> Any person who is not a minister of scientology who holds himself out as being willing to teach scientology commits an offence. The taxpayer itself does so, as does any layman who holds himself out. The taxpayer commits an offence every time it receives a fee . . . . The person who pays the fee, dues or tithes himself incurs criminal liability by aiding and abetting.[57]

His Honour concluded that the Church of the New Faith was a body formed for an illegal object under the law of Victoria and that it 'is the existence and effectuation of that illegal object which gives the taxpayer its character as a religious institution . . .'.[58] In other words, the tax exemption was only made possible by a breach of the criminal law. The law will not allow the rights arising from the commission of a crime to be enforceable in the courts.[59] As a matter of public policy, his Honour affirmed the principle that words expressed in a general form (such as those in section 10(b) of the Pay-roll Tax Act 1971) should be read down to prevent a person from deriving benefits from the commission of a crime.[60]

Brooking J. concluded that scientologists could not be allowed to gain any tax concessions by virtue of carrying on activities in contravention of the Psychological Practices Act.[61] This alleviated the need for his Honour to even consider whether scientology was or was not a 'religious institution' within the meaning of the Pay-roll Tax Act.

CONCLUSION

The fact that the practice of scientology is no longer illegal in Victoria — since the passage of the Psychological Practices (Scientology) Act 1982 (Vic.) — does not in any way detract from the interest which this case holds. It illustrates very nicely some of the intrinsic difficulties involved in grappling with a concept like 'religion', which is on the one hand so apparently familiar yet on the other so amorphous and hard to pin down. The evidentiary problems associated with trying to define in an area as personal and subjective as religious belief are also well illustrated, if only by way of showing that even where a number of judges are in complete accord about the result which they desire to obtain, the means of reaching the same goal can be wonderfully diverse.

MARK DARIAN-SMITH*

G. v. DAY[1]

Breach of Confidence — Information acquiring confidential status from context — Equitable jurisdiction against third parties — Role of Detriment.

The plaintiff in *G. v. Day* believed that he saw Frank Nugan in Atlanta, Georgia in November 1980. The event would have passed as less than exceptional had not Frank Nugan committed suicide in January 1980. Nugan had been a director of the notorious Nugan Hand Bank which had collapsed amid considerable controversy and had become the subject of a number of official investigations. The plaintiff informed the police and officers of the New South Wales Corporate Affairs Commission of his alleged sighting. Fearing reprisals, he volunteered the information to these authorities on the express condition that his identity be withheld from publication.

A fresh inquest was held into Nugan's death. The body accredited to Nugan was exhumed only to reveal that the corpse was indeed Nugan's. The matter might have ended there had not the first and

[57] [1983] V.R. 97, 139.
[58] *Ibid.* 140.
[59] *E.g., In the Estate of Crippen* [1911] P. 108, 112 *per* Sir Samuel Evans P.; *Beresford v. Royal Insurance Company Ltd.* [1938] A.C. 586, 599 *per* Lord Atkin.
[60] The observation of Dixon J. in *Federal Commissioner of Taxation v. Snowden & Willson* (1958) 99 C.L.R. 431, 437 was cited with approval.
[61] [1983] V.R. 97, 142.

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[1] [1982] 1 N.S.W.L.R. 24.

second defendants, the publisher and proprietor of the *Truth* (Sydney), decided that the revelation of the plaintiff's identity might assist in selling their newspaper. They ascertained the plaintiff's identity and, with the aid of various invasionary tactics, extracted from the plaintiff confirmation that he was the person who had made the alleged sighting. The defendants proposed to publish the plaintiff's identity as the visionary and the plaintiff brought an action in the Supreme Court of New South Wales to stop them. He founded his claim on breach of confidence.

In order to succeed in an action for breach of confidence, a plaintiff must first establish the existence of confidential information. The chief interest of the decision in *G. v. Day* lies in locating what exactly was the confidential information which supported the plaintiff's successful claim. It is well established that something which is common knowledge cannot be confidential.[2] It is perhaps surprising, then, to read the terms of the injunction which was granted in favour of the plaintiff in *G. v. Day*. The order restrained the first and second defendants 'from publishing the name and address of the plaintiff and any other information or photographs enabling him to be identified'.[3] How can a person's name and address be confidential? Ordinarily, they will be known to his family, his friends, his employer or business associates, and his neighbours. Most probably, they will be recorded in public documents such as telephone directories. Despite the terms of the injunction which was granted, it was not the plaintiff's name and address, nor his identity, which were confidential. One may test this conclusion by supposing that the plaintiff had been awarded a public honour of some description a week after judgment in *G. v. Day*. It would seem clear that the defendants would not have been in breach of the *intent* of the injunction if they had published the plaintiff's name and address in connection with the honour.

If the plaintiff's identity was not confidential, nor was the fact of the alleged sighting. All of the media at the time reported that a sighting was said to have occurred, as did the authorities in explaining the reason for the renewed inquest into Nugan's death. What was confidential, however, was the conjunction of the plaintiff's identity and the alleged sighting. *G. v. Day* illustrates a special and limited class of cases in which matters of common knowledge acquire a confidential status by virtue of their association with a particular context, by their relationship to some person, event, or circumstance. The injunction granted in the case, therefore, should not have simply prohibited the defendants from publishing the plaintiff's identity. Rather, it should have prevented them from publishing anything which associated his identity with the alleged sighting.

There are two other cases which establish that public information can be confidential as a result of its association with a particular context. In *Cranleigh Precision Engineering Ltd v. Bryant*[4] the defendant was the managing director of the plaintiff company. In this capacity he was informed by the plaintiff's patent agents of the existence of a Swiss patent for a swimming-pool similar to one which the plaintiff marketed and for which the plaintiff sought a British patent. The defendant not only failed to pass the information concerning the Swiss patent to the plaintiff, but also resigned his position and actively sought to exploit the information by taking an assignment of the Swiss patent through a company which he established. Like the plaintiff's identity in *G. v. Day*, the existence of the Swiss patent was a matter of public record. It had been so since the publication of the patent's specification. Confidentiality inhered in the relationship of that matter of public record to the plaintiff's business operations:

> I can perhaps best state the plaintiffs' argument in this way; it was not what appeared in the [Swiss] specification itself which was confidential. It was the knowledge of the possible effect to and upon the plaintiffs of the existence and publication of this specification which was confidential in the hands of the one person who was in a position to assess its true significance because of the knowledge which he, as the plaintiffs' managing director, possessed of all the facts of the plaintiffs' swimming pool and of their business connected therewith.[5]

The decision in *Foster v. Mountford*[6] in the Supreme Court of the Northern Territory was based (implicitly) on the same principle. In this case an injunction was granted in favour of a group of

[2] *Saltman Engineering Co. Ltd v. Campbell Engineering Co. Ltd* (1948) 65 R.P.C. 203, 215 *per* Lord Greene M.R.
[3] [1982] 1 N.S.W.L.R. 24, 42.
[4] [1966] R.P.C. 81.
[5] *Ibid.* 93 *per* Roskill J.
[6] [1978] F.S.R. 582.

aborigines to restrain the publication of a book which contained 'photographs, drawings and descriptions of persons, places and ceremonies [which were of] deep religious and cultural significance to the . . . plaintiffs'.[7] The book had been written by an anthropologist who had been taken into the confidence of the Pitjanjara people and to whom tribal secrets had been revealed. Some of the material in the book, such as the description of ceremonies, was no doubt confidential in its own right in that it was not publicly available. But other material, such as geographical sites or rock engravings, was, assuming no restrictions resulting from land ownership, available for all to see. This latter class of material, however, was transformed from the category of public knowledge to confidential information by virtue of its association with, and significance in, tribal custom and beliefs.

In *G. v. Day* the plaintiff thus succeeded in establishing the existence of confidential information which consisted in the conjunction of two pieces of freely available information. He next had to show that the defendants were bound by an obligation to respect the confidential status of that information, and that the way in which the defendants proposed to deal with the information would breach this obligation. It was clear that the publication of the plaintiff's identity as the person who had made the mistaken sighting would breach any obligation by which the defendants might be bound. But it was more difficult to establish that the defendants were bound by such an obligation.

The first and second defendants[8] were not direct confidants of the plaintiff.[9] The confidential disclosure about the mistaken sighting in Atlanta had been made to the police and the Corporate Affairs Commission, and it was these authorities who were directly bound to honour the confidence. It has long been established, however, that equity will restrain the misuse of confidential information by third parties who receive the information from a confidant who was bound not to disclose it.[10] Such third parties may be restrained once they are given notice of the breach through which they obtained the information even if they were innocent of knowledge of the breach at the time of acquiring the information.[11] The jurisdiction was thus clearly there to restrain the defendants in *G. v. Day*, but the difficulty was that it could not be shown that the defendants had acquired the information from either the police or the Corporate Affairs Commission. This difficulty may become an obstacle to relief when it is brought to mind that a plaintiff has no right to protect confidential information against someone who discovers or acquires the information by independent means.

Although Yeldham J. could not identify the source from which the first and second defendants acquired the information that the plaintiff had made the mistaken sighting, he was prepared to infer that it must have been a member of the police or the Corporate Affairs Commission who was acting in breach of his duty of confidence.[12] It is not the first case in which a third party has been restrained from misusing confidential information when the source of third party's information cannot be located.[13] In what circumstances, then, will the inference be made that the source was an errant confidant rather than some independent means available to the third party? The rule which seems to emerge is that, if the confidential information was so closely guarded and so little known that the third party could not have obtained it except through a breach of confidence, and if the third party does not establish that he acquired the information from a public source, the courts will infer that the source of the information

[7] *Ibid.* 584 *per* Muirhead J.

[8] The third defendant was the New South Wales Corporate Affairs Commission, but no relief was granted against it because:- (1) adequate protection was afforded to the plaintiff by s. 13 of the Securities Industry Act 1975 (N.S.W.) which prohibited officers of the Corporate Affairs Commission from disclosing the confidential information; and (2) the Corporate Affairs Commission had also given undertakings not to disclose the information: [1982] 1 N.S.W.L.R. 24, 41.

[9] It is true that the plaintiff had confirmed directly to the first and second defendants that he had made alleged sightings, but these defendants were already in possession of the information at the time of the confirmation.

[10] See *e.g.*, *Prince Albert v. Strange* (1849) 2 De Gex & Sm. 652; 64 E.R. 293; (on appeal) (1849) 1 Mac. & G. 25; 41 E.R. 1171.

[11] See, *e.g.*, *Butler v. Board of Trade* [1971] Ch. 680, 690 *per* Goff J.; *Fraser v. Evans* [1969] 1 Q.B. 349, 361 *per* Lord Denning M.R.; *Malone v. Commissioner of Police of the Metropolis (No. 2)* [1979] 2 All E.R. 620, 634 *per* Megarry V.-C.; *Wheatley v. Bell* [1982] 2 N.S.W.L.R. 544, 550 *per* Helsham C.J. in Eq.

[12] [1982] 1 N.S.W.L.R. 24, 35.

[13] See *Exchange Telegraph Co. Ltd v. Central News Ltd* [1897] 2 Ch. 48, 54 *per* Stirling J.

was an aberrant confidant. The circumstances of a case, thus, may raise a presumption that the third party has obtained confidential information through a breach and, unless he can displace this presumption by indicating a public source, the third party will be affixed with an obligation of confidence once he is given notice of the confidential status of the information.

A final point of interest in *G. v. Day* concerns the role of detriment in the action for breach of confidence. Detriment to the plaintiff is often cited as an element which must be shown to exist in order to establish a cause of action for breach of confidence.[14] Except in the special class of cases in which the government is seeking to restrain the disclosure of a public secret,[15] this view must be a misconception. An enforceable confidence does not depend for its existence on establishing that detriment has or will ensue to the plaintiff as a result of a breach of the confidence. Especially in the case of confidences formed by the communication of personal, as opposed to commercial, information, a breach of confidence may show the plaintiff in an advantageous rather than discreditable light. This much is apparent from the early case of *Prince Albert v. Strange*[16] in which the plaintiff was successful in restraining the disclosure of certain etchings which he and Queen Victoria had made. In the course of his judgment in the case Knight Bruce V.-C. commented:

> Everyone . . . has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances.[17]

The correct view is that detriment is not an element which must be established to make out a cause of action, but a factor relevant to the determination of the appropriate remedy once the cause of action has been established. The injunction, like all equitable remedies, is discretionary and one of the grounds on which it *might* be refused is the absence of detriment to the plaintiff as a result of the breach of confidence. But, even granting this role to detriment, the courts will not lightly exercise their discretion against the award of an injunction. The cases support the statement of Mason J. in *Commonwealth of Australia v. John Fairfax & Sons Ltd*[18] that it 'may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism'.[19] In a similar vein, Yeldham J. in *G. v. Day* held that 'no discretionary grounds'[20] existed for declining to grant an injunction to the plaintiff. The unauthorized disclosure of the plaintiff's name as the person who had made the mistaken sighting would work 'to his detriment in a not insubstantial way'[21] both because of the fear which he entertained for his safety and because of ridicule by those whose standards of conduct were different from his own.

FRANCIS GURRY*

REDDING v. LEE[1]

Assessment of damages for Personal Injury — Collateral Benefits — Social Security Benefits — Invalid Pension — Unemployment Benefits — Deductibility.

It frequently happens that a person who is injured becomes entitled to benefits from any of a number of sources, as well as having a claim for damages. Such sources would include an employer, who may

[14] See *Coco v. A.N. Clark (Engineers) Ltd* [1969] R.P.C. 41, 48 *per* Megarry J.; *Dunford & Elliott Ltd v. Johnson & Firth Brown Ltd* [1977] 1 Ll. L. Rep. 505, 509 *per* Lord Denning M.R.; *Castrol Australia Pty Ltd v. EmTech Associates Pty Ltd* (1981) 33 A.L.R. 31, 48 *per* Rath J.

[15] For an explanation of why this class of cases is treated differently, see *Commonwealth of Australia v. John Fairfax & Sons Ltd* (1981) 55 A.L.J.R. 45, 49 *per* Mason J.

[16] (1849) 2 De Gex & Sm . 652; 64 E.R. 293; (on appeal) (1849) 1 Mac. & G. 25; 41 E.R. 1171.

[17] (1849) 2 De Gex & Sm. 652, 697; 64 E.R. 293, 312.

[18] (1981) 55 A.L.J.R. 45.

[19] *Ibid.* 49.

[20] [1982] 1 N.S.W.L.R. 24, 37.

[21] *Ibid.* 36.

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[1] (1983) 57 A.L.J.R. 393; 47 A.L.R. 241.