Archeson: Medical Record Linkage 1967 pub. Oxford University Press suggests anonymity as the main safeguard against abuse by linkage with other information systems: referred to in Young (ed.) Privacy 1978 pub. Wildy page 206.*

62. *Journal of Royal College of General Practitioners 1978 page 140.*

63. *Personal Computer World 1978 page 56.*

64. *Self-poisoning: Management of patients in Nottingham, British Medical Journal 1978 page 1032 and correspondence, ibid. page 1346.*

65. *Milne & Chaplin (eds.): Modern Hospital Management 1969 pub. Institute of Hospital Administrators page 132 suggest that patients' records should be freely available to medical staff for research.*

66. *Zuckerman op.cit.*

67. *Disclosure for the benefit of society is discussed in Chapter 1.*

68. *Cantrell: Privacy - The medical problems. in Young (ed.) Privacy page 206.*

69. *(1972) Cmnd.5012 para.363.*

Disclosure to an employer

70. *It is also implied that it will not be used for any other purpose, so such a record may not be used as evidence in an action against his employer for personal injuries without the consent of the employee: Winn Committee on Personal Injuries Litigation (1968) Cmnd.3691 para.310.*

71. *Increasingly employers are requiring prospective employees to authorise disclosure by their general practitioner as a condition of employment. This would include such matters as a past history of depression which would not be discovered in a medical examination: British Medical Journal 1978 page 365.*

72. *The Younger Committee found that although the employer might consider the medical record to be his property and in theory conflicts could arise "the relationship between the doctor and his employer is normally good.": (1972) Cmnd.5012 para.382.*

73. *The situation of the University medical officer asked to disclose the names of pregnant students is in point here: Medical Defence Union Annual Report 1969 page 17.*

74. *[1974] 2 All E.R.414.*

75. *There may be rare occasions when it is impracticable to seek consent to disclosure and then a reasonable belief that it was beneficial might be a defence. See Chapter 1.*

76. *Paris v Stepney Borough Council [1951] A.C.367; cf. Withers v Perry Chain Co. [1961] 1 W.L.R.1314. Failure by the employee to disclose his illness to the employer was held to be contributory negligence when he was injured as a result of a breach of statutory duty on the part of the employer: Cork v Kirby MacLean Ltd. [1952] 2 All E.R.402.*

77. *Formerly the Employment Medical Advisory Service Act 1972.*

78. *Section 55 (1)(a).*

79. *Section 55 (6)(b).*

80. *Health and Safety at Work etc. Act 1974 section 60(1).*

81. *The parent or guardian was entitled to inspect the school record, but not to have a copy: Employment and Training Act 1948 section 13(3) proviso. This Act has been repealed by the Employment and Training Act 1973 and no provision has been made apparently concerning inspection of records other than records of vocational advice: 1973 Act section 55.*

82. *[1968] 1 All E.R.171,180.*

83. *Criminal Law Act 1967 section 1. It is still an offence to accept a bribe for refusing to disclose information concerning an arrestable offence: ibid. section 5.*

84. *7th Report Cmnd.2659 para.42.*

85. *[1974] 2 All E.R.414.*

86. *Tournier v National Provincial and Union Bank of England [1924] 1 K.B.461.*

87. *Fraser v Evans [1969] 1 All E.R.8. Conversely in Sykes v D.P.P. [1961] 3 All E.R.33 Lord Denning suggested that medical confidentiality would be a defence to misprision of felony (at 42).*

88. *Section 2.*

89. *Section 7.*

90. *cf. the employer's duty to outsiders by section 3.*

91. *cf. Medical Defence Union Annual Report 1969. "Where professional secrecy entails a risk of avoidable harm to an innocent third party, a doctor may have to break confidence if he fails to persuade the patient to disclose his disability or permit the doctor to do so." The Union suggests the medical officer of the employer, or the licensing authority for unfitness to drive.*

Disclosure to parents or guardians

92. *Competent means of course legally competent rather than factually capable. The law protects infants against themselves as well as against others.*

93. *Section 8(3). Skegg: (1973) 36 M.L.R.370 argues that the subsection also retains a common law ability to consent of a child under 16, provided he can understand and decide on the procedure concerned. Whether a young person may consent to donation of his kidney for the benefit of another is uncertain. The Secretary of State has suggested that consent of the court might be required: The Times January 25 1977. And Bonner v Moran (1941) 126 F.2d 121 cited in Dworkin: (1970) 33 M.L.R.353.*

94. *Marshall: Privileged Occasions and Professional Secrecy (1966) 6 Medicine, Science and Law page 68 stated this to be the strict ethical rule at least even though the Act had not then been passed.*

95. *The Times May 20 1974. In 1971 the General Medical Council disciplinary committee held a doctor not guilty of professional misconduct "in the particular circumstances of this case" for informing the parents of a sixteen year old girl that she was using contraceptives, information obtained by the doctor in confidence from the birth-control clinic: The Times March 8 1971, criticised (1971) 121 New Law Journal 214.*

96. *or any other person who has care and control of the child: Eekelaar (1973) 89 L.Q.R.210,225. But the Medical Defence Union advises doctors not to inform parents if the young person refuses consent: Conversation with a surgeon in Nottingham October 1977.*

97. *It has been said that as between the parent and the child custody is a dwindling right. "It starts with a right of control and ends with little more than advice": Lord Denning M.R. in Hewer v Bryant [1970] 1 Q.B.357,369.*

98. *There is much controversy whether parents are also entitled to see all school records. They have such a right in United States of America and it has been recommended by the Advisory Centre for Education. The Times October 3 1975. The Warnock Committee on Handicapped Children recommends that at least this group of parents should have access to all their child's records: The Times May 15 1978.*

99. *Commentaries on the Laws of England 16th ed. Vol.1. page 451.*

1. *R v Southwold Corporation ex parte Wrightson (1907) 5 L.G.R.888; Conway and others v Petronius Clothing Co.Ltd. [1978] 1 All E.R. 185 (company director).*

2. *Section 60.*

Disclosure in the patient's interests

3. *The Times July 11 1975.*

4. *Noted in Medical Defence Union Annual Report 1968 page 20.*

5. *H.C.Deb.Vol.901 (written answers cd.2). The British Association of Social Work welcomed the report: Justice of the Peace November 29 1975.*

6. *cf (1971) 121 N.L.J.214 "The doctors have no monopoly of insight into a patient's overall interests."*

Disclosure in the public interest

7. *Marshall loc.cit. suggests that such disclosure would be a defence for a doctor to breach of contract (relying on Tournier) and would provide a defence of qualified privilege in libel. He does not discuss the action of breach of confidence.*

8. *[1967] 3 All E.R.145,148.*

9. *cf. Lord Denning in Sykes v D.P.P. [1961] 3 All E.R.33,42.*

10. *apart, of course, from certain statutory duties considered above.*

11. *Wood V.C. in Gartside v Outram (1856) 26 L.J.Ch.113. quoted in Putterill.*

12. *[1969] 1 All E.R.8,11.*

13. *(1743) 17 State Trials 1139.*

14. *[1974] 2 All E.R.414.*

15. *If the woman consents to the intercourse he cannot be convicted of inflicting grievous bodily harm (Offences Against the Person Act 1861 section 20) but he may be guilty of causing grievous bodily harm (ibid. section 18). This will depend on whether he can be said to have intended to transmit the disease. His knowledge of the likelihood of transmission may be vital here.*

16. *S.I. 1974/29.*

17. *The Memorandum is referred to in Speller: Law of Doctor and Patient 1973 pub. Lewis page 13.*

18. *No action could lie for breach of statutory duty, since no statute has laid down a duty of disclosure in this case; the public interest is not alone normally a cause of action; a contractual relationship is unlikely in these circumstances.*

19. *The Times April 30 1975. The Report of the Data Protection Committee (1978) Cmnd.7341 Chapter 9 indicates that local authorities are increasingly sharing information from different sources and the Local Authorities Management Services and Computers Committee has suggested that local authorities must be able to collect and use information "for local government purposes." This is a very different matter from sharing information for the protection of an individual.*

20. *Another example would be that of the doctor informing the licensing authority of his patient's unfitness to drive a car: Rule: Private Lives and Public Surveillance 1973 pub.Lane page 106.*

Duty to give information to the patient.

21. *"Referring practitioners should exercise the utmost discretion regarding the disclosure of information obtained from consultants about the background of patients or their relatives": Medical Defence Union Annual Report 1969 page 16, citing a case where the consultant had written "the parents are more interested in making money than in the child." But in some American States, such as Connecticut and New Jersey, a patient has a statutory right to examine or copy a hospital medical record: Huffman: Medical Records Management 6th ed.1972 pub. Physicians Record Co. page 387. The Data Protection Committee found general agreement that patients should see factual data and a climate moving towards greater access to judgmental medical data: (1978) Cmnd.7341 paras.24.05-6.*

22. *British Medical Journal 1977 page 1544. In one American case the court refused an insurance company access to medical records of all its policy-holders in hospital, general consent having been given by the patients, on the ground that it was an unwarranted 'fishing expedition': Huffman op.cit.page 388.*

23. *For example the hypothetical case of agreement by insurance companies to require full disclosure given in Privacy and the Computer - Steps to Practicality 1972 page 11. The same problem may arise with refusal to answer apparently unnecessary personal questions.*

24. *Skegg: (1974) 90 L.Q.R. 512 argues that the basis of the defence is not implied consent but a doctrine of necessity and that it also justifies acting against the patient's refusal of consent or known objection if there are grounds for believing that if restored to a better state of health the patient would be likely to consent.*

25. *Medical Research Council statement on Responsibility in Investigations on Human Subjects (1963) Cmnd.2382. The Parliamentary Commissioner has criticized the Department of Health for failure to warn parents of the risks of whooping-cough vaccine for some children: 7th Report October 1977.*

26. *British Medical Journal March 16 1974 - analysis of deaths thought to be caused by side-effects of commonly used drugs.*

27. *This refers to drugs already licensed; experiments before licensing are strictly controlled.*

28. *H.C.Deb. Vol.897 (written answers col.474) The Code of Practice for N.H.S. Locally organised Research Schemes recommends that such schemes be submitted to the established ethical committees for their approval.*

29. *The Times August 29 1975: Should patients be 'tortured' in the name of progress?*

30. *The Declaration does not purport necessarily to represent national law.*

31. *as noted 28.*

32. *Letter from the Secretary of State to Robert Kilroy-Silk M.P. October 6 1975 in further response to his Question in the House of Commons. She did not think new legislation was required.*

33. *The Times July 24 1975.*

34. *Declaration of Helsinki; Medical Research Council Declaration on Responsibility in Investigations on Human Subjects; Report of Royal College of Physicians quoted above.*

35. *Declaration of Helsinki; Non-Therapeutic Clinical Research para.3.*

36. *Medical Defence Union Annual Report 1968 page 17.*

37. *The Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd.7054 para.1341 recommends strict liability for a volunteer in medical research who suffers severe damage as a result. But an American survey appears to indicate that volunteers participating in medical research run no greater than normal risk of injury: The Times October 5 1976.*

38. *The Times October 29 1975.*

39. *Jacob: (1976) 39 M.L.R.17 argues that consent is required to treatment for voluntary and compulsory mental patients and notes the D.H.S.S. view L973) to the contrary and its disapproval by the Butler Committee on Abnormal Offenders (1975) Cmnd.6244 and writers.*

40. *This view is also held by Speller: Law of Doctor and Patient 1973 Pub.Lewis page 58 and Dworkin: (1970) 33 M.L.R.353,360; cf. Declaration of Helsinki. The suggestion in the Medical Research Council Declaration that a child over 12 might sometimes validly consent for himself is unfounded. Skegg: (1973) 36 M.L.R.370 suggests he may consent to any procedure which a reasonable parent would consent to, including non-therapeutic procedures of public benefit but of no benefit (though no danger either) to him. Ormrod L.J. (1978) Medico-Legal Journal page 26 suggests that parental consent in such circumstances is ineffectual citing Re D a 1977 case of wardship where parental consent to non-necessary sterilisation of an 11 year old girl was overruled. It has been alleged that the main, unstated, reason for persuading parents to have their children vaccinated against whooping-cough is not their protection but that of other, younger, babies: The Times April 15 1977.*

41. *"To bring the patient into the decision making too much only causes confusion": A doctor in Horizon BBC2 Television February 9 1976.*

42. *Speller op.cit. page 22. This may be because warning is rarely given: if it were normal practice the doctor's words could be taken at face value. This happens in America where patients are more likely to sue if they suffer side-effects about which they had not been warned: The Times July 14 1976: Wood (ed.) The influence of litigation on medical practice 1977 pub.Academic Press (proceedings of an Anglo-American conference).*

43. *[1965] N.Z.191.*

44. at 197. Barrowclough C.J.

45. [1964] A.C.465.

46. [1965] N.Z.191,219. In Natanson v Kline 186 Kan.393 a similar suggestion was made.

47. Where an action was brought against a doctor, the manufacturer and the Department of Health alleging injury to a child as a result of vaccination against whooping-cough, the parents being ignorant of the risks, the Medical Protection Society stated they would defend the doctor who, on principle, should not be liable if he was not negligent: The Times January 27 1977.

48. [1957] 2 All E.R.118,122.

49. ibid. at 124, a medical witness.

50. ibid. another medical witness.

51. Smith v Auckland Hospital Board (above). It was not the doctor who lost his leg.

52. It has even been suggested, relying on dicta in Hatcher v Black, The Times July 2 1954 that a doctor may untruthfully deny risk in the patient's interest: Speller op.cit. page 23.

53. It has been pointed out that if no-fault compensation for medical injury were to be introduced, as in New Zealand and Sweden, compensation could be given without damning the reputation of the doctor: British Medical Journal 1978 page 805. Judges might then be less cautious about imposing duties on doctors. But the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd.7054 rejects the proposal (para.1347).

54. Similarly medical practice seems to require a husband's consent for his wife's sterilisation (relying on dicta in Bravery v Bravery [1945] 1 W.L.R. 1169.though this is clearly not the law. cf. Abortion, where a husband may be consulted but should not if the woman refuses consent: Bradley (1978) 41 M.L.R.365,370.

55. [1932] 1 D.L.R.507 cited in Smith.

56. 186 Kan.393 cited in Smith

57. [1957] 2 All E.R.118,123. If the patient cannot understand he cannot consent, and consent is required from someone else on his behalf.

58. The Times, October 6 1975.

59. Horizon : BBC2 Television February 9 1976.

60. A doctor who falsified records to hide the fact that he had prescribed over a long period a drug whose known side-effects had blinded the patient was suspended from practice for one year: Horizon temp.cit.

61. The human difficulty of telling the patient may be significant. A doctor stated that when a mother asked him not to inform her 15 year old child that he had cancer he agreed readily since it would be a hard disclosure to make: Inside Medicine BBC 2 Television August 30 1976.

62. Minter v Priest [1930] A.C.558; McTaggart v McTaggart [1949] P.94.

63. Rogers v Home Secretary [1972] 2 All E.R.1057.

64. Smith v East India Company (1841) 1 Ph.50; 41 E.R.550. It has been forecast that if patients have a right to see medical records doctors will cease to use them to "share their views with colleagues": The Times June 9 1978. The British Computer Society has suggested that all professional opinions - of lawyers, accountants, personnel officers etc. - should perhaps be kept secret and only made available to others with a professional need to see them: Privacy and the Computer - steps to practicality (1972). One might ask whether the desire for secrecy reflects a fear of incompetence being detected. Anyway, it has nothing to do with the confidentiality of the relationship with the client.

65. [1974] 1 W.L.R.1042.

66. [1946] 1 All E.R.562. A direction by Lewis J with the approval of the President of the Probate, Divorce and Admiralty Division.

67. This would still not be covered by statute as venereal disease is not "personal injuries" within section 32.

68. An example, in another case, of such disclosure is the duty to disclose a 'spent' criminal conviction to or at the request of the person convicted: Rehabilitation of Offenders Act 1974 section 9.

69. Bentham; a fragment on government cited by Hart: Definition and Theory in Jurisprudence (1954) 70 L.Q.R.37,48.

70. Salmond: Jurisprudence 12th ed. 1966 pub. Sweet & Maxwell page 217.

71. loc.cit.

72. This is the reason given by the Secretary of State for Social Services for non-disclosure to patients: H.C.Deb. Vol.918 (written answers col.512).

73. Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd.7054. para.1328.

74. (1978) Cmnd.7341 para.21.09.

75. ibid. para.24.05.

76. [1978] 2 All E.R.625.

77. An official of a medical protection society has said that doctors will ignore the case.

78. ibid. para.24.06.

CHAPTER 5

CONFIDENTIALITY OF COMMERCIAL INFORMATION

1. Introduction

There are several important, and sometimes conflicting, aspects of confidentiality relating to commercial information. The businessman may have secrets which he wishes to be kept from his competitors. These may range from patentable inventions to the results of market research or names of his sales representatives. The amount and cost of industrial espionage to obtain such information is enormous.[1] The use of computers may pose new and unexpected dangers for the concentration of commercial information on magnetic tapes may make a single theft a very profitable venture,[2] which may be difficult to detect, and magnetic tapes may not be stored with as much care as, for example, files marked SECRET.[3] Anyone who has access to the place of business may be in a position to learn secrets and use them or pass them elsewhere to be used to the owner's detriment.[4] The employer must allow his employees, and others such as Health and Safety Inspectors, access to his secrets; an inventor may need to collaborate with others to exploit his invention; each of them needs a wide measure of protection to ensure that those who have access to his secrets do not misuse them.

On the other hand, the employee has a legitimate interest in learning from his employment and being able to take his skills elsewhere. The employer may not prevent him from ever working for a competitor and using his own skills to the competitor's advantage even though this inevitably means passing on experience learned in the previous employment. Or the employee may wish to set up in business himself in competition with his former employer. The law must find a balance between the interests of employer and employee.

Furthermore, there is a growing awareness that the employee has a legitimate interest in knowing how the business is run. From the early industrial legislation which recognised that steps must be taken to protect the health of employees[5] an elaborate system of inspection of factories evolved. But only in the Health and Safety at Work etc. Act 1974 is recognition given to the right of employees to know the potential health hazards in their work.[6] These provisions have run into some difficulties with manufacturers of chemicals unwilling to disclose the composition of their products for fear of their competitors finding out.[7] This is a clear illustration of the fact that co-operation in the provision of information will only be given if commercial interests are sufficiently protected.[8]

The involvement of employees in the running of the enterprise is being seen at least as a means of improving industrial relations if not also of improving the expertise in decision-making.[9] The Employment Protection Act 1975 provides[10] for the giving of information sought by union representatives for collective bargaining. The Act provides a Code of Practice with appeal to the Central Arbitration Committee in case of dispute. There is some concern over what information will have to be given. The reaction of a manager to a senior trade union official:

> "if I had a man like that across the table from me I'd bury him in paper up to his neck; it would be both defensible and incomprehensible,"[11]

is not, one hopes, typical but a review[12] of companies' annual reports to employees indicated many vague and uninformative statements such as

> "The performance of our packaging and engineering units varied considerably as between one product and another but there were some excellent results."

The CBI saw the problem areas as information which competitors may find useful, information given in confidence and administrative difficulties in amassing information. Many employers fear that disclosure to the unions may mean wide dissemination.

> "The unions are also the unions of our competitors."[13]

It has been pointed out that some of the vagueness stems from inability to control future developments.

> "Many managers would rather not talk about it than diminish their "status" by sharing uncertainty."[14]

A similar problem may arise where information might reveal a person to be an incompetent manager.[15] There seems to be a general acceptance that unions are entitled to information for collective bargaining[16] but fear of what information may have to be given, recognising that there will be no control over further dissemination.

The Industry Act 1975 aims to provide the Minister with information for future planning of a sector of manufacturing industry and allows for unions also to be given some of the information. The provisions of this Act were hotly debated in Parliament and there was some diminution of the information to be given to unions. In particular the Minister may refuse information if it would be " undesirable in the national interest." Whether this would be used to suppress, for example, information about large-scale planned redundancies remains to be seen. There may be very different views on whether concealing bad news is in the

national interest. Both Acts are concerned with giving information to unions; whether this approach will extend to individuals being given a right to such information depends perhaps on political considerations.[17]

It is also being recognised, as seen in the Industry Act provisions, that as industry is of vital concern to the nation[18] and not just an individual matter there are areas in which a wider public may be entitled to know what is happening.[19] In the field of safety, employers have a duty to inform the public of health hazards,[20] and attempts are being made to combat dangers of pollution by such things as a register of chemicals in use to be generally available to the public[21] and inspection and analysis of effluents. The risk of disclosure of commercial secrets must be balanced against the public need to know. Whether there is also a public interest in knowing such things as plans for expansion or redundancy in an area is not yet clear. A company may be willing to tell a local authority its advance plans but may not do so if they are then made public.[22] Is such dissemination unlawful or would the public interest be a defence? When government is financially involved in an enterprise the problem of accountability brings with it a need to give sufficient information of the company's activities both to relevant government departments and to Parliament.[23] In all these cases it is of course vital to ensure that businesses are protected against the wrongful disclosure of information which may harm their interests or help their competitors. The problem is two-fold; on the one hand finding the balance between necessity of disclosure and harmfulness of misuse; and on the other ensuring that information which is disclosed is not used for ulterior purposes. If the latter can be ensured, the former is less critical; if it cannot, limiting the information disclosed becomes crucial.

Inventors too have commercial secrets and may need to share them with others in order to exploit them. If an invention is patented the method and extent of protection is clear. If it is not patented the question arises whether the inventor should have any protection against exploitation by others. If they discover it independently they can use it; what if he tells them in confidence? Some companies receive thousands of ideas each year some of which may be in a field on which the company is already working.[24] Protection for the inventor could disable the company from using its own information; no protection could dry up inventiveness. Patent protection is accompanied by public disclosure; injunctions for breach of confidence may be perpetual. The public

interest may require careful delineation of protection in this area.

2. Protecting the Employer's Secrets against Disclosure by Employees

The employer's secrets may be protected against disclosure by the employee during his employment, or, to a lesser degree, after his employment has ended. During his employment the law imposes a duty of fidelity to his employer.[25] The extent of this duty may be uncertain in some areas (such as the right to work for another in one's spare time) but it certainly protects the employer's confidential information, even where it would be doubtful whether one could class it as "property." Thus in Hivac Ltd v Park Royal Scientific Instruments Ltd.[26] specialist employees were prevented from working for a competitor in their spare time because it was felt that there was a danger that confidential information might be disclosed; again in Robb v Green[27] a servant who surreptitiously made a list of his master's customers, and in Wessex Dairies v Smith[28] an employee who solicited his master's customers just before leaving the employment, were both prevented from taking the customers from their employer. It has long been accepted that a servant in confidential employment, and thus having access to his master's secrets, is under a duty not to disclose them.[29] Furthermore, until the Patents Act 1977, discoveries made during the course of the employment by the employee were held by him on trust for the employer in the absence of contrary agreement.[30]

The Patents Act 1977 provides[31] that inventions made by an employee in the course of his normal duties belong to the employer if the carrying out of those duties might reasonably be expected to result in an invention or the employee had at that time a special obligation, from the nature of his job, to further the interests of the employer's undertaking. In all other circumstances the invention belongs to the employee and this right cannot, for inventions made after July 1977, be diminished by contract.[32] The Act also makes provision for compensation to be paid to the employee if the invention belongs to the employer.[33]

As well as the express or implied contractual rules, the court will restrain any use for his own purposes by the employee either during or after the employment of any information

> "which a man of ordinary honesty and intelligence would recognise to be the property of his ... employer, and not his own."[34]

The information may be in the form of a document or in the mind. In Holloway it was made clear that memorised information could be the subject of an injunction and the possible 'property' nature of memorised information never committed to paper was seen in the case of Re Keene[35] where

memorised formulae used in manufacture were held to be part of a bankrupt trader's assets which must be disclosed to his trustee in bankruptcy. In Baker v Gibbons[36] an injunction to prevent a former director soliciting sales representatives was refused in the absence of a list.[37] A better ground for the decision would be that the information, names of individual sales representatives, would not be the "property" of the company. It has been said that[38]

> "where the commercial value of an entity, whether tangible or intangible, has been brought about by the expenditure of time, effort, labour or money, the person who created that commercial value has a proprietary right to its commercial exploitation."

It is that proprietary right which should be protected by the law, and the warning agains excessive use of the action for breach of confidence should be heeded. Whitford J said[39]

> "An action of this kind could very easily be misused if in truth what the plaintiff is really seeking to do is to restrain competition rather than to restrain the use of information in which he can reasonably assert a proprietary right."

The employer may however wish to guard himself against competition or the use of his secrets by preventing the employee from working for another or in competition after leaving the employment. It has been suggested that this is the most appropriate way to protect the employer's confidential information which may be mixed with the employee's own skill.[40] Such a contract is prima facie void as a restraint of trade since it would prevent the employee from making use of his skills. It will only be valid if the employer can show that it is reasonably necessary to protect his legitimate interests, that the employee gets a reasonable return for the restraint and that it is not contrary to the public interest.[41] A contract which prevents the employee from making use of the employer's trade secrets or other confidential information is unlikely to fail this test unless it so restrains the employee that he cannot use his own skills or is wider than is necessary to protect the employer's legitimate interests.[42] It is not necessary that the information be classifiable as the employer's property provided that the employer can show a legitimate interest to be protected.[43] On the other hand if an attempt is made to restrain the use of all information received by the employee from whatever source the restraint is likely to be void as restraining his use

of his own skills and experience.[44] Whereas normally if such an express contractual term is void the employer is left with no protection, the duty of fidelity is deemed to be so fundamental a part of the relationship of employer and employee that it will not be excluded by the void restraint. In Triplex Safety Glass Co. v Scorah the express covenant was void as being unreasonably in restraint of trade but Farwell J nevertheless implied a term into the contract that any invention made by the employee in the course of his employment belongs to the employer, and so required the former employee to assign his patent.[45] The judge justified his intervention thus:

> "it cannot be that merely because a servant covenants in his contract of service to behave properly and honestly towards his employer and that contract of service happens to be too wide to be enforceable that he is thereby entitled to be as dishonest and to act as unfairly as he pleases towards his employer."[46]

The difficulty arises in deciding how far this decision will go. Which terms of a contract of employment will always necessarily be implied even if an attempt has been made to widen them beyond what the law allows? The whole law concerning restraint of trade is necessarily somewhat uncertain since validity depends in the last resort on what a judge considers "reasonable"; add to that uncertainty the further uncertainty whether, if the restraint is void, some other term will be implied into the contract and the law in this field becomes almost unworkable. As Rideout says[47] on the question whether an express covenant is reasonable

> "The matter is relatively simple where the property is plainly identifiable as a trade secret and the restriction is designed to prevent the employee using it. It becomes progressively more difficult as the proprietary right shades off into general aspects of the business and the restriction affects the employee's own abilities."

A further complication has been added by the decision of the Court of Appeal[48] that in construing the covenant the court may

> "limit its meaning as a matter of construction from the nature of the business in which protection is sought."[49]

Not only is there uncertainty on the judge's view of 'reasonable' but now also on whether, and if so how, he will restrict the written words

of the covenant. The defendant Harris had received legal advice that the restraint was void, and that he was justified in ignoring it, a view shared by two of the four judges who dealt with the case. Where an employer is seeking by a covenant against competition to protect information which is ill-defined and hard to separate from the employee's own skill and experience and so is not susceptible to protection by action for breach of confidence,[50] the onus should be on him to produce a clear and limited protection. The court should not seek to rewrite an excessive covenant for him.

Similarly it is submitted that where the court decides, in a particular case, that the express restraint is void implied terms should then only be brought in to protect information which a reasonable employee would recognise to be his employer's property, and to prevent surreptitious taking away of any information. These are matters which employees in general would recognise as obvious. To imply more could be unfair. As Cross J said, in relation to the action for breach of confidence

> "The law will defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary man."[51]

This is reflected in the decisions of Industrial Tribunals. In some cases dismissal of an employee who showed an intention to work for a rival or set up in competition has been held not unfair even though there was no contractual prohibition or restriction. In Foster v Scaffolding (GB) Ltd.[52] the employee had given to the rival company information which benefitted the rival and injured the employer and there was a strong inference that he was about to leave and

> "take with him as much useful information about [the employer's] business as he could obtain."

In Bergman v Farr & Sons Ltd.[53] the employee attempted to solicit a valued customer; his dismissal was also upheld.

Another area in which the court might be led to imply terms into the employee's contract is where the employer undertakes confidential work for a client. The employer may impliedly warrant to the client that he will use the client's secrets only for the purpose of the contract.[54] It is likely that the court would imply into the employee's contract of employment that he will also keep such information confidential.[55] But whether the client could take advantage of any such implied term is doubtful. In Easton v Hitchcock[56] the plaintiff, a private detective,

was hired to watch the defendant's husband. The detective employed several men on a daily basis as watchers one of whom, after leaving the employment, informed the defendant's husband, thus rendering the exercise fruitless. The defendant refused to pay the plaintiff. The court held that in such a contract the private detective impliedly warranted that she would not disclose her activity to any third party, but refused to extend the warranty to include former employees, on the ground that the limits of such a term could not be clearly prescribed. The question whether the warranty could include present employees was expressly reserved. Since no warranty covering ex-employees had been given, the contract had not been breached and the defendant had to pay for services which everyone knew to be useless. It is submitted that the court was unduly timorous here. Just as a reasonable employee can recognise that certain information belongs to his employer, so he can recognise that misuse of certain information may cause damage either to the employer or to his client. An employed accountant realises that information about his firm's clients must not be given to anyone and his professional code requires him to keep it secret. There is no reason why a non-professional employee should not be under an implied duty not intentionally or negligently to disclose information learned in the course of his employment which may reasonably foreseeably cause damage either to his employer or to his employer's client. The kind of information discussed here is describeable as the property of the client; it is not a question of preventing the employee from using his own skills; the restraint should last beyond the termination of his employment for so long as a reasonable employee would reasonably foresee a likelihood of damage arising from his disclosure. Problems of privity of contract would prevent the client being able to sue the employee. But the employer's contract with the client could include a warranty that his employees would also not disclose the information, leaving the employer to obtain redress against the employee and perhaps the recipient of the information for inducing the breach[57] if necessary. It is submitted that this solution would accord with what businessmen and employees would expect to be the law, without putting an unduly heavy burden on anyone. There is no reason for the law to protect an employee or ex-employee who peddles information, to which he only had access in his employment, with the aim of embarrassing either his employer or the client. There is every reason to ensure that the client who gives confidential information for the purposes of the contract is sufficiently protected against abuse of that confidence.

Will the court ever imply terms protecting the employer's secrets if the contract makes a valid provision for such protection, but in the particular circumstances it is inadequate? Suppose that the contract provides that the employee will not divulge to anyone information received from his employer and marked "confidential." Does this clause exclude the normally implied duty not to disclose information which is the employer's property? It is suggested that the clause would be construed as only applying to information which could be thus marked, leaving room for the implied term in relation to such things as physically-seen secret processes or the design of a machine. But written information not thus marked would not be covered by the express protection and it is suggested that the court would refuse to imply any term protecting it. Similarly, if the express contract restricts the employee's use of information for a fixed period or within a given locality it may be assumed that the court would not give additional protection to the employer outside those limits. To hold otherwise would be to make a mockery of the express terms of the contract. It was suggested above that if the express terms of the contract are void, then the court should only imply terms protecting the employer's property and preventing surreptitious use. Why not apply the same criteria here? It is suggested that if the express terms do make provision then the court should assume that the attention of the parties was sufficiently drawn to the subject and their mind was sufficiently expressed in the contract. In Vokes Ltd. v Heather[58] the Court of Appeal insisted that in the relationship of employer and employee all the terms are part of the contract, whether express or implied, and there is no room for equitable obligations outside the contract.[59] If the contract makes valid, though in the result insufficient, provision for the matter there would seem to be no room for further provision to be implied.[60]

An incidental, but important, result of the contractual nature of the duty of confidentiality in employment would seem to be that it is part of the employer's property and therefore assignable. That it is a valuable adjunct to the employer's secrets is obvious; in Mustad v Dosen the House of Lords assumed that a purchaser of the employer's business could buy also the right to secrecy of former employees, and enforce that right.[61] An action for breach of confidence, however, appears to depend upon the relationship of confidence between the plaintiff and defendant,[62] or at least between the plaintiff and the original discloser of the secret, the defendant not being a bona fide purchaser

for value without notice.[63] Whereas a beneficiary under a trust may assign his equitable interest, and the assignee may then enforce the trust against the trustee, a right of confidentiality does not appear to have acquired that "property" status and is still (as the right to enforcement of a trust once was[64]) a personal right.[65] If breach of confidence is a tort, it is clear that a bare right of action in tort cannot be assigned;[66] it is less clear whether the right to prevent, or receive compensation for, future breaches of confidence may be assigned. The reason for the non-assignability of a bare right of action is the public policy one of preventing maintenance and champerty;[67] it is however clear that property may be assigned even though that property may be incapable of being recovered without litigation - it is a chose in action.[68] In Dawson v Great Northern and City Railway Co. the Court of Appeal had to decide on the validity of an assignment, with a conveyance of the freehold, of rights to compensation for disturbance caused by the building of a railway. Stirling LJ said[69]

> "great weight must be given to the circumstance that the assignment is incidental and subsidiary to that conveyance, and is part of a bona fide transaction the object of which was to transfer to the plaintiff the property of Blake with all the incidents which attached to it in his hands. Such a transaction seems to be very far removed from being a transfer of a mere right of litigation."

The court held that the compensation was not in the nature of damages for a wrong but the price payable for the exercise of a legal right, so the actual decision is of no assistance. But it is submitted that the argument is of great persuasive weight. A trade secret together with the right to prevent disclosure[70] is obviously of more value than the secret without the right; indeed without the right the secret may be worthless. Transfer of the secret together with the right to prevent disclosure is clearly a transfer of property "with all the incidents which attached to it in his hands." It is submitted that if the right to prevent breach of confidence is a right in tort, then it is a right which may be assigned together with the property to which it relates. In all cases it is necessary that the law should be clear, and it would seem to be anomalous if the ability to assign a right of confidentiality should depend on the somewhat fortuitous question whether it is a right in contract, tort or equity.

Whether the employee may be entitled to disclose, in the public interest, information learned in his employment is unclear. It could be raised as a defence to an action for breach of contract or breach of confidence or as a ground for resisting an injunction against threatened disclosure. The cases indicate a defence, at least to breach of confidence, if the disclosed activity is injurious to the public even if not illegal;[71] this may even extend to misleading advertising.[72] An employer may use disclosure, or threatened disclosure, as a ground for dismissal of the employee. Mr Thornley was dismissed by the Aircraft Research Association after writing to a newspaper about weaknesses in certain military aircraft. Mr Laxton lost his job as a local authority planning official after writing in the local newspaper urging councillors to reject a planning application supported by his department. In both cases it could be said that public statements were made for what was seen as the public good, but Mr Thornley's dismissal was held not unfair. He had "denigrated a project his employers were hoping to sell."[73] Mr Laxton, on the other hand, was reinstated and the council were criticized for "gagging" employees.[74] Thus it would seem that the duty of fidelity does not include a prohibition on criticism of the employer but does include protection of his property. However, it is submitted that there should be a defence in all cases that the disclosure was made for the purpose of preventing foreseeable injury to individuals or fraud on the public even if the employer's property is thereby injured.[75] It is very unfortunate if employees may divulge pop-stars' private lives but not defence information which the public may need to know. There is insufficient protection for the brave employee who speaks out. The town clerk who first exposed the illegal activities of John Poulson had to resign his post and could not obtain another. Nothing has been done to compensate him for the hardship caused by his public spirited act.[76] An employer is entitled to protect his commercial property against disclosure by disgruntled employees, but this should not take precedence over the right of the public to know of real dangers.

3. Confidentiality of Information between Partners

Unlike employees, partners have a prima facie right to all information which belongs to the partnership.[1] The law imposes a duty of good faith between partners. Thus one partner may not take advantage of another by withholding information, or make a secret profit. To a large extent the duty of one partner to another is akin to that of the trustee to his beneficiary, but whereas the duty of a trustee not to profit from his trust is widely construed, this is rather less so in the case

of a partner. A trustee may not use for his own benefit information which is trust property even if the trust could not itself use the information;[2] a partner may not use information which is partnership property in competition with the partnership.[3] But in Aas v Benham[4] the Court of Appeal held that a partner who received information through his work in the partnership was not bound to account to the partnership for profits made by him, by the use of that information, in a business outside the scope of the partnership. The partnership is only entitled to profits from information

> "which is the property, or is to be included in the property of the partnership - that is to say, information the use of which is valuable to them as a partnership, and to the use of which they have a vested interest."[5]

This rule applies even if the partner is in breach of his contract of partnership by spending some of his time on another business.[6]

The right of each partner to share in the information belonging to the partnership means that, while they are acting as partners, each can insist on full disclosure by the others. In McLure v Ripley[7] the plaintiff failed to pay money at the time agreed in the partnership agreement. It was held that the defendant was thereafter under no duty to give him further information about the proposed joint venture.

During the partnership, each partner is entitled to inspect the partnership accounts and other books, and to take copies if he wishes.[8] In Trego v Hunt[9] the partnership agreement provided that on the dissolution of the partnership the goodwill of the business would belong entirely to the plaintiff. A short time before the end of the partnership the defendant partner started to take copies of particulars of customers of the firm. He made it known that he intended to set up a competing business when the partnership ended and attempt to persuade the customers to transfer their custom to him. It was agreed in the House of Lords that as a partner he was entitled to inspect the books and take copies. It was held, however, that just as a vendor of the goodwill of a business may not solicit the customers[10] so a partner who has contracted for valuable consideration that another shall have the goodwill of the partnership may not

> "decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."[11]

Since the defendant had clearly stated that he intended to use the

information for a wrongful purpose, the court could grant an injunction even though no wrong had yet been committed.

This case was clearly decided on the ground that the goodwill belonged solely to the plaintiff. In the absence of express provision the goodwill of the partnership will normally belong to all the partners. In Floydd v Cheney the question arose whether a partner in a firm of architects may take copies of documents forming part of the partnership business, with a view to using them on dissolution of the partnership. Megarry J held that he could not.

> "Such acts seem to me to be a plain breach of the duty of good faith owed by one partner to another. I cannot think it right that even if a partnership is marching to its doom each of the partners should be entitled to a surreptitious free-for-all with the partnership working papers."[12]

When counsel in Trego v Hunt were trying to argue that the right of a partner to take information was limited to information for his use in relation to the partnership the judges of the Court of Appeal held that this was too narrow an interpretation.[13] Partners are entitled to the information simply by virtue of their position as partners. Is Floydd v Cheney in conflict with this view? May partners take copies of information or not? It is submitted that the answer lies in seeing the information as property of the partnership. The reason why the defendant Cheney could not take the copies was because he was removing part of the partnership property. On a dissolution the property would be equitably divided between the partners; one may not prejudge the issue by removing some of the property beforehand. This property was different from, for example, a copy of the partnership accounts. If a partner takes a copy of the accounts he has not taken away any property of the partnership. But architect's working drawings, or the secret formula for a medicine,[14] or a list of customers may be part of the partnership property, even if only copies are taken, to be dealt with by the proper arrangements[15] rather than a "free-for-all." The judge in Floydd v Cheney may also have been influenced by the secretive way in which the copies were taken. In the case of an employee, he will be restrained from using any information obtained surreptitiously from his employer, even if his employment is not confidential and the information may not be classifiable as "property."[16] It is a breach of his duty of fidelity. In the same way such an act is a breach of the partner's duty of good

faith. In Trego v Hunt[17] the defendant was taking the information for an improper purpose; in Floydd v Cheney there would be nothing to stop the defendant from setting up in competition with the plaintiff after dissolution of the partnership, but he too acted wrongly in taking partnership property without agreement and behind the back of his partner.

Unless agreement is made to the contrary, all the partners are entitled to share in the value of the secrets of the business. In Morison v Moat[18] a partnership was set up for the purpose of making and selling certain medicines. The secret recipe was communicated by the inventor to the new partner, who undertook not to divulge it to anyone else. The question arose whether, as a partner, he became part-owner of the secret and so able to pass it on to his assignee in the partnership, the defendant. The court held that the agreement indicated that there was no intention to make the secret an asset of the partnership, and so he was not entitled to assign it. The defendant then claimed that first as an assistant and later as a partner by assignment he had become entitled to the secret. It was held that as a servant in confidential employment he would be under a duty to preserve the secret and not use it, and that as a partner his acquisition of the secret would depend on the decision of the owner to confide it to him. On the evidence he had clearly not so intended. The defendant then claimed that the other partners had allowed him to discover the secret by taking part in the making of the medicines. Turner V.C.[19] held that

> "If with the knowledge and concurrence of his partners he was permitted to acquire and did acquire, a full knowledge [of the secret] it would be difficult for any of those partners afterwards to restrain him from using any knowledge so acquired or any secret so disclosed. They would ... be considered to have waived any right to preserve the secret for their separate benefit."

It was held on the facts that this had not happened, and any knowledge which he had of the secret he must have acquired surreptitiously or through a breach of contract by his assignor. As a mere volunteer arquiring title through a "breach of faith and of contract" he would be restrained from using the secret.

Thus, any information which is intended to be part of the property of the partnership belongs to all partners, as also does any information acquired by them in the course of the business and with the concurrence of the partners who own the information. But information which is not intended to be part of the partnership property and which is obtained

surreptitiously or as a result of a breach of faith or contract does not belong to the partners, and any use of it by them even after dissolution of the partnership may be restrained. Difficult problems could perhaps arise if the partner acquires the information from an employee of the partnership who has been entrusted with it. The employee may have no reason to know that the information is not part of the partnership property, so he would not be in breach of his duty in disclosing it to one of his employers. The partner would thus not have acquired the information through a breach of contract or of faith. But it is submitted that his use of it could still be restrained because the relevant culpability is his and not the employee's. Equity will restrain both the innocent recipient from a culpable discloser[20] and the culpable donee from an innocent discloser. And in the latter case at least the defence of purchaser for value would not succeed.[21]

The duty of a partner to disclose all information to his fellow partners[22] may on occasion raise apparent conflicts of interest. A partner is an agent of the firm in obtaining information. If partner X acts for client A and in that capacity obtains information which is not generally known but could be of value to several people, and his fellow-partner Y acts for client B to whom the same information would be of value, what is the position of the partners? If X discloses the information to Y he may be liable to A for breach of trust or may suffer disciplinary action by his professional body.[23] He may even be criminally liable under the proposed offence of insider trading.[24] If he does not disclose, B may sue Y under Hedley Byrne & Co.Ltd. v Heller & Partners Ltd.[25] or Nocton v Lord Ashburton[26] for failure to exercise a proper standard in giving him advice. Partnerships of solicitors, management consultants, investment consultants hold themselves out as having special skills and knowledge. If the second agency is incompatible with the first, the first client may have a right to damages (though not to see information obtained on behalf of the second client[27]). The same problem, apart from the statutory duty of disclosure, may of course arise if X acts for both clients.

One of the reasons for the strong view of Lord Upjohn in Boardman v Phipps that information should not be described as property was the fact that people such as solicitors are expected to use information obtained when acting for one client in their work for later clients.[28] But it is suggested that it is necessary to distinguish between information which is generally obtainable (albeit not easily) or which was obtained by his own skill, experience or contacts, and that which could

only have been obtained because of the relationship with the client or the position as his agent. The former is information which the partner obtains on behalf of the partnership; the latter he holds on trust for the client. Neither his fellow-partners nor any other client can require him to disclose that information for their use for he would be in breach of his duty. The rule that a solicitor shall not be fixed with constructive notice of information obtained in another transaction[29] is a reflection of this principle.

It has been suggested that such information may not be used for another client unless no injury would be caused to the first client;[30] strict application of Boardman v Phipps[31] would indicate that profit made by its use by the agent would belong to the first client even if no injury had been caused.

4. Protecting An Employer's Secrets Against Disclosure By Third Parties Who Have Access To Them For Their Own Purposes.

The employer must allow a large number of people to enter and inspect his premises for various purposes under many different statutes. While there, they may see his manufacturing processes or other secrets. Some visitors have no right of access to these secrets. They are there solely for their own purpose which are unrelated to the business. An example is Gas Board inspectors.[1] Others, such as Factory Inspectors and Environmental Health Officers may need to inspect the premises or machinery or work carried on. They may be concerned with the health and safety of employees and of the public. They may be directly concerned with manufacturing processes and may inevitably learn trade secrets.[2] Yet others may be only indirectly concerned with the business. For example, under the Sex Discrimination Act 1975 the Equal Opportunities Commission may investigate allegations of discrimination by a particular employer. This may involve discovering various secrets relating to the work done by the employees. Furthermore, the employer may have to give information about his business and his employees to a variety of bodies, both government departments and other bodies with functions to perform. He may have to give information to his employees or to the public.

It is important that the employer is adequately protected against disclosure to outsiders of information obtained either directly or indirectly from him about his business. On the other hand it is equally important that those receiving the information should have adequate powers to perform their functions, which may include informing persons at risk from the activities carried on[3] or giving information to the public in general.[4] Another related problem is to decide how far information should be passed between one official body and another.

On the one hand is the principle that the donor should know exactly why the information is required from him and what it will be used for; on the other is the irritation of perhaps being asked for the same information by two different government departments[5] or having two lots of inspectors visiting the factory to see the same things. However if two different inspectors are shown different areas of the factory neither of them will see the whole process and so the employer may feel that his secrets are fairly safe. If they may pool their information his precautions are in vain.[6] The use of computers by the recipients of information may be a particular hazard here because of the increased likelihood of transfer of information between different recipients. In relation to the use of computers it has been said that

> "The real thrust of the attack should be aimed at the criteria for the cross-use of records, and their suitability for each purpose, rather than a blanket attack on the practice under any conditions."[7]

All these rights of inspection and information are conferred by statute. In each case the statute details either the function to be performed or the information to be collected. In the case where the information whose collection is authorised is not related to the business at all the statute could either provide a total embargo on disclosure of any unauthorised information, with civil and criminal liability, or try to ensure that no unauthorised information is discovered. The Gas Act 1972 uses the second method. In relation to factory premises, the Gas Board official may only inspect the Board's meters and the fittings between those meters and the gas mains.[8] He is not entitled to see how the gas is used within the factory, and so the employer may, by suitable siting and screening, prevent the Gas Board official from seeing any part of his business. Probably for this reason, there is no provision in the Act concerned with disclosure of information.

Where, however, the relevant statute does give a right to receive information about the business for certain purposes, the Act may limit the use of the information by the recipient to those purposes. Many of these statutes involve possible civil or criminal liability for non-compliance, and so the recipient of the information is allowed to use it for purposes of legal proceedings under the relevant statute. The Act may include power to disclose with the consent of the person who gave the information. Examples of this restriction of the use of the information to the purposes of the Act, which is widely used, are the Rag Flock Act 1951[9] (any information obtained under the Act) and the

Factories Act 1961 (information relating to "any manufacturing process or trade secret" obtained under the Act).[10] A somewhat wider power of disclosure is seen in the Offices Shops and Railway Premises Act 1963 which allows disclosure for "any legal proceedings" rather than only those instituted under the Act itself as in the other cases.

Parliament decides in some cases that the public is entitled to know some of the information collected. In passing the Statistics of Trade Act 1947 Parliament was concerned both that government departments should acquire detailed information and that the public should be able to see the picture built up by the census of distribution initiated by the Act. Section 9 of the Act provides elaborate precautions against disclosure to the public of individualised information. On second reading of the Bill, Sir Stafford Cripps, President of the Board of Trade, said[11]

> "We believe that this code as regards protection completely protects against any embarrassment to any individual firm by the disclosure of their individual businesses to competitors in this country or overseas as the case may be. That is done in a way which is also consistent with giving the maximum information to the public, to other industrialists and the Government."

The information to be given to the public must be in such a form that an individual person or undertaking cannot be identified, unless his consent has been obtained.[12] The report to the public may include totals of goods produced or sold, but even here, if disclosure might lead to identification, representations may be made to the body producing the report. The Board of Trade (now Department of Trade and Industry) has power to further limit disclosure by statutory instrument.[13]

More recent statutes have been less concerned with protecting the owner, and more with public knowledge. Under the Sex Discrimination Act 1975 the Equal Opportunities Commission may publish general statements, which must not identify the person to whom the information relates,[14] but the Commission is also bound to prepare a report on any formal investigation which it has carried out. Such a report is published and made available for inspection.[15] In preparing such a report the Commission

> "Shall exclude, so far as is consistent with their duties and the object of the report, any matter which relates to the private affairs of any individual or business interests of any person, where the publication of that

matter might, in the opinion of the Commission, prejudicially affect that individual or person."[16]

The Health and Safety at Work etc. Act 1974 also allows for disclosure of information to the public

"in a form calculated to prevent it from being identified as relating to a particular person or case."[17]

Inquiries under section 14 of the Act will normally be held in public and reports of such inquiries and special reports under the same section may be made public if the Commission thinks fit. Information obtained under the section may be included in the report with no requirement of anonymity; this includes trade secrets.[18] Furthermore the Act places a duty on inspectors to inform employees about matters

"affecting their health, safety and welfare."[19]

This includes factual information which the inspector has discovered in relation to their employment[20] and what steps he is intending to take. This information must also be given to the employer. This Act thus gives people directly concerned a right to know detailed information, and a limited right in the public in the case of special investigations and reports.

The Control of Pollution Act 1974 goes further. By section 79(i)(b) local authorities are empowered to obtain and publish information about the problem of pollution of the atmosphere. The material published should not disclose "any trade secret" unless consent is obtained of a person authorised to disclose the secret or the Secretary of State.[21] No information other than trade secrets is protected by this Act,[22] removing the protection from disclosure of manufacturing processes from the Clean Air Act 1956.

The Employment Protection Act 1975 is concerned with making provision for employees rather than the public and, like the Health and Safety at Work etc. Act 1974, recognises their special need for information. Section 17 provides a general duty[24] on employers to give trade unions information to help them in collective bargaining. Machinery is provided for conciliation and arbitration[25] with a final sanction for non-disclosure that terms may be included in employee's contracts.[26] There is no limit placed on what may be done with the information when it has been obtained but there are restrictions on the types of information to be disclosed. Thus information which would injure national security may not be disclosed[27] nor may that which is prohibited by another statute.[28] Personal information may not be disclosed without the individual's consent[29] nor may information

"communicated to the employer in confidence or which the employer has otherwise obtained in consequence of the confidence reposed in him by another person."[30]

Whether internal reports will increasingly be headed "Confidential" in an attempt to avoid disclosure under this provision[31] remains to be seen. It is to be hoped that the Central Arbitration Committee, to whom a complaint of non-disclosure must be made, will not be mesmerised by the mere use of a word. The test should be that the information would not have been obtained at all but for the requirement of confidentiality. The employer's commercial information is also protected by the exclusion of any which

"would cause substantial injury to the employer's undertaking for reasons other than its effect on collective bargaining,"[32]

as is information which would be subject to legal professional privilege.[33] Thus in this Act although the information is to be disclosed for a particular purpose no restriction is placed on subsequent use (perhaps because it would be impossible to enforce) but substantial restrictions are placed on the types of information which must be disclosed.[34]

Whenever information must be given to a government department or other official body, Parliament must decide whether disclosure to other bodies should be allowed only for the purposes of the Act in question, allowed for certain specified other purposes, or allowed generally. The Sex Discrimination Act 1975 is an example of limited internal disclosure. It allows for disclosure within the Equal Opportunities Commission "or, so far as may be necessary for the proper performance of the functions of the Commission, to other person."[35]

The Statistics of Trade Act 1947 was designed to allow for disclosure between government departments to avoid duplication of requests for information and to enable government to have sufficient information when and where it was needed for the planning of the economy. The Opposition, who were basically in favour of the Bill, were more concerned about this aspect than any other. A typical statement was that the co-operation of Industry with the proposed censuses

"will be given in proportion to its confidence in the secrecy of facts and figures supplied"[36]

and attempts were made to ensure that information would only be passed from one department to another with the authority of a senior official,[37] or after giving notice to the firm concerned,[38] or that this would not include individualised information at all.[39] In the result the Act[40] allows for disclosure of information relating to a particular undertaking without consent of the person to whom it relates, to another govern-

ment department for the purposes of the exercise by that department of any of its functions, but only in accordance with directions given by the Minister of the department which first obtained the information. It did not allow for disclosure to any other bodies of individualised information.

A change of emphasis is seen in two recent statutes which amend the section and allow certain information collected under the 1947 Act to be disclosed to other bodies. The Employment and Training Act 1973[41] allows for disclosure by the Secretary of State to the Manpower Services Commission, Employment Service Agency and Training Service Agency of any information obtained under the 1947 Act; disclosure by those bodies to any government department; disclosure between those bodies and industrial training boards where the kind of information and its use is specified by the Secretary of State; disclosure of specified information relating to a particular undertaking to an authorised officer of a local education or planning authority or development corporation for certain specified functions;[42] and disclosure by the Secretary of State in conjunction with the Commission to any person for a purpose to be specified of statistics relating to a particular region or activity. The most significant extension here is in allowing individualised information to go to local authorities. The safeguards are that both the information to be given and the purposes for which it may be given are detailed in the Act itself. The information which may be disclosed under this paragraph[43] consists of the name and address of the establishment, number of persons of different descriptions employed there and the nature of the activities carried on there.

The Health and Safety at Work etc. Act 1974 allows for this same list of information also to be given to the Health and Safety Commission and the Health and Safety Executive established under that Act, as well as further information if specified in a notice by the Secretary of State.[44] It is only to be used for a purpose of the Commission or Executive.[45] But this Act goes further than any previous legislation in allowing for disclosure of information collected under the Act. Apart from information (in particular trade secrets) obtained by exercise of powers of entry under the Act,[46] any information obtained under the Act may be disclosed to any government department, the Commission or the Executive, for any of its purposes. It may be disclosed to any enforcing authority under the Act, which may include local authorities and their inspectors, or any other person, for any purpose in connection with the relevant enactments.[47] Specific authorisation is given for disclosure

to authorised officers of local authorities and water authorities for the purposes of enactments relating to "public health, public safety or the protection of the environment."[48] An authorised police constable may be given information for the purposes of any enactment relating to "public health, public safety or the safety of the State."[49] Thus, in this Act, although the purposes for which disclosure may be allowed are stated, in broad terms, there is no restriction on the kinds of information[50] which may be disclosed. There is little doubt that information which an employer would consider confidential may be widely disseminated under this Act. The justification is the public purposes which are to be achieved by the availability of information.

The Industry Act 1975 provides more draconian provisions, though in a narrower sphere. The Act[51] provides machinery to require a great deal of detailed information about the affairs of a particular manufacturing company to be given both to the Minister and to trade unions, but sets limits on the information which must be given and on what may be done with it. Relevant information is that which is

> "needed to form or to further national economic policies or needed for consultations between Government employers or workers on the outlook for a particular sector of manufacturing industry,"[52]

but the types of information are then specified[53] and

> "details of know-how or of any research or development programme"

are expressly excluded.[54] Furthermore the minister must give notice to Parliament of his request and if the information is not given voluntarily he must lay an order, subject to annulment,[55] though the genuineness of Parliamentary control has been described as "a polite farce."[56] When the Minister receives the information which is detailed in relation to the company, though not to individual employees,[57] it can be passed to any government department for any of their functions and to the various employment and training agencies as well as being used in investigating possible offences and for criminal proceedings and report. The penalty for an offence of non-disclosure is that it may be disclosed without restriction![58] It may be thought that the uses to which the information may be put bear little relation to the purpose for which it was collected.

By contrast, any of the information which the Minister orders to be passed to a trade union has no restriction on subsequent use. But the Act carefully specifies grounds for non-disclosure to the unions of

information which may have been given to the Minister. These may be that it would be "undesirable in the national interest"[59] or would contravene another statutory provision, or a reason particular to the company. Likelihood of "substantial injury" to the undertaking or to a body of employees are special reasons[60] for non-disclosure as is the fact that the information was communicated to the company in confidence or was only received in consequence of a confidence reposed in them by another person.[61] Thus the national interest, the company's commercial interests and the confidences of others are seen as grounds for non-disclosure where no limitation of subsequent use is given.[62]

For the purposes of levying taxation the Inland Revenue have access to a large amount of information, both personal and relating to a business, which would otherwise be considered quite private. They have wide powers for acquiring the information.[63] A general recognition of the confidentiality of this information[64] is seen in the fact that all officers of the Inland Revenue on taking office make a declaration that they will not disclose any information received in the execution of their duties except for the purpose of their duties or for the purpose of a prosecution for an Inland Revenue offence or (in the case of junior officers) to the Board of Inland Revenue or in accordance with their instructions.[65] Thus taxation information is recognised to be more confidential than other information received by government departments.[66]

The obligation of secrecy is relaxed for particular purposes in various Acts. For example, disclosure is allowed to a designated governmental official of another country to enable double taxation relief to be assessed;[67] until 1976 disclosure was allowed to the government of Northern Ireland for the purpose of determining a person's liability to tax in accordance with the agreement between the two countries.[68] These two cases, and there have been other similar provisions, relate solely to taxation matters and are, or have been, necessary to enable the taxation provisions to be applied. Such provisions are part of the machinery of the assessment of tax, and are likely anyway to be beneficial to the person to whom the information relates.

The Finance Act 1969,[69] however, allows for disclosure to other bodies for other purposes. Disclosure is authorised to the Department of Employment, Business Statistics Office of the Department of Trade and Manpower Services Commission for the purpose of any statistical survey. The information which may be thus disclosed is specified, and is limited to names and addresses of employers and numbers of employees, or the name

and address of the employer of a particular employee selected as a statistical sample for a survey relating to earnings. A further precaution is that the Act specifies that the recipient body may further disclose the information only to another such body for the same purpose or in a non-personalised summary form or with the consent of the person to whom it relates.

None of these taxation statutes allows for a general passing round of the information to other government departments for their unspecified purposes, as do some of the other Acts discussed above.[70] However, the Finance Act 1972 allows for a general sharing of such information between the Commissioners of Inland Revenue and the Commissioners of Customs and Excise "for the purpose of assisting them in the performance of their duties."[71] There is no need to specify the purpose for which the information is required, and no Ministerial or other consent need be obtained.[72] But the section restricts further disclosure by the recipient body other than "for the purpose of any proceedings connected with a matter in relation to which those Commissioners perform duties."[73] This provision is a new departure in the field of tax law, though the disclosure allowed is still less wide than that allowed in other, non-taxation statutes.

The question arises what is the effect of these various statutory provisions. If the receiving body does pass on the information to another body without express statutory authorisation, or if the information is used for a purpose which is not authorised, has the injured donor of the information any redress?[74] (It is unlikely that he will discover how the information was acquired or used, but there are increasing instances of "leaks" which may give such facts.)[75] Clearly if the disclosure or use is expressly prohibited by the statute, or a penalty is provided for disclosure, then such disclosure is unjustifiable[76] even in legal proceedings. In such a case an action for breach of statutory duty might lie. The injured donor of the information would seem to be clearly within the mischief of the statute.

A more difficult question arises where the disclosure in question is not expressly forbidden, but is not within the authorised list.

A divergence of judicial opinion about the effect of statutory authorisation of limited disclosure of information is seen in the case of Norwich Pharmacal Co. v Commissioners of Customs and Excise.[77] Counsel for the Commissioners pointed to the various statutory provisions and argued that no disclosure other than those provided for was permissible,

even for the purpose of legal proceedings. This contention was unanimously rejected by the House of Lords who pointed out that the rule could not be absolute as information would be disclosed for a serious criminal case (conceded by counsel); it could therefore be disclosed in the case of a civil wrong, at least under a court order. The House affirmed the duty of the court to weigh the conflicting public interests of disclosure and confidentiality.[78] Lord Cross argued that the provisions

> "were enacted in order to make it clear that the obligation of secrecy which the Commissioners very properly consider to be binding on them as a general rule is not to apply in the cases there specified."[79]

His Lordship clearly anticipated that disclosure would not normally be made.

Viscount Dilhorne however took a different view. He argued that a distinction should be drawn between information which is confidential in nature and that which is not. He said

> "I agree that information of a personal character obtained in the exercise of statutory powers, information of such a character that the giver of it would not expect it to be used for any purpose other than that for which it is given, or disclosed to any person not concerned with that purpose, is to be regarded as protected from disclosure, even though there is no statutory prohibition of its disclosure. But not all information given to a government department, whether voluntarily or under compulsion, is of this confidential character."[80]

He suggested that the statutory provisions allowing disclosure were enacted at the request of the Commissioners because of their, erroneous, view that otherwise all disclosure by them would be prohibited, and so they do not indicate a general duty of non-disclosure. One might have expected his Lordship to have concluded that the Commissioners were wrong not to have disclosed the information (names and addresses of importers of a chemical) without requiring a court order, but he agreed with the rest of the House that they had acted properly, in requiring the claimants to get a court order.

Lord Morris, in the same case, suggested that the express prohibition of disclosure of names in one of the statutory provisions indicated that such information was

"within an area indicated by the legislature as being one of special sensitivity"[81]

and the court should take this into account in making an order.

It seems clear at least that, with the judges unsure whether non-authorisation means a prohibition of disclosure in all cases, or only some, an aggrieved individual would be unlikely to succeed in an action for breach of statutory duty. He would not succeed under the present law in an action for breach of statutory duty if nothing is said about subsequent disclosure in the Act; it has been said that information disclosed for one purpose should not be used for other purposes[82] but there is no general statutory rule to this effect. Perhaps there should be, but the absence of any restriction in recent Acts such as the Employment Protection Act 1975[83] suggests that unrestricted disclosure or use was anticipated.

It is possible, however, that the aggrieved person could succeed in an action for breach of confidence whether subsequent disclosure is limited or not mentioned, if the information is of a confidential nature, being personal or commercial information which would not have been disclosed but for a relationship of confidence or which was disclosed for a particular purpose.[84] However, if the plaintiff's complaint is that he was convicted of an unrelated offence as a result of the disclosure he will probably fail since disclosure of 'iniquity' is at least a defence if not a duty.[85] Furthermore, the defendant might be able to say either that consent to such disclosure could be implied or that the disclosure was made in the public interest.[86] The extent of such defences is uncertain so that the protection given to those who have to provide information is not sufficient in view of the amount and nature of information which has to be given to various bodies and the potential injury that can be caused by dissemination. Co-operation in the provision of information depends in the end on the relevance of what is collected and protection against excessive disclosure.[87] As more detailed information is required it becomes more necessary to provide a proper statutory protection.[88]

5. Protecting Commercial Information Against Exploitation By Others

When a person discovers or invents something he may try to keep it secret but he runs the risk that someone else may make the same discovery or invention. If he puts his product on the market there will be nothing to stop others taking it apart or analysing it or otherwise discovering the secret and then setting themselves up in competition to make the same or a modified product. Similarly if he publishes

information there is nothing to stop others making use of it, though the law of copyright prevents them copying the form in which he has expressed it.

The law encourages competition but also recognises the importance of encouraging innovations.[1] The original discoverer of patentable information may obtain a patent which will give him the sole right to make use of his invention for, usually, twenty years.[2] During that time[3] he may prevent anyone[4] else from using it, at least without payment to him, even if the other person since independently discovers it. But the price of this monopoly is full disclosure

> "in a manner which is clear enough and complete enough for the invention to be performed by a person skilled in the art,"[5]

so that thereafter the information is within the public domain, If the holder of the patent does not sufficiently exploit it a compulsory licence may be granted to another to do so.[6]

The question arises whether the discoverer of patentable information should have any protection if he does not obtain a patent, and if he does have protection how long it should last.[7] If another person makes the same or a similar discovery and obtains a patent for which he applies before the original discoverer has taken any steps in the exploitation of his invention, the original discoverer will not only be prevented from exploiting his own invention during the period of the other's patent but the information will then be in the public domain and his 'secret' will be worthless. However, if he has in good faith begun to take steps to exploit it, the Patents Act 1977[8] gives him some protection. He can continue to do "that act" though it infringes the patent and, if it was done in the course of a business, he may assign the right to do it or pass it on his death, but only to a successor in the business. But he cannot grant licences to exploit the invention and, if he had discovered it in his spare time, he cannot set up a company to exploit it or sell the invention to another or even leave it in his will.

Can he then prevent others from finding out the same thing by telling them in confidence? If he does so, how long will they be bound? In Morison v Moat[9] the parties to the breach of confidence action were the children of the original sharers of the secret, the parties to the agreement having long since died and in Newberry v James[10] the action was brought more than sixty years after the original agreement. It is clear that if an inventor shows his plans to a manufacturer with a view to

collaboration there is a presumption that the information is received in confidence.[11] If collaboration does not take place the donee will be prevented from using the information, or will have to share the profits[12] with the inventor, even if he acted without awareness of the breach.[13] This may so restrict the inventiveness of the recipient and even his ability to use information discovered by himself that some large companies with their own research departments refuse to receive information in confidence. It has been suggested[14] that a requirement of release from any obligation of confidence is unfair and that a provision for an independent expert to decide whether the information was already known should be sufficient protection for the recipient company. It may be that a release provision would be avoided in equity on the grounds of inequality of bargaining power.[15] If the recipient company applies written standard terms of business excluding liability for any breach of confidence the contractual provision will not release it from liability unless the provision is a fair and reasonable one in the particular circumstances.[16]

But suppose the inventor then markets his product, without patent, so that the secret becomes discoverable by anyone. Must the person who received it in confidence refrain from using it though anyone else may? It seems that if he did not use it while he alone knew it[17] no restraint will be placed on his use once it is no longer secret.[18] But if his knowledge gives him an advantage over others, he will not be allowed to benefit from that headstart or "springboard"[19] to compete unfairly with the donor of the information. Melville[20] offers a tentative rule

> "Where valuable information of a confidential nature forming part of the goodwill of a business is conveyed to another in confidence he is bound by that confidence and by any lawful conditions to which the information is subject. After such information or any part thereof is in the public domain the nature of the obligation changes and in due course is dissipated and discharged, the period for such dissipation being reasonable having regard to the headstart given to the disclosee by the springboard of prior disclosure."

This accords with the attitude of the law to employees for in spite of his duty of fidelity an employee will not be restrained (in the absence of express contractual provision) from using information which any third party could acquire,[21] unless he has acted unconscionably in taking it

surreptitiously.[22] Indeed it has been suggested[23] that if the plaintiff has not sought a patent he should have no protection. Thus the law is protecting information which may properly be said to be the property[24] of the plaintiff and is also concerned to prevent or sanction unconscionable behaviour. The length of time for which a defendant may be restrained and the extent of sanctions against him must inevitably depend on the circumstances of each case. Injunctions against infringements made when the information was secret may be perpetual but it is thought that restraint against producing new goods after the information has become public should not extend beyond the period of patent protection.[25] This is considered sufficient if the plaintiff has a patent; he should not be given more by action for breach of confidence or contract. The basis of the law in this field is that the defendant must not take unfair advantage of his possession of confidential information; the plaintiff should not be allowed to do so either.

Another problem which has received less attention is whether the discoverer may use the law of confidence to suppress his invention. It may be something which would devalue his existing product and yet be less profitable[26] and which a competitor might use to injure him. If he tells in confidence those who might be expected to discover the invention can he then prevent them from ever using or disclosing the information? Here there is a question of public interest. If a patent is not exploited by the patent holder anyone wishing to do so may apply for a compulsory licence,[27] so the public get the benefit. It is suggested that similar provisions should be made where the information is covered by confidence and not patent.[28] There is perhaps a defence of disclosure in the public interest if, for example, the suppressed information indicated the dangerous properties of the discoverer's product[29] but there is no clear defence to breach of confidence that disclosure or use would be for the public benefit and the court might look askance at such a claim from a defendant who was setting up in business in competition with the plaintiff.[30] It is not sufficient in the public interest that third parties are not prevented from independent discovery;[31] the court should be able to grant a right to use the information,[32] in spite of the obligation of confidence, on terms similar to those for a compulsory licence of a patent.

The law of copyright may be used for the protection of confidential information[33] but only the owner of the copyright may bring the action. Thus when someone stole a memorandum written by Norah Beloff concerning Ministerial speculations about a possible future Prime Minister she lost

her action for breach of copyright against the newspaper which published it because the judge held that copyright was owned by her employer[34] but he commented[35] that her complaint was really of the breach of confidence in disclosing her source rather than the copying of the memorandum.

Another person was more successful in using copyright to stem criticism. Mr Rose, an engineer, refused to assign to his former employers the copyright in certain plans and calculations he had made when employed by them because he knew the Sunday Times wanted to publish them in an article on an unsafe building. He felt this would villify him as the person responsible without any trial. He was able to extract an undertaking from the former employers not to knowingly cause or permit copies to be published, although they had claimed a public duty to pass on the information. The judge pointed out that they could pass it on "at secondhand."[36] The owner of copyright has a right to prevent the form being reproduced but copyright does not protect the substance of the work from disclosure.

It has long been recognised that copyright law does not prevent actions for breach of confidence. Under the pre-1911 law the owner of copyright in unpublished material could not bring an action to enforce it unless it was registered. Prince Albert v Strange[37] indicated that even if it was unregistered it was property and so could be protected by action in breach of confidence; the Court of Appeal in Tuck v Priester[38] granted an injunction against a "gross breach of faith" though the copyright had not been registered. The Copyright Act 1956[39] makes it clear that

> "Nothing in this Act shall affect the operation of any rule of equity relating to breaches of trust or confidence."

A duty of confidence may be owed to someone other than the copyright owner, and may protect matters such as the plot of a play, or characters, which are not protectable by copyright,[40] but only of course if the information was obtained in confidence whereas copyright applies automatically.

The question arises whether by confidence information may be suppressed indefinitely. Although compulsory licences may be granted under the copyright law[41] there is not the same public interest in obtaining copies as there is in the exploitation of patents, and in fact copyright time does not being to run until publication[42] so there is no time limit on confidential information. Therefore there is no need for a general right to breach confidence and disclose such information on the ground of suppression though there should be a defence of disclosure to prevent

foreseeable injury. The argument for a wide defence of public interest[43] is balanced by the importance of protecting confidences. It has been said that use of a 'leaked' document could not be fair dealing within the Copyright Act 1956 section 6. Such a use in breach of confidence would be equally unjustified.

NOTES

1. *Confederation of British Industries Review May 1975 suggesting "tens of millions of pounds" quoted in The Times May 12 1975.*

2. *Two employees demanded nearly £300,000 from ICI in return for tapes. They were unsuccessful: The Guardian January 18 1977.*

3. *An analysis in United States of America in 1975 indicated weak control in magnetic tape libraries; in two East Midlands Companies no librarian was employed and tapes were stored on shelves in a corridor: Jay: Computer Security 1977 unpublished undergraduate thesis of Trent Polytechnic.*

4. *A criminal offence of insider trading in quoted securities is proposed in the White Paper: The Conduct of Company Directors (1978) Cmnd.7037. By para.28 it would apply not only to directors and employees but to anyone with information "not generally available" and which "would be likely to materially affect the price" of the securities. The change of emphasis from the status of the holder to the potential damage of use of the information is in line with the principles proposed in Chapter 2, but it is not taken to its full extent as in United States of America.*

5. *The Factory Act 1844 was the first to deal with safety measures: Gayler & Purvis: Industrial Law 2nd.ed.1972 pub. Harrap.*

6. *Section 2(2)(c); section 28(8), (9). Under earlier legislation Factory Inspectors often knew of health hazards but were forbidden to inform employees: Howells (1974) 3 Industrial Law Journal 87, 91. Civil actions based on negligence may still be the first way the public is alerted to unfamiliar areas of work-hazard: Industrial Law Society (1975) 4 Industrial Law Journal 195.*

7. *The Times May 31 1978.*

8. *There is also a suggestion that employers suppress such information "because of the trouble and expense if the workforce got to know": Speech to RoSPA by the legal adviser to DuPont (U.K.): The Times May 26 1978.*

9. *In 1975 the C.B.I. council recommended every company to develop a policy for providing information to employees: The Times November 18 1975; Industrial and Commercial Training May 1975 page 184.*

10. *Sections 17-21. In force in August 1977 with the Code of Practice.*

11. *quoted in The Times May 16 1977.*

12. *The Times July 5 1976.*

13. *The Times May 26 1978.*

14. *Innis Macbeath: The Times May 16 1977.*

15. *A similar reaction can be seen when governments fail to implement promises: Jacob: Some reflections on governmental secrecy [1974] Public Law 25,28.*

16. *The Employment Protection Act 1975 provisions follow those in the Industrial Relations Act 1971 sections 56(1) and 158: Kay: Disclosure and collective bargaining [1973] J.B.L.126.*

17. *By section 57 of the Industrial Relations Act 1971 individual employees were entitled to some information. The section did not come into force.*

18. *The Industry Act 1975 has been said to "set the seal on the ever-closer relationship that has developed between government and industry": Page: [1976] J.B.L.130.*

19. *Much opposition to the Green Paper proposals on disclosures to be made in company accounts of such matters as energy usage and international trade is based on fear of public accountability being built into company law. For example the Stock Exchange criticisms: The Times January 12 1978.*

20. *Health and Safety at Work etc. Act 1974 section 3(3).*

21. *The Times November 24 1975.*

22. *The Times July 7 1977. "They are concerned lest political capital may be made."*

23. *Ganz: Government and Industry 1977 pub.Professional Books Ltd. especially chapter 5. The Public Accounts Committee have called for full acess by the Comptroller and Auditor General to the records and papers of the National Enterprise Board and British National Oil Corporation, including specific investment information which would not normally be given by a holding company: Eighth Report H.C. Paper 621 August 25 1978.*

24. *Melville: Precedents on Intellectual Property 2nd ed. 1972 pub. Sweet & Maxwell page 297.*

Protecting the Employer against the Employee

25. *Rideout: Principles of Labour Law 2nd ed. 1976 pub. Sweet & Maxwell page. 94.*

26. *[1946] 1 All E.R.350.*

27. *[1895] 2 Q.B.315.*

28. *[1935] 2 K.B.80.*

29. *Tipping v Clark (1847) 2 Hare.393; AmberSize & Chemical Co.Ltd. v Menzel [1913] 2 Ch.239. But cf.Woodward v Hutchins [1977] 2 All E.R.751.*

30. *British Celanese Ltd. v Moncrieff [1948] 2 All E.R.44*

31. *section 39.*

32. *section 42.*

33. *or vice versa section 40.*

34. *Printers & Finishers Ltd. v Holloway [1964] 3 All E.R.731, applied in Thomas Marshall (Exports) Ltd. v Guinle [1978] 3 All E.R.193. In Vokes Ltd. v Heather (1945) 62 R.P.C.135 the Court of Appeal insisted that the obligation of good faith is an implied term of the contract and not a separate equitable obligation, and so could be modified by the contract.*

35. *[1922] 2 Ch.475, C.A.*

36. *[1972] 2 All E.R.759.*

37. *He had not surreptitiously taken the information.*

38. *Libling: The concept of property: property in intangibles (1978) 94 L.Q.R.103,119. The 'right' is not yet fully recognised in law, cf. Melville op.cit. probably following Felix Cohen (1954), emphasises that property involves a right to exclude others.*

39. *Yates Circuit Foil Co. v Electrofoils Ltd [1976] F.S.R.345,384.*

40. Littlewoods Organisation Ltd. v Harris [1978] 1 All E.R.1026,1038. Megaw L.J.

41. Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co. [1894] A.C.535; Esso Petroleum Co. v Harpers Garage (Stowport) [1968] A.C.699.

42. Commercial Plastics Ltd. v Vincent [1964] 3 All E.R.546.C.A. disapproved by Goodhart: (1965) 81 L.Q.R.5.

43. It may thus be a wider protection than an action for breach of confidence.

44. Triplex Safety Glass Co. v Scorah [1938] 1 Ch.211.

45. cf. Patents Act 1977 section 42 for inventions after July 1977.

46. [1938] 1 Ch.211,217. Jacob & Jacob: Confidential communications (1969) 119 New Law Journal 133 suggest that the existence of express terms (albeit void) excluded the possibility of implied terms.

47. Principles of Labour Law page 95.

48. Littlewoods Organisation Ltd. v Harris [1978] 1 All E.R.1026.

49. at 1040 (Megaw L.J.); similarly at 1037 (Lord Denning M.R.). cf. Browne L.J. dissented.

50. Printers & Finishers Ltd. v Holloway [1964] 3 All E.R.731 as explained by Megaw L.J.

51. Printers & Finishers Ltd. v Holloway (above) at 736. Followed in United Sterling Corp. v Felton [1974] R.P.C.162.

52. (342/73) Beverley Tribunal. Quoted in McGlyne: Unfair Dismissal Cases 1976 pub. Butterworths page 168.

53. (11022/73) Birmingham Tribunal.

54. Pollard v Photographic Co. (1889) 40 Ch.D.345 (photographic plate of the client); Ackroyds (London) Ltd v Islington Plastics Ltd [1962] R.P.C.97 (tool for making plastic swizzle-sticks and information about the market).

55. This was clearly implied in Prince Albert v Strange (1849) 1 Mac. & G.25; 41 E.R.1171.

56. [1912] 1 K.B.535.

57. Ansell Rubber Co. v Allied Rubber Industries [1967] V.R.37.

58. (1945) 62 R.P.C.135.

59. The contract may be construed as creating a trust which may outlast the contract. Triplex Safety Glass Ltd. v Scorah [1938] 1 Ch.211; British Celanese Ltd. v Moncrieff [1948] 2 All E.R.44.

60. This reasoning was applied in Thomas Marshall (Exports) Ltd. v Guinle [1978] 3 All E.R.193 where a covenant forbidding 'disclosure' was held not to forbid 'use'.

61. [1963] 3 All E.R.416 decided in 1928. The plaintiffs failed to get an injunction because they had patented the invention and so made it public.

62. Fraser v Evans [1969] 1 All E.R.8. approved by Jones (1970) 86 L.Q.R. 463. but cf. discussion in Chapter 1.

63. Morison v Moat (1852) 21 L.J.Ch.248 affirming 20 L.J.Ch.513.

64. *The Statute 1 Richard 3 c.1. allowed a beneficiary to alienate the property rather than just the use: Ashburner: Principles of Equity 2nd ed.1933 page 23.*

65. *A mere equity is a right ancillary to property but is not usually assignable: Snell: Principles of Equity page 25. An example of a personal, non-assignable, right recognised in equity is the wife's right to have accommodation provided by her husband: National Provincial Bank Ltd. v Ainsworth [1965] A.C.1175.*

66. *Prosser v Edmonds (1835) 1 Y. & C. Ex.481 approved obiter in Defries v Milne [1913] 1 Ch.98.C.A.*

67. *Although the actions have been abolished, the rule probably remains: Criminal Law Act 1967 section 14 (2).*

68. *Law of Property Act 1925 section 136.*

69. *[1905] 1 K.B.260,271.*

70. *The right is, of course, only to prevent disclosure by those who are bound by the duty not to disclose; there is nothing to prevent third parties discovering the information by themselves if it is not patented. It has been argued that this prevents the information being describable as property: Melville: Precedents on Intellectual Property page 34.*

71. *Initial Services Ltd. v Putterill [1967]3 All E.R.145; Hubbard v Vosper [1972] 1 All E.R.1023. Street: New Society December 15 1977 suggests this may apply to a local authority officer disclosing the activities of his department.*

72. *Woodward v Hutchins [1977] 2 All E.R.751.*

73. *The Times May 12 1977, E.A.T.*

74. *The Times June 7 1977. Glasgow Industrial Tribunal. The Local Authorities' Scheme of Conditions of Service para.74 forbids disclosure by officials of proceedings of meetings or contents of documents.*

75. *Prevention of frauds or crimes has been suggested as a ground for disclosure by a bank of a customer's confidential information: Tournier v National Provincial & Union Bank of England [1924] 1 K.B.461.*

76. *Similarly the House of Commons in 1975 failed to prevent the redundancy of Mr Grimshaw who had given valuable evidence of Coal Board pricing policy to a Select Committee: Discussed in Chapter 7B.*

Confidentiality between partners.

1. *Partnership Act 1890 section 28.*

2. *Keech v Sandford (1726) 2 Eq.Cas.Abr.741; Boardman v Phipps [1967] 2 A.C.46; applied to a company director Industrial Developments Consultants Ltd v Cooley [1972] 2 All E.R.162.*

3. *Dean v MacDowell (1878) 8 Ch.D.345; Partnership Act 1890 sections 29,30.*

4. *[1891] 2 Ch.244.*

5. *Bowen L.J. at 257 explaining Dean v MacDowell (above).*

6. *Dean v MacDowell (above).*

7. *(1850) 2 Mac. & G.274; 42 E.R.105.*

8. *Partnership Act 1890 section 24(9). A company director has a common law right to inspect all the company's books to enable him to perform his duties as director: Conway and others v Petronius Clothing Co. Ltd. and others [1978] 1 All E.R.185. This right is a corollary of his duty, whereas the partner's right, like that of a beneficiary under a trust or principal of an agent, is based on ownership.*

9. *[1896] A.C.7.*

10. *The court overruled Pearson v Pearson (1884) 27 Ch.D.145 and reinstated Labouchere v Dawson (1872) L.R.13 Eq.322 on this point, as the Court of Appeal had hoped.*

11. *[1896] A.C.7, 25 Lord Macnaghten.*

12. *[1970] 1 All E.R.446,450.*

13. *[1895] 1 Ch.462. A statutory, as opposed to a common law, right allows the court no discretion in enforcing it: Conway v Petronius Clothing Co. Ltd. (above).*

14. *Morison v Moat (1852) 21 L.J.Ch.248.*

15. *Partnership Act 1890 section 20(1).*

16. *Robb v Green [1895] 2 Q.B.315.*

17. *[1896] A.C.7.*

18. *(1852) 21 L.J.Ch.248.C.A.*

19. *(1851) 20 L.J.Ch.513,527 affirmed by the Court of Appeal.*

20. *Fraser v Evans [1969] 1 All E.R.8.*

21. *In Morison v Moat (above) it was suggested that a bona fide purchaser for value might be protected. But in Stevenson, Jordan & Harrison Ltd. v Macdonald & Evans Ltd. (1951) 68 R.P.C.190 an injunction was granted to prevent publication although the publishers had no notice of any breach of confidence when they contracted to publish Gareth Jones (1970) 86 L.Q.R.463 suggests the more relevant defence would be change of position. See Chapter 1.*

22. *Partnership Act 1890 section 28.*

23. *Rider: The fiduciary and the frying pan [1978] Conv.114 the Law Society forbids disclosure: 71 Law Soc.Gaz.395.*

24. *If the information related to quoted securities: Changes in Company Law (1978) Cmnd.7291 draft clause 57 (5).*

25. *[1964] A.C.465.*

26. *[1914] A.C.932.*

27. *North & South Trust Co. v Berkeley [1971] 1 All E.R.980.*

28. *[1966] 3 All E.R.721,759.*

29. *Law of Property Act 1925 section 199 (1)(b); Taylor v Blacklow (1836) 3 Bing.N.C.235.*

30. *Rider loc.cit. at 128.*

31. *[1966] 3 All E.R.721.*

Protecting the Employer against Third Parties

1. *Gas Act 1972 Schedule 4 Para.24.*

2. *Health and Safety at Work etc. Act 1974 sections 14,20.*

3. *As under the Health and Safety at work etc. Act 1974; Control of Pollution Act 1974.*

4. *As under the Statistics of Trade Act 1947; Sex Discrimination Act 1975; Consumer Safety Act 1978.*

5. *The Business Statistics Office have been able to reduce the number of forms sent out by taking some information from V.A.T. registers: The Times May 23 1978.*

6. *It has been said that a major problem of industrial spying in this field lies in the impersonation of environmental health officers (Conversation with a former environmental health officer February 1976).*

7. *Tapper: Computers and the Law 1973 pub. Weidenfield and Nicolson page 43. The principles proposed by the Data Protection Committee (1978) Cmnd.7341 para.21.09. in relation to personal information have the same emphasis.*

8. *Gas Act 1972 Schedule 4 para.24(2).*

9. *Section 13 (b).*

10. *Section 154.*

11. *H.C.Deb. Vol.432 (5th series) Co.46.*

12. *Statistics of Trade Act 1947 section 9 (5)(b).*

13. *ibid. section 9(3).*

14. *Sex Discrimination Act 1975 section 61 (1)(c).*

15. *ibid. section 60 (3), (4).*

16. *ibid. section 61 (3).*

17. *Health and Safety at Work etc. Act 1974 section 28(3)(d).*

18. *ibid. section 28 (7)(b).*

19. *ibid. section 28(8).*

20. *Some employers are anxious that information about the composition of their products sought by the Health and Safety Executive, and formerly given in confidence, may by this provision get back to their rivals by way of the unions.*

21. *Control of Pollution Act 1974 section 79(5). By the Control of Atmospheric Pollution (Research and Publicity) Regulations S.I. 1977 No.19 a local authority must keep a register of information obtained under section 79(2).*

22. *Section 94.*

23. *Section 79(10). In force January 1 1976.*

24. *This Part of the Act came into force in August 1977.*

25. *Section 19.*

26. *Section 20.*

27. *Section 18 (1)(a). The Minister's certificate is conclusive: Section 19 (17).*

28. *For example the Official Secrets Acts.*

29. *Section 18 (1)(d). This might include salary, but not salary scales.*

30. *Section 18 (1)(c).*

31. *This is often done, for example in relation to accident reports: above Chapter 3.*

32. *Section 18 (1)(e).*

33. *Section 18 (1)(f).*

34. *In the first case under these provisions the managers of the Daily and Sunday Telegraph were required to disclose pay scales for employees: Daily Telegraph July 1 1978.*

35. *Sex Discrimination Act 1975 section 61 (1)(e).*

36. *H.C.Deb. Vol.432 (5th Series) col.99 Sir R.Glyn.*

37. *ibid. col.108 Sir A.Grindley.*

38. *ibid. col.57 Mr D.Eccles.*

39. *ibid. col.113 Mr I.J.Pitman.*

40. *Statistics of Trade Act 1947 section 9.*

41. *Section 4(3).*

42. *ibid. section 4(5)(d) and (e).*

43. *Section 4 (3)(e).*

44. *Health and Safety at Work, etc. Act 1974 section 27(2).*

45. *ibid. section 27(4).*

46. *This may only be disclosed with consent or for the discloser's functions or for legal proceedings, inquiry or report: section 28(7).*

47. *Section 53(1) and Schedule 1. The list includes most statutes relating to employment, apart from those concerned with taxation.*

48. *ibid. Sections 28(3)(c) and 28 (5)(b).*

49. *ibid. section 28(3)(C)(iv) and 28 (5)(C).*

50. *It is of course limited to information collected under the Act.*

51. *Industry Act 1975 sections 28-34.*

52. *Section 28(1).*

53. *Section 30 (1).*

54. *Section 30(5) thus protecting the company's major commercial secrets. cf. Consumer Safety Act 1978 which exempts only legal professional privilege, but restricts subsequent disclosure: Section 4(1), (3).*

55. *Section 28(8)*

56. *Sharpe: The Industry Act 1975 1976 pub.Butterworths.*

57. *Section 30(2)(a).*

58. *Section 33.*

59. *Section 31(3)(a). This is much wider than national security which was the proposal of the White Paper: The Regeneration of British Industry (1974) Cmnd.5710 para.20.*

60. *In case of dispute on special reasons an Advisory Committee, sitting in private, may make a recommendation but the Minister decides: section 32.*

61. *One would not expect that this could be information about the company itself. The White Paper proposed exemptions only for national security and serious prejudice to the company's commercial interests.*

62. *Once the information has been passed to the trade union, it will not be treated as confidential by the Government department: H.C.Deb. 5th series Vol.888 (written answer col.58).*

63. *Income and Corporation Taxes Act 1970 sections 453,481 (as amended): Taxes Management Act 1970 section 20 (as amended): Finance Act 1976 Schedule 6; Royal Bank of Canada v I.R.C. [1972] 1 All E.R. 225; Clinch v I.R.C. [1972] 2 W.L.R.862; Wilover Nominees Ltd. v I.R.C. [1974] 3 All E.R. 496; Power to obtain information from lawyers about their clients was given by the Finance Act 1975, Schedule 4 paras.4,5.*

64. *It has been pointed out that the respect of the I.R.C. for confidentiality stems from their need for public co-operation to function efficiently, whereas bodies like Social Security require the public seeking benefits to contact them and give information: Jacob [1974] Public Law 25,33.*

65. *Taxes Management Act 1970 section 6 and Schedule 1 (as amended by Finance Act 1975 section 57(2).).*

66. *The New Law Journal campaigned against the use of P.A.Y.E. coding letters which disclose marital status: (1972) 122 New Law Journal 801,822.*

67. *Income and Corporation Taxes Act 1970 section 518 (as amended by Finance Act 1972 section 100).*

68. *Finance Act 1927 section 53, repealed by Finance Act 1976 section 132(5).*

69. *Section 58 (as amended by the Employment and Training Act 1973 section 4(6).).*

70. *The Department of Health and Social Security would like access to tax records to trace self-employed people: The Times April 9 1977.*

71. *Finance Act 1972 section 127(1).*

72. *Undertakings were given in the passage of the Bill that exchanges would only be made at Head Office level. In 1977 exchanges at local level were authorised: The Times February 18 1977.*

73. *ibid. section 127(2).*

74. *Those who persuade or agree to cause by dishonest means a person performing public duties to act contrary to his duty commit the crime of conspiracy to defraud: D.P.P. v Withers [1974] 3 All E.R.984; Scott v Commissioner of Police for the Metropolis [1974] 3 All E.R. 1032.*

75. *For example in Rogers v Home Secretary [1972] 2 All E.R.1057.*

76. *Rowell v Pratt [1938] A.C.101. There may also be criminal liability under the Official Secrets Acts if the information is passed outside the Government service without authorisation.*

77. *[1973] 2 All E.R.943.*

78. *Discussed in Chapter 3.*

79. *at 968.*

80. *at 961.*

81. *at 954.*

82. *For example the Franks Report (1972) Cmnd.5104 para.192 "it is generally accepted." Before the 1971 census the Government promised that the information would not be given to outside bodies, but a follow-up on nurses was done for the DHSS. Sunday Times July 2 1978.*

83. *Information disclosed to trade unions for collective bargaining.*

84. *Information disclosed under the Employment Protection Act 1975 would not come within this definition.*

85. *Discussed in Chapter 1. The extent of 'iniquity' is uncertain but it clearly covers any criminal offence.*

86. *The Minister of State in the Department of Industry suggested it might be in the public interest for him to disclose to Parliament plans of imminent closure of an important industrial concern, discovered under Industry Act powers, at the same time as they were disclosed to the unions by the company: H.C.Deb. 5th series Vol.888 (written answer col.211).*

87. *DuPont (U.K.) announced that it was refusing to disclose information about the composition of products to the Notification and Data Appraisal Unit of the Health and Safety Executive because of the risk of this information being passed to customers and unions and so reaching competitors: The Times May 26 1978.*

88. *Even in Sweden, with a long history and tradition of openness of information in the hands of government, the development of State intervention and welfare policy has led people to doubt the value of publicity. Herlitz [1958] Public Law 50,59.*

Protection against exploitation by others

1. *The attack on monopolies under the Treaty of Rome Articles 85,86 and national legislation shows a reversal of earlier policy emphasising the rights of individuals.*

2. *Patents Act 1977 section 25; the period was sixteen years under the Patent Act 1949.*

3. *In Newberry v James (1817) 2 Mer.446 the court refused to enforce an agreement of confidentiality after the patent had expired.*

4. *The effect of American Cyanamid Co. v Ethicon Ltd. [1975] 1 All.E.R. 504 may be an increase in misuse of doubtful patents since the court will have to assume the patent in question to be valid: Cornish: [1975] J.B.L.234.*

5. *Patents Act 1977 section 14(3).*

6. *ibid. section 48.*

7. *The duty of confidence is not well-known and people not infrequently assume that if there is no patent there is no restraint on use by others. For example British Industrial Plastics Ltd and others v Ferguson and others [1940]1 All E.R.479 (no damages for inducing breach of contract); Seager v Copydex Ltd. [1967] 2 All E.R.415 (damages but no injunction or account). But in Morison v Moat (1851) 9 Hare 241 the principle of confidence in the absence of patent was stated, though in Williams v Williams (1817) 3 Mer.157 Lord Eldon had been unwilling to protect formulae for medicines in the absence of a patent.*

8. *section 64.*

9. *(1851) 9 Hare 241.*

10. *(1817) 2 Mer. 446.*

11. *Coco v Clark (A.N.) (Engineers) [1969] R.P.C.41.*

12. In Peter Pan Manufacturing Corp. v Corsets Silhouette Ltd. [1963] 3 All E.R.402, 409 the defendant had to account for all profits since the product could not have been made without the confidential information, but if the offending information merely makes it more economical he may have to account solely for directly attributable profit as in Siddell v Vickers (1892) 9 R.P.C.152 or pay damages for loss as in Seager v Copydex Ltd. [1967] 2 All E.R. 415.

13. Seager v Copydex Ltd. (above)

14. Melville: Precedents on Intellectual Property 2nd Ed.1972 page 297.

15. As in Schroeder v Macaulay [1974] 3 All E.R.616; Davis (Clifford) Management v W.E.A.Records [1975] 1 All E.R.237; Wooldridge: [1977] J.B.L.312.

16. Unfair Contract Terms Act 1977 sections 3,11.

17. Presumably the meaning of "while it remained confidential" in the Peter Pan case (above) at 408.

18. In the Peter Pan case this was the decision in respect of the composition of certain material.

19. Terrapin Ltd v Builders' Supply Co. (Hayes) Ltd. and others [1960] R.P.C.128. The principle is discussed by Cornish: [1970] J.B.L. 44.

20. op.cit. page 36.

21. For example United Indigo Chemical Co.Ltd. v Robinson (1932) 49 R.P.C.178; Mustad (O) & Son v S.A.Allcock & Co.Ltd. and Dosen [1963] 3 All E.R. 416; Baker v Gibbons [1972] 2 All E.R.759.

22. As in Robb v Green [1895] 2 Q.B.315.

23. Lord Denning M.R. in Potters-Ballotini Ltd. v Weston-Baker and others [1977] R.P.C.202. An interlocutory injunction was refused against former employees setting up in competition by a rather strained interpretation of their contracts of employment. And Williams v Williams (1817) 3 Mer.157.

24. cf. Melville op.cit. page 34. who agrees that the information is valuable but denies that it can be called property since others could independently discover it. The Patents Act 1977 section 30 provides that "any patent or application for a patent is personal property" but two applications could be made independently in relation to the same invention.

25. The question was expressly left open in the Peter Pan case but it has received attention in the United States of America. In Shellmar Products v Allen-Qualley Co. 87F 2d.104 (1936) a perpetual injunction was granted but in Conmar Products v Universal Slide Fastener 172F.2d.150 (1949) the injunction was limited until the information became public knowledge. This approach was approved in Kewanee Oil Co. v Bicon Corp. 94 S.Ct.1879 (1974) cases cited by Bryan: (1976) 92 L.Q.R.180.

26. For example ladderless tights perhaps.

27. Patents Act 1977 section 48.

28. Under the Design Copyright Act 1968, if a design is registrable under the Registered Designs Act 1949 its copyright protection is, for industrial purposes only, reduced to fifteen years, the patent-type period under the 1949 Act.

29. *Hubbard v Vosper [1972] 1 All E.R.1023. No final decision was made on the point. In Church of Scientology v Kaufman [1973] R.P.C.635 the uselessness, but not the danger, of the cult was emphasised.*

30. *Even payment for the information has been frowned on: Initial Services Ltd. v Putterill [1967] 3 All E.R.145.*

31. *cf. Melville op.cit. page 34 but he does not consider the question of suppression.*

32. *Perhaps on payment of a royalty as suggested in Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41; Cornish: [1970] J.B.L.44 criticises the idea of a 'compulsory sale' but justified refusal of an injunction where it would halt the exploitation of new products.*

33. *It is recognised that the basis of copyright law is economic: Whitford Committee on Copyright and Design Law (1977) Cmnd. 6732; Dworkin: 1977 40 M.L.R.685.*

34. *Similar difficulties arise with teachers' copyright: Bloom [1973] J.S.P.T.L.333.*

35. *Beloff v Pressdram Ltd [1973] 1 All E.R.241,269. It was not known whether the memorandum was disclosed in breach of confidence or stolen; it may have been left lying about.*

36. *The Times January 21 1976.*

37. *(1849) 1 Mac. & G.25.*

38. *(1887) 19 Q.B.D.629.*

39. *Section 46 (4).*

40. *Copinger & Skone James on Copyright 11th ed.1971 pub. Sweet & Maxwell para.89; Dworkin loc.cit. page 686. The Whitford Committee vaguely suggested an 'unfair competition' law.*

41. *Universal Copyright Convention. This is used for translations for developing countries but only applies to published works.*

42. *Copyright Act 1956 section 2(3).*

43. *As suggested by counsel in Beloff and in Fraser v Evans [1969] 1 All E.R.8 and discussed in Chapter 1.*

CHAPTER 6

LOCAL AUTHORITIES AND CONFIDENTIALITY

1) Introduction

Any group trying to govern any collection of people from a country to a youthclub, is faced with a conflict of secrecy versus openness as soon as it begins to take decisions.[1] The tendency of the governing group will be for secrecy; that of the other members[2] for openness. This stems from various causes which mostly, in the end, come down to power.[3] If the group could be sure that all the members would agree with the decision on the same basis as the group arrived at it, they could put all the facts and arguments in front of the members before or at the same time as announcing the decision. If the group did not mind what decision were arrived at, and had plenty of time in which to decide, again all the facts and opinions could be put before the members and some method of ascertaining their decision could be devised.[4] If this procedure were to be carried to the logical end of no decision being taken until the members were unanimous, the functions of the group would be to initiate and to gather information but not to govern.

But in the usual case the group will have to make a decision which the members will be expected to obey. This obedience may be based on respect for the group,[5] which will require the group speaking with one voice so as not to lessen the respect, or it may be based on accepting an argument. Here the group will wish to present a clear and cogent argument for the decision[6] uncluttered by any arguments or awkward facts on the other side, so that there will be no danger of the members preferring the arguments for a different decision.[7] On the other hand, the group may wish, for whatever reason, to make a decision which they know, or guess, will be unpopular with the members or some of them. Here they will wish to withhold any information until the decision has been made and acted on and it is too late for protest to be effective.[8]

Members wishing to influence the decision will wish to know at an early stage all the relevant information[9] and attempt to persuade individual members of the group to their viewpoint. Knowledge of different views within the group helps them in their persuasion of members of the group. If the group can be made aware of the views of members[10] before the decision-making, this will be effective in persuading

the group if they are expecting consent based on agreement. To mobilise member-feeling requires that the members know of the proposal before the decision is made.[11] The group may counter member-feeling by introduction of new facts, so it is important for the members to discover all the facts in advance, and important to the group (if wedded to its decision) to keep useful facts secret. This balances against the urge to publicise useful facts so as to persuade member opinion to the group view. Excessive holding back of information suggests a fear in the group that member-opinion cannot be won by argument.[12]

In the implementation of policy the governing group may wish to keep the policy secret so that there will not be pressures to re-open the issue. This may also be a reason for non-disclosure of information which would be damaging to acceptance of the policy, such as statistics of illegal immigration,[13] or possibilities of water pollution from waste disposal[14] or evidence that those who administer the policy do not approve of it.[15] They may wish to keep rules of policy secret to enable discretions to be exercised. The reason advanced for not publicising the discretion guidelines in the Supplementary Benefits A Code is the fear that guidelines would then become rules and flexibility to benefit one person more than most would be lost. On the other hand, there is evidence that ignorance of the Code has prevented people making claims or putting forward information which would be relevant to the exercise of discretion in their favour. In the end, administration of a policy will receive more ready acceptance if the guidelines and ambit of discretions are known and differing decisions can be justified, while recognition is given that good faith exercise of a discretion by the person or body in whom it is vested should not be disputed.

These various pressures apply to the work of a local authority with the particularly poignant characteristics that if the 'members' (i.e. the local electorate) do not approve of the actions of the 'group' (i.e. the council, or effectively the majority party) they can remove them at the next election, and, on the other hand, that the actions of the group may have a great influence on the personal lives and property of the members.

2) The Right Of A Local Authority To Make Decisions In Private

a) Attendance at meetings

If the members of a local authority may meet in private to undertake their business, that is the best way of ensuring that matters are not known by the public until decisions have been made. At common law

there was no duty on local authorities to hold meetings in public[16] and, indeed, the courts have sometimes frowned on conventions of openness. Purcell v Sowler[17] concerned a report in a newspaper of allegations of professional misconduct by a doctor made in a meeting of the Poor Law Guardians which had been held in public. The plaintiff claimed damages for libel and the newspaper claimed qualified privilege. The Court of Appeal accepted that it was a matter of public interest but distinguished the cases allowing qualified privilege for the reporting of proceedings in Court and in Parliament on the ground that those bodies were open to the public and "there would be nothing wrong in putting the rest of the public in the position of those who were actually present;"[18] whereas meetings of Poor Law Guardians did not have to be held in public and "when charges are to be made affecting private character, the more proper course would be to close the doors and hold the discussions in camera."[19] The judges expressly did not decide on the position of local authorities, Cockburn C.J. drawing the distinction thus

> "In these instances publicity may be essential to good administration. But here we have to deal with the case of a body of very limited jurisdiction, and as to which it cannot be asserted that publicity is essentially necessary or usual."[20]

It might have been expected that a later court, faced with the question whether the public were entitled to attend meetings of a local authority, would have aligned such authorities with the courts and Parliament rather than with bodies "of very limited jurisdiction." But the judicial mind has tended to see secrecy as an adjunct of good administration, A reporter of a local newspaper was forbidden to attend meetings of the local authority by resolution of the council. He appealed and the Court of Appeal upheld the decision of the council.[21] At first instance the decision went on the narrow ground that the corporation was the creature of statute and there was no statutory provision for the attendance of members of the public nor should any such right be inferred from the provisions for the display of notices of the time and place of meetings. Buckley L.J. however, went further and decided the matter on principle.

> "The persons whose duty it is to determine questions of policy and questions of government ought to be placed in such a position as that they can express their views freely without the consequence of their

becoming communicated to the public which may be a disadvantage to the body whose affairs they have to govern."[22]

Parliament disagreed and promptly passed an Act[23] to allow representatives of the press to attend meetings of local authorities (including Poor Law Guardians) unless the authority resolved that "in view of the special nature of the business then being dealt with or about to be dealt with ... exclusion is advisable in the public interest." This Act did not, however, grant a general right of admission to the public.[24]

The present law in this regard is the Public Bodies (Admission to Meetings) Act 1960, which is extended by the Local Government Act 1972[25] to cover committees[26] as well as meetings of the council. This Act provides a general rule that meetings of local authorities shall be open to the public. The grounds for exclusion of the public are

> "whenever publicity would be prejudicial to the public interest by reason of the confidential nature of the business to be transacted or for other special reason stated in the resolution and arising from the nature of that business or of the proceedings."[27]

and one specific instance which may be a sufficient "special reason" is stated to be

> "the need to receive or consider recommendations and advice from sources other than members, committees or sub-committees ... without regard to the subject or purport of the recommendations or advice."[28]

In introducing the Bill, Mrs. Thatcher explained that there were two main groups of reasons why publicity would be prejudicial to the public interest. The first were matters of a confidential nature.

> "They may relate to personal circumstances of individual electors. They may relate to a confidential communication from a Government Department asking local authorities for their opinion on a subject which the Minister would not like to be discussed in open session until he is a good deal further on and has received the views of local authorities."

The other group were matters not strictly confidential but still prejudicial to the public interest to discuss them in open session.

> "They may relate to staff matters, to legal proceedings, to contracts, the discussion of which tender to accept and other such matters."[29]

These would be the cases for the special reason for exclusion to be stated in the resolution.

Soon after the 1960 Act was passed, the Minister of Housing and Local Government, Mr Henry Brooke, suggested that councils should exclude the public during deliberations concerning the private affairs of individuals and also

> "In the formative stages of some of their business free and uninhibited discussion might well be impeded if conducted in public."[30]

This is a different matter from the example given by Mrs Thatcher since the basis of her case was that the communication came in confidence from another person. Mr Brooke's example foreshadows the argument later made by the Fulton Report on the Civil Service[31] for secrecy of discussions between civil servants and ministers. But while that argument may be relevant to discussions between local councillors and their officers (which would probably come within section 1(3) of the Act)[32] there is no such relationship between councillors themselves, and no convention of "Ministerial responsibility" to give it justification in this context. In the same circular. Mr Brooke said

> "It is not merely a question of letting people know what their local authority have done and why; informed public opinion should have an opportunity of playing its part in the formation of policy."[33]

It is hard to envisage a better way of informing public opinion of the various issues involved in a matter soon enough for public views to have some effect on policy than enabling the public to hear debate at the formative stage. If fear of being seen to change one's mind, or loyalty to the party line whatever that should ultimately be, are so strong as to prevent free discussion in public then the right of the public to attend council meetings, whatever value it may have, is clearly irrelevant to the formation of policy.

The "special reason" why public discussion would be prejudicial to the public interest may arise from the nature of the business or of the proceedings. An unexpected meaning of these words arose in the Liverpool Taxi[34] case. The attempt by the City Council to review the issue of licences for taxis had attracted great local attention and had already twice been challenged in court. The council issued a public notice of the meeting of the allocating committee inviting anyone wishing to make representation to attend. The association informed the

council that their members intended to attend, but not to make representations. When the committee arrived for the meeting it was found that of the 55 seats available 22 were needed for councillors (not all members of the committee), 19 for officials, and police, leaving only 14 seats for applicants for licences, press and public. There were some 40 people waiting to enter the room. The committee resolved that the applicants and the press be allowed to enter but the public be excluded. The reasons for this decision (though not embodied in the resolution) were that applicants should be heard in the absence of competing applicants and that it would be impossible either to admit all the public or to choose who should enter. The court held that although a council must have regard to their duty to the public in arranging for a suitably-sized room, if their arrangements are swamped by the number of people and they then fairly and honestly decide that the only answer is to exclude everyone, that is a reason arising from the nature of the business or of the proceedings.

This decision, on the second ground at least, seems to be wrong. The difficulty arose not from the nature of the business or from the nature of the proceedings but from the size of the room. It is difficult to see how the public interest could be served by the exclusion. The court was anxious to avoid condoning bad faith on the part of a council but the argument of sensible arrangements swamped by an unexpected influx of the public seems thin on the facts. Should not the council in those circumstances have anticipated a crowd and chosen a very large room? Perhaps the chairman could even have excluded some of the councillors and officers if their presence was unexpected and unnecessary; if it was not unexpected the room was clearly too small before any members of the public arrived.

This is not to say that councils must find room for every member of the public who appears. The true analogy, it is submitted, is with the courts. The public are allowed to enter (except in rare instances) to the extent of available accommodation. They are not all excluded because too many wish to attend. The question of who enters and who stays outside is for the usher, not the judge. If there is unruly behaviour inside the meeting there is a clear right to remove the offender;[35] if there is unruly behaviour outside that is a matter for the police. (The analogy provides an answer for the first ground also. Competing applicants could be kept outside, as witnesses are, until their turn to be heard. The fact that some members of the public were anxious to hear what the applicants said was not the ground put forward for their

exclusion, nor would it be a valid one).

If the public are to be excluded from the meeting the resolution must either state that the matter is confidential or give the special reason for exclusion. Mr Brooke suggested that

> "it is in the interests of good public relations that a clear indication should, wherever possible, be given of the reasons why it is considered that publicity would be prejudicial to the public interest. Only in exceptional cases, where an indication of the nature of the business would in itself be prejudicial to the public interest, should the explanation be simply in terms that the business is confidential."[36]

Nevertheless it is apparent that the exclusion resolution is often passed simply on the ground of confidentiality.[37] Indeed the Association of County Councils, in its evidence to the Royal Commission on the Press, stated

> "in cases where the press are excluded the press must accept that this is because there are certain parts of the local authorities' business which must be conducted in private without giving rise to press inquisition as to why this is happening and what is being discussed."[38]

No such inquisition would presumably take place if the special reason were given.

Under the Act it is not sufficient for the council to decide that the matter to be discussed is confidential; it must also decide that public discussion would be contrary to the public interest and Lord Denning has said that it will not be presumed that the public interest aspect has been taken into account.[39] It is clear in law that the fact of confidentiality does not automatically make secrecy a requirement in the public interest. The court is ready to balance the interests of confidentiality against other aspects of the public interest. This is so whether the confidentiality is a private relationship[40] or is imposed in the public interest.[41] However, in deciding whether a resolution excluding the public was validly made, the court would have to decide only whether the reason for exclusion was a conclusion which could properly be reached by the council,[42] not necessarily that it was the conclusion to which the court would itself come.

If the public or the press, or both, are excluded without tenable reason, their exclusion is invalid under the Act and it would seem that any resolution passed by the council while the resolution is in force is void. However, the Divisional Court has held that the requirement that the reason for exclusion be stated in the resolution is merely directory. A resolution which stated that the public were excluded "that the business of the committee may be carried out satisfactorily" did not fulfil the statutory requirement, but the court refused to avoid the subsequent decision of the committee, since no-one had suffered "significant injury" as a result of the error.[43] It is highly unlikely that an individual would suffer "significant injury" by being excluded from a council meeting (at which he has anyway no right of audience), but the Act was concerned not with prevention of individual injury but with a public right, namely that

> "matters of real importance to the locality ought to be openly debated, unless there are compelling reasons against publicity."[44]

It appears that the Courts are adopting restrictive approaches to the statute, in much the same way as they did to the provision in the Local Government Act 1894 allowing a parochial elector to inspect the minutes of a district council meeting.[45] Common law rights may depend on the applicant showing a "direct and tangible interest"[46] but statutory rights may be based on other considerations and judges should not seek to limit them by reference to irrelevant criteria.[47]

There may be many occasions like that when the Sheffield libraries and arts committee resolved to exclude the public while they debated a request by the Campaign for Homosexual Equality to use the library theatre. The committee refused to give any reason for the exclusion while reporters were present.[48] On the basis of the Liverpool case protest would be in vain whereas had the Divisional Court taken a more robust line in that case such apparent disregard of the Act could be checked.

It may be argued that these matters are of very little importance. Very few people attend council meetings.[49] Decisions to exclude the public are only challenged in court by people who object to decisions made and try to use the judicial review procedure as a kind of appeal against the decision of the authority. Nevertheless, it is evident from the way councils resolved themselves into committee under the 1908 Act, gave decisions to committees under the 1960 Act and merely rubber-

stamp decisions made in party caucus under the 1972 Act that a desire for secrecy of decision making is strongly felt in local authorities. As Mrs Castle said, of some councillors

> "We tend to forget that just because we have been elected we do not thereby become someone special, someone who can disregard the claims to knowledge by the public who gave us our being and without whom we should not exist."[50]

In 1977 the Mayor of Bodmin, when criticized for holding a private, unminuted meeting of the council said

> "we did more business that night in a better manner than we do when some of you councillors are playing up to the Press and Public"

and said that he would hold more such meetings.[51] It may be that democracy and efficiency are not always compatible but, Parliament having given rights of attendance to the public, local leaders should not be able to ignore them at will. With reorganisation of local government producing fewer councillors wielding much greater power it is more than ever important that the reminders which Parliament provided should be upheld and not eroded by the courts.[52]

b) Obtaining information before decisions are made

If members of the public wish to influence a decision made by the local authority it is necessary that they know beforehand what matter is to be decided, and relevant information about it, with perhaps various alternative proposals. If the local authority do not mind what decision is made they may use various means to bring the relevant information before the public eye and to seek a response.[53] Posters, displays, questionnaires, public meetings are all means of allowing the public to know the facts and make an informed response. Others will be quick to point out any distortions in the facts given, so in these cases the authority will be careful to give as complete and balanced a view as possible. The authority may put forward draft proposals and seek comment on these or they may not formulate proposals until the public response has been assessed.[54] In these circumstances members of the public have a fair chance of influencing the final decision, if enough of them can speak with one voice.

The problem is far greater in those cases where the local authority do not positively seek public views.[55] Even a concerted public voice has much less chance of changing the authority's decision once it has

been made, so it is important to ascertain what is being considered at the earliest possible stage. However cogent the argument for a course it will be of no avail if the authority can show that it takes no account of an important fact, so it is essential to obtain as much information as possible at an early stage. This is the importance of allowing the press and the public to attend meetings of local authority committees as well as of the full council.[56] The statement in the 1961 circular, referred to above, suggesting that

> "In the formative stages of some of their business free and uninhibited discussion might well be impeded if conducted in public"

and that this could be a good special ground for exclusion of press and public may be used to keep the matter secret, but the reason will have to be given and the motion debated publicly which may be enough to show the public what is under discussion. (And a motion to exclude may have the damaging result for the authority of raising hostility and suspicion.[57])

More important, perhaps, is the duty, under the 1960 Act,[58] to give to the press in advance of the meeting a copy of the agenda and sufficient other papers to indicate the nature of the items on the agenda. The further papers may consist of copies of reports or other documents supplied to members or separately prepared explanatory documents. A copy of the auditors report must be included if the meeting is to discuss it.[59] The provision of information in advance is very important since even the press do not attend all committees and this enables them to ascertain where their priorities should lie. However, many authorities supply the press with all the papers which members get which can be a formidable quantity,[60] and it has been argued that the press now receives so much that if sub-committees were also to be open to them the burden would be too great.[61] Nevertheless, public disquiet at refusal to disclose documents erupts from time to time.[62] Recent examples have been in relation to cuts in the estimates of various committees in order to reduce public spending; many authorities have refused to indicate how the various cuts were to be achieved before the estimates have been approved by the council.[63] A mere agenda item 'to approve the estimates' is of very little use in encouraging public participation in decision-making.

Of equal importance to the provision of papers is the ability to comment on the items before the meeting. If the press is to be effective

in encouraging informed discussion it must be able to raise the issues and stimulate consideration at a time when the decision has not yet been made. If an embargo is placed on comment until after the meeting the papers may be useful to help explain why a decision has been taken but they are of very little use in assisting the public to take part in decision-making.

Government has said

> "The Press should have copies of documents circulated to council and committee members for meetings ... at the same time as they reach members ... and there should be no embargo to prevent reports and comments in advance of the meeting."[64]

Nevertheless it seems to be common practice that papers are embargoed until after the relevant meeting.[65]

The leader of the South Yorkshire County Council is reported to have justified such embargoes on all papers by saying

> "what you are sending out to members can be regarded as private documents until they are debated."[66]

A newspaper which breaks an embargo may be blacklisted by the local authority, as happened to the Hereford and Worcester Evening News in 1976.[67] It would seem that such a procedure is illegal if it extends to agendas and papers necessary to indicate the nature of the agenda items, but is valid in relation to other papers. If one newspaper breaks an embargo this may give it an advantage over its competitors, and the Press Council has upheld several complaints on this ground by one newspaper against another. The general approach of the Press Council is that

> "The object of the system is to give newspaper staffs plenty of time to prepare adequate summaries and considered comment."[68]

This statement appears to overlook the purpose of prior notice of local government matters, to some extent, at least, guaranteed by statute, of allowing the local community to express its views before policy decisions are made. The system of prior consultation with interested groups, so well developed in central government,[69] is of much less significance in local government; comment and response in the local newspaper is a valuable alternative.

The other major way in which information may be obtained in time to affect a decision is by 'leakage.' Just as leaks of Cabinet information and discussions are evidence of a divided government so[70] a member

of a local authority who disapproves of council policy on a matter, if only the policy of secrecy may leak the information to the local press. This may be more effective than the official provision of papers as it may be received at an earlier stage, and contain controversial information which might not appear in the official papers though a leak may also be biased and misleading. It has been pointed out that the press prefer to make a matter public before the committee, or even sub-committee, stage

> "because once a policy matter has reached the committee stage it is very seldom that public reaction will deter the majority group from its determined path."[71]

The Press Council takes a very different view on disclosure of 'leaked' information than it does on breach of embargoes. For example, in 1963 two newspapers published a confidential report of talks held between a deputation of local councillors and Dr Beeching about the future of the town's railway interests.[72] The councillors prepared a report for their colleagues but stated that it was confidential, a joint statement would be made later to the public. One councillor objected to the secrecy since it was a matter of great local importance and the public were very anxious, and he gave the report to the newspapers. The Press Council stated that the fact that the council treated the report as confidential did not preclude the editors, who had not received it under seal of confidentiality, from making their own decision as to whether it should be published in the public interest. The Press Council rejected the complaint of the local authority.[73] It is, of course, important that the newspaper receives the information legitimately and not subject to a requirement of secrecy. Where the document leaked was under an embargo which the newspaper breached, the Press Council rejected a complaint by the authors of the document, the Northern Regional Health Authority. The third party from whom it had been received did not object to the prior publication. The Press Council said

> "An authority cannot impose a duty of confidentiality except by direct communication to the person upon whom it is sought to impose it."[74]

If such a leak takes place has the local authority any redress in law? They may, be resolution, exclude the offending councillor from committees[75] but they cannot 'blacklist' him to prevent him from obtaining information which he is entitled to by statute[76] or which is necessary to enable him to carry out his duties as a councillor. In R v Southwold

Corporation ex parte Wrightson[77] the authority had passed a resolution that the councillor, who was opposed to the council's policy in relation to a lease of some land, was not to be given information about the matter since he was likely to use it "for a purpose antagonistic to the policy of the Town Council". The Divisional Court held that although a councillor

> "has no right to a roving commission to examine books or documents of the corporation because he is a member of the council"

his desire to raise the question whether or not the contract was a prudent and proper bargain was a proper exercise of his function as a councillor, and he was therefore entitled to see the documents.

It would seem from dicta in R v Barnes Borough Council ex parte Conlan[78] that a councillor cannot argue that it is part of his duty to see papers of committees of which he is not a member.[79] Also, the cases do not appear to see the role of the individual councillor as helper of his constituent[80] and, mandamus being a discretionary remedy, the courts have refused to order disclosure to a councillor,

> "not actuated solely by the public interest"[81]

or having an indirect motive

> "not consistent with the interests of the council as a whole."[82]

It is doubtful how the court would approach an application for mandamus by a councillor refused papers because he had leaked information to the local newspapers. It is submitted that one leak, or a few, on a matter of obvious public interest (and the court has held very local matters to be of public interest)[83] may be taken to be part of his normal function as a councillor, but if he has evinced a general refusal to keep matters confidential the court is likely to show him little sympathy. While the court is prepared to accept that a particular breach of confidentiality may be in the public interest[84] it seems to take almost no cognizance of general democractic "right to know" arguments.[85]

Alternatively, or in addition to taking measure against the leaking councillor, the local authority may wish to bring an action against the newspaper concerned. The two possibilities are breach of confidence and breach of copyright. An action for breach of confidence may be against a person who was not a party to an agreement of confidentiality but has since received the information with knowledge of it. However, whereas in cases of disclosure of commercial secrets the requirements

described in Coco v A.N.Clark Ltd.[86] are sufficient, it seems that where the basis of the confidentiality is the public interest in good government the court must weigh the conflicting elements of public interest, not just in deciding on the extent of protection but in deciding whether there is to be any protection at all. In the Crossman diaries case[87] a "sphere of secrecy" of joint cabinet responsibility[88] sufficient to require at least some protection of Cabinet discussions, but no "sphere of secrecy" existed in relation to advice given by senior civil servants to ministers or observations on the suitability and capacity of individual civil servants. The question arises whether a "sphere of secrecy" is created in relation to local authority deliberations. There is no local authority parallel to the doctrine of joint Cabinet responsibility with its requirement to show a united face to Parliament, and the members of a Committee are under no duty to refrain from expressing their individual disapproval of a decision.[89] It is submitted that, even though many members of a local authority committee might feel themselves bound to keep discussions confidential, the court would not consider that a "sphere of secrecy" existed which would require protection of that confidentiality at law. The other possible ground for action against the newspaper would be an action for breach of copyright. This would only lie if the action were brought by the true owner of the copyright,[90] and is only applicable to protect the form of the document disclosed, nor its content. It is, therefore, of no avail in relation to leakage of information not in the form of a document or where the article complained of makes use of the leaked document but does not actually quote extensively from it. On the other hand, it would appear from Beloff v Pressdram Ltd. that the defence of "fair dealing"[91] is very unlikely to be successful where leaked information is published without authority. In that case the judge rejected any distinction between a leak of information never intended to be published and a pre-empting leak in anticipation of authorised publication. And he stated

> "the leak was clearly a dealing with the work in which copyright existed at the time of the leak, and the leak was given and accepted for the purpose of unauthorised publication. And, further, the publication itself was ... of publication of information known to be leaked, which could not without the leak have been so published. The vice of the leak and publication in this case was, to my mind, clearly unjustifiable for the authorised purposes ... and clearly in my view constituted dealing which was not fair within the statute."[92]

The other defence which the newspaper would wish to run is that publication was justified in the public interest. In the same case it was accepted that such a defence overrides the rights of individuals (including copyright) but it was held that, as at present recognised by the law, it does not extend beyond "misdeeds of a serious nature and importance to the country."[93] It would be rare that a newspaper which leaked a document relating to local authority policy would be able to claim such a defence, though evidence of corruption or failure to declare an interest would come within this category.[94]

In relation to either action against a newspaper if the local authority were to succeed the relief would probably be minimal. An injunction would be of little use after the publication and the court would not grant an injunction against future publication of other information

> "The court, when asked to restrain such a publication must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need."[95]

In an action at common law the successful plaintiff is entitled to, at least, nominal damages. In an action for breach of copyright this would apply; in the case of a breach of confidence it is suggested that, in this sphere at least, the matter rests in equity and is not a tort, so no right to even nominal damages exists.

Occasionally a council or some councillors may wish to disclose to the public information which has been given to the authority in confidence but officers may object. They may argue that the information has been given to them personally[96] or that the supply of such information is necessary to the future planning of the area[97] or the fulfilment of their functions and would not be forthcoming in the future if it were disclosed. The first argument is dangerous since, if accepted, it would take power away from elected councillors into the hands of officials. It is submitted that it is also erroneous; local government should learn from the law of charity the difference between information given to a person personally and information given to him in his official capacity. Any information given to a local authority official, relating to local authority work, is given to him in that capacity and on behalf of the authority.[98]

The second argument is more difficult for there are arguments in favour of the protection both of sources of information and of the secrecy

of some information. Sources of information may need to be protected in children cases[99] and personal and commercial information may properly be protected against general disclosure. But in local government, the public interest in knowing matters which affect life in the local community or its government is not readily overthrown either by a desire to protect souces or by the fact that information has been given in confidence.

Indeed disclosure and subsequent publicity may have the beneficial result of changing the policy on dissemination of information. The outcry on leakage of a secret motorway plan at Waltham Holy Cross led to the Department of the Environment regional construction unit allowing alternatives to be put to the public for discussion,[1] though this seems not to be widely used.[2] But consultation and openness, too, has its pitfalls. Excessive delay in decision on a matter such as the siting of a motorway and the consequent uncertainty may cause injustice to individuals and constitute maladministration.[3]

c) Taking decisions outside council meetings

i) Decision making in committee

Changes in local government structure and working have led, in many cases, to a reduction in the number of committees of an authority but an increase in their power.[4] The Local Government Act 1972[5] allows authorities to delegate decision-making powers to committees and this is now frequently done.[6] Although the press and public may attend meetings of these committees there may be no right to see their minutes.[7] Section 228 of the 1972 Act provides

> "The minutes of proceedings of a local authority shall be open to the inspection of any local government elector for the area ..."

In Wilson v Evans[8] it was held, on the construction of the London Government Act 1939 section 173, which was in the same terms as section 228, that no right to see the minutes of a decision-making committee was given. Lord Parker C.J. while admitting that a contrary decision would be sensible, said

> "I can see no ground for treating the proceedings of the meeting recorded in the minutes as other than the proceedings of the committee alone as opposed to the council, even though the acts done or the decisions arrived at may in law be the decisions of the county council."[9]

His reasons for rejecting a right of inspection were that meetings of the council and meetings of committees were dealt with in different

parts of the Act and the provisions relating to their constitution and proceedings were different. Also the provisions about minutes were different, there being a requirement to print the minutes of proceedings of the council but not those of a committee so a meeting of a committee was different from a meeting of the council, even if that committee had delegated powers. So the proceedings of the meeting were those of the committee alone and the minutes were those of the proceedings of the committee alone. He rejected the argument that the inspection section by speaking of "minutes of proceedings of the authority" rather than "minutes of proceedings of a meeting of the authority" introduced a significant difference. An act of a committee, even if in law the act of the council, was not a "proceedings of the local authority."[10]

Has the 1972 Act affected the authority of this case? Clearly, since section 228 (the inspection section) is in the same terms as the section there construed, the question posed is still the same. It is also still true that a meeting of a committee is seen to be different from a meeting of the council. The power of appointing committees is granted by section 102; their membership may include persons not members of the authority;[11] their quorum is to be determined by standing orders[12] and so may be different from the quorum for a meeting of the council. But the 1972 Act treats various matters of procedure, including the drawing-up and authentication of minutes, in the same way for both council and committee meetings. By section 99 the same Schedule applies to "meetings and proceedings of local authorities and their committees." The schedule makes provision for the drawing-up of minutes "of the proceedings of a meeting of the local authority"[13] and this provision applies "in relation to a committee."[14] No provision is made for the printing of minutes in either case. Just as in the 1939 Act, the inspection section speaks of "minutes of the proceedings of a local authority" and the provisions relating to minutes speak of "minutes of the proceedings of a meeting."

Thus, insofar as the judgment in Wilson v Evans depends on the treatment in the Act of meetings of committees as different from meetings of the council, the judgment is still applicable. Insofar as it depends on the treatment of minutes of a committee as different from minutes of a council meeting, it is no longer applicable. Insofar as it depends on rejection of a distinction between 'minutes of proceedings' and 'minutes of a meeting' it is still applicable. The new provision of the 1972 Act allowing attendance at committees[15] does not seem relevant here, since non-attendance was not relevant to the earlier decision.

It is submitted that Wilson v Evans is still law. The framers of the 1972 Act knew of the case and could easily have reworded section 228 to make the matter clear; they did not do so. Merely to group together the provisions for the making-up of minutes is not sufficient to alter the reasoning on which the case was based. It may well be that Lord Parker C.J. was wrong to reject the argument that 'proceedings of a local authority' is different from proceedings of a particular meeting and that anything resolved by the local authority is the 'proceeding' of the authority and therefore any minute recording such a resolution is a minute of the proceedings of the authority. But since he did reject the argument the 1972 Act has done nothing to alter the situation[16]. Lord Parker said

> "it would be surprising if this legislation, which provided for the inspection of the minutes of the proceedings of the county council, could be defeated by the council using their general powers of delegation."[17]

It may be surprising but it would seem to still be the law.

This decision, which was even more unfortunate before the 1972 Act gave a right of attendance at committees, contrasts with the earlier decision of Williams and another v Mayor and Corporation of Manchester[18] which concerned the minutes of non-decision-making committees. The business of the council was run by twenty-one committees the minutes of which were kept in a book. An abstract of those minutes was given to the councillors and proceedings of the committees were approved by reference to the book. The council minutes were therefore of very little use in showing what had been approved, though the relevant Act stated that

> "the minutes of proceedings of the council shall be open to the inspection of a burgess."[19]

Cave J held that the burgesses were entitled to inspect

> "all acts of committees submitted to the council for approval and either approved or not."

Thus, where a committee recommends and the council decides, relevant minutes of the committee are open to inspection; where the committee makes the decision they are not.

It is possible that the Public Bodies (Admission to Meetings) Act 1960 (as amended by the 1972 Act) may give to the press the right to see minutes. The Act provides[20]

> "there shall ... be supplied for the benefit of any newspaper a copy of the agenda for the meeting ...

together with such further statements or particulars if any as are necessary to indicate the nature of the items included or, if thought fit in the case of any item, with copies of any reports or other documents supplied to members of the body in connection with the item."

One item on the agenda will be the consideration of the minutes of the previous meeting.[21] Is it necessary to have a copy of the minutes in order to see what is their nature? In the Circular sent by the Ministry of Housing and Local Government in amplification of the 1960 Act, it was suggested that a mere statement that the council would consider the report of a particular committee would be insufficient; the agenda should be accompanied by some further explanation, preferably a copy of the "actual committee reports as they are circulated to council members."[22] Here the nature of the item to be considered is dependent upon what was decided; it is not necessary to see the content of minutes to know the nature of an item to approve them as minutes. Another item on the agenda may be matters arising out of the minutes. Here it is necessary to know the content of the minutes to be able to know the nature of matters arising, but it is not necessary to know all the minutes since matters will probably not arise on all of them and one cannot say in advance which will be needed. So probably here too no right to a copy of the minutes is given. It would seem that the only right is to copies of, or abstracts of, extracts which are actually necessary to explain an item of substance on the agenda. So although there is now a right for the press and the public to attend meetings of committees there would still seem to be no right to inspect the minutes of decision-making committees.

The only exception to this unsatisfactory situation arises if the person seeking to see the minutes can show a right at common law to see them, for the statute has not ousted the common law but merely provided limited additional rights. In R v Justices of Staffordshire[23] ratepayers sought mandamus to see documents relating to expenditure under the rates. At that time the rate was levied and the accounts agreed by the justices in quarter sessions and there was statutory provision for documents to be kept and for their inspection by justices. Lord Denman C.J. agreed that the statutes inferred that there was no common law right to inspection, but added

"we are by no means disposed to narrow our own authority to enforce by mandamus the production of every document of a public nature, in which anyone of the King's subjects can prove himself to be interested. For such persons, indeed, every officer appointed by law to keep records ought to deem himself for that purpose a trustee."[24]

However, even if they found any errors in the expenditure the prosecutors could not recover any money, since the accounts in question had been accepted, and could not prevent the levying of a new rate since that was a matter for the justices.[25] They were therefore unable to show that

"direct and tangible interest which is necessary to bring them within the rule on which the court acts in granting inspection of public documents."[26]

There is no doubt that minutes of a committee are public documents but the onus of showing a sufficient personal interest is not easily discharged. The mere fact that one has to pay the rate in question is shown by that case to be insufficient even though, if the ratepayers' contention was right, the justices had acted illegally in levying a new rate before three-quarters of the previous rate had been lawfully spent.

There is also at common law a right in a member of a corporation to inspect documents belonging to the corporation.[27] The basic distinction between statutory rights and common law rights was stated by Lindley L.J.:

"When the right to inspect and copy is expressly conferred by statute the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest."[28]

But the need at common law to show a special interest has affected the judges in cases on statutory powers of inspection. The case which goes furthest in this respect is R v Bradford on Avon Rural District Council ex parte Thornton.[29] The Local Government Act 1894[30] provided that

"Every parochial elector .. may .. inspect .. all books, accounts and documents belonging to and under the control of the district council."

The elector wished to see a case to and opinion of counsel relating to a disputed right of way. Lord Alverstone C.J. agreed that they were within the meaning of 'documents' but added

> "we must go much further if we say that although no right or interest is shown a parochial elector can inspect any document. Mr Thornton has shown no special ground at all for his being allowed to see these documents."

And Darling J said

> "There must be some sort of limitation put on the section, and some sort of discretion must be given to the district council."[31]

Yet is is clear that Parliament, in enacting the section, did not intend inspection to be limited in this way. The section was debated at length in committee in the Commons where several members argued that the right should be restricted in time so that parish councils would not need to keep an office and a clerk always available. One member justified his suggestion of making documents available on only one day a month by saying that

> "They must remember that in a great many parishes there were a certain number of troublesome people who liked to do things because they caused trouble and bothered other people, and they were going to pass an enactment in order to give an opportunity to busybodies to make themselves disagreeable."[32]

But neither he nor any other contributor to the discussion suggested that busybodies or anyone else should be totally prevented from seeing documents. The courts have thus added restrictions which Parliament never intended.[33]

ii) Decision making in party meeting

The increased importance of party politics in local government, and also the increased access of the public to meetings, have resulted in the true decision being taken in party meeting rather than in committee or council.[34]

> In the debate on the 1960 Act one Member warned
> "This Bill will lead to more back door methods of carrying out local authority work. The work would be driven from the committee into the hands of a few people meeting together in a little gang outside."[35]

The 1961 circular exhorted, rather lamely

> "Council meetings should not, as occasionally occurs, be merely formal proceedings in which proposals formulated and discussed in private are rubber-stamped without debate."[36]

In advocating the extension of the right of attendance to committees, Burke[37] recommended that the policy committee, or management board,[38] should be excluded.

> "To admit the Press to such a meeting would drive the real policy-making back into the caucus thus destroying much of the purpose of establishing a policy committee."

The policy committee would have officers present, whereas they would be excluded from the party meeting.

Another difficulty of this arrangement was raised by the Committee on Conduct in Local Government[39] who pointed to the dangers of members failing to disclose their interests in a matter under discussion. The committee said

> "improvements in local government law and practice, however valuable in themselves, will be ineffective if the spirit which informs them it not also observed in party group meetings."[40]

Since political parties do not wish to give ammunition to their opponents it is perhaps inevitable that an "agreed party line" will be formulated in private. Whether the committee merely endorses the decision without debate or the matter is hotly debated depends largely on the size and energy of the opposition. A large and cohesive opposition party with access to the relevant information[41] will be able to air all the arguments against the decision; a small or fissiparous opposition may be totally ineffective.

Thus the statutory right of the public and the press to attend meetings of council and committees and to receive information about what is to be, or has been, decided is of little practical effect if a strong majority party is determined to keep decisions secret and there is little effective opposition within the council.

3. The Right Of A Local Authority To Exercise Discretions

a) Introduction

Most decision making activity in local government is not actual policy making but implementing the implications of earlier policy decisions.[1] In this detailed carrying out of policy the authority must

frequently exercise discretions and make decision which have a direct bearing on the lives or assets of individuals in the area. The decision may relate to the grant or refusal of a permission (for example the taxi licences in the Liverpool case); removal of a person's property (for example a compulsory purchase order); the personal life of an individual (for example whether to take a child into care); or the allocation of scarce resources (for example council housing). The words of the Franks Report on Administrative Tribunals and Enquiries, though they referred to special procedures, are relevant to all administrative decision making

> "Administration must not only be efficient in the sense that the objectives of policy are securely attained without delay. It must also satisfy the general body of citizens that it is proceeding with reasonable regard to the balance between the public interest which it promotes and the private interest which it disturbs."[2]

The Committee on Conduct in Local Government made a similar point, in relation to local authorities.

> "To secure public confidence the workings of the authority should in general be both visible and intelligible ... [T]he authority must ensure that the policies and procedures by which it carried out its statutory functions are publicly known and understood. This is particularly important in the use of its regular discretionary powers."[3]

The reports quoted agree that decisions by the authority are more likely to be accepted if seen to be fair.[4] This involves knowing as much as possible about the policy and procedures, but ultimately the decision is that of the local authority. Here it is not a question of members of the public seeking to influence the formation of a policy[5] but rather that of the individual concerned being able to see that the policy has been properly applied in his case. The individual, aggrieved by a decision which does not favour him, will wish to challenge the decision. The less information he has the harder it is to formulate a ground of challenge but the greater will be his sense of grievance. On the other hand, the more information he has the clearer will be the distinction between his objection to the policy, on the one hand, and his possible grievance that the policy was misapplied in his case, on the other. The former is a matter for the local authority; the latter may be a valid

ground for interference by the court if necessary.

Occasionally a public inquiry or a lawsuit reveals evidence of the "passionate love of secrecy inherent in so many minor officials"[6] which may have resulted in "astounding statements"[7] that an individual may not see certain information. When there are also revealed illegal assumption of discretionary power (as in Blackpool Corporation v Locker) or unreasonable bias against an individual (as in the Crichel Down affair) or a reliance on untrue statements of fact[8] there is seen to be good reason for allowing the individual to see all relevant information.

The reason given for refusing access to information on discretions is that this would merely lead to interminable argument about the merits of the decision; that is, by statute, a matter for the local authority and no-one should be able to interfere with it. There is also a natural reluctance to re-open the matter once a decision has been made. But local authorities must remember that they are exercising discretions on behalf of the public. The criticism of J.A.G. Griffith in relation to Crichel Down[9] is appropriate to the challenge of discretion exercised by local authorities.

> "Had these actions and attitudes [of the various civil servants] been revealed in the attempts by a private person to further his own plans, they would not have been regarded as exceptional. Here the difference was that public servants were seeking to pursue a decision and were being challenged by a member of the public who was seeking not merely to defeat their plans but also to reverse the decision itself. Where they failed was in their refusal to consider how far his protestations were justifiable not merely in his own but also in the public interest."

b) Knowing the legal basis of the discretion

A local authority, or a committee or an officer, may obtain the authority to exercise discretions in various ways. The power may be granted to the local authority by statute and thence be delegated to a committee or an officer. Or the power may be given by statute to a Minister and thence be delegated to the authority or to a particular officer. Whereas the source of statutory power is clearly visible, delegation may be made under general statutory powers[10] by a resolution of a council or committee or by statutory instrument or even Ministerial

circular.[11] The minutes of a committee or a circular may not be available to the public - indeed it seems to be general civil service policy to treat circulars as private internal communications regardless of their content. It has been suggested that, although it may not be right to make public the instructions or advice to delegates, the actual delegations themselves contained in circulars should be made available to the general public "as proper matters of public interest and concern."[12] The same principle should presumably apply to delegations contained in committee minutes, though it should be emphasised that this was a statement of policy and not of law.

It is, however, clear law that an individual affected by the exercise of such a delegated power is entitled to see the source of the delegation

> "Plain justice at least requires that the citizen who is informed that ... his property is to be taken out of his hands ... should be entitled to know what precisely is the authority which has been exercised and to see that the exercise is not in excess of the power which Parliament has directly or indirectly conferred."[13]

Although the quotation refers only to a person whose property is being removed it is equally applicable to a person affected in any other way by the exercise of a discretion.

c) Knowing the policy upon which the discretion is exercised

The authority must itself exercise its discretion; it cannot effectively leave the decision to be taken by another.[14] Nevertheless the authority is entitled to formulate a policy upon which decisions will be made in the normal course of events. The statute, or other instrument giving the discretion, may indicate the policy to be followed, or give guidelines, in which case the discretion must be exercised in accordance with that policy or guidance.[15] If no such indication is given, the authority may decide its own policy and the courts will not interfere with that policy. There is some doubt whether, in spite of the policy, the authority must consider every case. In R v Port of London Authority ex parte Kynoch Ltd.[16] Bankes L.J. suggested that it is sufficient if

> "without refusing to hear an applicant, [the authority] intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case"

but not if

> "a tribunal has passed a rule or come to a determination, not to hear any application of a particular character by whomsoever made."

In British Oxygen Co. Ltd. v Minister of Technology[17] Lord Reid thought that this statement could not be applied literally in every case where a discretion was exercised.

> "The general rule is that anyone who has to exercise a statutory discretion must not 'shut [his] ears to the application' ... But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that provided the authority is always willing to listen to anyone with something new to say."

Viscount Dilhorne in the same case went further

> "It seems somewhat pointless and a waste of time that the Board should have to consider applications which are bound as a result of its policy decision to fail."[18]

There are, however, dicta which indicate the importance of the policy being made known to people affected by the exercise of the discretion. In British Oxygen Viscount Dilhorne said

> "It was both reasonable and right that the Board should make known to those interested the policy that it was going to follow. By doing so fruitless applications involving expense and expenditure of time might be avoided."[19]

In H.Lavender and Son Ltd. v Minister of Housing and Local Government Willis J said

> "If the Minister was intending to follow his stated policy, I think that it was very undesirable that it should not have been made known in advance. It is possible to imagine great hardship falling on appellants who, all unawares, embark on an expensive appeal foredoomed to failure by reason of a strict, though unannounced policy. However, I agree with counsel for the Minister that the failure to publicise the policy is not a ground for questioning the decision."[20]

Many of the discretions exercised by a local authority will be exercised in accordance with a policy and not merely ad hoc. One of the

most important, both in terms of the size of the problem and in its effect on people's lives, is the allocation of council housing. The Cullingworth Committee reported[21] that they received much information on

> "the apparent shroud of secrecy which often surrounds selection procedures."[22]

More than a quarter of the authorities in their sample treated their selection schemes as confidential, though by contrast Port Talbot Borough Council published their points scheme in the local newspaper. The Committee found that the fear that publication might encourage some to worsen their position, or not improve it, was "greatly exaggerated" and concluded

> "We attach such importance to the publication of methods of selection that we recommend that this should be a statutory duty on local authorities."[23]

As well as knowing the policy so that he may not waste his time in a fruitless application, an applicant is also entitled to make representations that the policy should not be applied in his case.[24] He would then be entitled to have his case considered at least if he had "something new to say."[25]

It may be that there is also a right to make representations before such a policy is changed. If this is so, it follows that persons concerned must be informed that a proposal to change the policy is being put forward, and of any new information which has led to the proposal. In Re Liverpool Taxi Owners' Association Lord Denning M.R. said

> "when the corporation consider applications for licences under the Town Police Clauses Act 1847 they are under a duty to act fairly. This means that they should be ready to hear, not only the particular applicant, but also any other persons or bodies whose interests are affected."[26]

He indicated that he was talking of policy rather than just of individual applications when he gave as examples proposals to reduce or to increase the number of licences, and said

> "it is the duty of the corporation to hear those affected before coming to a decision adverse to their interests."

Roskill L.J.said

> "This court is concerned to see that whatever policy the corporation adopts is adopted after due and fair

regard to all the competing interests."[27]

The duty to consult the association in this case before changing the previously announced policy may have arisen only because they had been consulted before the previous decision had been made and "were entitled to think that if there were to be any further change of policy they would be among the first people to be consulted."[28] Neither Roskill L.J. nor Sir Gordon Willmer said whether that earlier consultation had been necessary, though Lord Denning M.R. clearly thought it was. The fact that the second decision was in breach of a clear undertaking[29] was also of major importance; the court was concerned to ensure that the council could not disregard such an undertaking simply on the ground that it was ultra vires as a fettering of their discretion. Lord Denning M.R. felt that they could only disregard it

> "after the most serious consideration and hearing what the other party has to say; and then only if they are satisfied that the overriding public interest requires it."[30]

It has been pointed out[31] that it is strange if a hearing is required before non-statutory policy guidelines are made, when there is no duty at common law to consult before a statutory rule-making power is exercised.[32] The question also arises as to who should be consulted in these circumstances. Locus standi for an order of prohibition was held to include "any person who has a genuine grievance because something has been done or may be done which affects him."[33] It may be that the duty to consult would not have to include every person who might have locus standi. If the law is as wide as Lord Denning M.R. seems to have suggested,[34] a local housing authority would have to consult before changing its allocation system for council housing, and the number of people who might be affected by the decision could be very large. While an individual whose priority on the housing list was reduced might have locus standi, "fairness" would presumably not require consultation with every such person.[35]

d) Knowing the information upon which the decision is made.

The information upon which the decision is made in the exercise of a discretion may be factual or a matter of assessment. Factual information may be given by the applicant himself or obtained from elsewhere. If given by himself the authority may wish to check its accuracy[36] but the applicant himself has no complaint. If it is obtained from elsewhere, the applicant may wish both to know what information is being used[37] and to check its accuracy. Reports received by the deciding authority may contain a mixture of fact and

assessment. For example a housing visitor may be required to note the cleanliness and quantity of bedding and furniture and assess the "suitbility" of the family for council housing.[38] Similarly, a recommendation for priority rehousing on medical grounds includes both medical factual information and an assessment of the aggravation caused by housing conditions.[39] While assessment is a matter for the discretion of the appropriate person, the applicant will wish to be sure that it is not biased or based on irrelevant or inaccurate material. The applicant for social security payments whose file was found to contain the statement that she "was chanting the usual left-wing slogans"[40] was justified in questioning the relevance of the information even if it was true. Diagnosis by a social worker may be provisional and later amended in the light of further experience but opinion tends to be read as fact, particularly after a period of time. It is important that matters of assessment on a file are clearly shown as such with relevant factual information given in substantiation. It is not unknown for local authority social workers to write on the file "This mother is rejecting the child" or "This child has a grudge against society." Autistic children were for years blamed on "frigid" mothers. One education authority asks community teachers "What undesirable habits have you observed in the home?"[41] The Cullingworth Committee were concerned at the wide powers of assessment given to housing visitors on the basis of a brief visit. They said

> "Without wishing to impugn the goodwill and good sense of the majority of housing visitors, we believe that the system leaves too much scope for personal prejudice and unconscious bias to be acceptable."[42]

Nevertheless assessment of one kind or another plays an important part in much of the discretionary work of local authorities where deciding on allocation of scarce resources or on the best treatment for a particular person. Is the applicant entitled to see the file to ensure that factual information is accurate and relevant and assessment is unbiased and made in good faith?

The argument in favour of disclosure is basically one of fairness

> "Procedural fairness is what makes intensive government tolerable. A decision reached after fair consideration of every side of the case will not only appear less arbitary; it will most probably also be less arbitary."[43]

If the applicant knows what information is used, and that all accurate and relevant matters have been considered he is more likely to accept the

decision. The arguments against disclosure may range from the needs of good administration - requests for inspection of files would waste time or require more staff;[44] protection of the donors of information who might not express themselves with candour[45] or might not be forthcoming at all;[46] protection of the writers from possible libel actions; to the need to protect the subject of the information himself from information which might be harmful or upsetting to him.[47] The practical argument against disclosure of files, that information will only be given by telephone or personal contact,[48] is less serious than it may appear. The effect would be that while such untestable and possibly biased information might be used for the immediate purpose it would not be placed on the file, as at present, so receiving a stamp of authenticity for all time. One use of inaccurate information is less damaging than many uses of it; a small but accurate file is of more real value than a large, misleading one.

The question whether the applicant has a legal right[49] to see, and if necessary contradict, the information upon which the decision is made depends on whether it can be said that the requirements of natural justice are applicable to such circumstances. For, although the procedures sufficient to satisfy the requirements of natural justice will vary according to the type of case,[50] the right to see and comment on the evidence used in the decision is basic.[51]

> It has been argued that the requirements may not apply here "Nor does such a duty necessarily arise where numerous persons are competing for scarce resources ... *[I]t* has not yet been held in this country that they have any common law right to go to the courts on the ground that their applications have been summarily rejected, even if the rejection has been based on an adverse undisclosed report."[52]

Many of the cases in which natural justice has been held applicable have been concerned with an individual's deprivation of property[53] or of office.[54] It has been said that

> "The courts have long insisted that in exercising powers which affect a person's rights, and in particular his property rights, public authorities should observe the principles of natural justice."[55]

However, in more recent cases the courts have held that the "duty to act fairly" is applicable to rather wider circumstances.[56] Thus in R v Kent Police Authority ex parte Godden the decision was one which would "affect

the man's whole future."[57] In Breen v Amalgamated Engineering Union Lord Denning said that the duty applied in relation to

> "some right or interest or some legitimate expectation of which it would not be fair to deprive him without a hearing or reasons given."[58]

This case indicates that not only loss but also failure to obtain may be a circumstance for imposing the requirements of natural justice.

It can perhaps be said that where a person's failure to obtain a privilege, licence or property is based on objections against him he is entitled to know at least the essence of those objections[59] and to have opportunity of contradicting or correcting them. Thus in Hoggard v Worsbrough Urban District Council compensation would normally have been payable to the plaintiff. When the defendant council wished to apply the exception and give the payments elsewhere it was held that they must give the plaintiff opportunity to challenge the evidence. Winn J said

> "Where two parties are in dispute, and it is the obligation of some personor body to decide equitably between the competing claims, each claim must receive consideration and each claimant ... must be afforded an opportunity of making comment on the material put forward by rival claimants and which the council are proposing to consider."[60]

That this principle does not only apply where the authority has to decide between two competitors is seen from R v Gaming Board of Great Britain ex parte Benaim and Khaider.[61] This principle is analogous to the rule, discussed in Ridge v Baldwin,[62] that if there has to be a ground for removal of a person from an office he is entitled to be heard on the evidence. It is suggested, therefore, that if the decision of a local authority is made on the basis that the individual falls, or does not fall, within a certain category he is entitled to see, and if necessary challenge, the evidence on which the categorisation was made.[63] If, however, the decision is made on grounds of policy (as for example the decision to declare a clearance area cited in Hoggard) or in the end simply on the basis of shortage of resources there is no legal ground of complaint for the individual.[64] His complaint is against the policy or allocation of resources, not against "unfairness" in his own case.

If the individual is in litigation with the local authority in connection with the subject matter of the decision, the information may have to be made available on discovery. In Blackpool Corporation v Locker

the Court of Appeal forcefully rejected the argument that correspondence and momoranda between departments of the corporation and between the corporation and central government were "by their nature" privileged. In relation to a possible claim of public interest (though that had not been pleaded) Scott L.J. said

> "No such claim has been conceded to any local government officer when his employing authority is in litigation. Public interest is from the point of view of English justice a regrettable and sometimes dangerous form of privilege though at times unavoidable."[65]

Claims that reports made by civil servants and others acting under statutory duties must be privileged from discovery in the public interest lest the writers would be unable to express themselves with candour have been castigated as "the old fallacy" in the House of Lords.[66] Nevertheless, at least in relation to reports concerning the care of children, these arguments still have great weight. In Re D(Infants)[67] the Court of Appeal held that a mother claiming custody of her children from the local authority could not see child care officers' reports. In short judgments both Harman and Karminski LJJ indicated that the "candour" argument was of great importance[68] though they also felt that discovery should not anyway be available in "children" cases. Lord Denning M.R. based his decision on the relevant Regulation which provided for the case record to be open to inspection by authorised persons; he construed this as implying that no inspection could otherwise be permitted.

In R v Greenwich Juvenile Court ex parte Greenwich London Borough Council[69] the local authority used this case to refuse to disclose any information to a mother seeking resumption of custody of her children. The Divisional Court held that the Juvenile Court had no power to order discovery though the judges indicated the importance of as much information being revealed as possible. Pain J said that

> "it was appropriate that the authority should specify their objection, and consider how much they could safely reveal rather than claim privilege in order to conceal information."

There may be special factors which require confidentiality for the protection of children[70] but if the "candour" argument is alone seen as a justification for non-disclosure that is equally applicable to reports and recommendations in relation to the many other areas of discretion of a local authority. It should be seen that the protection afforded by

qualified privilege against libel is normally quite sufficient to protect the giver of information.

e) Intervention by a councillor on behalf of the individual

If the individual cannot have access to information, the question arises whether a councillor may have access to it on his behalf. The individual may be satisfied if the councillor can see the information to ascertain that the matter is being dealt with properly, that no bias or irrelevancy is present or that a good decision in all the circumstances has been reached. Alternatively the individual may wish the councillor to see the information in order to pass it on to him to be used by him for one purpose or another.

The councillor, as a member of the authority has a prima facie right to see information in the possession of the council

> "so far as his access to the documents is reasonably necessary to enable the councillor properly to perform his duties as a member of the council."[71]

Do a councillor's duties include looking after the interests of individual constituents? Local authorities vary in their attitude to this question. For example, in Derbyshire County Council if the councillor is not a member of the relevant committee concerned with the matter he will not readily be given access to the information unless he can show a need.[72] On the other hand Nottingham District Council take a very wide view of a councillor's duties. For example when a member for a ward where building work was about to be done wished to see the tenders before the housing committee had met he was allowed to see them, though with the figures blocked out. Although none of the cases in the law reports say that acting for a constituent is part of a councillor's job, it is obvious that it is a recognised function outside the courts[73]. The Committee on Management of Local Government which recommended a great reduction in the number of local government committees and their size felt that this would not detract from the importance of the job of councillor.

> "The member who does not serve on any committee will have more time to devote to the problems of his constituents"[74]

and the Sheffield study showed that a quarter of all councillors considered that dealing with the problems of particular individuals was their main task.[75] Parliament, too, has recognised this function of local councillors by providing for complaints to the Local Commissioner to be normally channelled through local councillors.[76]

If the individual is in dispute with the local authority a councillor who seeks to support him may be refused access to information by the court

on the ground that he has

> "some indirect motive ... not consistent with the interests of the council as a whole"[77]

or that he is

> "not actuated solely by the public interest."[78]

Mandamus being a discretionary remedy, the court requires the claimant to show both a need to see the document (in relation to his work) and that he has no indirect motive. Some, though not all, local authorities follow the lead of the courts in restricting access. Once legal action has begun, or is seriously contemplated, even liberal local authorities are less forthcoming with information and the courts have been scathing in condemnation of councillors trying to obtain information when acting for the individual against the authority.[79] The question of "fishing" for evidence becomes relevant here and the reluctance to allow disclosure is in line with the court's attitude to "fishing expeditions,"[80] though on discovery in the action disclosure may be ordered. In Rose v Chesham Urban District Council[81] where the owner of a river bed brought an action against the sanitary authority for pollution disclosure was ordered of correspondence with earlier complainants, minutes of the authority relating to the complaints and plans of new sewers proposed.[82]

The councillor may wish to see information because he is critical of the policy of the council and is seeking evidence about the exercise of that policy. If the information has been before a committee he may have no difficulty in obtaining it, either from a sympathetic member of that committee or because, in some authorities, all councillors are entitled to see the papers for any committees.[83] Some authorities readily accept that criticism of policy is a part of the councillor's job and so he may see the information, even if it has not been before a committee. Others, however, are more defensive. Both R v Southwold Corporation ex parte Wrightson[84] and R v Barnes Borough Council ex parte Conlan[85] came to court as a result of a resolution of the council that the particular councillor should not be allowed to see certain information. The Southwold Corporation passed its resolution because he was "likely to use it for a purpose antagonistic to the policy of the Town Council," being opposed to a lease which the corporation had granted. The court held that

> "if he was desirous ... of raising the question whether or not the bargain ... was a prudent and proper bargain, he had sufficient interest"

and he was allowed to see the lease. In the Barnes case, the council had

decided to defend an action by the ratepayers association. They set up a small committee in relation to the litigation and resolved that no other councillors could see the information.[86] Mr Conlan was known to be opposed to the decision to defend the action. The court held that he was not entitled to see the information

> "It has not been established that Mr Conlan has been prevented from carrying out any duties which fell upon him as a councillor by the failure to disclose the documents ... and while no useful result would follow from such a disclosure to Mr Conlan the interests of the council in the pending litigation might be prejudiced."[87]

Similarly, in R v Hampstead Borough Council ex parte Woodward the court made it clear that the alderman was right, in the exercise of his public duty, to examine the property and propose a variation of the order of the public health committee,[88] but that his support of the individual in dispute with the local authority was an "indirect motive" disentitling him to access to the information.

Even if the councillor can show an interest in seeing the information and no "indirect motive," there may be a reluctance to show him information on the ground that it is particularly confidential and the protection of the donor or the person to whom it relates should override the councillor's interest in seeing it. Local authority social workers are very cautious of allowing councillors to see files relating to their clients. Personal information which has to be put to a committee may be printed on different coloured paper and given a restricted circulation, or it may be given orally at the meeting and not committed to paper at all. Such matters may be discussed only in sub-committee which is not open to the public and where the papers are not circulated beyond the members of the sub-committee.[89] The British Association of Social Workers, rather hopefully, have said[90]

> "Councillors and committee members need information to enable them to make decisions which affect clients and families and the use of resources. This information can almost certainly be provided by members of the staff in summary form and direct access to the files by councillors and committee members will not be necessary."

If reluctance to disclose the information is based on "the client's right to confidentiality"[91] then it should be clear that if the client gives his permission for the councillor to see the information there

is no reason for the local authority to refuse permission. The information may, however, have been given by other people and disclosure may be resisted on the ground that the donor should be protected.[92] Standing Orders adopted by Derbyshire County Council in 1974 to govern councillors' right of inspection include the following clause:[93]

> "In the case of any document containing personal information, any decision by a chairman and chief officer or a committee to permit inspection shall be subject to condition that before the document is produced for inspection the permission of the original author of the document shall be obtained and such author shall be given the opportunity to amend the document or withdraw the document in part or in its entirety."

This remarkable requirement was made necessary by the assertion that local doctors otherwise would refuse to give the authority medical information.[94] The procedure agreed with the Area Medical Committee also provides that the originator of the information will normally be told of the nature of the need and motive for disclosure before he decides whether to give his permission. Nothing is said about whether information removed from the file before disclosure may be put back afterwards!

Whether or not such standing orders would be upheld by the court if challenged,[95] it may well be in the public interest that some information should be withheld to protect the donor. This may be required if the supply of information from such sources is necessary to the continuance or efficiency of the service and the supply would be likely to be seriously affected by such disclosure or individual informants would be likely to suffer injury.[96] Protection should not be given just because such information is convenient for the authority or just because it was given in confidence,[97] and this would not be a sufficient reason for the protection of reports by officers of the authority or internal memoranda. In most of such cases sufficient protection is given by non-disclosure of the name of the source, though sometimes the nature of the information would necessarily reveal it.

In other cases, it may be necessary to ensure that the subject[98] of the information does not see it if the knowledge would be harmful or hurtful. This, it is submitted, must be rare in the case of an adult, competent subject but some people are particularly vulnerable.[99] Perhaps a frail elderly person in the care of the local authority should not be told of attempts by her family to get her property; perhaps a student should not be told that his father has an incurable illness even though the information is on his file in his interests; perhaps a long-term

prisoner should not, in his own interest, be told of difficulties in his family.[1]

If there is a special reason for the subject not seeing the information, that does not necessarily mean that the councillor may not. In some cases the subject may be satisfied if the councillor sees it, though in others he may not. Standing Orders may provide that any onward transmission by the councillor is not authorised,[2] which will protect the authority from loss of qualified privilege on the ground of having authorised excessive publication.

Thus it would appear that if the councillor can show a need to see the document, which may be to advise or assist a constituent, and there is no litigation pending, the councillor may insist on seeing information in the possession of the authority subject only to the private right of confidentiality of the person to whom the information relates (which is no problem if he is seeking the disclosure) and the public interest in protection of children and vulnerable people and possibly the identity of informants in other circumstances.

f) The Local Commissioner for Administration

Under the provisions of the Local Government Act 1974 a Local Commissioner may investigate action taken by a local authority to ascertain whether a complainant has suffered "injustice in consequence of maladministration."[3] It was pointed out that

> "The Commissioner is not appointed as a court of appeal to deal with the merits of an issue. He is not appointed to decide whether a tribunal of any sort has reached the right decision or the wrong decision ... The Commissioner is there to see whether there has been any maladministration, which is something very different."[4]

This is emphasised by section 34(3) of the Act which provides

> "It is hereby declared that nothing in this Part of this Act authorises or requires a Local Commissioner to question the merits of a decision taken without maladministration by an authority in the exercise of a discretion vested in that authority."

Complainants, however, do not always recognise the distinction. One Local Commissioner, who rejected for investigation 617 of the 789 complaints he received in the year, said

> "The main cause of rejection is that the complaint does not disclose any evidence of maladminstration or injustice.

> Very often a complaint is simply an expression of disagreement with a decision that has been properly reached."[5]

Maladministration is not defined in the Act (as it is not in the Parliamentary Commissioner Act 1967 upon which the provisions are modelled) but it includes "arbitrariness, malice or bias" and "failure to take relevant considerations into account."[6] It may also include failure to apply a policy consistently between applicants.[7] One Local Commissioner, in making a finding of maladministration, said

> "The public should have confidence in the way council houses are allocated; whatever allocation scheme is decided upon by a council it should be followed meticulously."[8]

If the authority, in coming to a decision, takes into account certain information there will be maladministration if applicants are not invited to give that information and some do while others do not.[9]

In some cases failure to give reasons for a decision may be considered to be maladministration. In one case a political organisation was refused permission to hire a hall controlled by the local authority. No reasons were given for the decision. Maladministration was found in the failure to give reasons for delays in making the decision and this was increased by the failure to give reasons for the decision, although it was accepted that no reasons were required by law.[10] By the time a second report was made[11] the local authority had passed a resolution that the organisation in question, and some others, should not be allowed to hire the halls and had again refused an application. No reason for the resolution was given either in the resolutionor in the minutes. The reason given for rejecting the application was simply the resolution of the council. The Local Commissioners found that the council had repeated the maladministration.[12] This case is significant because it was accepted that the council was not bound by law to give reasons for a decision to refuse an application to hire the hall.[13] Evidence obtained by the Commissioners revealed several different reasons for refusal in the views of officers and councillors[14] some of which, like a fear of disorderly conduct in the meeting, could have been answered by the applicant if they had been put to him[15] and others of which appeared to indicate political bias.[16]

It is clear from the investigations made that the Local Commissioners may inquire into the exercise of discretions by local authorities and the

policy and reasons why decision have been made. Although they will not question the policy they may require authorities to follow their policy once made and, sometimes at least, to give reasons for the exercise of their discretions.

The Act gives the Commissioners wide powers of access to information for the purpose of an investigation, which must be held in private.[17] Thus the Commissioner

> "may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit."[18]

He may

> "require any member or officer of the authority concerned, or any other person who in his opinion is able to furnish information or produce documents relevant to the investigation, to furnish any such information or produce any such documents"[19]

and he has powers of subpoena[20] and to certify an obstruction to the High Court as contempt.[21] The Act expressly provides that he may require information about communications with central Government[22] and neither Crown privilege nor the Official Secrets Acts can apply to such disclosure.[23] It is clear from the investigations made that wide use is made by the Commissioners of their powers to obtain information. Reference is often made to internal memoranda and files (with critical comment on missing information) and reports to committees as well as oral evidence. In one case the Commissioner had obviously examined the complainant's medical records (with her consent) and the files of the police, her solicitor, the Social Services department and the Health Service Commissioner.[24]

There are, however, some restrictions on the obtaining of information. No-one may be compelled to give information or produce a document which he could not be compelled to do in civil proceedings in the High Court.[25] Thus privilege against self-incrimination is retained and also legal professional privilege and conciliation privilege. A more serious restriction, however, has recently arisen. In Re a Complaint against Liverpool City Council[26] the Divisional Court held that a local authority was entitled, under section 32(3), to refuse to disclose documents to the Local Commissioner on the ground that disclosure to him would be contrary to the public interest. The documents in question related to a child boarded out with foster parents, an area which the court has always recognised as particularly sensitive, but the decision was surprising

on construction of the sub-section in its context. The section is headed "Law of defamation, and disclosure of information" and sub-section 2 clearly uses the word "disclosure" to mean disclosure by the Local Commissioner of information which he has received. It was widely assumed[27] that sub-section 3 provided machinery to allow a Minister or local authority to require the Local Commissioner not to make certain information public in his report. Sub-sections 2 and 3 appear very similar to sub-sections 2 and 3 of section 11 of the Parliamentary Commissioner Act 1967, and sub-section 3 of that Act clearly concerns communication by the Parliamentary Commissioner. One might ask why section 29(4) was enacted, removing Crown privilege, if it could come back again extended also to the local authority in section 32(3), for that provision

> "that in the opinion of the Minister, or as the case may be of the authority, the disclosure of that document or information, or of documents or information of that class, would be contrary to the public interest"

is as wide as Crown privilege claimed before Conway v Rimmer.[28] The only limitation is that the Secretary of State may override the decision of a local authority.[29] The court were disturbed that the Commissioner would be unable properly to carry out his statutory function without access to the information. Nevertheless there is some significant difference in the wording of section 32(3) of the 1974 Act and section 11(3) of the 1967 Act and the court felt that the 1974 provision was clearly intended to keep information from the Local Commissioner. Under the Parliamentary Commissioner Act 1967 if notice is given under section 11(3)

> "nothing in this Act shall be construed as authorising or requiring the Commissioner ... to communicate to any person or for any purpose any document or information specified in the notice."

Under the 1974 Act if notice is given under section 32(3)

> "nothing in this Part of this Act shall be construed as authorising or requiring any person to communicate to any other person, or for any purpose, any document or information specified in the notice."

The use of the words "any person" instead of "the Commissioner" is sufficient to change completely the meaning and scope of the provision and may have the effect of nullifying the appointment of the Local Commissioners. The provision should be changed by Parliament.

The effectiveness of Local Commissioners has been criticized as they have no enforcement powers. The view of the government was that

> "another important element in the system is the emphasis it gives to local publicity, and the effect of public opinion in rectifying any maladministration by local authorities. Thus reports on particular cases by Local Commissioners will be made available for public inspection, and will no doubt be fully reported in the Press. That is the effective sanction."[30]

The report is given to the complainant (who may publicise it if he wishes) and to the local authority who must make it available for inspection by the public for a period of three weeks and advertise this fact locally.[31] The report does not normally state names[32] and in some cases the Commissioners expressly request the local authority not to make known the complainant's identity.[33] The Act gives the Commissioners a discretion

> "after taking into account the public interest as well as the interests of the complainant and of persons other than the complainant"

to direct that a particular report shall not be made available to the public.[34] This discretion is sparingly exercised but has been used in the case of a complaint involving the conduct of a neighbour[35] and in one case concerning custody of a child.[36]

Apart from the report, the Commissioners may only disclose information received in the course of their investigations for ancillary purposes connected with their work.[37]

Thus if a Local Commissioner decides[38] to investigate a complaint of injustice caused by maladministration he has wide powers to obtain relevant information and, although he will not question the merits of a decision, he will consider in detail the way in which it was taken. Until now the confidentiality of the information which he seeks to obtain has not normally been used to prevent him from seeing it; it remains to be seen whether much use will be made of the power of withholding information under section 32(3).

NOTES

Introduction

1. *"Governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives": Soucie v David 448 F.2d.1067,1080(1971) quoted in Kutner: Freedom of Information: Due Process of the Right to Know (1972) 18 Catholic Lawyer 50.*

2. *The word 'members' is here used to denote the people governed, be it citizens of the country, residents of the area of a local authority or members of the youth club. The governing 'group' may be one person or many.*

3. *"Political power and the effective control of communication go together." Hill: Democratic Theory and Local Government 1974 pub. Allen & Unwin page 162.*

4. *An example of this method applied to central government is the Children and Young Persons Act 1969. A White Paper - The Child, the Family and the Young Offender - was published in 1965, followed by another - Children in Trouble - in 1968, which took account of the discussions on the earlier White Paper and made further proposals. The Act was based on the second White Paper and further discussions*

5. *This may also lead to stifling of criticism from members. Holt C.J. justified actions for seditious libel on the ground that "it is very necessary for all governments that the people should have a good opinion of it": Tuchin's case (1704) quoted in Kutner loc.cit.*

6. *A group member, or his adviser, will not normally wish to embarrass the group, or himself, by appearing to have made up his mind in advance of the group decision, hence the Fulton Committee's argument for non-disclosure of civil service discussions: Report on the Civil Service (1968) Cmnd.3638 para.279. Lord Armstrong has suggested that the public has the right to know the various possibilities but not who said what: The Secrets of Government BBC Radio 4 March 4 1976. In Sweden writers of papers have a right of anonymity: Chapter 2 Freedom of information.*

7. *On the reasons for non-disclosure of Cabinet information, for example the affidavit of Lord Gardiner in Attorney-General v Jonathan Cape Ltd reported in The Times July 24 1975 and discussion in Chapter 2. Journalists were able to reconstruct argument in Cabinet about the IMF loan because of leaks by Ministers opposed to deflationary measures: The State of the Nation, Granada Television February 15 1977.*

8. *An example would seem to be the decision by the Liverpool Education Committee in 1976 to hold in secret meetings of the sub-committee considering reorganisation of its secondary schools, to refuse representation of parents on the sub-committee and to dismiss from the sub-committee any member disclosing its deliberations: The Times November 5 1976. But secrecy may cause greater difficulties. "The greater the secrecy, the greater the sense of exclusion from the decision making process and the greater the difficulty of gaining public acceptance for the decisions arrived at - and very probably, too, the worse the decisions": Report of the Commission on the Constitution (1973) Cmnd.5469 Memorandum of Dissent, Quoted in Jacob: [1974] Public Law 25.*

9. *Some 300 information officers of central government are in daily contact with press and broadcasting organisations: The Times October 7 1976. The 1969 White Paper: Information and the Public Interest stated as Government policy that "the prior publication of information about the considerations involved in policy matters should form a continuing part of the decision-making process whenever reasonably possible." Cmnd.4089 para.14 In July 1977 Sir Douglas Allen instructed government departments that relevant background papers on major policy matters would normally be released and suitable analyses of policy options should be prepared. But these do not include matters of evaluation or assessment: Lord Croham BBC Radio 3 August 31 1978; The Listener September 7 1978 page 298.*

10. *Pressure groups are good indicators of significant member-feeling both for central and for local government. The democratic process is endangered, however, if a particular group is assumed to have a view on an issue whether its members feel sufficiently strongly to press a point or not: R.Dworkin: Open government or closed? New Society June 24 1976. Or if the identity and effectiveness of certain pressure groups cannot be ascertained. "In a situation in which the people dance but do not call the tune, it is on the badly lit backstage of consultative 'closed politics' rather than under the stage lighting of the public performance of 'open politics' that the answers to our vital questions generally lie": Hayward: Private interests and public policy 1966 pub. Longmans page.6.*

11. *"It is an abuse of consultation when it is turned into a belated attempt to prepare the ground for decisions that have in reality been taken already": Fulton Report para.278.*

12. *"The arms-length model of a free press ... forces those who manage the decision to take more care, as they broaden the groups that consider the decision, to argue on principles that are able to withstand publicity": R.Dworkin loc.cit.*

13. *The Hawley report disclosed by Mr Enoch Powell: The Times May 25 1976.*

14. *The Sunday Times March 9 1975.*

15. *Refusal of the Home Office to publish a survey which indicates magistrates' disapproval of official policy on marijuana smoking: The Sunday Times February 1 1976.*

Attendance at meetings

16. *Before 1888 much local government was carried out by justices of the peace at Quarter Sessions, which were always held in public.*

17. *(1877) 2 C.P.D.215. The point is now covered by the Defamation Act 1952 section 7.*

18. *at 219.*

19. *at 220. The basis for distinguishing Wason v Walter (1868) L.R.4.Q.B. 73 was very weak, since the public had no right to attend meetings of Parliament.*

20. *at 219. Privilege for the member speaking is not lost by the presence of the public: Pittard v Oliver [1891] 1 Q.B.474.*

21. *Tenby Corporation v Mason (1908) 6 L.G.R.233. The background to the case and subsequent developments are discussed in Burke: The Murky Cloak - Local Authority - Press Relations 1970 pub.Knight.*

22. at 242.

23. Local Authorities (Admission of the Press to Meetings) Act 1908.

24. The public had been entitled to attend Parish Councils by the Local Government Act 1894, since these were seen as extensions of Parish Meetings.

25. Section 100.

26. Sub-committees are not included, though by Circular 45/75 'Publicity for the work of Local Authorities' the Department of the Environment urged authorities to open them to the press and public. In the ensuing discussion 'council' is used to include both council and committee.

27. Public Bodies (Admission to Meetings) Act 1960 section 1(2).

28. ibid. section 1(3).

29. Quoted in Cotter: Admission of Press and Public to Meetings of Local Authorities: (1974) 138 Local Government Review 174.

30. Ministry of Housing and Local Government Circular 21/61 para.6. The circular is reproduced in Burke op.cit.

31. (1968) Cmnd.4089 para.279. A view accepted also in the past as a ground for Crown Privilege.

32. Cross. Principles of Local Government Law 5th ed. 1974 pub. Sweet & Maxwell page 48. This was clearly the intention of the supporters of the Bill when the amendment was moved. "It may be difficult for officials of a local authority to give advice freely and absolutely unfettered in the presence of the public or of the press: Mrs Thatcher H.C.Deb.Vol.623 col.773.

33. Circular 21/61 para.4.

34. R. v Liverpool City Council ex parte Liverpool Taxi Fleet Operators Association [1975] 1 All E.R.379.

35. Public Bodies (Admission to Meetings) Act 1960 section 1(8). This provision was inserted in the Act in case it might be thought that the common law right of removal was excluded.

36. Circular 21/61 para.9.

37. Examples are given in 'Secrets the councils keep from their ratepayers': The Sunday Times March 14 1976.

38. The Times November 29 1974. The Final Report did not raise the point.

39. Peachey Property Corp. v Paddington Borough Council. The Times June 9 1964 (C.A.).

40. For example Hopkinson v Lord Burghley (1867) 2 Ch.App.447.

41. D v NSPCC [1977] 1 All E.R.589.

42. R. v Liverpool City Council ex parte Liverpool Taxi Fleet Operators Association [1975] 1 All E.R.379,382 Lord Widgery C.J.

43. ibid. at 384. (The grounds for exclusion were discussed above).

44. Circular 21/61 para.6.

45. R v Bradford on Avon Rural District Council ex parte Thornton (1908) 99 Law Times 89. See further below.

46. R v Justices of Staffordshire (1837) 45 Rev.Rep.412.

47. *In the Liverpool case the court may have been influenced by the fact that the Press were not excluded, and perhaps also by the fact that the attempt by the committee to allocate taxi licences was before the court for the third time.*

48. *Sunday Times March 14 1976.*

49. *Table 3 of the Survey Results for the Committee on Management of Local Government and the Royal Commission on Local Government in England shows no attendance by the public at meetings of two-thirds of non-London authorities over a period of twelve months, though most of these were rural district councils. Of all the 684 non-London authorities only two groups (six County Boroughs) averaged an attendance above twenty people.*

50. *during the debate on the 1960 Bill. Quoted in Burke op.cit.*

51. *The Cornish Guardian November 10 1977.*

52. *The Press Council has been more forthright in criticising councils which exclude the public without formal motion, leaving the Clerk to draw an appropriate resolution for insertion in the minutes: Press Council 15th Annual Report 1967-8 pages 104 to 106. And the Local Commissioners for Administration have commented that "a decision to deal with sensitive issues behind closed doors is likely to lead to rumour and critical speculation": Report for year ending March 31 1976 page 48.*

Obtaining information before decisions

53. *Power to give information to the public, and spend money on it, is provided by Local Government Act 1972 section 142.*

54. *For discussion and examples see Ganz: Administrative Procedures 1974 pub. Sweet & Maxwell Chapter 5.*

55. *The Maud Committee on Management of Local Government (1967) para.439 considered that major proposals or issues should be widely circulated in the form of council papers well before discussion in council. When the Oldham Community Development project set up Area Councillors' Committees to encourage consultation "councillors' strongest reservations were linked to an underlying belief that the Committees exacerbated the dilemma of reconciling specific demands with global priorities and collective responsibilities." Corina: [1977] Public Administration page 340.*

56. *Local Government Act 1972 section 100. The 1960 Bill would have applied also to committees exercising delegated functions but this was removed in Committee.*

57. *Report of the Committee on Conduct in Local Government (1974) Cmnd.5636 para.135.*

58. *section 1(4)(b).*

59. *Local Government Act 1972 section 160(2).*

60. *Table 4 of the survey results published in the Report of the Committee on Management of Local Government shows that hardly any 'average' members received less than 100 sheets of typewritten foolscap each month and some as much as 600. The 'average' member would not be a member of all the committees.*

61. *'A pressman's view of circular 45/75': anon. (1975) 139 Local Government Review 784.*

62. *Thirteen percent of complaints received by the Local Government Reform Society in 1965 related to this area: Jackson: Local Government 2nd ed.1970 pub. Butterworths page 168. Many complaints to the Local Commissioners for Administration allege secrecy, failure to inform or misunderstanding about intentions: Report for year ending March 31 1976 page 22.*

63. *Several examples are given in the Sunday Times March 14 1976.*

64. *Department of the Environment Circular 45/75.*

65. *In the Nottingham area both the County Council and the City Council provide the local press and radio with all papers as sent to councillors, except a few confidential papers. Embargoes are rarely imposed though recent examples have been proposed rate increases, budget speeches and land deals. Another District Council, however, embargoes everything until the meeting. (Information provided by municipal correspondents of the Nottingham Evening Post, Radio Trent and Radio Nottingham in February 1977)*

66. *Quoted in The Sunday Times March 14 1976. The argument that members of the authority must receive papers before the press or public, as if they were private property, is also used to justify the punishment as contempt of Parliament of those who prematurely publish reports of select committees. This has been castigated as "mere self-importance": The Observer March 19 1978.*

67. *Sunday Times loc.cit. A decision to exclude representatives of a newspaper from meetings of the authority would presumably be illegal, even though other newspapers were represented.*

68. *Quoted in Levy: The Press Council, History, Procedure and Cases 1967 pub. Macmillan page 52.*

69. *Discussed in the Fulton Report (1968) Cmnd.3638 chapter 8.*

70. *The analogy is not, of course, complete since some members of the authority will usually belong to minority parties and may use leaks as a form of political attack. This is one reason why decisions are effectively now usually taken in private party meeting.*

71. *Anon. : A pressmen's view of circular 45/75: (1975) 139 Local Government Review page 784.*

72. *The town was Darlington.*

73. *Press Council Annual Report 1963 pages 35-37. Levy op.cit. gives several examples of similar decisions.*

74. *Complaint against the Northern Echo: The Times August 16 1978.*

75. *A threat of exclusion may be effective to prevent disclosure, for example the Liverpool Education case cited above note 8.*

76. *For example Local Government Act 1972 section 228 (3).*

77. *(1907) 5 L.G.R.888.*

78. *[1938] 3 All E.R.226.*

79. *This is the only apparent reason for the statement of the court (at page 230) that it would be an impossible burden on a councillor to expect him to be familiar with everything, and so the duties are divided between various committees. The councillor in that case was asking to be shown the documents, not complaining of overwork. Alec Samuels argues that a councillor is entitled to attend meetings and receive papers of a committee of which he is not a member: (1978) 142 Local Government Review page 73.*

80. *R v Hampstead Borough Council ex parte Woodward (1917) 116 L.T.213 - the Alderman who championed the famour Mr Arlidge against the Local Government Board was held thereby to have an "indirect motive." Yet a councillor's function of dealing with electors' problems took an average of 7½ hours a month - 14% of the time which he spent on public business - in 1967: Report of the Committee on Management of Local Government Vol.2 page 91. And a survey of Sheffield councillors in 1970 showed that in a period of four weeks one-third of the councillors had been approached by 50 or more of their electors, and the average was 45: Hampton: Democracy and Community 1970 pub. Oxford University Press page 198. The question of the councillor assisting the elector is further considered in section 3(e).*

81. *(1917) 15 L.G.R.309,313.*

82. *[1938] 3 All E.R.226,230.*

83. *For example in Purcell v Sowler (1877) 2 C.P.D.215.*

84. *As in Initial Services Ltd. v Putterill [1968] 1 Q.B.396.*

85. *As in the attitude to statutory rights of attendance (discussed above) and inspection (discussed below).*

86. *[1969] R.P.C.41 discussed in Chapter 1.*

87. *Attorney-General v Jonathan Cape Ltd. [1975] 3 All E.R.484 discussed in detail in Chapter 1.*

88. *Held by Lord Widgery C.J. (at 495) to be "an established feature of the English form of government."*

89. *Almost always some members of the committee will be of a different political party than the majority; they may feel it a duty to dissent.*

90. *It was on this ground that the action failed in Beloff v Pressdram Ltd. [1973] 1 All E.R.241.*

91. *Copyright Act 1956 section 6.*

92. *[1973] 1 All E.R.241,264.*

93. *ibid. at 260.*

94. *Between 1964 and 1972 48 members or employees of local authorities were convicted of such offences: Committee on Conduct in Local Government (1974) Cmnd.5636 para.14.*

95. *Attorney-General v Jonathan Cape Ltd. [1975] 3 All E.R.484,495.*

96. *This argument has been used in Derbyshire County Council in relation to possible future road plans.*

97. *An example is National Coal Board plans for later expansion in the Nottinghamshire area: Nottingham Evening Post June 20 1978.*

98. *There is support for this in Blackpool Corporation v Locker [1948] 1 K.B.349. Delegation had been made to the Town Clerk but a submission that the authority was wrongly sued for his acts was rejected.*

99. *D. v N.S.P.C.C.[1977] 1 All E.R.589.*

1. *Department of Environment Consultation Paper 'Participation in Road Planning' 1973.*

2. *Hill: op.cit. page 171. In 1976 a councillor in Derbyshire was refused access to papers from the regional constructional unit on the ground that they are personal to the officer to whom they were sent.*

3. *Report of the Parliamentary Commissioner: The Times March 15 1977.*

Decision making in committee

4. *The Committee on Management of Local Government (1967) recommended that they could be reduced to about six, but envisaged decisions being taken by a management board (paras.160,168).*

5. *Section 101.*

6. *In South Herefordshire District Council five key committees take most of the decisions and the council meets only twice a year: Sunday Times March 14 1976.*

7. *Though a local authority may make all such papers normally available. In 1977 a complete set for council, committees and some sub-committees of Nottingham County Council cost a member of the public £10.*

8. *[1962] 1 All E.R.247.*

9. *at 252.*

10. *ibid.*

11. *Section 102 (3).*

12. *Section 106.*

13. *Schedule 12 Part VI para.41.*

14. *ibid. para.44.*

15. *Local Government Act 1972 section 100.*

16. *It may, indeed, have reinforced the judgment. Section 99 speaks of "meetings and proceedings of local authorities and their committees."*

17. *[1962] 1 All E.R.247,250.*

18. *(1897) 13 T.L.R.299.*

19. *Municipal Corporations Act 1882 section 233.*

20. *Section 1 (4)(b).*

21. *Local Government Act 1972 Schedule 12 paras.41,44.*

22. *Circular 21/61 para.10.*

23. *(1837) 45 Rev.Rep.412.*

24. *at 418. A beneficiary under a trust has a proprietary interest in trust documents: O'Rourke v Darbishire [1920] A.C.581.*

25. *There is now statutory provision for inspection of orders for the payment of money and of an abstract of the accounts and the auditor's report by local government electors: Local Government Act 1972 section 228 (2),(4).*

26. *at 419. "rational curiosity" was not enough.*

27. *R v Master & Warden of the Merchant Tailors' Company (1831) 2 B. & Ad.115; 109 E.R.1086.*

28. *Mutter v Eastern and Midlands Railway Co. (1888) 38 Ch.D.92,106 a case of a statutory right of inspection held to include a right to copy a list of names. And Conway v Petronius Clothing Co.Ltd. [1978] 1 All E.R.185.*

29. *(1908) 99 Law Times 89.*

30. *Section 58. The effect of the case was confirmed by Local Government Act 1933 section 280: 'a person interested.' Now Local Government Act 1972 section 228(5).*

31. *at 90.*

32. *H..C.Deb. 4th series Vol.20 col.851: Mr W.Long. Nottinghamshire County Council have decided to press for a change in the statutory provisions to require an applicant to give 24 hours' notice in writing of his desire to inspect a document: Nottingham Evening Post June 20 1978.*

33. *The discretionary nature of mandamus is important, In a prosecution for obstruction of a right to see orders for the payment of money (London Government Act 1939 section 173(3), now Local Government Act 1972 section 228(2)) the court held that the elector was entitled unless his request was "so oppressive as to amount to an abuse of the elector's right": Evans v Lloyd [1962] 1 All E.R.239.*

Decision making in party meeting'

34. *This cannot apply, of course, where no one party has a sufficient majority to ensure the passage of its will.*

35. *Mr Gerry Reynolds during the debate on Second Reading when the Bill still included committees.*

36. *Circular 21/61 para.6.*

37. *op.cit. page 91.*

38. *Advocated by the Maud Report para.158.*

39. *(1974) Cmnd.5636.*

40. *ibid.para.31.*

41. *Members of a party which could become the majority party may find co-operation of officers in giving information more easy to obtain than members of a weak opposition.*

Exercise of Discretions

1. *Dearlove: Politics of Policy in Local Government 1973 pub. Cambridge University Press page 5.*

2. *(1957) Cmnd.218 para.21.*

3. *(1974) Cmnd.5636 paras.135,138.*

4. *The Franks Report saw the three essentials for an administrative tribunal as "openness, fairness and impartiality" (para.23). They are equally applicable to all administrative exercise of discretion.*

5. *As are the matters discussed above in section 2.*

6. *(1954) Cmd.9176. The Crichel Down Inquiry.*

7. *Blackpool Corporation v Locker [1948] 1 All E.R.85,93 Scott L.J.*

8. *Lord Gardiner gave two examples - an allegation of homosexuality and an allegation of former membership of the Communist Party - which cost innocent people their jobs. Horizon: Political surveillance and privacy. BBC2 December 13 1976.*

9. (1955) 18 M.L.R.557,564.

10. For example Local Government Act 1972 section 101.

11. As in Blackpool Corporation v Locker (above).

12. Evershed L.J. in Blackpool Corporation v Locker.

13. [1948] 1 All E.R.85, 99 Evershed L.J. Counsel conceded that the circular should have been shown to the citizen when he challenged the act of the town clerk.

Knowing the policy

14. H.Lavender and Son Ltd. v Minister of Housing and Local Government [1970] 3 All E.R.871.

15. Padfield v Minister of Agriculture [1968] 1 All E.R.694.H.L.

16. [1919] 1 K.B.176, 184.

17. [1970] 3 All E.R.165 H.L.

18. at 175. Both statements were strictly obiter since the application had been considered.

19. ibid. Failure to explain local authority policy so that a claimant went through the application procedure unnecessarily was maladministration: Local Government Commissioners Investigation 2189S.

20. [1970] 3 All E.R.871,880. A similar statement has been made about licensing justices: R v Torquay Justices ex parte Brockman [1951] 2 K.B.784,788.

21. Council Housing Purposes, Procedures and Priorities. 9th Report of the Housing Management Sub-committee of the Central Housing Advisory Committee 1969.

22. Para.72.

23. Ibid. para.75. This has since been reiterated by the Housing Services Advisory Group and is likely to be enacted: The Times September 22 1978.

24. Lord Reid (with whom Lord Diplock and Lord Wilberforce agreed) in the British Oxygen case.

25. Ibid. But notnecessarily an oral hearing.

26. [1972] 2 All E.R.589,594.

27. Ibid. at 596.

28. Ibid. at 598 Sir Gordon Willmer.

29. That the new policy would not be implemented until a private Act had been obtained.

30. Ibid. at 594. This is analogous to R v Manchester Corporation ex parte Wiseman (1911) 9 L.G.R.129 where the persons who had obtained a clause in a private Act had locus standi for mandamus.

31. J.M.Evans [1973] 36 M.L.R.93.

32. Bates v Lord Hailsham and others [1972] 3 All E.R.1019.

33. [1972] 2 All E.R.589,595.

34. De Smith: Judicial Review of Administrative Action 3rd ed. 1973 page 91 thinks it must be limited.

35. *The City of Birmingham policy review committee requested views from M.P.s, councillors and voluntary bodies working in the housing field when reviewing its allocation methods, but not from the persons primarily affected. Report 'Housing Allocation' March 1975 cited in Lewis: Council Housing Allocation: Problems of Discretion and Control [1976] Public Administration page 147.*

Knowing the information

36. *This may be one of the functions of the housing visitor: Cullingworth Report para.87 citing Report of Institute of Housing Managers (1962).*

37. *Applicants not infrequently protest at being asked apparently irrelevant questions. Refusal to comply may be damaging, or may result in deletion of the question. There are, for example, conflicting views about whether housing records should include the applicant's ethnic origin: The Times April 30 1977.*

38. *Cullingworth Report para.88.*

39. *Ibid. para.108.*

40. *Referred to by the applicant's Member of Parliament: H.C.Deb. Vol.858 col.1963.*

41. *Information given at a MIND workshop on confidentiality April 1977. A Portsmouth teacher resigned her job when asked to compile secret files on her pupils: The Times April 26 1977.*

42. *Cullingworth Report para.99.*

43. *Schwartz & Wade: Legal Control of Government page 24. Some social workers would claim that it is therapeutic for clients to see, or jointly prepare, their reports.*

44. *One of the Civil Service arguments against a Freedom of Information Act.*

45. *The "old fallacy" discredited in relation to public interest privilege but reiterated and accepted in Re a Complaint against Liverpool City Council [1977] 2 All E.R.650.*

46. *As in D v NSPCC [1977] 1 All E.R.589 and the Derbyshire doctors (discussed below).*

47. *Discussed, in relation to medical information, in Chapter 4. In McIvor v Southern Health and Social Services Board [1978] 2 All E.R. 625 Lord Diplock found the arguments for non-disclosure unconvincing but suggested legal advisers might keep information from the patient.*

48. *This sometimes happens in Sweden, where information given to governmental bodies (including local bodies) is freely available, but it is thought to be a disadvantage outweighed by the benefits of disclosure: Herlitz [1958] Public Law 50, 59.*

49. *The Data Protection Committee recommend that Codes of Practice should allow social work clients to see computerised records: (1978) Cmnd 7341 para.24,11.*

50. *This variety was emphasised in Ridge v Baldwin [1964] A.C.40.*

51. *For example "Evidence may sometimes, though rarely, be so confidential that it cannot be put to those affected by it, even in general terms. If so, it should be ignored so far as they are concerned." Lord Denning M.R. in Re Pergamon Press Ltd. [1970] 3 All E.R.535,540.*

52. De Smith: Judicial Review of Administrative Action page 141. He argues that in such circumstances the deciding body should not be required to give a hearing but should be required to give fair consideration to such representations as are in fact made to it: ibid. page 158. But cf. Hoggard v Worsbrough U.D.C. [1962] 2 Q.B.93 if natural justice does apply.

53. Cooper v Wandsworth Board of Works (1863) 14 C.B. (N.S.) 180.

54. Ridge v Baldwin [1964] A.C.40.

55. Wilson: Cases and Materials on Constitutional and Administrative Law 2nd ed. 1976 pub. Cambridge U.P. page 586.

56. Earlier cases expressed the duty widely at least for quasi-judicial acts e.g. Wood v Woad (1874) L.R.9 Ex.190 "matters involving civil consequences to individuals." In the United States of America it has been held that the duty to allow confrontation and cross-examination of adverse witnesses applies where an authority takes "detrimental action against a person's substantial interests" (emphasis supplied) even in a national security case: Garrott v United States 340 F 2d. 615 (Court of Claims) (1965).

57. [1971] 2 Q.B.662,669.

58. [1971] 2 Q.B.175. Although Lord Denning gave a dissenting judgment, Edmund Davies L.J. agreed with him on this point.

59. R v Gaming Board of Great Britain ex parte Benaim and Khaida [1970] 2 Q.B.417; McInnes v Onslow-Fane and another [1978] 3 All E.R.211.

60. [1962] 2 Q.B. 93,100.

61. Above. And Re Pergamon Press Ltd [1970] 3 All E.R.535 shows that the loss need not be tangible.

62. [1964] A.C.40,67 Lord Reid citing Fisher v Jackson [1891] 2 Ch.824.

63. An example would be the right of the couple refused permission to adopt a Thai baby to see the report on their suitability as adopters: Evening News September 10 1976.

64. Subject, of course, to what was said above about the right to know what the policy is and to "say something new."

65. [1948] 1 All E.R.85,98.

66. Lord Salmon in Rogers v Home Secretary [1972] 2 All E.R.1057,1071.

67. [1970] 1 W.L.R.599.

68. Both judgments expressed this in wide terms which would be equally applicable in non-children cases.

69. The Times May 10 1977; (1977) 7 Fam.L.171. D.C.

70. D v N.S.P.C.C.[1977] 1 All E.R.589,especially 614 Lord Simon.

Intervention by the councillor

71. R v Barnes Borough Council ex parte Conlan [1938] 3 All E.R.226 and discussion above, section 2(b).

72. There is some support for this view in the Barnes case. Some authorities give the chairman of the committee the right to decide whether a non-member may see the information. Alec Samuels argues that this cannot be binding as all elected members rank equally: (1978) 142 Local Government Review page 73.

73. *See the figures given in Section 2(b) note 80.*

74. *(1967) para.168.*

75. *Hampton op.cit. page 198.*

76. *Local Government Act 1974 section 26(2). But this is not popular with complainants: Report of the Commission for Local Administration 1975/6 paras.43-46.*

77. *R v Barnes Borough Council (above.)*

78. *R v Hampstead Borough Council ex parte Woodward (1917) 15 L.G.R.309.*

79. *As, for example, Mr Woodward.*

80. *See Chapter 3A. And the court's protection of documents disclosed on discovery: Riddick v Thames Board Mills [1977] 3 All E.R.677.*

81. *Chancery Division April 13 1913. Noted in 77 J.P.Newspaper 184 and Dumsday: Local Government Law and Legislation 1913 page 171.*

82. *But minutes and reports of a committee with reference to the litigation are privileged from discovery since the committee are acting as agents of the authority in deciding on its case: Bristol Corporation v Cox (1884) 26 Ch.D.678.*

83. *For example both Nottingham and Southampton District Councils and Nottinghamshire County Council.*

84. *(1907) 5 L.G.R.888.*

85. *[1938] 3 All E.R.226.*

86. *Similar arrangements have been made recently by both Nottinghamshire County Council and Nottingham District Council and have been accepted by councillors.*

87. *[1938] 3 All E.R.226,231. He had not acted for the other party to the litigation as had Mr Woodward in the Hampstead case.*

88. *(1917) 15 L.G.R.309; 116 L.T.213. This point is made clear only in the Law Times report.*

89. *All three methods are used by Nottingham District Council.*

90. *B.A.S.W. Policy Statement: Confidentiality in Social Work para.2.17(b).*

91. *Ibid. para.1.5.*

92. *He would, of course, normally have qualified privilege against an action for libel.*

93. *Clause 6.*

94. *Following the Bookbinder case, a local 'cause celebre', in which a county councillor claimed access to a social services file: Sunday Times July 8 1974.*

95. *Standing Orders are "merely directions as to the functions inter se of the council and its officers:" R v Hereford Corporation ex parte Harrower [1970] 3 All E.R.460,463.*

96. *These seem to be the requirements common to the police informers cases, Rogers v Home Secretary [1972] 2 All E.R.1057, Crompton (Alfred) v Commissioners of Customs (No.2) [1973] 2 All E.R.1169 and D v N.S.P.C.C. [1977] 1 All E.R.589 and not fulfilled in Norwich Pharmacal co. v Commissioners of Customs [1973] 2 All E.R. 943.*

97. *D v N.S.P.C.C. [1977] 1 All E.R.589.*

98. *Or perhaps his parents if the subject is a child and, for example, he has expressed hostile feelings towards them or a medical or school report is critical of them and there is fear that they might blame the child.*

99. *This is recognised in the Mental Health Act 1959 sections 36 and 134, allowing a hospital to withhold letters from a patient if they would cause him unnecessary distress.*

1. *This is the view of the Parole Board but some prisoners and prison staff say it is better for the truth to be known and faced: The Times January 23 1976.*

2. *For example Derbyshire County Council "such inspection is allowed on the clear understanding that neither the document nor its contents should be passed on to any other party."*

The Local Commissioner

3. *Section 26(1). Some areas of activity such as crime prevention, personnel, school discipline and curriculum and some commercial transactions (though not the acquisition or disposition of land) are excluded from investigation: Section 26(8) and Schedule 5, Discussed in Williams: Maladministration Remedies for Injustice 1976 pub. Oyez pages 159-161.*

4. *H.C.Deb. Vol. 867 col.1738 Graham Page.*

5. *Report of the Commission for Local Administration in England for the year ended 31 March 1976 page 35.*

6. *ibid. para.80.*

7. *For example Investigation 2341C.*

8. *Investigation 4157H para.24.*

9. *Investigation 89H case 3 (whether siblings attended a certain school).*

10. *Investigation 2893 S/H.*

11. *As required by Local Government Act 1974 section 31(2).*

12. *Investigation 2893 S/H, second report.*

13. *Para.33 of the first report.*

14. *Ibid. paras 14,15.*

15. *cf. the "duty to act fairly" requirements in cases such as Re Pergamon Press Ltd. [1970] 3 All E.R.535 and R v Gaming Board of Great Britain ex parte Benaim and Khaida [1970] 2 Q.B.417. allowing the applicant to know the tenor of charges against him and be able to answer them.*

16. *Which might be a ground for a finding of maladministration.*

17. *Section 28(2).*

18. *Ibid.*

19. *Section 29(1).*

20. *Section 29(2).*

21. *Section 29(8). But it is not contempt for the authority to continue dealing with the matter: Section 29(10).*

22. *Section 29(3). He must give notice to the Department before putting such information (if not published) in his report: Section 32(5).*

23. *Section 29(4).*

24. *Investigation 1030H.*

25. *Section 29(7) subject to sub-section (4) above.*

26. *[1977] 2 All E.R.650.*

27. *For example the note to the section in Current Law Statutes merely says that it "limits the disclosure of any information received by" the Commissioner. The note to Halsbury's Statutes says nothing. No comment was made on the section in Parliament. Some protest, or at least commment, would be expected at so wide an exclusion. Street: New Society December 15 1977 blames the hurried passage of the Bill. But it had been under consideration since 1970. Stacey: The British Ombudsman 1970 pub. Oxford page 331.*

28. *[1968] 1 All E.R.874.*

29. *But central government is often more secretive than local government. For example the encouragement of Rent Scrutiny Boards to sit in private: H.C.Deb. Vol.867 col.1731.*

30. *H.C.Deb. Vol.864 col.53.*

31. *Section 30(2), (4) and (5). Some local authorities have refused to make reports available after this period.*

32. *Section 30(3).*

33. *For example Investigation 1897C (a person in prison); Investigation 2094S (admission to a psychiatric hospital); Investigation 2829C (allocation of a child to a school).*

34. *Section 30(7).*

35. *Investigation 2315S.*

36. *Referred to in the Annual Report 1975/6 Mr Harrison para.9.*

37. *Section 32(2).*

38. *Mandamus will not lie to compel him to do so: Re Fletcher's Application [1970] 2 All E.R.527 (a case on the Parliamentary Commissioner).*