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## The Spycatcher Saga

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# Articles

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D.G.T. Williams\*

The Spycatcher Saga

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## I. Introduction

The central facts in the unfolding of the *Spycatcher* saga are relatively well-known. Peter Wright left M.I.5 in 1976 after some twenty years' service "in the shadows;"<sup>1</sup> his health was "bad", his pension "derisory", but he had his "memories."<sup>2</sup> After retirement he went to live in Tasmania, where (according to Kirby P in the Court of Appeal of New South Wales) "he still resides in a place with the idyllic name of Cygnet."<sup>3</sup> Despite the distance Peter Wright remained closely involved in the welter of allegations and denials, which emerged especially after the unmasking of Anthony Blunt as a former double agent in late 1979, about the inner workings of M.I.5 and Soviet penetration of M.I.5. In 1984 a television interview with Mr. Wright concerned in part the suggestion that Sir Roger Hollis, a former Director-General of M.I.5, had been a Soviet agent. In March 1985 Mr. Wright was approached by a representative of Heinemann, the publisher, to write a candid account of his life in the shadows; and the British government, on learning of these plans, sought injunctions in the courts of New South Wales. The contents of *Spycatcher*, as it became, ranged far beyond the allegations concerning Sir Roger Hollis to encompass allegations about the bugging of diplomatic premises and of diplomatic conferences, about a plot to assassinate President Nasser of Egypt, about attempts to destabilise the Labour government under Mr. Harold Wilson, and about much else. Many of the allegations had appeared in print before *Spycatcher* emerged, but the status of the author, it was claimed by the Crown, gave them a special ring of authenticity.

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\*This article is based on the Horace E. Read Lecture delivered at Dalhousie Law School in October 1988. The lecture was delivered ahead of the second decision of the House of Lords on *Spycatcher* and before the introduction of the Security Service Bill and the Official Secrets Bill. References to these later developments are made briefly in this revised and shortened text. See Notes in [1985] Cambridge L.J. 2 and 329 and [1989] Cambridge T.J. 1. For a report of all decisions in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)*, see [1988] 3 All E.R. 545.

1. P. Wright, *Spycatcher. The Candid Autobiography of a Senior Intelligence Officer*.

(Toronto: Stoddard Publishing Co., 1987) at 27.

2. *Id.*, at 381.

3. *Attorney-General for the United Kingdom v. Heinemann Publishers Australia Pty. Ltd. and Peter Maurice Wright*, (1987) 10 N.S.W.L.R. 86.

The civil proceedings launched in New South Wales and later in other jurisdictions were based on the claim that Peter Wright owed an obligation of confidence with regard to information acquired in the Security Service. This obligation was presented or argued with variations from court to court in Australia and elsewhere. The boundaries of the obligation of confidence — arising out of commercial and other relationships — are still being explored. In a case in 1988, for instance, it was held that information relating to sexual conduct could in some circumstances be the subject of a legally enforceable duty of confidence. There was no precedent for protecting such information, but it was said by Sir Nicolas Browne-Wilkinson V-C that there was nothing either in principle or authority to stand in the way.<sup>4</sup>

It is also the case, as one judge has put it, that there “are relatively few authorities in which the duty of confidence has been discussed in connection with secrets of government.”<sup>5</sup> The first authority in the field was *Attorney General v. Jonathan Cape Ltd.* in the mid-1970s,<sup>6</sup> where it was held that an injunction could in principle be granted to stop publication of Richard Crossman’s Diary of his time as a Cabinet Minister from 1964 to 1970. Lord Widgery C.J. was prepared to extend the duty of confidence to “public secrets,” just as a few years earlier it had been extended to marital secrets,<sup>7</sup> and he was prepared to undertake a balancing exercise to determine whether an injunction would be in the public interest. A like approach was later adopted by Mason J. in *Commonwealth of Australia v. John Fairfax & Sons Ltd.*<sup>8</sup> In any balancing exercise, considerations of national security would obviously weigh heavily in favour of a government’s claims, but at the heart of the arguments submitted in the *Spycatcher* litigation was the question as to how far the balance should be tilted.

The British government did not achieve much success in the litigation in Australia, apart from delaying publication of *Spycatcher* as a result of interlocutory proceedings starting in late 1985. At first instance in New South Wales the case was heard by Powell J., whose lengthy judgment of March 1987 (holding against the British government) stressed that

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4. *Stephens v. Avery*, [1988] 2 All E.R. 477, 482 Ch. D. In the course of his judgment, the Vice-Chancellor agreed that the courts would not enforce a duty of confidence “relating to matters which have a grossly immoral tendency.” His Lordship added (at 480) that “at the present day the difficulty is to identify what sexual conduct is to be treated as grossly immoral.”

5. *Attorney-General v. Guardian Newspapers Ltd. (No. 2)*, [1988] 2 W.L.R. 805, 842.

6. [1976] Q.B. 752. See Williams, “Official Secrecy and the Courts” in *Reshaping the Criminal Law* (ed. Glazebrook, 1978) 154-173; Report of the Committee of Privy Councillors, *Ministerial Memoirs*, Cmnd. 6386, January 1986; Hugo Young, *The Crossman Affair* (1976).

7. *Argyll (Duchess) v. Argyll (Duke)*, [1967] Ch. 302.

8. (1980), 47 C.L.R. 39.

most of the principal allegations in the book had already appeared in the United Kingdom and that the British government had acquiesced to some extent. Appendix A to the judgment, incidentally, lists no less than 33 books on security and intelligence matters which were tendered in evidence.<sup>9</sup> The Court of Appeal of New South Wales rejected the British government's appeal in a divided decision of September 1987.<sup>10</sup> All three judges adopted very different emphases. Of the majority, it was the central approach of Kirby P. which later won endorsement in the High Court of Australia in June 1988.<sup>11</sup> Kirby P. took the view, which takes us into the realm of the Conflict of Laws, that to grant relief would be inconsistent with the principle that Australian courts do not enforce the public law and policy of a foreign state. His Honour commented that the disinclination of the English courts "to enforce revenue, penal, political and other public laws of foreign sovereigns simply reflects a fundamental principle of private international law." He apologised for describing England as a "foreign country" for this purpose, and he had no doubt that the British government's action was "one, directly or indirectly, for the enforcement of the public law of secrecy imposed by the statutes, common law and prerogative in the United Kingdom upon officers and former officers of the security services of that country, including M.I.5." In the High Court Mason C.J. examined the relevant law on unenforceability in some detail, but his recognition that the contours of the principle are not clear is underlined by the different analysis offered by Cooke P. in *Spycatcher* litigation before the Court of Appeal of New Zealand.<sup>12</sup> In a decision of March 1988, Cooke P. argued that the "world is shrinking, with nuclear hazards, terrorism, ideologies and the power of the media transcending national boundaries and at times making them almost irrelevant," adding that it would "seem anachronistic for the Courts to deny themselves any power to do what they can to safeguard the security of a friendly foreign state."

The attention given to the principle of enforceability by no means obscured the arguments based on confidentiality, and several of the judges both in Australia and New Zealand had the opportunity to comment at length. In New Zealand, where the proceedings were brought against *The Dominion* (a Wellington newspaper) by the British government, Cooke P. was at pains to disavow any intention to interpret

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9. *Attorney-General for the United Kingdom v. Heinemann Publishers Australia Pty Ltd.* (1987), 8 N.S.W.L.R. 341.

10. *Supra*, note 3.

11. (1988), 78 A.L.R. 449 See generally, Malcolm Turnbull, *The Spycatcher Trial* (1988).

12. *Attorney-General of the United Kingdom v. Wellington Newspapers Ltd.*, [1988] 1 N.Z.L.R. 129 (Cooke P., McMullin J., Casey J., Bisson J.).

the public interest of the United Kingdom; but he was satisfied that it was in the public interest of New Zealand that the information from *Spycatcher* should be available to the New Zealand public. This view was vigorously re-asserted when the British government sought discretionary leave to appeal to the Judicial Committee of the Privy Council from the Court of Appeal in New Zealand. In a ruling in late April 1988, Cooke P. stressed that the merits of the case could only be assessed from the point of view of a New Zealand court, bearing in mind "the development of New Zealand law in what is clearly a somewhat new field and the application of New Zealand law to the particular facts."<sup>13</sup>

*Spycatcher* proceedings in England began in June 1986, with the securing of interim injunctions against the Guardian and the Observer to stop further publication of allegations claimed to be in the forthcoming book. Action could not be taken directly against Mr. Wright, because he was outside the jurisdiction. Instead, the English proceedings involved newspapers caught up as third parties in the legal web of confidentiality. The constitutional background to the litigation should be considered as a necessary preliminary to an examination of how the English courts have responded.

## II. *The Constitutional Background*

In the first place, the United Kingdom has often been accused of obsessive secrecy. Twenty years ago the Fulton Committee on the Civil Service claimed that civil servants and perhaps also Ministers "are apt to give great and sometimes excessive weight to the difficulties and problems which would undoubtedly arise from more open processes of administration and policy-making."<sup>14</sup> A continuing adherence to secrecy in the United Kingdom has been bolstered by the notorious section 2 of the Official Secrets Act 1911 which in theory blankets all official information. Section 2 survived intermittent controversy between the wars, and one of the prosecutions brought the novelist Compton Mackenzie to the dock at the Old Bailey. The charge against him, to which he pleaded guilty, related to a book called *Greek Memories* detailing some aspects of his intelligence work in Greece during the First

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13. *Attorney-General of the United Kingdom v. Wellington Newspapers Ltd. (No. 2)*, [1988] N.Z.L.R. 180.

14. Cmnd. 3638, para. 380. In a criminal prosecution in 1978, an army officer giving evidence was accused of being obsessed with secrecy. He replied (see *The Times*, 19 October 1978, at 2); "I am not obsessed with secrecy. Because of my knowledge of the subject I am better aware than many people of the crucial need to ensure that some secrets which are more secret than others are kept as secret as possible."

World War. He was fined £100, the book was expensively withdrawn from the bookshops and pulped, and — to the best of my knowledge — the book has never been republished in an unexpurgated version.<sup>15</sup> After the Second World War selective prosecutions continued with considerable governmental success until 1970; but there then began a number of prosecutions where the Government stumbled. The anomalies of section 2 were such that judges and juries reacted critically; a Departmental Committee under Lords Franks reported in 1972 urging widespread reform; there were several abortive attempts at legislation and there were two White Papers, one in 1978 and one in 1988, seeking to shed light at the end of the tunnel.<sup>16</sup> But the tunnel has been long and tortuous. Bearing in mind that the Official Secrets Act was born easily (it went through all its stages in the House of Commons in less than thirty minutes) and that a High Court judge in early 1971 looked forward to section 2 being “pensioned off” on its sixtieth birthday in August of that year, only in 1989 were we able to anticipate its final demise — unintentionally marking the hundredth anniversary of the first Official Secrets Act of 1889 — through a new Official Secrets Act.

Meanwhile, the United Kingdom has no legislation on freedom of information akin to that in the United States, Canada, Australia and New Zealand. Ministers regularly claim advances in openness, but critics of the recent White Paper on section 2 argued that any acceptable reform of the law should be accompanied by some statutory provision for access to information. The British government has rejected any such quid pro quo, and for the immediate future — despite a vigorous freedom of information campaign with all-party support — no legislation is likely to be forthcoming.

A second constitutional factor to be considered in the context of *Spycatcher* is the remarkable British adherence, especially as to national security, to non-statutory institutions, procedures and practices. This in its turn reflects the absence of a written constitution and particularly of a Bill of Rights, though at least one distinguished judge (Lord Bridge of Harwich) has in the course of *Spycatcher* given an indication of increasing impatience with rather vague reliance on the common law as a guarantor of British liberties. His Lordship indicated in a dissenting speech in mid-1987 that hitherto he had not been in favour of

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15. See Williams, *Not in the Public Interest* (1965), at 90; Compton Mackenzie, *My Life and Times. Octave Seven 1931-1938* (1968). It might be mentioned that no objection was raised in 1962 to the publication of H. Montgomery Hyde's book on Sir William Stephenson, *The Quiet Canadian* (1962), though questions were raised in the House of Commons (see Williams, *supra*, note 5 at 90-91).

16. Much of the history of section 2 since 1970 has been extensively chronicled. The latest White Paper, Cm. 408 of July 1988, met with a mixed and often hostile reception.

incorporation of the European Convention on Human Rights into domestic law, in large part because, as he put it, he had “had confidence in the capacity of the common law to safeguard the fundamental freedoms essential to a free society including the right of freedom of speech which is specifically safeguarded by article 10 of the convention.”<sup>17</sup> His confidence, he added, had been “seriously undermined” by the decision of the majority in the House of Lords. Insofar as the common law has any resilience in the protection of fundamental freedoms, however, it is handicapped by the lack of definition, particularly of statutory definition, in many aspects of national security.

There are numerous examples of this lack of definition. Until 1989 neither M.I.5, the Security Service, nor M.I.6, the Secret Service, was provided for or regulated in any way by statute. A rare public appearance by M.I.5 agents, which even then was protected by ensuring the anonymity of the individuals involved, was at the recent coroner’s inquest on the deaths of the three I.R.A. members in Gibraltar.<sup>18</sup> A consequence of the absence of statutory provision is that political accountability has been difficult to establish other than through Ministerial forms of control, and accountability to a Parliamentary select committee has not been secured.<sup>19</sup> In the *Spycatcher* litigation Lord Donaldson M.R. said with regard to M.I.5 that it “may be that the time has come when Parliament should regularise the position of the service;”<sup>20</sup> and eventually the Security Service Act 1989 emerged, promising a form of statutory regulation for M.I.5. M.I.6 remains free of statute, and much of the work of M.I.5 and M.I.6 remains outside the range of statutory definition. The Security Commission, for instance, is charged with investigating the efficiency and proper working of M.I.5 at the request of the Prime Minister; set up in 1964 the Commission has publicly reported on such events as the association of two Government Ministers with prostitutes, the circumstances in which a temporary shorthand typist in the Cabinet Office was charged with an official secrets offence, the espionage activities (leading to a 35-year prison term) of an employee at GCHQ in Cheltenham (Government Communications Headquarters), and a first ever conviction (in 1984) of an M.I.5 agent (Michael John Bettaney) for spying.<sup>21</sup> There are also the measures designed to ensure physical and

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17. *Attorney-General v. Guardian Newspapers Ltd.*, [1987] 3 All E.R. at 346.

18. The inquest ended on September 30, 1988.

19. See the comments of Lord Donaldson M.R. in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)*, [1988] 2 W.L.R. at 877-78, C.A.

20. *Id.*, at 880.

21. See respectively Reports of the Security Commission for July 1973 (Cmnd. 5367), for June 1967 (Cmnd. 3365), for May 1983 (Cmnd. 8876), and for May 1985 (Cmnd. 9514).

personnel security in the public service, where — in the words of the Prime Minister (Mrs. Thatcher) in 1982 — “difficult balances” have “to be struck between the need to protect national security, the nature and cost of the measures required to do so effectively, the need for efficiency and economy in the public service and the individual rights of members of the public service to personal freedom and privacy.”<sup>22</sup> These balances, however, are made in a non-statutory context.

Still in the non-statutory area of security, there is the Special Branch of each police force — especially the Metropolitan Police Special Branch which “has responsibilities throughout the kingdom in relation to dealing with Irish Republican extremism and terrorist groups” — and each Special Branch acts to assist the security services, often providing the visible and effective culmination (through arrest or whatever) of security investigations.<sup>23</sup> The Special Branch of the Metropolitan Police originated through administrative action in 1883, in the face of the Irish-American dynamite campaign of 1881-85,<sup>24</sup> and special branches are given major responsibilities both in the face of subversion and terrorism and in the face of threats to public order. A further non-statutory device, particularly relevant to trials involving issues of national security and terrorism, is that of jury-vetting, which only came to full-scale public knowledge in the course of an official secrets prosecution — the so-called ABC case — in 1978.<sup>25</sup> Yet a further device, this time with considerable implications for freedom of the press, is a system of extra-statutory censorship called the D-Notice system: in operation in peacetime since 1912 it only came to full-scale public knowledge exactly fifty years later, it led to at least one major clash between Downing Street and the Press (the D-Notice affair of 1967), and the Government remains firmly of the view that the “existence of a voluntary system whose purpose is to seek protection from publication of information having a bearing on national security, and which is based on co-operation and consultation between

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22. Statement on the Recommendations of the Security Commission, May 1982, Cmnd. 8540, para. 30.

23. See Fourth Report from the Home Affairs Committee, Session 1984-85, *Special Branch*, H.C. 71 (April 1985), para. 7; Lord Denning's Report, Cmnd. 2152 of September 1963, para. 274.

24. See Bernard Porter, *The Historiography of the Early Special Branch* (1986), 1 Intelligence and National Security 381; Bernard Porter, *The Origins of the Vigilant State. The London Metropolitan Police Special Branch before the First World War* (1987). The concept of a Special Branch (aimed at subversion in particular) is not confined to British experience: see Report of the Royal Commission (South Australia) on the Dismissal of Harold Hubert Salisbury (1978).

25. See O. Hood Phillips and Paul Jackson, *O. Hood Phillips' Constitutional and Administrative Law* (1987), at 384-86. The Special Branch and sometimes the Security Service are involved in jury-vetting.



the government and the media, provides a necessary and beneficial service for both.”<sup>26</sup>

Legislation, when it does occur, is often patchy and a response to a particular event or pressure. The Security Service Act is an example, in part a response to *Spycatcher*. Access to public records was in a chaotic, non-statutory state until legislation of 1958; and the changes of 1958 and afterwards came about both in the interests of departmental efficiency and through “increased pressure by historians, social scientists, journalists, and a wider public for access to recent records.”<sup>27</sup> Nevertheless, the interests of security and intelligence are well protected within the discretionary powers to extend the presumptive period of thirty years for access, and it could well be 100 years or more before many of the relevant records are released.<sup>28</sup> In the area of data protection, where legislation had long been delayed, a Data Protection Act was eventually enacted in 1984, in no small measure because of our commercial need to conform with a Council of Europe Data Protection Convention; but the Convention allows derogation from the general principles in the interests *inter alia* of State security.<sup>29</sup> The 1984 Act duly allows for a wide exemption “for the purpose of safeguarding national security” as interpreted exclusively by the Crown.<sup>30</sup> Yet a further example of an area that was late in legislative formulation is that of the interception of communications, where the external stimulus was provided by an adverse decision of the European Court of Human Rights.<sup>31</sup> The Interception of Communications Act 1985 is a somewhat grudging piece of legislation, as one might have expected, and in its White Paper on section 2 of the Official Secrets Act the Government supported continued and wide protection through the criminal law for

26. *The D Notice System*. Observations presented by the Secretary of State for Defence (on H.C. 773 of Session 1979-80), Cmnd. 8129 of January 1981, para. 2. See also *Security Procedures in the Public Service* (the Radcliffe Report), Cmnd. 1681 of April 1962, Ch. 9; Report of the Committee of Privy Councillors appointed to inquire into “D” notice matters, Cmnd. 3309 of June 1967; The “D” Notice System (White Paper, Cmnd. 3312 of June 1967); Williams, “Official Secrecy in England” (1968) 3 Federal L.R. 20; Third Report from the Defence Committee, Session 1979-80, The D Notice System, H.C. 773, August 1980.

27. *Modern Public Records. Selection and Access* (Report of the Wilson Committee), Cmnd. 8204 of March 1981, para. 47.

28. *Id.*, para. 197-200. See *Modern Public Records* (The Government response to the Report of the Wilson Committee), Cmnd. 8531 of March 1982, para. 28. In *Secret Service* (1985), however, Christopher Andrew writes in his preface (xvi) that intelligence material was often carelessly or accidentally released either to the Public Record Office or in private papers.

29. See *Data Protection. The Government's Proposals for Legislation*, Cmnd. 8539 of April 1982, para. 2-5 and 17.

30. Data Protection Act 1984, s. 27.

31. *Malone v. United Kingdom* (1984), 7 E.H.R.R. 14. See the decision of Sir Robert Megarry V-C in *Malone v. Metropolitan Police Commissioner*, [1979] Ch. 344.

information relating to telephone tapping and like procedures.<sup>32</sup> On broad issues of the law relating to breach of confidence — the theme of the *Spycatcher* litigation — we still have no legislation despite detailed consideration and proposals by the Law Commission some years back.<sup>33</sup> If legislation is forthcoming, possibly as a result of *Spycatcher*, there will probably once again be special national security exemptions, though the Law Commission spoke of the possibility of statutory definition of the methods used by both the police and the security services to obtain information.<sup>34</sup>

The third constitutional factor to be borne in mind in the *Spycatcher* saga is that the role of the courts in matters of national security has never been easy. National security imposes severe constraints in all countries and all jurisdictions, of course, but the cumulative impact of so many non-statutory and extra-statutory institutions and practices in the United Kingdom is bound to add to the exclusion of the courts. The governmental view has long favoured keeping the courts at arm's length. In its response to the *Crossman Diaries* case a Committee of Privy Councillors under Lord Radcliffe, in searching for an alternative mechanism for protecting governmental confidentiality, did not regard a judge as "likely to be so equipped as to make him the best arbiter of the issues involved," adding that the relevant considerations are "political and administrative;"<sup>35</sup> on the matter of adjudicating on statutory access to information, a Green Paper of 1979 suggested that it was "doubtful whether in the British context such essentially political matters could be determined in the Courts;"<sup>36</sup> and in the White Paper of 1988 the government rejected any *general* defence of the public interest in the context of a replacement of section 2.<sup>37</sup> Similar hesitations are reflected in Professor Friedland's treatment of the role of the Canadian courts which he set out in a study of 1979 prepared for the McDonald Commission.<sup>38</sup> Yet the irony of the *Spycatcher* saga is that the courts in several jurisdictions have, at the instigation of the British government, been dramatically involved in matters of national security; and the involvement has compelled judges to delve into areas of the law beyond official secrets and confidentiality and to highlight values such as freedom of speech and freedom of the press.

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32. Cm. 408 of June 1988, paras. 30 and 53.

33. *Breach of Confidence*. Law Com. No. 110, Cmnd. 8388 of October 1981.

34. *Id.*, 6. 43.

35. *Ministerial Memoirs*, Cmnd. 6386 of 1976, paras. 65-66.

36. *Open Government*, Cmnd. 7520 of 1979, para. 55.

37. Cm. 408, paras. 58-61.

38. *National Security: The Legal Dimensions*, by M.L. Friedland (1979), Part 5 ("The Role of the Judiciary").

Delving into areas beyond official secrets and confidentiality came about, in particular, because the original *Spycatcher* litigation in England was designed to stop two newspapers, the Guardian and the Observer, from publishing matter alleged to appear in *Spycatcher*. Injunctions against them were originally secured on an interlocutory basis in mid-1986, well ahead of the beginning of the hearing on permanent injunctions which commenced in November 1987. There was difficulty enough in framing appropriate interim injunctions, but there was always the crucial question about how far, if at all, *other* newspapers were bound. In April 1987 the matter was tested when the Independent, a daily newspaper, and two evening newspaper published further material derived or taken verbatim from Peter Wright's memoirs. Had these newcomers breached the injunctions, assuming that one could have free-range injunctions, or was there some other remedy at hand? The Attorney-General turned with relief to the notoriously expansible area of criminal contempt of court, and proceedings were undertaken in the Chancery Division before Sir Nicolas Browne-Wilkinson V-C on the preliminary issue of law as to whether the actions of the newspapers *could* be a contempt.

One should pause at this point to note that criminal contempt proceedings are nowadays normally brought under the "strict liability" provisions of the Contempt of Court Act 1981 — another statute, incidentally, which went on the statute book as a response to an adverse decision of the European Court of Human Rights. The strict liability provisions were not relevant in the *Independent* case, however, because the *Spycatcher* proceedings were not "active" within the terms of the 1981 Act. Reliance had to be placed on common law contempt, expressly preserved by section 6 (c) of the Act, covering intention to impede or prejudice the administration of justice. Could it be said, subject to trial on such issues as the defendants' intention, that the three newspapers aimed to endanger trial of the *Spycatcher* proceedings against the Guardian and the Observer? The Vice-Chancellor thought not. He was acutely aware of the national security implications of the decision, but — after an exhaustive analysis of the authorities including allegedly "confused" Canadian case-law — he saw objections based on practical considerations and on natural justice to extending the law of contempt as the Attorney-General wished. Within weeks an appeal was taken to the Court of Appeal which overruled the Vice-Chancellor.<sup>39</sup> Lord Donaldson M.R., in the principal judgment, laid emphasis on the special nature — irrespective of national security — of confidential information: its

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39. *Attorney-General v. Newspaper Publishing plc*, [1987] 3 All E.R. 276, Ch. D. and C.A.

“inherently perishable nature” gives rise to “unique problems,”<sup>40</sup> whether or not national security is involved. Again there was a detailed examination of the law, again the guidance offered by the Canadian authorities was seen as “limited and confused,” there were some reassuring comments on the nature of the intent to be proved (specific rather than general intent, thus excluding recklessness), and it was held that the conduct of the three newspapers could constitute contempt.

The contempt of court proceedings against the *Independent* and the other two newspapers, together with proceedings later undertaken against the *Sunday Times* on similar grounds, were only resumed in 1989 — after the civil litigation on *Spycatcher* had been concluded. Meanwhile the spin-off from the Court of Appeal’s decision is such that the expansiveness of common law contempt has been further underlined in a decision of 1988, *Attorney-General v. News Group Newspapers Ltd.*<sup>41</sup> The *Sun* newspaper had in effect campaigned against a medical doctor, accusing him of rape and other indecencies affecting an eight-year old girl, and eventually financed a private prosecution which resulted in the acquittal of the doctor. Going beyond the previously-accepted preliminary time limits of criminal contempt either at common law or under statute, the Divisional Court rejected — in the words of Watkins L.J. — the view “that common law contempt cannot be committed where proceedings cannot be said to be imminent, but where there is a specific intent to interfere with the course of justice accompanied by a real risk that the published matter will impede a fair trial, the occurrence of which is in contemplation.”<sup>42</sup> Reference was made to the *Independent* case, prefaced by the claim that the common law “is not a worn-out jurisprudence rendered incapable of further development by the ever increasing incursion of parliamentary legislation.”<sup>43</sup> Watkins L.J. also said that the “need for a free press is axiomatic, but the press cannot be allowed to charge about like a wild unbridled horse. It has, to a necessary degree, in the public interest, to be curbed.”<sup>44</sup>

The press, it seems, rather than public policy, is now the unruly horse; and the *Spycatcher* litigation has demanded of the courts a new and difficult approach to problems of freedom of speech when balanced, in particular, against national security. The *Independent* case is one illustration of this. Still at the interlocutory stage of the English proceedings, an even more complex question arose over whether or not

40. *Id.*, at 291.

41. [1988] 2 All E.R. 906, Q.B.B.

42. *Id.*, at 920.

43. *Id.* Watkins L.J. added that the common law “is a lively body of law capable of adaptation and expansion to meet fresh needs calling for the exertion of the discipline of law.”

44. *Id.*, at 921.

the interim injunctions in force against the Guardian and the Observer should remain in force after publication of the book *Spycatcher* in the United States on 14 July 1987. The Sunday Times, incidentally, published verbatim extracts from *Spycatcher* on Sunday 12 July, and that was what led to the later proceedings for criminal contempt. Also incidentally but of some importance to an understanding of what happened after mid-July 1987, neither the postal nor the customs authorities in the United Kingdom made any effort from the outset to intercept copies of *Spycatcher* pouring into the country. To add to the confusion, however, most bookshops did not offer the book for sale, and libraries (including university libraries) were inclined towards timidity after a decision of Knox J. on the Chancery Division in October 1987.<sup>45</sup> It was held in that case that for a public library to acquire and make available copies of *Spycatcher*, pending trial of the action for permanent injunctions against the Guardian and the Observer, would be a contempt or an interference with the due administration of justice; but libraries were relieved of any need to check on its newspapers, periodicals and magazines to ensure that they contained no offending material. In making this ruling, only a few weeks before the action, Knox J. was influenced not only by the *Independent* case on contempt, but by the sharply divided decision of the House of Lords on maintaining the interim injunctions pending trial.<sup>46</sup>

After publication of the book in the United States, the Guardian and the Observer lost no time in seeking to free themselves of the interim injunctions. Their central contention was that the floodgates had now opened and that the Crown no longer had an arguable case for injunctions at the trial. Sir Nicolas Browne-Wilkinson V-C, who heard the application at first instance, did not see the issue as simple as that. Nevertheless he was impressed by the vagueness of the law of confidentiality and the incongruities of seeking to apply it on the facts of *Spycatcher*; and, while conceding the importance of the secrecy of the security services, he was not prepared to shut his eyes to the realities. Indeed, his Lordship saw "the freedom of the press" as a "matter of very great public importance in its own right."<sup>47</sup> He concluded, in discharging the interim injunctions, with references to Canute and the tide, to the little Dutch boy and the dyke, and to the danger of the law appearing to be "an ass."<sup>48</sup> Two days later, and for the second time in a week, the Vice-

45. *Attorney-General v. Observer Ltd. Re an Application by Derbyshire County Council*, [1988] 1 All E.R. 385, Ch. D. See also, *Times Higher Education Supplement*, 13 November 1987.

46. *Attorney-General v. Guardian Newspapers Ltd.*, [1987] 3 All E.R. 316, Ch. D. C.A., H.L.

47. *Id.*, at 331.

48. *Id.*, 332.

Chancellor was overruled by the Court of Appeal, and shortly afterwards the House of Lords by 3 to 2 affirmed the Court of Appeal. The interim injunctions remained in force.

What different view of the realities could have influenced the Court of Appeal and the majority in the House of Lords? In essence they saw a danger of prejudicing the Attorney-General's case by discharging the injunctions and they saw the interests of national security as prevailing over those of freedom of the press. On the issue of freedom of the press, Lord Templeman (one of the majority in the House of Lords) referred to article 10 of the European Convention on Human Rights — which protects freedom of expression — and enumerated reasons why it was “necessary in a democratic society” to derogate from that protection, as the article permits, “in the interests of national security.”<sup>49</sup> These reasons are the harassment of the Security Service which would follow from “mass circulation” of the *Spycatcher* allegations, the need to avoid “an immutable precedent,” and the danger of giving in to pressure from the media; and his Lordship insisted that the “imposition of restraints on the press in the exercise of a judicial discretion in conformity with the convention is an expression and not a negation of democracy in action.”<sup>50</sup> Lord Ackner, another of the majority, spoke in scathing terms of the “press hysteria” which greeted the announcement of the House of Lords' decision two weeks ahead of the reasons, adding later in his speech “that there are elements in the press as a whole which lack not only responsibility but integrity.”<sup>51</sup> At one point his Lordship noted that in the United States “the courts, by virtue of the First Amendment, are, I understand, powerless to control the press. Fortunately, the press in this country is, as yet, not above the law . . .”<sup>52</sup>

The last remark highlights the absence of any constitutional guarantee of free speech in the United Kingdom, apart from the external influence of the European Convention. Yet some of the underlying themes of the First Amendment, not least the presumption against prior restraint, are part and parcel of the common law. In the Supreme Court case of *Near v. Minnesota*<sup>53</sup> in 1931, Hughes C.J. cited with approval Blackstone's claim in the *Commentaries* that the liberty of the press “consists in laying no *previous* restraints upon publications, and not in freedom from

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49. *Id.*, 355-57.

50. *Id.*, 357.

51. *Id.*, 362 and 365 respectively.

52. *Id.*, 363.

53. (1931), 283 U.S. 697, at 713-20. See Fred. W. Friendly, *Minnesota Rag. The Dramatic Story of the Landmark Supreme Court Case that gave New Meaning to Freedom of the Press* (1981). (Vintage Books edition, 1982).

censure for criminal matter when published,” and in a case on commercial confidentiality in 1981 Lord Denning M.R. (dissenting) referred both to Blackstone’s doctrine of “prior restraint” and to the “classic case” of *Near v. Minnesota*.<sup>54</sup> The two dissenting members of the House of Lords in *Spycatcher* in the summer of 1987 were also swayed by the importance of a free press, and some of their comments were among the sharpest expressed in the House of Lords in recent years. These comments virtually determined the terms of reference for the later trial on permanent injunctions.

Neither of the dissenters, Lord Bridge of Harwich and Lord Oliver of Aylmerton, was thrown off balance by distaste for Peter Wright or by sensing indignation that he might have “got away with it.”<sup>55</sup> Lord Oliver, for instance, said that liberty “may be and sometimes is harnessed to the carriage of liars or charlatans, but that cannot be avoided if the liberty is to be preserved,”<sup>56</sup> and it might be recalled in this regard that Jay M. Near of *Near v. Minnesota* was a man whose sentiments were “anti-Catholic, anti-Semitic, antiblack and anti-labor.”<sup>57</sup> Frankfurter J. once said in the Supreme Court of the United States that it “is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”<sup>58</sup> In *Spycatcher* both Lord Bridge and Lord Oliver were more concerned to stress the absurdities of the situation and the importance of a free press. Lord Bridge, for instance, noting that freedom of speech is always “the first casualty under a totalitarian Regime,” said that the “present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down” a “very dangerous road.”<sup>59</sup> Lord Oliver, conscious of our reputation as “the cradle of democratic liberty,”<sup>60</sup> spoke of the realities of the situation and described (citing Blackstone) the liberty of the press as “essential to the nature of a free state.”<sup>61</sup> “‘Facilis est descensus Averno,’ ” his Lordship added with reference to Virgil’s *Aeneid*, “and to attempt, even temporarily, to create a sort of judicial *cordon sanitaire* against the infection from abroad of public comment and discussion is not only, as I believe, certain to be ineffective but involves taking the first steps on a very perilous path.”<sup>62</sup>

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54. *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1, 17, [1981] All E.R. 321, 330.

55. *Supra*, note 45, at 345.

56. *Id.*, at 376.

57. *Minnesota Rag*, *supra*, note 53, at 32.

58. *United States v. Rabinowitz* (1950), 339 U.S. 56, 69.

59. *Supra*, note 45, at 346-47.

60. *Id.*, at 371.

61. *Id.*, at 376.

62. *Id.* at 376.

The background of allegedly obsessive secrecy, the absence of statutory definition in matters of national security, and the difficult role of the courts in seeking to balance national security against freedom of the press, remind one of the complicated platform on which the *Spycatcher* saga was staged.

### III. *Principal Litigation*

The principal action began on 23 November 1987. Had the proceedings been directly against Peter Wright or any agent of his, most of the judges agreed that on the facts a permanent injunction could have been secured. Such unanimity was lacking on most other issues except for the holding, with varying emphases, that there could be no “*Spycatcher 2*” injunction to protect against further disclosures by Mr. Wright or other agents and ex-agents.

A division of views occurred on the following matters. First, were the Guardian and the Observer in breach of the duty of confidentiality when they first published the allegations in 1986? Scott J., the Court of Appeal, Lord (Donaldson M.R. dissenting) and the House of Lords (Lord Griffiths dissenting) held that they were not. Scott J. noted that the newspapers became subject to a duty of confidence as third parties and that public interest factors “may apply to the information in the hands of the original confidant.”<sup>63</sup> This was, he added, particularly the case with newspapers, and he was prepared to seek a balancing process consistent with our treaty obligations under article 10 of the European Convention. His Lordship went on to speak of the legitimate interest of the British public in June 1986 in the forthcoming proceedings in New South Wales, of the fact that many of the allegations had already been ventilated in earlier books or broadcasts, and of the possible defence of iniquity or wrongdoing. On the latter point he said that “the ability of the press freely to report allegations of scandals in government is one of the bulwarks of our democratic government;”<sup>64</sup> but in the Court of Appeal Dillon L.J. entered a caveat to the effect that allegations of iniquity should be “credible” and published only after weighing other aspects of the public interest.<sup>65</sup> Lord Donaldson M.R., albeit in dissent, amplified this point by suggesting that, given the strong presumption in favour of secrecy, the newspapers should run all sorts of checks before publication. “We really cannot afford,” he declared, “to lose an immensely valuable national baby in an indiscriminate outpouring of allegedly dirty

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63. [1988] 2 W.L.R. at 848.

64. *Id.*, at 858.

65. *Id.*, at 897.



bathwater.”<sup>66</sup> The iniquity defence alone might not have saved the Guardian and the Observer; it was the cumulative impact of all the relevant considerations behind the decision to publish that saved the day.

Secondly, was the Sunday Times in breach of its duty by publishing verbatim extracts from *Spycatcher* in mid-July 1987 just ahead of publication of the book in the United States? Scott J., the Court of Appeal (Bingham L.J. dissenting) and the House of Lords held that it was and that the Attorney-General would be entitled to an account of profits on the basis that there was “sufficient inferential evidence . . . of increased circulation attributable to the *Spycatcher* extract.”<sup>67</sup> The publication of the extracts had not, it seems, been subject to adequate critical assessment in terms of the public interest. Nevertheless, Bingham L.J. returned to the realities of the situation on 12 July. It was a “virtual certainty” that widespread publication of the book would take place in the United States “imminently,” and he would have allowed in effect a projected defence of worldwide dissemination.<sup>68</sup>

Thirdly and finally, should permanent injunctions be granted against all three newspapers? It was unanimously agreed that the Guardian and the Observer should be relieved of further restraint despite the argument that injunctions were necessary for the morale of M.I.5 and to reassure the security services of friendly nations. Emphasis was placed on the futility of injunctions in the face of world-wide dissemination and on the importance of freedom of the press; and the effect of lifting the injunctions would be “that no injunction should be granted to restrain any public library in this country from stocking copies of *Spycatcher* and lending them out, or to restrain booksellers in this country from selling copies of *Spycatcher* bought from abroad.”<sup>69</sup> Scott J., a majority of the Court of Appeal and a majority (4-1) of the House of Lords also refused a permanent injunction against renewed publication by the Sunday Times of verbatim extracts from *Spycatcher*. Lord Donaldson M.R. dissented on the ground that the Sunday Times, in the process of serialisation, stood in the shoes of Mr. Wright “by virtue of a contract with and licence granted by his publishers.”<sup>70</sup> Bingham L.J., one of the majority, accepted that there was an anomaly in allowing serialisation, but it would also be anomalous, he said, if a citizen of England “could read reports and reviews of the book and comments on it in the newspapers, and could buy it in a bookshop or borrow it from a public

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66. *Id.*, at 879.

67. *Id.*, at 859.

68. *Id.*, at 919.

69. *Id.*, at 894.

70. *Id.*, at 887.

library, but could not read a serialised extract of the book in a newspaper.”<sup>71</sup> In other words, the balance of anomalies favoured the Sunday Times.

The British Government may well argue that the lengthy proceedings were worthwhile, on the principle of *pour encourager les autres*, and section 2 of the Official Secrets Act has been replaced with the lessons of *Spycatcher* very much in mind. Perhaps, at a later stage, the law of confidence will be put on a statutory basis with *Spycatcher* very much in mind. On the other hand the present or some future Government may find irresistible the pressure for more and more statutory definition in areas of national security; and the press, at a time when the media are under a variety of pressures, may ultimately gain from a strong affirmation of the spirit of article 10 of the European Convention. Cases such as *Spycatcher* will make us turn to the experience of the United States under the Bill of Rights and to Canadian experience under the Charter. There are also lessons to be derived from *Spycatcher* of relevance to the United States and Canada, for many of the balancing exercises undertaken in the proceedings on matters of national security are unavoidable in any democratic country. With some reluctance, a Conference on Privy Councillors recognised in 1956 that in some of the measures which the State is driven to take to protect its security “it is right to continue the practice of tilting the balance in favour of offering greater protection to the security of the State rather than in the direction of safeguarding the rights of the individual.”<sup>72</sup> The perennial question, however, is when does one tilt the balance and how far does one tilt the balance. That is the essence of the *Spycatcher* saga.

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71. *Id.*, at 914.

72. Statement on the Findings of the Conference of Privy Councillors on Security, Cmd. 9715 of March 1956, para. 15.