

# Paul Stanley, Law of Confidentiality: A Restatement

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## INTRODUCTION

*The Law of Confidentiality* provides a refreshing analysis into the development of this law; exploring several cases to 'tease out the fundamental principles among the modern law'. Published by Hart Publishing, the author's aim was to give this book a 'systematic treatment so that the best insights offered ... are applied consistently and the less fruitful or counter-productive ones are eliminated.' The author further adds in the preface that the book will focus on a practical and critical approach. The question at this stage, is whether the book achieves these objectives? Unlike other textbooks, that have dealt with the subject of confidentiality with cursory treatment, this book, at first blush, provides a succinct, yet concise account of this issue. It is also a nifty guide, easy to handle, 162 pages excluding the index.

## STRUCTURE

The book is divided into three main parts: Part I on the *Duty of Confidence*; Part II *Limiting Principles*; Part III *Remedies and Procedure*. Each chapter begins with an emboldened statement of one of the principles of the law of confidence followed by a short commentary of the principle highlighting relevant applicable cases. For example, Chapter 1 describes the basic principle as "information [which is] is protected as confidential where the claimant has a reasonable expectation of confidentiality or privacy, and the defendant has agreed to keep the information confidential or has notice of its confidentiality." The author uses Lord's Goff's judgment in the *Spycatcher* case<sup>(1)</sup> as a discussion point on the issue of the requirement of a pre-existing confidential relationship in an action for breach of confidence. Interwoven with numerous cases in the footnotes to highlight the issues, perhaps, what was missing from the outset were a few footnotes, such as Philipson's *Modern Law Review* article on the law of confidentiality<sup>(2)</sup>. For the pernickety, reference was made to the Human Rights Act 1998 on page 5 and whether the law of confidence satisfied the requirements of Art. 8 of the European Convention of Human Rights. To give the subject of the Human Rights Act 1998 the extensive treatment it deserves, it would have been useful to extend footnote references to include the debates about the horizontal effect of Art. 8 of the European Convention of Human Rights, which

has been the subject of diverse judicial views ranging from Lord Wade<sup>(3)</sup> to Lord Buxton.<sup>(4)</sup>

Chapter 2 deals with the subject of *reasonable expectation of confidentiality*, beginning with an opening paragraph on Lord Phillips' view in the *Royal Diaries* case. Again, the chapter refers to relevant cases on this issue, described in a concise way.

Skipping to Chapter 7 on the *loss of confidentiality*, the author deals with an obvious trite point that information that is freely available is no longer regarded as confidential. The author elaborates on the case of *Douglas v Hello* (No. 3)<sup>(5)</sup> over the application of this principle drawing on, *inter alia*, issues of the identity of the publisher; and the springboard injunctions with reference to *Terrapin Ltd v Builders Supply Co (Hayes) Ltd*<sup>(6)</sup> and *Seager v Copydex Ltd*.<sup>(7)</sup>

Chapter 10 on *Disclosure with consent* deals with information that is no longer confidential if the claimant has expressly or impliedly consented to its disclosure. The author then proceeds with the various aspects of consent. Like other chapters, this topic is described in the most succinct terms with reference to *Sunderland v Barclays Bank Ltd.* and the Crossman diaries in *Attorney-General v Jonathan Cape Ltd.* The chapter concludes with the following statement:

Consent must, of course, be given by a person with the authority to consent, and with the capacity to do so. There are occasional suggestions in the cases that it ought to be given some particular form. But those references seem to be dealing with what form it would have been prudent to use, rather than with any formal requirement. While it may be wise to obtain consent in writing or other permanent form, that is not required as a matter of law unless there is an express prior agreement to that effect.

Of the other chapters, Chapter 11 on *Public Interest*, provides one of the most interesting, yet difficult issues to grapple with. The author begins with Lord Goff's judgment in the *Spycatcher* case. The author takes a different approach to other academic writers, where the case of *Lion Laboratories Ltd v Evans*<sup>(8)</sup> is often cited first before proceeding to the discussion of public interest. The author's approach encapsulates and summarises what the defence of public interest entails. An extensive discussion is given to this subject referring *inter alia* to *Hubbard v Vosper*<sup>(9)</sup> and *Webster v James Chapman & Co.*<sup>(10)</sup> The topic is then further developed in the next chapter on *Public interest: wrongdoing*, drawing a fine distinction between the preceding chapter on public interest and the issue of wrongdoing. The topic of public interest spans several chapters of the book, including public interest: safety and health, administration of justice and national security. The author has done justice to the treatment of this subject rather than gloss over this issue and this is fairly clear from the discussion. The remaining chapters of Part II then centre on restraint of trade; freedom of expression; protection of legitimate commercial interests and change of position. In the chapter dealing with *freedom of expression*, Art. 10 of the European Convention of Human Rights is discussed with consideration of Lord Bingham's judgment in *R v Shayler*.<sup>(11)</sup> The author includes a subsection on the main factors on Art. 10. This section is given further analysis and includes a discussion of the strength of the privacy or confidentiality interests involved; the nature and degree of detriment which will be suffered by the claimant and relevant privacy codes. In discussing privacy codes, the author provides that 'the Human Rights Act 1998 requires that, in cases concerning 'journalistic, literary or artistic material' the court should have 'particular regard' to any 'relevant privacy code'. There is no definition of 'privacy code'. It certainly includes public codes such

as that maintained by the Press Complaints Commission.’ Whilst the author is right to point out that there is no Privacy Code, what should be taken into account (at least in the footnotes) is that reference to ‘journalistic, literary or artistic material’ is reminiscent of terms used under the UK Data Protection Act 1998, which implements the European Data Protection Directive 95/46/EC (Art. 9). Therefore, in the absence of an express Privacy Code, there is legislation in the form of the Data Protection Act 1998 that protects the personal information of individuals; discussion of which could be included in the footnotes or elsewhere.

What is very constructive is the final part of this book, which details the remedies and procedures for breach of confidentiality and discusses *inter alia* the subject of final injunctions and interim injunctions.

Three appendices are included on detriment, information and property, and confidence and privacy. On confidence and privacy, the author discusses the advantages of the current approach of confidence and privacy as follows:

For the reasons given above, it is suggested that complaints that ‘impermissible violence’ has been done to the ‘traditional’ law of confidentiality have been overstated. But is there any positive advantage to the current position? If English law decided to divide ‘confidentiality’ law from ‘privacy’ law, and address each using distinctly different rules, it *would be necessary to identify the dividing line*. It is not clear where critics feel that line would be drawn. One possibility is that it might lie along the boundary between ‘commercial’ secrets and ‘personal’; privacy, that is along a line which represents distinct interests... To carve these cases out of the law of confidence, on the ground that ‘personal privacy’ is to be protected by its own separate tort on different principles from commercial confidences, would itself be a novel development. As things stand, it is arguably a merit of the law that it can accommodate what is relevantly [sic] distinctive about such cases without requiring precise boundaries to be drawn.

The author raises some very interesting issues relating to the dividing line between confidentiality and privacy, a subject which should not be relegated to the appendices but should be a chapter in its own right. Indeed, this topic requires further analysis, and is lamentable for raising it with brief discussion. The author should be encouraged (if he has not) to develop the discussion into a follow-up article.

## CONCLUDING REMARKS

The main conclusions to be drawn are as follows. This book is not only reader-friendly, but a welcome addition by emphasising the relevant cases, principles and controversies for noting and discussing by the busy academic or practitioner. It should be added that further development or discussion into the law of confidence should be supplemented by other noteworthy commentaries on this subject given its concise treatment. This work, however, would be an invaluable guide in understanding the complexities of this important emerging area of law.

[\(1\)](#) *Att-Gen v Guardian Newspapers (No 2)* [1990] 1 AC 109.

[\(2\)](#) Phillipson, G. “Transforming breach of confidence? Towards a common law right of privacy under the Human Rights Act” (2003) 66 *MLR* 726.

[\(3\)](#) Wade, W. “Horizons of horizontality” (2000) 116 *LQR* 217.

[\(4\)](#) Buxton, R. (Sir) "The H.R.A. and private law" (2000) 116 L.Q.R. 48

[\(5\)](#) [2007] 4 All ER 545.

[\(6\)](#) [1967] RPC 375.

[\(7\)](#) [1969] 2 All ER 718.

[\(8\)](#) [1984] 2 All ER 417.

[\(9\)](#) [1972] 1 All ER 1023.

[\(10\)](#) [1989] 3 All ER 939.

[\(11\)](#) [2002] 2 All ER 477.