

Concerns and Ideas about the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)

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1. INTRODUCTORY REMARKS

Few can doubt that the UK Human Rights Act 1998, in incorporating the European Convention on Human Rights (ECHR) and in particular the guarantee of the right to privacy in Article 8 of the Convention into UK domestic law, and also in requiring the judiciary in s. 6 to have regard to the Convention in developing the common law, is having a considerable effect on the developing protection of human privacy in English common law. This was predicted when the Human Rights Bill was going through its various parliamentary phases by many, including the Lord Chancellor, who described the judges "as pen-poised . . . to develop a right of privacy."¹ Also predicted was the way the expansion was likely to come about: incrementally and, initially at least, by means of expanding established torts.² The early judicial decisions that have been handed down since the coming into force in October 2000 of the 1998 Act confirm the above predictions. Arguably, they also display the defects of dealing with new societal problems by putting old torts on the Procrustean bed and stretching them out of shape to meet new requirements.

Those who share this view may ask why the richer experience of other systems, in particular that of Germany, France and the USA,

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1. House of Lords Deb. Vol. 583 col. 785 (Nov. 24th, 1997).

2. See *inter alia* H. Fewick and G. Phillipson, *Breach of Confidence as a Privacy Remedy in the Human Rights Act Era*, 63 MOD. L. REV. 660 (2000).

has not been extensively employed to help English judges at this formative stage of a new era. In fact, foreign experience has, if anything, been (mis)used, mainly by those who oppose the creation of a new tort of privacy or some equivalent thereof, to stunt such a development. The motives for such actions may be understandable. But the way foreign law and comparative legal experience has been misrepresented or overlooked to restrict developments in our law cannot be left un-answered.

The purpose of this article is also to point out some of the incremental changes that have taken place in English privacy law, notwithstanding opposition by some parts of the UK Press and the self-regulatory press body, the Press Complaints Commission, politicians' fears to act (lest they incur the wrath of the newspaper magnates), and judicial timidity expressed in the form of opting for the path of least resistance. The authors of this article feel that this timid way of proceeding poses problems; and in this paper they will explore some of them and outline the parameters of a more coherent approach, whilst also welcoming the changes that have come about in a remarkably short period of time. In doing this, they will invoke where necessary the lessons of foreign experience; but as one of them has repeatedly stressed,³ this reference to foreign law will not present it solely in terms of its own – often theoretical – self-description, but will try to present it in a way that makes it suitable for importation into English law. This paper is thus as much an exercise in comparative methodology as it is an attempt to depict our developing law of privacy, warts and all.

2. DEVELOPMENTS IN THE LAW OF PRIVACY

It is understandable that the judiciary has used recent case law as an occasion to re-state the well-known view that English law (or the European Convention for the Protection of Human Rights) does not require the development of an independent tort of privacy. Disputes about whether a law of privacy is required and its potential implications for the Press have consistently raged over the English legal landscape for the better part of thirty-five years. Due caution would suggest that the judiciary would do well to avoid being embroiled in this debate, and cautious pragmatism has been the keynote of the case-law so far.

In the absence of a tort of privacy, the equitable remedy of confidence,⁴ a variety of torts linked to intentional infliction of harm to the person,⁵ and administrative law principles relating to the appropri-

3. Basil Markesinis, most recently in *COMPARATIVE LAW IN THE COURTROOM AND THE CLASSROOM: THE STORY OF THE LAST THIRTY FIVE YEARS* (Oxford: Hart, 2003).

4. See, e.g., *A v. B plc* [2003] Q.B. 195.

5. *Home Office v. Wainwright* [2001] EWCA Civ. 2081.

ate use of police powers,⁶ have all been recently called into service to resolve cases which, at their root, involve allegations of an infringement of personal privacy. However, the application of this multiplicity of different remedies has been accompanied by frequent and emphatic judicial assertions that no general tort of privacy exists in English law, with the House of Lords confirming this view in *Wainwright v Home Office*.⁷

Of course, bold judges (of the kind which our society welcomes less readily than it did, say, one hundred or even fifty years ago) would be prepared to cut through the dense thicket created by their brothers' complexity and caution, and admit that what was really at stake in these cases, despite the convoluted legal routes adopted, was, in essence, the protection of the human personality, and the private space necessary for it to grow and develop in all its manifestations. Thus, it comes really as no surprise that Lord Cottenham LC acknowledged in *Prince Albert v. Strange*⁸ that privacy was the interest which had really been affected in that case. This same approach was espoused many years later by Lord Denning when speaking in the House of Lords in support of Lord Mancroft's Privacy Bill.⁹ Both were bold judges, and both were willing and able to cut to the core of what was at stake when privacy was endangered.

But the mentality of the modern judges does not allow such flights of the imagination. Thus, in his decision in the case of *R v Wainwright* when it was before the Court of Appeal¹⁰, Lord Justice Mummery asserted that:

“As to the future I foresee serious definitional difficulties and conceptual problems in the judicial development of a “blockbuster” tort vaguely embracing such a potentially wide range of situations. I am not even sure that anybody – the public, Parliament, the Press – really wants the creation of a new tort, which could give rise to as many problems as it is sought to solve. A more promising and well trodden path is that of incremental evolution, both at common law and by statute. . . of traditional nominate torts pragmatically crafted as to conditions of liability, specific defences and appropriate remedies, and tailored to suit significantly different privacy interests and infringement situations.”

Leaving aside Lord Justice Mummery's assertion that nobody “wants” such a development – and one could argue that the public *certainly* does,¹¹ Parliament *probably* does (but does not dare to

6. *Ellis v. Chief Constable Essex Police* [2003] EWHC 1321.

7. [2003] UKHL 53, 16 October 2003.

8. (1849) 1 Mac. & G.25, 47.

9. HL Debates, Vol. 229, col. 638.

10. [2001] EWCA Civ. 2081, at para. 42.

11. On this, at least, there seems to be reliable empirical evidence to suggest that the learned Lord Justice's view does not correspond to reality. See The Public Inter-

act)¹², and the Press is *divided* – one must really ask whether the “pragmatic” way favoured by the learned judge really has the advantages he claims it does. Similarly, one must question Lord Hoffmann’s assertion in the same case that privacy, freedom of speech and other underlying values of the common law are not “capable of sufficient definition to enable one to deduce specific rules to be applied in concrete contexts. . . that is not the way the common law works”¹³, and that any “perceived gap can be filled by judicious development of an existing principle” without having to acknowledge the existence of a general tort of privacy.¹⁴ This expectation that a cautious, pragmatic approach is preferable to one based on the application of a general principle of privacy is very questionable.

The *Wainwright* case concerned an attempt by counsel for the plaintiffs to obtain a remedy for the intrusive strip-search to which the Wainwrights had been subject by arguing that various torts of intentional interference with the body of a person should be given an expanded definition to protect personal privacy, or in the alternative, that an autonomous tort of privacy should finally be recognised in English law. In the initial county court decision, Judge McGonigal had concluded that the conduct of the prison staff in conducting the searches did constitute a tort of trespass to the person. This finding was based inter alia upon both an extended application of the rule in *Wilkinson v. Downton*¹⁵ that the intentional infliction of emotional harm constituted a form of trespass, and an additional finding by the judge that, in the wake of the Human Rights Act, an unjustified invasion of privacy could in itself constitute trespass to the person, trespass being capable of extending to other interests other than protection from bodily harm.

The Court of Appeal was quick to reject both grounds, with Lord Justice Buxton commenting as follows on this extravagant stretching of trespass under the telling heading: “The inappropriateness of trespass”:¹⁶

est, the Media and Privacy, survey commissioned by the BBC, the Broadcasting Standards Commission, the Independent Committee for the Supervision of Standards of Telephone Information Services, the Independent Television Commission, the Institute for Public Policy Research, and the Radio Authority, conducted under the supervision of Professor David Morrison and Michael Svennevig, published in 2002 and available on the websites of the commissioning bodies.

12. See the Fifth Report from the Culture, Sport and Media Committee, *Privacy and Media Intrusion*, Session 2002-3, HC 458, Vols. I-III: “III. On balance, we firmly recommend that the Government reconsider their position and bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone – not the press alone – into their private lives”.

13. Op cit., para. 31.

14. Op cit., para. 18.

15. [1897] 2 Q.B. 57.

16. Sub-title to para. 48, emphasis added.

“Whatever torts the Wainwrights may be able to complain of, none of them are, or can properly be seen, as derivatives of the tort of trespass to the person, and *only confusion was caused by the attempt to force what occurred in this case into that straitjacket*. That objection is not merely an obsolete recourse to the forms of action, nor a reflection of a mediaeval distinction between trespass and case. As I shall demonstrate, it reflects fundamental principles by which modern English law, rightly or wrongly, limits the ambit of tortious liability.”

Lord Justice Mummery agreed with this criticism, and the House of Lords in its decision in the same case came to a similar conclusion in respect of the same arguments. Yet the alternative pragmatic approach that both courts advocate in the same case towards ensuring the protection of privacy is based upon a similar artificial and confusing stretching of existing tortious remedies. In *Wainwright*, the Law Lords refused to recognise the existence of a separate and free-standing tort of privacy, relying upon the progressive extension of the existing breach of confidence action to protect privacy interests. Yet this involves an identical process of distorting existing torts as that criticised by Lord Justice Buxton.

Nor, unfortunately, is the *Wainwright* decision a novel one in this respect. The objections of Lord Justice Buxton can also be applied to the following attempts, listed below, to stretch existing torts to fit privacy within their scope (all of which are well-known to English lawyers, who have had to grapple with the conceptual lack of clarity in this area for decades now). What these cases (some successful, some not) have in common is that they all raise serious doubts about the efficacy of what one could, at present, call the *Wainwright* pragmatic approach to protecting privacy via the incremental extension of existing remedies to suit the circumstances as required. All have involved a judicial choice between two options. The first option was to accept that existing remedies, in the absence of a tort of privacy, were inadequate to protect against even massively exploitative intrusions upon personal privacy. Alternatively, the second option was to fashion a new remedy by the stretching of an existing rule to provide a degree of partial, confusing, and doctrinally unsound protection. This false choice has repeatedly constrained the approach of the English courts. As we will argue, the development of the law of confidence since *Douglas and Zeta-Jones* is only the latest artificial and unsatisfactory attempt to stretch the fabric of an existing tort to fit privacy within its straitjacket.¹⁷

17. See also A. Morgan, *Privacy, Confidence and Horizontal Effect: “Hello” Trouble*, 62 (2) CAMBRIDGE L. J. 444 (2003).

(a) *Gordon Kaye v. Andrew Robertson and Sport Newspapers Ltd.*¹⁸

The facts of this decision are well-known and strikingly odious. The plaintiff, a well-known actor, attempted to obtain an order restraining the publication of photographs of the injuries he had sustained in a car crash which had been obtained via deception by a tabloid's journalists while he was still in hospital undergoing treatment. Counsel for the plaintiff in seeking relief argued for the applicability of a multitude of different torts, including libel, trespass and nuisance.¹⁹ The Court of Appeal concluded that only malicious falsehood was applicable to the circumstances of the case, having decided that no tort of privacy existed in English law, and granted the plaintiff a limited and inadequate remedy, merely prohibiting the publication of any inference that Mr. Kaye had given informed consent to the publication of the story.

We have come across no judicial or academic dicta to suggest other than full condemnation of the unsatisfactory nature of the result (reluctantly) reached by a strong Court of Appeal. A better example of the limitations of the 'pragmatic' approach through existing torts cannot be had. Recognised torts gave inadequate protection to the plaintiff despite attempts to stretch them to cover the appalling intrusion in question, while the Court of Appeal choose to apply this inadequate level of protection rather than take the bold step of recognising a tort of privacy. This unfortunate decision has subsequently been treated as authority for the proposition that English common law does not encompass a privacy tort, and its influence has acted as a dead hand on any potential for developing remedies against privacy intrusions. The result was not made any better when, many years later, the European Commission on Human Rights was persuaded not to protect a similarly placed English claimant on the very unconvincing ground that recent developments in the law of breach of confidence afforded adequate remedies unavailable at the time of *Kaye*.²⁰ Recent developments notwithstanding, *Kaye* remains a compelling demonstration of the limits of both existing English law and of the limitations of an approach that relies upon inadequate existing remedies to protect privacy.

18. [1991] FSR 62.

19. Significantly, breach of confidence was not pleaded in the *Kaye* case, presumably because Mr. Kaye's legal advisers considered that it could not offer an appropriate remedy for their client. Lord Bingham, who was one of the judges who heard the case, has subsequently argued (extra-judicially) that it would not have succeeded. Thus, see his *Opinion: Should there be a Law to Protect Rights of Personal Privacy*, in *THE BUSINESS OF JUDGING* (OUP 2000), pp. 148-49. Lord Scott, on the other hand, has taken a different view; see "*Confidentiality*", in Jack Beatson and Yvonne Cripps (eds.) *THE FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION* (Oxford: OUP, 2000), p. 272.

20. *Spencer v. United Kingdom* [1998] 25 EHHR CD 105.

(b) *Bernstein of Leigh v. Skyviews & General Ltd.*²¹

This decision, which saw a plaintiff denied a remedy in trespass for aerial over-flights and photography of his country estate, is another example of a tortured attempt to provide a remedy through trespass to land or nuisance for what was a clear case of snooping and unacceptable aerial surveillance.²² The case, once again, shows the limitations of the pragmatic approach. The reader should place himself in the hypothetical position of being the owner of similar premises to those with which this case was concerned. Most persons in such position would believe that they were going about their lawful business free from external snooping. But the attempt in the *Bernstein* case to use trespass to ensure a remedy for this intrusion merely succeeded in establishing that trespass would fail if the picture was taken from an angle outside the property, even if it was taken from a low height that, potentially, brought the intruder within the air space of the observed person. Nuisance would in all likelihood likewise fail, and following the decision of the Law Lords in the *Hunter v. Canary Wharf Ltd.* case²³ would certainly not provide any protection to any guests or visiting friends of the property owner, if he/she has no interest in the surveyed land. And if the surveillance or photographing was the result of an isolated event, it would not be covered by nuisance at all (though now it may possibly be covered by the Protection from Harassment Act 1997). Do such scholastic niceties in the face of considerable intrusion into personal privacy do credit to the law?

(c) *Khorasandjian v. Bush*²⁴

In this case, the Court of Appeal granted an injunction to restrain the defendant harassing the plaintiff by repeated telephone calls. Again, it involved another attempt to provide a legal remedy for what should be an impermissible activity by stretching the law of nuisance, which was upheld this time, despite the doctrinally unsatisfactory nature of this artificial extension. A valiant dissent by Lord Justice Gibson rejecting the artificiality of this extension thus had to await later vindication by the House of Lords in *Hunter v. Canary Wharf Ltd.*,²⁵ which disapproved of the Court of Appeal's attempted expansion of the tort, even if this later decision itself raises many uncertainties (and which left many potential claimants unsatisfied

21. [1978] QB 479.

22. Cf. and contrast OLG Köln 13 October 1988, NJW 1989, 720 – the case of land owner observing through video camera fixed in a bird house situated on his land the comings and goings of his neighbour. The latter's claim for 7,000DM was strengthened by the fact that the "observer" had been earlier ordered by (another) court to desist but had refused to do so.

23. [1997] AC 655.

24. [1993] QB 727.

25. [1997] 2 WLR 684.

because of the quaint requirements of a tort – nuisance – originally devised seven hundred years ago to deal with noxious smells).

(d) *Tolley v. Fry*²⁶

Tolley remains the archetypal illustration of judicial ingenuity in the face of a *lacuna* in English law: the misuse of the image of the plaintiff, an amateur golfer, was held in the particular circumstances of the case to constitute defamation, as the use of his image was deemed to imply that he was a professional. This solution worked here because of the quaint mores of the times. But in contemporary circumstances, it manifestly fails to provide protection to those who might need it most. Its limitations were graphically illustrated in *Kaye*, where the Court of Appeal refused to apply the *Tolley* precedent to give redress; and in all likelihood no remedy in defamation would exist today for a similar appropriation of an individual's personal image. (Whether the law of confidence would now provide such a remedy remains very uncertain, as discussed below.)

(e) *Re X*²⁷

This decision first provided anonymity to the daughter of Mary Bell, who had while still a young girl murdered another child and had therefore acquired tabloid notoriety. Here, the English courts again artificially stretched their existing powers by invoking the old judicial wardship jurisdiction to grant an injunction restraining the publication of information as to the identity and whereabouts of her young daughter (and by extension, her mother) to protect against press intrusion. Academics pointed out at the time the limitations of the wardship jurisdiction and the consequent age limit to the extent of the protection offered to Mary Bell's privacy and that of her child. However, the point became manifest to all most recently as the daughter neared the age of majority and thus the end of the wardship period, and has therefore necessitated further judicial ingenuity, time, and expense to sort the problem out in the way that had been already clearly indicated and worked out by the German Constitutional Court precisely thirty years ago by means of their coherent approach to privacy.²⁸ In her recent admirably clear and concise judgement, Butler-Sloss LJ arrived at the same position as the Constitutional Court by adopting a similar approach based on principle and due recognition of the crucial importance of privacy within the ECHR framework of rights (albeit via the loose framework of breach

26. [1931] AC 333.

27. [1984] 1 WLR 1422.

28. BVerfGE 35, 202, translated in BASIL MARKESINIS and HANNES UNBERATH, *THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE*, 4th ed. (Oxford: Hart, 2002), 423 ff.

of confidence, which will be discussed further on).²⁹ Prior to this, in contrast, pragmatic judicial ingenuity within existing frameworks had proved to be inadequate, riddled with difficulties and in need of precisely such a principled approach.

(f) *Douglas v. Hello*³⁰

These two recent decisions which came in the wake of the coming into force of the Human Rights Act saw Michael Douglas, Catherine Zeta-Jones and OK! Magazine obtain damages against Hello! Magazine for publishing unauthorised photographs of their wedding when the rights to publish images of the wedding had been previously sold to OK! These decisions will be discussed further on in the context of the expanding protection afforded by the equitable remedy of breach of confidence. However, it is worth noting that the *key* issue at stake in both decisions was arguably not confidence or privacy but in reality the right of publicity. This is not merely a terminological observation but a point which can have important legal consequences which we shall highlight when we discuss compensation (which we do, briefly, below). It also illustrates the range of problems that the action for breach of confidence is now being stretched to encompass, both in the *Douglas* cases and in the subsequent celebrity confidence cases.

The expansion of the law of confidence in the wake of the Human Rights Act, begun in *Douglas (No. 1)* decision, is the latest and most far-reaching example of Procrustean stretch in the realm of privacy. S. 6 of the Act requires the courts to give effect to the rights contained in the Convention in developing the common law, which include the Article 8 right to privacy. The courts have attempted to do this, using the cautious, pragmatic and incremental approach favoured by *Mumery LJ* and the Law Lords in *Wainwright*. Private material can now increasingly be classed as “confidential” and therefore injunctive relief or damages can be obtained to deter publication of such material as this now would constitute a “breach of confidence”. The development of the confidence action in this way, unlike the previous attempts to artificially stretch causes of action discussed above, is often presented as adequately and coherently covering the vast majority of instances of intrusions upon privacy. Lord Woolf C.J. explicitly states this in *A v. B plc*:³¹

“It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort

29. *X (A woman formerly known as Mary Bell) v O'Brien and others* [2003] EWHC 1101.

30. [2001] 2 WLR 992 (CA), henceforth referred to as *Douglas No 1*, and *Douglas v. Hello! Ltd.* [2003] EWHC 786 (Ch), henceforth referred to as *Douglas No 2*.

31. [2003] Q.B. 195, 205.

which protects privacy. In the great majority of situations, if not all situations, where the protection of privacy is justified, relating to events after the Human Rights Act 1998 came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection.”

It remains to be seen whether Lord Woolf's confidence is justified. Much depends on whether the framework of the action is flexible enough to be stretched in incremental stages sufficiently far to encompass the diversity of privacy claims, and to give appropriate remedies where necessary, while retaining coherence. Lindsay J. in *Douglas No. 2* was considerably less sanguine:

“Further development by the Courts may merely be awaiting the first post-Human Rights Act case where neither the law of confidence nor any other domestic law protects an individual who deserves protection. A glance at a crystal ball of, so to speak, only a low wattage suggests that if Parliament does not act soon the less satisfactory course, of the Courts creating the law bit by bit at the expense of litigants and with inevitable delays and uncertainty, will be thrust upon the judiciary.”³²

There are strong indications that the pragmatic extension of the law of confidence will be inadequate to protect privacy as a result of the inherent limitations of the action. Despite Lord Woolf's optimism in *A v. B plc*, the development of confidence bears all the signs of being another artificial stretching of a cause of action to give limited and patchy relief to certain types of privacy violations.³³ Contrary to some of the extravagant claims made on its behalf, the expansion and distortion of the confidence action cannot serve as an adequate substitute for a full privacy action, unless by either judicial sleight of hand or the bold grasping of the privacy nettle, a free-standing right to privacy emerges fully-formed like Athena from the limitations of the confidence action.³⁴

3. THE EXPANSION OF CONFIDENTIALITY

Notwithstanding the concerns or objections voiced above, the progression of confidentiality is a (partially) welcome development for those of us who support the expanded protection of human privacy.

32. Op cit., note 35, § 51 (iii).

33. See also R. Singh and J. Strachan, “Privacy Postponed” [2003] European Human Rights Law Review Special Issue: Privacy 12-25.

34. Note also that a number of distinguished commentators have argued in favour of maintaining a clear distinction between privacy and confidence: see Law Commission, *Breach of Confidence*, No. 110 (Cmnd 8388), 5; R. WACKS, *PERSONAL INFORMATION, PRIVACY AND THE LAW* (Oxford, 1989), pp. 132-4; Dame Mary Arden, “The Future of the Law of Privacy” (1998-99) *King's College Law Journal* 1, 5; Lord Bingham, “Should There Be a Law to Protect Personal Rights to Privacy?” [1996] *European Human Rights Law Review* 450, 461.

Thus, we note indicatively the following welcome trends, as road markers on the route towards a conceptually rigorous and suitable privacy action:

- a) *The absence of a need to show a pre-existing relationship of confidence where private information is involved, and the recognition that publication of private material in and of itself constitutes a "detriment"*

One welcomes the unshackling of the power of the court to restrain the publication of private information from the requirement that a pre-existing confidential relationship exist, a step definitively recognised in *Douglas (No. 1)* and *Venables v News Group Newspapers*.³⁵ Judicial concentration upon the question of *who* has published the offending material, a core issue in confidence actions, appears therefore where the publication of private material is concerned to be superseded by a welcome focus upon *what* has been published.³⁶ This change has, no doubt, been encouraged by the Human Rights Act even if it built upon previous authority³⁷, and it has made possible the granting of the orders *contra mundum* in the *Venables* and *Bell* cases and the expanded scope given to the protection of private life in *A v. B plc* and *Campbell v. MGN Ltd*³⁸. The expanded protection of human privacy is reflected in the Sunday People's capitulation in the Sara Cox case before the issue reached the court, following their publication of photographs taken of a well-known English radio presenter while on her honeymoon on a private beach.

The assumption by the Court of Appeal in *Campbell* that intrusion into privacy could in itself constitute a detriment, which is a required element in order to bring a successful action for breach of confidence, is also to be welcomed. By virtue of these fundamental alterations of the existing law of confidence as it pertains to private information, a new legal path (albeit of a narrow and twisted nature) has been opened up for the protection of privacy as an essential element of the human personality. This *may* now extend to ensure a remedy in a case similar to that of *Kaye*.

Nevertheless, as discussed below, the question of the extent to which information which has entered already into the public sphere, or which can be described as "private" but not easily as "confidential", can be protected by the breach of confidence action remains undecided. In the light of the *Peck* judgement of the European Court of Human Rights, this is a serious area of uncertainty. There also re-

35. [2001] Fam 430. See also the *dictum* of Lord Goff in *AG v Guardian Newspapers (No. 2)* [1990] 1 AC 109, 281, which laid the foundations for this development.

36. See A. Morgan, *op cit.*, 451-2.

37. See H. Fenwick and G. Phillipson, "Confidence and Privacy: A Re-Examination" [1996] Cambridge Law Journal 447.

38. [2002] EWCA Civ 1373, CA.

mains significant uncertainty (and excessive deference to press interests) as to what will constitute a violation of privacy, which becomes a particularly pertinent issue where public figures are involved.

b) *Public figures*

Writing nearly twenty years ago, one of us complained that the common law seemed to make little difference between those who were born to publicity, those who sought it, and those who had it thrust upon them.³⁹ The argument was mainly directed against the plight of victims of sexual crime who had to suffer the extra indignity of having their suffering publicised for what was often little less than a desire on behalf of the publisher to satisfy prurient interest in sexual crimes. In the English common law, this 'defect' was gradually remedied by means of typically piece-meal and un-principled legislation⁴⁰ while in the United States such activity still remains possible, justified by a warped appreciation of the First Amendment.⁴¹

The failure to distinguish between those seeking publicity in particular circumstances and those who have publicity thrust upon them has remained a recurring feature of English law and popular opinion. Individuals having the status of public figures have been viewed as fair game, irrespective of how they acquired public status, the circumstances of the privacy intrusion, or the link between the intrusion and the nature of the public interest in the individual concerned.⁴² How rigidly inimical English attitudes have been on this point towards victims of press intrusion can be seen from a statement

39. B. Markesinis, "The Right to be Let Alone v. Freedom of Speech" in (1986) *Public Law*, 67-82, reproduced as chapter seventeen in *FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS* (Oxford: Hart, 1997). For dicta in cases see: *Woodward v. Hutchins* [1977] 1 WLR 760 at 765 per Bridge LJ; *Lennon v. News Group Newspapers* [1978] FSR 573.

40. Such as s. 4 of the Sexual Offences (Amendment) Act 1976 (granting anonymity to victims of rape-related offences (narrowly defined), the Criminal Justice Act 1987 and then, finally, the Sexual Offences (Amendment) Act 1991 and the related Statutory Instrument 1336/1992 of October 1992. The question of the possible anonymity of the accused has not yet been addressed; the very recent case of the television presenter John Lesley, accused by the media of committing rape in the media, and the adverse publicity he had to put up with for nearly ten months until the Crown Prosecution Service decided to drop the prosecution against him (without any details of the reasons for this decision given in public), reveals another gap in our law and one which led the Lord Chief Justice to express serious reservations about this form of "trial by the media" (interview granted on 31 July 2003). It also shows the drawbacks (in terms of human suffering as much as legal inconsistency) of incrementally 'closing' the gaps of English law by constant tinkering, rather than attempting to identify consistent underlying principles that should apply across the board.

41. E.g., *Cox Broadcasting Corp. v. Cohn*, 420 US 469, 95 S.Ct. 1029; *The Florida Star v. B.J.F.*, 491 US 524, 109 S.Ct. 2603, 105.

42. See for example Bridge L.J.'s comments in *Woodward v Hutchins* [1977] 1 WLR 760: "It seems to me that those who seek and welcome publicity of every kind bearing upon 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".

made by the former Chairman of the Press Complaints Commission (in those days the Press Council), Lord Wakeham, when asked to comment about a television play portraying an entirely fictitious conversation of the late Princess of Wales with a psychiatrist. Asked whether the programme⁴³ violated her privacy he replied: "Diana [sic] has sacrificed her right to privacy by going on television so, I think, she is fair game to be publicly analysed."⁴⁴

By contrast, in French and German law we find a far more nuanced approach as to when a distinction will be made between public and private figures. In both legal systems, the category of person matters less than the nature of the activity or information in question. Since this is a 'developing' area of the law as far as English law is concerned, it is worth presenting these foreign approaches in some detail in order to demonstrate the wealth of experience one finds in both these jurisdictions when it comes to making such distinctions. The manner in which excessive rigidity is avoided between the public/private dichotomy is as notable as is the fact that the privacy rights of public figures are not summarily dismissed.

In France, the Cour de cassation has adopted a consistent position that « everyone whatever his rank, birth, fortune, present or future occupation, is entitled to a right to privacy ».⁴⁵ However, infringements on someone's privacy may sometimes be held to be legitimate, especially when public figures are concerned. Thus, in the wake of the controversy surrounding the imposition of a ban on the publication of *Le Grand Secret* by François Mitterrand's doctor,⁴⁶ French judges seem more willing to recognise a right of the public to know about public figures' health, whenever ill-health could jeopardise the smooth running of the public figure's function or mandate.⁴⁷ Even when the revealed personal information in question has no link to official functions, the most recent case-law dealing with claims from celebrities seems to be more lenient and in favour of publication than when anonymous citizens are concerned.⁴⁸ Nevertheless, public figures are still entitled to the protection of the law of privacy, and the recent case law represents the development of a

43. Michael Grade, chief executive of the television channel Channel 4, described this programme as "an exercise in exploitation".

44. *The Times*, 2 May 1996, p. 16.

45. Civ. 1^{ère} 23 October 1990, *Bull. civ.*, n°222.

46. In the *Grand Secret* case relating to undue disclosure of the former President of the Republic François Mitterrand's illness, the Cour d'appel in Paris prohibited publication of the entire book in which the revelations took place. The decision however remains controversial and was probably motivated by the fact that the disclosure was done in breach of professional confidence by François Mitterrand's former doctor. See E. Agostini, "Le grand secret", *D.*1996, p. 58; G. Memeteau, "L'honneur d'un Président", *G.P.*1996.II., p. 754.

47. See, C.A. Paris 5 December 1997, *D.*1998, *I.R.*, 32, which cautiously follows this approach.

48. Cf. Civ. 1^{ère} 23 April 2003, *D.*2003, n°28, p. 1854, note C. Bigot.

more nuanced approach than applied hitherto, which recognises the difference between public figures and anonymous citizens and still requires that strong public interest justification be demonstrated where substantial breaches of privacy are at stake.

German law has recognised this basic distinction between private and public figures, while taking pains to draw further sub-divisions where dealing with the publication of images, in particular between images of permanent public figures (e.g., Heads of State and famous actors, scientists or athletes)⁴⁹ and those of individuals who attract public attention only for a limited period of time (e.g., victims of crime) and who then recede back into anonymity and have their rights of privacy (as fully private figures) eventually revived.⁵⁰

The attempt to define and distinguish between these two categories has led to an interesting case law. Factors to be taken into account include participation in significant historical, political, social or cultural events and achievements of some importance.⁵¹ However the result is also affected by the right of the press to identify, focus on and cultivate, within limits defined by law, possible issues of future public interest.⁵² The second category of public figures – those who attract public attention for a limited time due to specific events – are accorded a higher level of protection. Nevertheless, even “permanent” celebrities may successfully invoke privacy rights in particular as far as the intimate sphere of their lives is concerned.

The publication of secretly taken photographs showing an actress naked in her private surroundings was thus prohibited, despite the fact that this actress had previously featured naked in films and had consented to the publication of nude photos on several separate occasions.⁵³ The same decision was taken in the case of a prominent football star whose penis had accidentally slipped out of his shorts during a game: a journal had published a large-sized copy of this image and thereby had additionally enlarged the relevant section of the photo.⁵⁴ As their fame and importance for the public diminishes (e.g., ageing politicians, actors, or singers), even so-called ‘absolute’ or ‘permanent’ public figures will regain a stronger privacy claim when the publication of their images is in dispute.⁵⁵ They will, however, always

49. So-called *absolute Personen der Zeitgeschichte*.

50. So-called *relative Personen der Zeitgeschichte*.

51. Schwertdner in Münchner Kommentar zum Bürgerlichen Gesetzbuch (3rd edn 1999), § 12 no. 171.

52. BVerfGE NJW 2000, 1021, 1025 (Caroline von Monaco).

53. OLG Hamburg AfP 1982, 41 (Dolly Dollar).

54. OLG Hamburg ArchPR 1972, 150.

55. See, e.g., the decision LG Berlin 19 November 1996, NJW 1997, 1155 (discussed in more detail below).

remain closely connected to 'their' particular time or era, and the publication of historical pictures will not be prevented.⁵⁶

Figures who, by contrast, attract attention only for a very limited period of time – usually due to a singular event – include individuals who are closely connected to celebrities (e.g., family members, friends or lovers), who hold a public office (e.g., public prosecutors) or enter the public stage due to their profession (e.g., criminal lawyers in high-profile cases), who are involved in criminal proceedings (e.g., suspects and convicts) or who become involved in public events by mere coincidence (e.g., victims of crime, natural catastrophes or traffic accidents). Their right to remain anonymous is again weighed against the right of the public to be informed, and the publication of images will remain confined to the incident which brought them to the attention of the public in the first place.

Similarly, in France, the publication of intrusive images and information by newspapers will be more carefully controlled where only 'temporary' public figures are involved.⁵⁷ Even in this context, the importance and particular circumstances of an event or of the publication of an image may still outweigh the privacy rights of these 'temporary' public figures. For example, judges will consider whether the focus of a photo of a public event that contains the image of the plaintiff is centred upon the public event itself or on the plaintiff.⁵⁸ Nevertheless, French law (as German law) adopts a nuanced approach, distinguishing between various categories of public figure as well as between various types of disclosed personal information, while enabling even 'permanent' public figures to avail of privacy rights when intimate information is at stake in the absence of clear public interest.

This nuanced, context-specific approach that recognises that public figures do not sign away their privacy rights simply by virtue of being famous seems to be emerging in England, in the post-Human Rights Act 'confidence'-linked actions. Recent case law is pleasantly replete with dicta to the effect that public figures, too, are entitled to

56. Even in France where the publication of public figures' pictures must be justified by a topical event and confined to this event, there is no doubt that publication of historical pictures is permissible. Thus pictures of a politician's funerals cannot be used to illustrate a story that has no bearing on the politician's death (T.G.I. Paris 19 May 1999, *Legipresse*, 1999, n°165-I, p. 116). But there is no restriction on the publication of one of the symbolic photos of the May 1968 events, as it was deemed to have become part of French national history (T.G.I. Nanterre 9 June 1998, *Legipresse*, 1999, n°161-I, p. 52).

57. See Civ. 1^{ère} 20 February 2001, n°9823/471, after the terrorist attack at RER Saint Michel Station in Paris.

58. See Civ. 1^{ère} 25 January 2000, D.2000, Somm. com., p. 270, obs. C. Caron; *JCP*.2000.II.10257, Conclusions Jerry Sainte-Rose: "if the complaining person is not the main subject of the photo but only one of the component elements of a whole public subject, he should not be allowed to oppose to the publication of the photo on the ground of privacy and image rights".

have their privacy protected. Lord Woolf thus remarked in *A v. B plc*:⁵⁹

“Where an individual is a public figure he is entitled to have his privacy respected. A public figure is entitled to a private life.”

This comes, however, with the realisation that he

“. . . should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media.”

How far this intrusion can go is a matter of some dispute, and Lord Woolf's comments on the extent of privacy rights of public figures in *A v B plc* are in certain respects very problematic. We shall return to this in examining the limitations of the confidence cases. But the general position about public figures is no longer in doubt: they, too, have privacy rights.

In *Campbell v. MGN Ltd.*,⁶⁰ the Master of the Rolls seems to have re-stated and even expanded the position set out by Woolf when he said:

“For our part we would observe that the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual, who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay.”

Compared to Lord Woolf's full statement in *A v. B plc*, this seems to show much greater sensitivity towards privacy rights. This divergence is discussed below as one of the points of uncertainty and tension produced by the stretching of the confidence action: for now, it will suffice to note that the confidence cases appear to see the UK courts taking the first steps towards the nuanced approach developed by the French and German courts and towards the recognition of the entitlement of all to a degree of privacy.

c) *Public places*

English law has not only changed in so far as it now accepts that even public figures may have privacy rights; it has also changed quite radically by accepting that their privacy rights may extend to things that they do in public places. The *Campbell* decision by the Court of Appeal seems to support this proposition by treating an appearance in a public place (albeit *en route* to a private place to attend a Narcotics Anonymous meeting) as capable of giving rise to a breach of confidence action, as does the *Douglas No. 2* case with its acceptance that images of a wedding with numerous guests (other photos of which

59. Op. cit., para. 11 (xii).

60. [2002] EWCA Civ 1373, para. 41.

would appear in a mass circulation magazine) could still attract the protection of the confidence action.

This general position that privacy rights may extend to acts done in public places was fully analysed and justified in the *Caroline* cases in Germany and has also been adopted in some common law jurisdictions such as Canada⁶¹ and California.⁶² This position is well established in French law where protection of privacy no longer relies on spatial considerations – whether the activity is conducted in a private or public sphere – but tends to depend upon the significance and the nature of the activity carried out.⁶³

The decision in *Peck v. UK*⁶⁴ by the European Court of Human Rights confirms that such an approach is now required to satisfy the Article 8 right to privacy in the ECHR. The Strasbourg court in *Peck* found that the UK was in violation of Articles 8 and 13 of the ECHR by failing to provide a legal remedy to prevent the publication of the CCTV footage of Mr. Peck's suicide attempt, which occurred in a public place. This decision appears to depart from previous Strasbourg case law that had viewed the taking of photographs or other images of subjects in a public place as not violating an applicant's right to privacy.⁶⁵ The Court's decision in *Peck* now however recognises that there is "a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'".⁶⁶ The fact that the event in question occurred in a public place and had no quality of secrecy or confidence was not itself a bar to the plaintiff having his right to privacy vindicated.

The Strasbourg court in *Peck* was prepared to draw a distinction for the purposes of privacy between different sets of factual circumstances where the events in question occur in a public place: the public nature of the place and activity in question was balanced against the subsequent disclosure of the intrusive CCTV footage without any attempt to conceal Mr. Peck's identity. The judgement also suggests that foreseeability on the part of the subject as to whether the privacy of their actions in a public place would be respected will be an important consideration. In particular, the Court stated:

61. *Editions Vice Versa v. Aubry* [1998] 5 BHRC 437.

62. Cal. Civil Code, s. 1708.8. The statute makes it a tort to trespass or use a 'visual or auditory enhancing device' – e.g., a telephoto lens or a directional microphone – to film or record a person engaging in personal or familial activities under circumstances in which the person had a reasonable expectation of privacy. A person violating the statute is liable for up to three times the amount of special and general damages, plus punitive damages, and also may be enjoined.

63. See, C.A. Paris 6 October 1999, D.2000, Somm. com., p. 268, obs. A. Lepage: "a wedding, notwithstanding that it is celebrated in a public place, remains of a private nature and therefore cannot be filmed without the spouses' consent".

64. (2003) E.H.R.R. 287 (App. No. 00044647/98).

65. *Friedl v. Austria* (1995) 21 EHRR 83.

66. *Op cit.*, para. 57.

“The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of some distress. . .the footage was disclosed to the media for further broadcast and publication purposes. . .The applicant’s identity was not adequately, or in some cases not at all, masked in the photographs and footage so published and broadcast. He was recognised by certain members of his family and by his friends, neighbours and colleagues. . .As a result, the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation . . . and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995.”

This aspect of the decision appears to shift considerably the boundaries of what is regarded as private life under Article 8, and to recognise that intrusion into personal privacy cannot be justified simply by virtue of that intrusion occurring while the person concerned was present in a public place.⁶⁷ The *Campbell* and *Douglas* decisions indicate that the English courts will be prepared to adopt a similar approach, which is also broadly similar to the German and French approaches, even if Lord Hoffmann in *Wainwright* appeared rather bafflingly to regard *Peck* as solely concerned with identifying the need for the UK to introduce a system of control for the distribution of CCTV footage. Serious concerns remain, however, as to the extent to which this approach can be fitted within the straitjacket of the confidence action, which again will be dealt with below.

d) *Tele lens and short lens*

Another welcome development is the possibility that the English courts by means of the law of confidence may be willing and able to provide a remedy when tele or short lenses are used to intrude upon personal privacy. Previously, this would not even be an issue, as *Kaye* and *Bernstein* had clearly established that privacy interests could only be protected if actual trespass or other forms of punishable intrusion (e.g., interference with telephone lines) could be established. Another reason why this issue did not arise was because telephoto lenses (or, the reverse, short lenses) tend to be used on celebrities from a distance. Since public figures received even less protection than private ones, the point was hardly discussed by our judges or academic commentators.

It was the *Caroline* cases in Germany, in the middle of the 1990s, that first pointed out that the use of the telephoto lens was an indication that the potential claimants would not have approved of their

67. See also *PG and JH v. UK*, ECHR 25th September 2001 and *R v. Loveridge* (2001) EWCA Crim 973.

being photographed, and that was a factor which the courts could take into account in deciding whether an actionable violation of privacy had taken place.

A similar development has occurred in French law.⁶⁸ But no such thing initially occurred in English law. It had to take the huge furore against the press that followed Princess Diana's death before the Press Complaints Commission was prepared to introduce into its Code of Practice in article 3 (ii) the statement that "The use of long lens photography to take pictures of people in *private places* without their consent is unacceptable." Note, of course, that the Press Complaints Commission has not come to accept that the same might be true of photos taken of individuals who are in public places, something which has now happened in California⁶⁹ (and has yet to be challenged on constitutional grounds).

However, the development of the law of confidence now appears to ensure that such use of tele and short lenses to photograph individuals in either private or public places may be relevant in determining whether a legitimate expectation of privacy was being infringed. Lord Woolf in *A v. B plc* suggested that breach of confidence could extend to cover "an intrusion in a situation where a person can reasonably expect his privacy to be respected",⁷⁰ and following the sound logic of the German courts in the *Caroline* cases, the use of special lenses should indicate that a "reasonable expectation of privacy" was being intruded upon. Again, the piecemeal development of the law of confidence seems sensibly to be bringing English law closer to the position adopted in German and French law.

e) *Towards a balancing of competing interests*

A gradual convergence with the German and French approaches can also be detected when it comes to examining how the courts have balanced the rights of privacy and freedom of expression in the breach of confidence cases in the wake of the HRA. It is obviously often the business of the law to sort out clashes between competing values and interests. Given the importance of the potentially conflicting rights of expression and of personality and privacy for any democratic state, striking an appropriate balance between the two sets of rights calls for wise and measured reactions, uninfluenced by reasons of political expediency (or its judicial equivalent). There are two possible answers to the question of how this dilemma is to be resolved in the case of privacy rights.

68. See T.G.I. Paris 29 May 1996, *Legipresse*, 1996, n°135-I, p. 122.

69. And, of course, in Germany after the *Caroline* decision, BVerfGE 101, 361 = NJW 2000, 1021, translated into English in Markesinis and Unberath, op. cit., pp. 450 ff.

70. See *A v. B plc*, op cit., para. 11 (x).

The first is to go down the road adopted in the United States. In *Konigsberg v. State Bar*,⁷¹ Mr Justice Black said: "I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field. . ." Though this dictum appears in a dissent, and one can find, especially in earlier times, American justices arguing that "no constitutional guarantee enjoys preference"⁷² over others, it would appear that Justice Black's statement succinctly states the dislike felt both by American judges⁷³ and academics⁷⁴ in balancing competing values against that of free speech.

The second contrasting approach is to go down the road we have already taken in our law of defamation and attempt to weigh these interests, the one against the other, in the context of the facts of each case. In our law of defamation, some would argue that we have given a premium to reputation over speech; in the emerging law of 'privacy' protection one hopes that a true equilibrium will be attained, a priori favouring no value over the other. The first signs are that we *may* be heading in this direction. Lord Woolf in *A v. B plc* emphasised the need to strike a balance in applying the law of confidence between the requirements of the privacy guarantee in Article 8 of the ECHR and the guarantee of free expression in Article 10. He said:

"There is a tension between the two articles which requires the court to hold the balance between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights both articles are designed to protect. Each article is qualified expressly in a way which allows the interests under the other article to be taken into account."⁷⁵

The same approach has been adopted by Butler-Sloss P. in *Venables and Bell*: in the latter case, she refers to the "necessary balancing exercise between the need to protect confidentiality and the need to pay proper respect to the right of freedom of expression".⁷⁶ This approach certainly reflects the jurisprudence of the Strasbourg court in *Peck* and other cases, where freedom of expression (while given due weight) is *not* treated as a 'trump card' over other rights. (In *Peck*, the Strasbourg court specifically adopted a proportionality approach, bal-

71. 366 US 36, 61 (1961).

72. *Ullmann v. United States*, 350 US 422, 428 (1956) (Frankfurter, J.).

73. See, also Hugo Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, esp. 882 ff. (1960).

74. Thus, among the voluminous literature see: Robert B. McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959); Laurent Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962).

75. *Op cit.*, para. 6.

76. *Op cit.*, para. 58.

ancing the public interest in deterring crime and freedom of expression against Mr. Peck's right to personal privacy.⁷⁷) As discussed below, this reflects the approaches of the German and French courts as well, but what is not yet clear in the British context is how this balancing will be carried out, and in particular the extent to which privacy rights are given due weight and value. As with the other areas of progress that we have identified, the nature and extent to which privacy interests are protected by means of the breach of confidence action in the wake of the HRA remains uncertain.

4. UNRESOLVED PROBLEMS

Despite these welcome developments in the way UK courts approach privacy issues, the picture is not, as noted above, all rosy. In this section we shall thus look at a number of crucial issues which, despite the progress made thus far, still remain unresolved. A common factor underpins the uncertainties that remain: the reliance on confidentiality to address privacy issues instead of developing a proper tort of privacy has so far prevented the courts from addressing these questions as carefully as they should. This lack of clarity demonstrates the conceptual distortions induced by reliance on confidentiality as opposed to a more explicitly privacy-orientated approach. All of the issues identified below have been addressed by the French and German courts as part of their development of a comprehensive and clear privacy law, forming part of a wider need to protect human personality in all its manifestations. While we do not argue for the automatic transplantation of this foreign learning into the UK legal context, we suggest that in every one of the five issues we examine below, an approach based upon the recognition of an explicit privacy action as essential to upholding human dignity would yield greater clarity, rigour, and coherence than the muddled results brought about by piecemeal extensions of the confidentiality principles. The study of foreign law can help demonstrate this; and it should not be excluded simply by the fact that English judges became more introspective in the mid 20th century than their predecessors were during the 19th.

a) Presumptive preference for one interest over another?

To adopt the view that a balance has to be struck between the competing values, as the English courts appear to have done (as discussed above) is one thing; to maintain in addition that there is no 'presumptive' preference for one over the other is the next and more

77. See R. Singh and J. Strachan, "Privacy Postponed?" [2003] *European Human Rights Law Review* Special Issue: Privacy 2003 12, 21-22.

subtle step. Our courts may be moving in that direction; but the point has yet to be clarified conclusively.

As noted above, in *A v. B*⁷⁸ Lord Woolf noted the “. . . tension between the two articles [Articles 8 and 10 of the Convention] which require the court to balance between the conflicting interests they are designed to protect.” Though he expressed no view that one value should prevail over the other, one cannot ignore the fact that his decision is peppered with statements which suggest that at least as far as public figures are concerned, the right to publish seems to come first.

The presumptive primacy of free speech also seems to be implicit in Butler-Sloss P.'s judgments in *Venables* and *Bell*. In both judgments, the exceptional circumstances involved (including threats to the lives and mental health of the individuals concerned, who had in both cases become notorious as a consequence of their killing of small children while they themselves were very young adolescents) were cited as justifying the granting of orders *contra mundum*. While the emphasis in both decisions was on the special facts of each case, and Butler-Sloss P.'s comments should perhaps be confined to the extraordinary circumstances involved, one must note the high threshold she seems to require in order to restrain press freedom where the publication of information relates to the identity of those who have committed criminal offences.⁷⁹

If these dicta seem to point in one direction, others would appear to be less emphatic. Lord Justice Sedley's views in *Douglas (No. 1)* thus deserve close scrutiny. For there, in a passage not affected by the subsequent Court of Appeal decisions in either *A v. B* and *Campbell*, he invoked the case law of the European Court of Human Rights when he claimed that “Article 10 (i) [of the Convention] does not have the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts.”⁸⁰ The approach was cited with approval by Mr Justice Lindsay in *Douglas No. 2*;⁸¹ and also seemed to have found favour by Lightman J. in *Campbell v. Frisbee*⁸² when considering section 12 (4) of the Human Rights Act 1998. Subsequently, these views of Lightman J. were considered by the Court of Appeal in *Campbell v. Frisbee*⁸³ and were not (expressly) overruled, though his judgment was. Notwithstanding the

78. *Op cit.*, para. 6.

79. *Bell*, *op cit.*, para. 59.

80. *Op cit.*, para. 135. Brooke L.J., at para. 49 appeared to share this view by “renouncing” implicitly a phrase used by Hoffmann L.J. in his earlier judgment in *R v. Central Independent Television plc* [1994] Fam 192, 203. Subsequently as Lord Hoffmann he appeared to modify this statement in his Goodman lecture. See also *R v. BBC (ex p. Pro-life Alliance)* [2003] UKHL 23, 15 May 2003.

81. *Op cit.*, para. 186 (v).

82. 14 March 2002. See also the comments of Simon-Browne LJ in *Cream Holdings Ltd v Banerjee* [2003] EWCA Civ 103, paras. 51 and 53.

83. [2002] EWCA Civ. 1374, para. 25.

provisions of s. 12 (4) of the HRA, with its requirement for the courts in applying the Convention in domestic law to pay “particular regard” to the importance of the freedom of expression and especially to “journalistic, literary or artistic material”, the importance of freedom of expression is not allowed to completely overshadow the claims of privacy. In particular, hypothetical or *de minimis* restrictions on publication should not be given presumptive primacy over the protection of a core element of the human personality such as privacy. Effective balancing of both rights involves giving both due weight, and suitable judicial dicta to this effect will play an important role in making this clear.

The pains to which judges in other jurisdictions have gone to balance conflicting human rights without giving presumptive priority to one or the other are considerable and noteworthy since we submit that on the philosophical position of whether ‘to balance or not to balance’ the competing interests, English law has always been more akin to these European systems than it has been to the “brutal simplicity of the First Amendment.”⁸⁴ More particularly, we emphasise the German approach, which – based on the notion that fundamental rights (apart from human dignity) are, in principle, accorded the same status – demands that courts try to reconcile conflicting positions as best they can and give pre-eminence to one value only after due consideration of the particular circumstances characterising each and every case. The outcome of the exercise is thereby open, and the balance must be found time and time again on the basis of the facts of each case.⁸⁵ The following statement of the Landgericht Berlin, typical for the approach adopted by German courts on all levels of the system, may serve as an illustration of this attitude:

“In balancing the personality rights of the applicant with the freedom of the press invoked by the respondent, it is of crucial importance to identify the sphere of life into which the activity of the applicant fell when he featured in the pornographic film-clip. This determines the standard by which the press coverage of the respondent must be measured. For protection of privacy and freedom of expression are accorded the same status by the Constitution (BGH NJW 1981, 1366). As far as resulting conflicts can only be resolved by restricting one and protecting the other, the choice as to which right should prevail in the concrete case must be based on a balance of values and interests which upholds the equal constitutional status of

84. The words belong to the late Lord Wilberforce and come from his Foreword to Basil Markesinis' *Always on the Same Path: Essays on Foreign Law and Comparative Methodology*, vol II, (Oxford: Hart, 2001), p. xiii.

85. BVerfGE 30, 173, 195; 35, 202, 225; 59, 231, 261 ff.; 67, 213, 228; 81, 278, 292; 91, 1, 21. This position is met with approval in academic literature, see, e.g., Jarass in Jarass/Pieroth, Grundgesetz für die Bundesrepublik Deutschland (6th edn 2002), Vorb. Vor Art. 1 no. 49.

both rights and takes into account the privacy interests and the interests of the Press worthy of protection under the particular circumstances of the case.”⁸⁶

Similar considerations can be found in other systems not included in our study. For present purposes Israel may offer an excellent illustration since this is a system which – though in many respects influenced by contemporary American jurisprudential ideas – has, on this point, opted for what we have termed above the ‘European balancing approach’. Thus Chief Justice Barak once remarked that:

“the solution of these conflicts does not lie in ignoring one principle and completely preferring another. Rather, the proper method is to place the principles side by side, giving appropriate weight to each, and balancing them at the point of conflict. This is a ‘process of placing competing values on a scale, and choosing those that, after the weighing process, are stronger under the circumstances.’”⁸⁷

A balancing approach similar to that found in Germany (and Israel) can also be found in France where privacy and freedom of expression both receive due consideration.⁸⁸

We thus submit that a similar approach should be adopted in this jurisdiction, and made clear by appropriate judicial dicta before the current uncertainty is perpetuated and encourages more judicial disputes. To put it differently, approaching privacy issues through the rubric of confidentiality may confuse the issue and result in an excessive presumptive prioritisation of free speech. When balancing free speech against privacy in circumstances where the confidential interest is low but where privacy concerns remain considerable (where, for example, an intrusion occurs in a public place), the root of the existing remedy in the law of confidence may influence judges to place a lower value on privacy considerations than is warranted or appropriate.

The breach of confidence action has also hitherto had a very limited scope of application, and restrictions on free publication have only been imposed in limited and incrementally outlined circumstances, with free speech given (by some judges) presumptive priority

86. LG Berlin 19 November 1996, NJW 1997, 1155.

87. *Hevra Kadisha (Burial Society) of the Jerusalem Community v. Lionel Aryeh Kastenbaum*, Civil Appeal 294/91 (P.D. 46(2) 464 at no. 8 of his judgement (English translation) in B.S. Markesinis’ Website of Israeli Legal Material at University College London/University of Texas at Austin, http://www.ucl.ac.uk/laws/global_law (references omitted). These, incidentally, are cases dealing with the thorny problem of horizontal effect of human rights where Israeli eclecticism has, once again, led many of the country’s jurists to seek inspiration in German doctrine. The lodestar case here has been the famous *Lüth* decision of the German Constitutional Court.

88. See Civ. 1^{ère} 23 April 2003, D.2003, n°28, p. 1854, note C. Bigot, expressly approving the Cour d’appel for having reached equilibrium between privacy rights and freedom of expression.

except in cases involving a clear breach of confidence. Developing an adequate privacy law for the UK in contrast will require clear guidance by the higher courts that the protection of privacy, not the remedying of a breach of confidence, should be the guiding value of this new expanded action, and that privacy is a right emanating from human dignity which must be given due weight when balanced against the claims of free speech. Otherwise, the distorting effect of squeezing privacy into the straitjacket of confidence will distort the application and development of the law of privacy.

b) Revelation in the public interest

The same considerations arise where a defence of public interest is argued to justify a privacy violation. Of the five possible defences⁸⁹ to a claim for actionable violation of privacy that can be brought in a breach of confidence action, this is arguably the most significant. It also gives rise to perhaps the one core question in all privacy related disputes: who should decide when publication is justified in the public interest? Hitherto, this has been left to the Press Complaints Commission and other bodies. In the wake of the HRA, the courts have now begun to take over this role, as seen in *Campbell* and *A v. B plc*. If the courts are to fulfil this role well, this will require the development of a public interest test that incorporates the suitable balancing exercise as between free speech and privacy discussed above, while also factoring in other public interest considerations that may otherwise be neglected, such as the interest of the public in the rehabilitation of offenders.⁹⁰

The neglect of privacy as a value in the common law should not be carried over into how this test is framed and applied. Article 8 of the ECHR, now injected into the common law via s. 6 of the HRA with its requirement that the courts give indirect horizontal effect to the ECHR rights in developing the common law, requires due protection to be afforded to privacy. Equally, the importance of the public interest in protecting personal privacy has to be built into any public interest test. Thus far, much of the formulation of the public interest defence in *A v. B plc* and *Campbell* has tended to analyse the public interest as solely concerned with securing freedom of expression: the public interest in publication has been contrasted with the private interests of the individuals involved. This is inappropriate. For there is also a public interest in protecting personal privacy, as well as in securing other public goods such as the rehabilitation of criminals

89. The other four are: (a) information is already in the public domain; (b) consent; (c) special immunity; and (d) lawful authority. The first of these raises nice problems which are discussed below.

90. See *Venables*, op cit., note, and *Bell*, op cit., para. 59.

and the prevention of harassment. Butler-Sloss P. appeared to indicate as much in her judgments in *Venables* and *Bell*.

The use of the law of confidence has probably contributed to this neglect. Breach of confidence actions have prior to the HRA involved a personal claim of confidence being balanced against a broader public interest in publication. Such an approach is no longer tenable under the HRA. Instead, due recognition of the importance of privacy as an essential value, as well as the other dimensions of the public interest, need to be factored into any application of the public interest test. Clear judicial dicta to this effect are again required.

c) *Public figures 2*

We have welcomed above the recognition by the English courts that public figures do not automatically surrender their entitlement to a private life simply by virtue of their celebrity. However, in the context of the application of the public interest test, the Court of Appeal has created unhappy confusion in *A v. B plc* between the ideas of what is in the public interest and what the public is interested in. This may nullify much of the progress in the confidence cases towards a nuanced approach to the privacy of public figures. In contrast to the sensible approach seemingly adopted by the Master of the Rolls in *Campbell* towards the question as to when public figures retain their privacy, discussed above, Lord Woolf in *A v. B plc* seems almost too eager to accept that once the public figure status has been attained, much if not most of the individual's privacy rights are presumptively lost to the public's interest to be informed about that celebrity's life. This, at any rate, is how we read what Lord Woolf had to say after the lines already cited above, namely:

"Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. . . In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable *and so legitimate interest in being told the information. . . . The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.*"

With the greatest respect to Lord Woolf, both the italicised sentences from his judgment are debatable.

First, the assumption that if the public has an "understandable" interest in the information it also has a "legitimate interest" in receiving it comes dangerously close to accepting that everything that interests the public should be published in the public interest – something which the learned Lord himself tried to renounce in his preceding sentence. To put it differently, in practice the dividing line

between the two notions as expressed by the Lord Chief Justice seems to us to be rather flimsy. Any attempt to equate what elements of the public are interested in reading with the “public interest” is very questionable, and runs the risk of eroding the protected sphere of “confidential” private information. Professor Wacks has noted that the adoption of a similar approach in the US – where a defence to a privacy action may be made out if a newspaper can show that publication was “newsworthy” in that it attracted a degree of public attention – has “effectively demolished” the US private-facts tort.⁹¹

Mackay J. in *A v. B and C (No. 1)* in granting an injunction restraining the publication of nude photographs of a pop singer took a more robust and in our opinion more appropriate view of the overlap between the public interest and what certain members of the public may be interested in: “some members of the public will be interested in looking at these pictures. That does not mean that there is any scrap of public interest in their publication.”⁹² The view of the Supreme Court Procedure Committee sitting under the chairmanship of Lord Justice Neill in 1991 in their Report on Practice and Procedure in Defamation, in rejecting the introduction of a public figure defence, is also worth citing:

“(Such a defence) would mean, in effect, that newspapers could publish more or less what they liked, provided they were honest, if their subject happened to be within the definition of a ‘public figure’. We think this would lead to great injustice. Furthermore it would be quite contrary to the tradition of our common law that citizens are not divided into different classes. What matters is the subject-matter of the publication and how it is treated, rather than who happens to be the subject of the allegations.”⁹³

We would suggest that these decisions reflect a more nuanced distinction between what elements of the public are interested in and what can be classified as being in the “public interest”, and any attempt to conflate the two concepts should be firmly resisted. Adequate guidance needs to be given by the higher courts to this effect. Tugendhat and Christie have also made the argument that

“there is no Strasbourg authority which supports the proposition that there is a public interest in ‘gossip of a trivial nature’ for information which the public have an ‘understandable’ (in the sense of prurient curiosity) interest in receiving. Despite the importance which the European institutions attach to the right to freedom of ex-

91. R. Wacks, *Privacy and Press Freedom* (Blackstone Press: London, 1995), p. 113. See also G. Phillipson, “Judicial Reasoning in Breach of Confidence Cases: Not Taking Privacy Seriously?” [2003] EHRLR Special Issue: Privacy 2003 54, 62-65.

92. *A v B and C (No. 1)*, 2 March 2001, unreported (HC). See also the Australian case of *Chappell v TCN Channel Nine* (1988) 14 NSWLR 153 (NSW SC), per Hunt J.

93. Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991).

pression, they always consider the content of the publication concerned and what its 'informational value' consists of."⁹⁴

Indeed, the Strasbourg court in a number of recent cases has treated publications that invade personal privacy as actually *lacking* any public interest for precisely that reason: strong penalties following such publication have been deemed by the Court to constitute a proportionate measure to protect personal privacy.⁹⁵

Secondly, the assumption made by Lord Woolf that if less lurid gossip is published there will be fewer publications (for which read tabloids) that indulge in this kind of publishing, and that this in turn will be against the public interest, is also a highly debatable proposition. German privacy law has not hindered the considerable sales success of tabloids such as the *Bild*, while still protecting celebrities against gross privacy intrusions and contributing to the creation of a markedly less abusive media environment.⁹⁶

The more 'lean' formulation of the Master of the Rolls in the *Campbell* case⁹⁷ thus seems preferable to us as a guiding dictum coupled, perhaps, with the rider one finds in some German decisions that this does not mean that the tabloid press has no role to play in our society. In this context a recent decision of the Federal Supreme Court put matters in the following way:

"This freedom [of the Press] also exists in favour of the tabloid and sensational Press and thereby also for news which primarily satisfies the need of a more or less broad readership of superficial entertainment."⁹⁸

We submit that for present purposes the above will suffice and that further details can be left to the triers of fact to decide on the basis of the circumstances of each case when the public interest in a thriving press justifies publication. It is imperative however that this recognition that the concept of the public interest can extend to the publication of sensationalist material does not turn into a rule of law, or a weighty guidance principle that few puny judges will dare to disregard, which could establish a near-blanket right to publish all details concerning a celebrity's private life.

The privacy rights of public figures can be however eroded if they, themselves, have made misstatements about themselves. This,

94. M. Tugendhat and I. Christie (eds.), *The Law of Privacy and the Media*, (Oxford: OUP, 2002), para. 10.62.

95. *Ibid.* citing *N v Portugal* no. 20683/92 (1995) and *Tammer v Estonia* no. 41205/98 (2001).

96. See Helen Fenwick and Gavin Phillipson *Breach of Confidence as a Privacy Remedy in the Human Rights Act Era* Mod. L. Rev. 660, 693 (2000).

97. "For our part we would observe that the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media": para. 41, *Campbell*, *op cit.*

98. BGH 29 June 1999, NJW 1999, 2893 = VersR 1999, 1250, translated in Markesinis and Unberath, *op. cit.*, pp. 469, 471.

understandably, revives the right of the Press to intrude in order to put the picture straight. The *Campbell* case, especially if one reads both the first instance judgment of Morland J. as well as the Court of Appeal decision, would also seem to suggest that this revival of the intrusion power must be exercised in a measured way so that if the disclosures then become excessive, the privacy rights of the victim are revived.⁹⁹ Misstatements by a public figure should not mean that all aspects of their life become “fair game”.¹⁰⁰

In this context, the English courts also should be very cautious in straying too far down the approach that appears to have been adopted in both *A v B plc* and *Theakston v MGN*¹⁰¹ that if a public figure can be deemed to be a “role model”, then there is a real public interest in exposing any misbehaviour by that individual. As Phillipson has argued, the courts should be very wary in making assumptions as to who is a “role model”, the actual capacity in which that person exercises an influence and whether revelations about an aspect of that person’s private life really performs any useful function if that aspect of their life is not directly related to the reason why that person is a role model.¹⁰² The notion advanced by Lord Woolf in *A v B plc* that a professional footballer is a *moral* role model for young people and that exposing misconduct by that footballer in their *personal* (as distinct from professional) life performs a valuable function appears to us to be frankly quaint, naïve and redolent of an earlier, more innocent sporting era.

The Court of Appeal in *A v. B plc* may have made matters worse and more confused in this respect by conflating the traditional notion of “legitimate” with the term “understandable” public interest, implying that public interest in a celebrity would open up all aspects of their private life. The lumping together of all public figures for the purpose of the judicial dicta issued in that case, coupled with the tendency of Lord Woolf to tolerate greater prying into such figures private lives, enhances unacceptably the public interest defence and should be re-defined at the first possible opportunity. This is a necessary first step in ensuring that the UK adequately protects the basic privacy rights of public figures.

99. In Miss Campbell’s case the Court of Appeal, unlike the Court of First Instance, felt that this had not occurred since the disclosures by the Daily Mirror tabloid of her attendance at Narcotics Anonymous did not include clinical details of her treatment.

100. See G. Phillipson, “Judicial Reasoning in Breach of Confidence Cases: Not Taking Privacy Seriously?” [2003] *European Human Rights Law Review*, op cit., 70.

101. [2002] EWHC 137 (QB).

102. *Ibid.*, 68-69.

d) *Material already in the public domain*

Another defence to a breach of confidence action whose implications for the protection of privacy has been neglected thus far has been the defence of previous publication or where the material in question is already in the public domain. This defence has hitherto been usually a complete defence to a confidence action.¹⁰³ As discussed above, the English courts now seem to accept that a breach of confidence action can arise even where the violation of privacy occurs in a public place. However, it is not at all clear as to where the confidence action will provide an adequate remedy when the material at issue has already been put into the public domain in some form and to some limited degree, but where dissemination of the material to a greater degree may constitute a gross violation of privacy.¹⁰⁴ This material could not be described as 'confidential' in any meaningful sense, as it has already been released into the public domain, even if only to a minimal degree.¹⁰⁵ Nevertheless, if a remedy is not provided for where such material would violate privacy rights, then the UK would arguably be in violation of its ECHR obligations. This appears to be confirmed by the *Peck* decision.

In that case it will be recalled that Mr. Peck carried out his suicide attempt in a public place with no attempt made to restrict its visibility. In addition, Mr. Peck later went public with his identity and the nature of the act in an attempt to prevent dissemination of the CCTV footage. Nevertheless, the Strasbourg court rightfully held that the subsequent publication of such images in the local and national media constituted a gross intrusion into private life. The traditional confidentiality defence based upon material being already in the public domain cannot serve therefore as a blanket defence to a privacy claim if compatibility with the ECHR is to be maintained.

Once again, however, the existing case-law on the scope of the law of confidence in the wake of the HRA does not give clear guidance on this crucial issue, revealing again the distorting effect of utilising the confidence framework to attempt to substitute for the development of a full privacy action. In the recent case of *Ellis v. Chief Con-*

103. See *O. Mustad & Sons v. Dosen* (1928) [1964] 1 WLR 109n. See also J. Morgan in "Privacy, Confidence and Horizontal Effect: "Hello" Trouble" [2003] 62 (2) Cambridge Law Journal 444, 452-457.

104. See the useful discussion by Jonathan Morgan, *ibid.*, 452-457. Morgan disagrees with Professor Tettenborn's heterorthodox suggestion (made in respect of the pre-HRA breach of confidence action) that if further disclosure of material already in the public sphere would cause additional harm, then an obligation of confidence remains enforceable within the parameters of the "traditional" breach of confidence action: see A.M. Tettenborn "Breach of Confidence, Secrecy and the Public Domain" (1982) 11 Anglo-American LR 273, 274. Morgan's critique of this suggestion is convincing, but in any case the lack of clarity on this point illustrates the inadequacy of relying upon the law of confidence when material has entered into the public sphere.

105. See Morgan, *op cit.*, 456-7452-457.

stable of Essex,¹⁰⁶ the Divisional Court was asked to rule on the compatibility with Article 8 of the ECHR of a new scheme to deter crime which relied upon displaying posters of convicted criminals in public locations. Lord Woolf CJ, in giving the judgement of the court, refused to give a declaration that the scheme was contrary in principle to the ECHR until a specific individual case was brought before the court.¹⁰⁷ However, he emphasised the need to take the impact upon the private life of the convicted criminals into consideration. The private life of his family should also be taken into account in framing and applying the scheme.¹⁰⁸ The Court however avoided the issue of whether the police could have breached a duty of confidence to the individuals concerned, as previously suggested by Laws J. (as he was then) in *Hellewell v. Chief Constable of Derbyshire*,¹⁰⁹ preferring to deal with the case under the rubric of the HRA.

This leaves open interesting questions. If private individuals, such as a neighbourhood watch group, had displayed such posters, they would not be subject to the HRA. Could their actions constitute a breach of confidence in appropriate circumstances? *Ellis* does not clarify this, with the court conspicuously steering clear of the question as to whether the law of confidence could apply. Such information would be public in nature and could not be described as 'confidential' in any conventional sense of the term, but its publication could again constitute a massive intrusion into the family life of the individuals involved. Similar scenarios, some of a considerably greater degree of invasiveness, can be imagined.¹¹⁰ The lack of clear direction on this illustrates the conceptual difficulties generated by the reliance upon the confidence framework to do a job for which it is conceptually ill-suited.¹¹¹

Lord Woolf in *A v. B plc* did appear to suggest that breach of confidence could extend to cover "an intrusion in a situation where a person can reasonably expect his privacy to be respected".¹¹² This could cover the *Peck* scenario, and would be on all fours with the *Douglas* decision. However, Lord Woolf also cited as a indicative guide to determining whether information was confidential the observations of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*¹¹³ that

106. [2003] EWHC 1321.

107. See paras. 38 and 39.

108. In the individual case that was originally in question, he expressed concern about the "police's superficial reaction" to the risk of damage to the private life of Mr. Ellis' family. See para. 35.

109. [1995] 1 WLR 804.

110. See *The Florida Star v. B.J.F* 491 US 524, 109 S.Ct. 2603.

111. See J. Morgan, *op cit.*, 457.

112. See *A v. B plc*, *op cit.*, para. 11 (x).

113. [2001] HCA 63.

“certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.”¹¹⁴

While doubtless the publication in *Peck* of the images “would be highly offensive to a reasonable person”, these images would not come within the part of Gleeson CJ’s formulation that refers to acts intended to be “unobserved”. Nor can they be classified credibly as “confidential” material in the original sense, given that the event occurred in a public place and was legitimately observed initially by CCTV. The same applies for similar reasons to the material at stake in *Ellis* and any similar cases. The requirement that disclosure be “highly offensive” in any case sets an excessively high standard, especially when it comes to determining whether activities in a public place will be covered: it is most unlikely that “highly offensive” material will be obtainable in a public place except in exceptional circumstances like *Peck*, yet intrusive disclosure of everyday non-offensive material obtained in public places may be extremely corrosive of personal privacy.

By its very nature, “confidential” material ceases to be confidential on publication: the potential distortions that could therefore be produced by reliance upon confidence need to be addressed by the courts. It is imperative that the development of a privacy action ensures that previous publication does not confer a *carte blanche* for the further publication of material that may seriously infringe upon the personal privacy and well-being of individuals. Just as the celebrity of public figures should not justify denial of the protection of privacy laws, previous publication should not automatically deprive individuals of the benefits of privacy protection where appropriate. This principle should also extend to criminals like Mr. Ellis in a rehabilitation process: the assumption in much of legal and political debate in the UK that previous convictions or involvement in any capacity in the criminal process should render an individual fair game is very questionable. Again, comparative experience illustrates how a coherent, nuanced and context-sensitive approach could be adopted in this context.

We start with the U.S.A. where the First Amendment would appear to dictate an extreme position. In *The Florida Star v. B.J.F.*¹¹⁵ the US Supreme Court had to grapple with the scenario where infor-

114. *Ibid.*, para. 42.

115. 491 US 524, 109 S. Ct. 2603 (1989).

mation is in the public domain in a very limited manner but, as a result of the (subsequent) publication, reaches a much wider audience with possible additional adverse consequences for the victim/claimant. This is no place to note the nuanced differences in the various judgments delivered in that case. Suffice it to mention, that the majority had no hesitation in holding the publication to be protected by the Constitution. The authors of this article, however, declare their own preference for the approach adopted earlier by the Supreme Court of California in the case of *Briscoe v. Readers Digest*,¹¹⁶ a decision which had to do with the extensive dissemination of the criminal record of a rehabilitated criminal. The judgment is commended to the readers of this article not only because of the kind of criteria the court thought ought to be considered before disposing this type of question but also because their considerable similarity with the *Lebach* arguments show how transplantable the German reasoning can be even in a system such as the American which is – or appears to be – philosophically so diametrically different to the German.

Of course, the question that then arises as to how much of *Briscoe* remains alive after *Cox Broadcasting Corp. v. Cohn*¹¹⁷ and *The Florida Star v. B.J.F.*? The latter two decisions suggested that matters mentioned in public records (including judicial records) and matters already in the public domain will receive First Amendment protection. Though neither decision had to address specifically previously published but subsequently forgotten facts - as *Briscoe* did - their tenor seems too categorical to allow such a distinction. But law is about fine distinctions; and another (and on the whole not sufficiently exploited decision) of the United Supreme Court, would seem to suggest that there is some room for argument. The case was *United States Department of Justice et al., Petitioners v. Reporters Committee for Freedom of Information*¹¹⁸ and it turned on the correct interpretation of the Freedom of Information Act (FOIA). Its complex facts were as follows.

On the basis of information provided by local, state, and federal law enforcement agencies, the Federal Bureau of Investigation (FBI) compiles and maintains criminal identification records or “rap sheets” on millions of persons, which contain descriptive information as well as a history of arrests, charges, convictions, and incarcerations. After the FBI denied requests based on the Freedom of Information Act (FOIA), the respondents, a CBS news correspondent and the Reporters Committee for Freedom of the Press, filed suit in the District Court seeking the rap sheet for a particular individual as it

116. 4 Cal. 3rd 529, 93 Cal Repr. 866, 483 P. 2d 34 (1971).

117. 420 U.S. 469 (1975).

118. 489 U.S. 749, 109 S. Ct 1468 (1989).

contained "matters of public record." The FBI had refused the FOIA request on the ground that that the rap sheets were protected by Exemption 7 (c) of the FOIA, which excludes from the statutes disclosure requirements records or information compiled for law enforcement purposes "to the extent that the production of such materials. . . could reasonably be expected to constitute an unwarranted invasion of privacy." Now, the crux of this case lies in the fact that much of the information contained in these rap sheets derives from a wide variety of official documents, most if not all having been in the public domain in a multiplicity of locations and documents. But those seeking this information were not trying to obtain the information they needed from the original source but from the documents prepared by the law enforcement agencies.

The Supreme Court took the view that there was a substantial difference between "scattered bits of criminal history and a federal compilation". Quoting from a lecture¹¹⁹ given by Associate Justice Rehnquist (as he was at that time), Justice Stevens endorsed the view that the fact that "an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of information." As stated previously, this decision ultimately turns on the construction of a Federal Statute and the discovery of the legislator's intent. But it is submitted that much of what is said in this judgment, including the quotation from Chief Justice's Rehnquist's speech, could be applied to the cases considered in this section of our article to support the view that even in the USA, past events already in the public domain may, in appropriate circumstances, attract privacy protection.

Turning now to Germany we note that privacy rights are viewed as part and parcel of the protection of human dignity, and the *Peck* case would have been viewed in line with the Strasbourg court's decision as a straightforward infringement of human dignity, irrespective of the material having been in the public domain. German law (as a result of its tendency to see personal privacy as an aspect of human dignity) is anxious to avoid the so-called "Prangerwirkung" – putting individuals in the pillory. As a consequence, the plaintiffs in both *Ellis* and *The Florida Star v. B.J.F.* would probably have succeeded in Germany due to a) the fact that the privacy rights of victims of crime are strongly protected (especially in sex offences) and b) the importance accorded to the re-integration of criminals once they have served their sentence.¹²⁰ The above are subject to one or two caveats.

119. *Is an expanded right of privacy consistent with fair and effective law enforcement?*, (1974) 23 KANSAS LAW REV. 1, 8.

120. It should also be kept in mind that the *Ellis* scenario involved an infringement of fundamental rights by a public authority rather than the Press (with a potentially stronger level of protection granted to individuals vis-à-vis the state in horizontal relationships than in the private sphere), and that previous behaviour by an offender –

Thus, in dealing with pictures of persons involved in crime, distinctions are made in German law on the basis of the seriousness of the offence and the age of the person involved. When reporting on petty offences and crimes committed by minors, an additional interest of the public will thus have to be shown in order to justify the publication of images, and pictures of mere suspects will require that substantial evidence has been brought forward against them.

Outside the criminal context, other German cases have also involved alleged violations of privacy where the limitation of information to a particular segment of the public domain was in question. As the *Lebach* decision of the Federal Constitutional Court has made clear, privacy rights in principle include the right to determine whether and in which way an individual's personality is discussed in public. This, however, is only the starting point in a nuanced analysis.

In a case decided in 1992, the OLG Hamburg rejected the claim of an actress who had featured half-naked in a men's magazine and who then tried to keep one of these photos (passed on by the magazine) from being published in a daily newspaper which picked up on the story.¹²¹ These cases reflect the understandable wish of individuals to limit images to a certain segment of the public (not least for commercial reasons), but both claims failed because the plaintiffs were categorised as absolute public figures and the press coverage in question – though spreading the images to a far greater audience – could invoke the public interest defence. Depending on the circumstances of the case, privacy rights can, however, prevail.¹²²

In France, due to the personal nature of privacy, treated as an individual prerogative – a *droit subjectif* – the majority of French cases consider that individuals are, in principle, granted a personal

e.g., strong moral statements – can strengthen the right of the press to inform about criminal convictions. See, e.g., BGH 5 May 1964 NJW 1964, 1471 ff. *Briscoe*, mentioned above, is a decision that shows that even in the United States some courts share the view that these are interests worth protecting against unwarranted or excessive intrusions.

121. OLG Hamburg AfP 1992, 159 ff. A similar view was taken by the OLG Frankfurt in the case of the ex-GDR athlete Katharina Witt, who featured both in the American and German editions of the *Playboy* – a fact this time reported on by a Sunday newspaper, which made use of an image copied down from the internet website of the magazine.

122. In a decision dating back to 1985, the Federal Supreme Court had to deal with the claim of a male model, who had featured naked in a schoolbook on biology (together with his son and other female models). Following the prohibition of the use of such pictures in Bavarian schools, the image was shown in a television documentary and thus spread far beyond the original 100,000 copies of the book. In this case, the plaintiff was successful. The BGH thereby left undecided the issue of whether the model was (or had become, due to the discussion of the political decision taken by the State of Bavaria) a public figure; the spreading the image beyond the limited public domain composed of mainly teachers, school children and (possibly) their parents to potentially millions of television viewers was regarded as a severe infringement of the personality rights of the plaintiff; see BGH NJW 1985, 1617 ff.

and exclusive right to determine freely the extent to which their private matters can be made public.¹²³ Accordingly, consent to a first publication cannot automatically be deemed to imply acceptance of a new dissemination.¹²⁴ Prior tolerance to publicity will only diminish the level of damages available.¹²⁵ In France, claims against revelation of material already in the public domain have failed not because plaintiffs are categorised as absolute public figures but because they have consented to publicity and are denied the possibility of withdrawing their approval.¹²⁶ Nevertheless, this traditional case-law has been criticised on the ground that celebrities may waive their right to privacy to satisfy fickle changes of mind or to suit financial strategies. Thus, in more recent cases, a more flexible approach seems to be emerging, balancing privacy with freedom of expression in a way which looks similar to the German approach.¹²⁷

A related question that has arisen in both jurisdictions is where the event reported was once very much in the public domain but subsequently became forgotten. Can it be revived, at the risk for instance of disturbing the rehabilitation of the claimant? The decision of the German Constitutional Court of 5 June 1973,¹²⁸ as well as the subsequent decision of the Court of Appeal of Hamburg of 5 February 1978,¹²⁹ with facts (and outcome) very similar to those of the decision of the California Supreme Court in *Melvin v. Reid*¹³⁰ contain guiding principles which could prove useful to our courts.¹³¹ In the criminal context, in Germany the right to publish images of convicted criminals gradually recedes while the right to make a fresh start takes pre-eminence. The public trial is the place where individuals

123. See Civ. 2^{ème} 14 November 1975, *D.*1976, p.421, note B. Edelman.

124. See C.A. Paris 19 June 1998, *D.*1998, *I.R.*, 204.

125. See C.A. Paris 28 February 1989, *JCP.*1989.II.21325, note E. Agostini.

126. See T.G.I. Paris 8 September 1999, *D.*2000, *Somm. com.*, p.271, obs. C. Caron.

127. See at first instance level, T.G.I. Paris 8 September 1999, *op. cit.*; T.G.I. Nanterre 3 March 1999, *Legipresse*, 1999, n°162-I, p.75; T.G.I. Paris 4 February 1988, *JCP.*1988.II.21107, note E. Agostini. See as well at Cour d'appel level, C.A. Toulouse 10 December 2002, *JCP.*2002.I.126, note E. Tricoire. See also Civ. 1^{ère} 10 October 1995, *JCP.*1997.II.22765, note J. Ravanas: the widow of the former Emperor of China was not entitled to complain about a book written by one of his biographers after his death, mentioning facts that the Emperor had himself, in an autobiography published earlier, confessed. (As an heir, the widow would not today be allowed to complain about infringements of the deceased's privacy anyway – see below).

128. BVerfGE 35, 202 = NJW 1973, 1227.

129. OLG Hamburg, AP 3 (1976), 137 and note Gehard.

130. 112 Cal. App. 285, 297 P. 91 (1931).

131. Other cases outside the criminal context can be mentioned, e.g., the decision of the Landgericht Berlin concerning the TV anchorman discussed above. The court decided in favour of the plaintiff because his past – with the relevant events taking place some 20 years previously – had already been the subject of public discussion two years before the trial and the public interest in renewed (and unnecessarily sensationalist) coverage thus ranked below the right of the anchorman to make a fresh start.

must take responsibility for their actions, after which they eventually regain the right not to be exposed publicly.¹³²

In contrast, the existence of a “right to be forgotten” (*droit à l’oubli*) is doubtful in French law. Most cases consider that a person cannot prohibit a new publication of facts relating to an old criminal affair which had attracted public odium.¹³³ This case-law is criticised on the grounds that where the person is no longer in the limelight, such repetition impairs the chances of reintegration in society.

To conclude, in French and German law we again see the evolution of (occasionally varying) nuanced, context-specific approaches to the publication of material already in the public domain, with clear guidelines established by (especially German) courts as to how free expression and privacy are to be balanced in such cases. Thus far, however, the guidance available in English decisions is again scant and unsatisfactory.¹³⁴ The reliance on incremental expansion of the breach of confidence action has, once again, served (if anything) to blur the picture. In the absence of clear judicial dicta and the establishment of a privacy action with a firm basis in principle, a long and tortuous process of case-law driven evolution, with consequential costs to plaintiffs and publishers, is thus to be expected. In all likelihood, this will only lead to costs and delays though, ultimately, our courts are likely to reach a result broadly similar to that currently taken by the German courts. Should blinkered objection towards comparative European law thus be allowed to prevent our judges from taking early advantage of the European experiences?

Though we argue for open-mindedness, we also are quick to stress that we are not suggesting a slavish adoption of foreign law. It

132. As a striking example we refer to the decision of the OLG Hamburg concerning the publication of photos of Marianne Bachmeier, a woman who had killed the murderer of her child in the courtroom. The court distinguished between, on the one hand, images taken of her at the time of the event and the subsequent trials and, on the other hand, pictures taken after her sentence was beyond appeal. Publication of former was allowed *inter alia* due to the fact that she had consented to the making of two films about the event and had thus willingly entered the public stage; publication of the latter were prohibited for the sake of rehabilitation. OLG Hamburg AfP 1987, 518 (Marianne Bachmeier). Witnesses may be regarded as relative figures of public attention, as can – under exceptional circumstances – the victims themselves (e.g., if there is a special personal relationship between offender and victim). Members of the offender’s family will usually not be regarded as relative figures of public attention; see OLG Frankfurt GRUR 1958, 508, 509.

133. Civ. 1^{ère} 20 November 1990, *JCP* 1992.II.21908.

134. The decision in *Bell* did concern the restraint of publication of new material rather than the resurrection of old material previously in the public domain. However, Butler-Sloss P. was anxious to emphasise that it would be “wrong for the court to find that the notoriety which may follow the commission of serious offences would of itself entitle the offender upon release from prison to injunctions based upon the interference to his private and family life caused by press intrusion.” *Op cit.*, para. 59. This would appear again to tilt the balance presumptively towards free expression rather than towards ensuring that individuals have the space to complete their rehabilitation. The Court of Appeal avoided engaging with this issue in *Ellis*.

thus appears to us that previous publication will continue to be a very relevant factor in deciding whether to grant relief, perhaps to a greater extent than in German law – but not a determining factor. However, in the absence of a clear judicial steer, the principles underpinning the breach of confidence action can provide little or no conceptual guidance. Only an approach based on privacy rather than confidence can make coherent sense. When Lord Hoffmann in *Wainwright* argues that privacy as an “underlying value” of the common law is nevertheless not “capable of definition to enable one to deduce specific rules”, he disregards without discussion the German, French and US experiences of privacy as a general principle providing exactly the required coherent guidance to frame and shape the common law in practice.

e) *Citation of authority*

Discussing judicial directions as to the citation of authority may appear an unusual topic to insert at this stage, but the guidance that has been given in this respect in the post-HRA cases is significant and illustrative as to what it demonstrates again of the weaknesses of the existing confidence-based incremental approach of the English courts. Early in his judgment in *A v. B*, Lord Woolf included in his guidelines the following admonition:¹³⁵

“In the present appeals the parties have placed before us three lever arch files of authorities. In addition, during the course of the hearing we were handed a number of other domestic and Strasbourg decisions. . . It is understandable that, in what is a developing area of the law, citation of authority is necessary, but we would hope that the law has now, at least at the level below the House of Lords, become sufficiently clear to make the citation of authority on this scale unnecessary. . . The need for control of the extensive citation of authority should be born in mind in deciding questions of costs since it leads to disproportionate expense which can in turn make litigation beyond the means of ordinary persons. . . The authorities largely fell into two categories. The first. . . consists of the decisions of the Strasbourg court on Articles 8 and 10. These decisions are valuable sources of principles which the articles embrace. The decisions do however tend to repeat the same principles in successive cases in order to apply them to different situations. The citation of a single authority may therefore be all that is required.”

Though this statement seems particularly apposite to applications for injunctive relief made to judges in their chambers – usually late in the evening – where speed rather than thoroughness is *de rigueur*, it contains quite a remarkable series of propositions which

135. *Op cit.*, paras. 8-9.

must, for the sake of proper evaluation, be scrutinised with great care. Five objections can thus be levelled against it.

First, the idea that the three “lever arch files” account for the cost of litigation in England is, with respect, unconvincing. High legal fees, the use of two sets of lawyers (solicitors and barristers) for the work done in other systems by one, the length of oral argument, and the considerable expense associated with expert evidence (especially before the recent reforms of English civil procedure overseen by Lord Woolf himself) are, it is submitted, the most significant contributory factors to this unwelcome phenomenon.

Secondly, the view that these expenses are the reason which keeps the “ordinary person” out of court must also be questioned. To be sure, our legal system is not available to all who deserve to have recourse to it; and in this area, in the absence of legal aid, this means that not only those who are very poor are excluded but also those with middle incomes. To put it differently, only the very rich can afford to litigate; and the spate of recent cases confirms this unhappy state of affairs. That a change should be made, and made urgently, can be strongly argued; that the status quo is due to the “three lever arch files” is, with respect, fanciful.

Thirdly, the somewhat summary rejection of the Strasbourg case law as consisting of the repetition of basic principles is surprising to say the least. It is also, to use the colloquial expression, like the pot calling the kettle black! For thousands of law students (and practitioners) can testify to the fact that they have been forced to read the same long extracts from the same core cases multiple times, due to the willingness of the English judiciary to cite the same basic extracts repeatedly, even where basic principles are settled and well in place. Impressed by this repetitiveness, one of us even tried to do an empirical study of how much longer English judgments were getting as a result of this long-winded and unnecessary repetition of earlier dicta, where no textual or legal point was going to be made by the judge.¹³⁶ Closer attention to how the Strasbourg court has actually applied the core principles of its privacy case-law may prove illuminating, and our judges need to be prepared to wade through the reiteration of basic principles in its case-law to absorb how Strasbourg balances and applies these principles in each specific context.

Fourthly, as the extracts from the German cases show, the principles developed by the German courts – Lord Woolf failed to inform us whether any of these decisions were included in the “lever files” – are carefully crafted, fact-sensitive, and (at the Federal Court level)

136. Basil Markesinis and S Deakin, *The Random Element of their Lordship's Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphy* 55 MOD. L. REV. (1992) 619, especially 642-3.

hardly repetitive.¹³⁷ Indeed, precisely because they are so nuanced and fact-oriented they are of real use to common lawyers.

Finally, if Lord Woolf's advice is heeded, future judges will be pushed more towards arguing round factual permutations than discovering, elaborating and applying the correct principles. And if this were seen to be an academic's point of view, oblivious of real practice, here is what an experienced judge (who is also a respected jurist) had to say about the precise issue in question:¹³⁸

"What matters, as it always does, is that practitioners should help the courts not to try to reason from factual analogies – a process once memorably demonstrated by Sir George Jessel¹³⁹ to be capable of eventually standing a decision on its head – but to tease out the principles to be applied to ever-new facts."

It appears to us that attempting to sidestep the issues of principle at stake in privacy issues in favour of an excessively fact-specific approach will engender more litigation in the absence of accessible broad guidelines based on sound and accessible principles. It also ignores the reality that core questions of privacy and the protection of human personality are at stake, and we are confident that any attempt to retreat within the walls of an old-fashioned pragmatic, fact-specific approach will prove ultimately more problematic than a bold attempt to formulate the key principles that should apply. Again, the incremental, pragmatic approach to protecting privacy via the fig-leaf of confidence is distorting and obscuring the need for a principle-led approach. Wishful hankering for a factual approach that does not bother with issues of principle or foreign comparative material is likely to ensure greater confusion, a longer and more tortuous process of developing the law (perhaps necessitating frequent prodding from Strasbourg), and greater costs for litigants and the courts in the long run.

f) Remedies: damages and injunctions.

Given the absence of a tort of privacy it is not surprising to assert that there is a considerable dearth of authority and guidance on the question of damages. The rules applicable to breach of confidence can provide some guidelines; in our view so can foreign law, with the latter having the advantage of long familiarity with the issues thrown up by the application of privacy laws and a coherent principled basis. With the latter mainly in mind we thus note three points.

137. The repetition of principles does, however feature in the decisions of the Constitutional Court, which also often have the un-welcome feature of being exceedingly long.

138. *Sir Stephen Sedley*, Foreword to *PRIVACY AND THE MEDIA. THE DEVELOPING LAW* (London: Matrix Media and Information Group, 2002).

139. In *Aspden v. Seddon* (1875) 10 Ch. App. 394, 397, n. 1.

(i) *Damages for mental distress, injury to feelings and the like.* This is the non-pecuniary element of the award that would become payable if a tort were to be recognised. Back in 1993, Lord Mackay's Report¹⁴⁰ expressed the view that they could be modelled on awards made for malicious prosecution, false imprisonment, wrongful arrest and other such torts. They also believed that if that were the case, the average levels would be somewhere in the region of £2-5,000. In 1997 the Court of Human Rights in Strasbourg awarded¹⁴¹ what, in today's values, would be approximately £10,000. In the same year the same court¹⁴² awarded roughly the same amount to a claimant who complained for wrongful telephone tapping which, inter alia, caused stress. English cases have moved in the same region¹⁴³ and, more intriguingly (proving, once again, the transplantability of foreign law based on similar values and value judgments), so have the German courts.¹⁴⁴ What some jurists sometimes refer to as statistical reasoning thus offers reassuring data that the development of privacy law in this respect is on the right track.

The position in France points in the same direction though two caveats must be stressed.

The first is associated with the (often) excessive variations in awards – often regional in character – found in French (and Italian) compensation law. Thus, we find judgments awarding 1F (10p) for a photograph taken in a church¹⁴⁵, 150 000F (£15,000) for the use of telephoto lens to take a picture in a private place of a celebrity in her swimming costume¹⁴⁶, 50 000F (£5,000) for the photograph of a public figure known for her elegance as she was bedridden¹⁴⁷, 250 000F (£25,000) for the photograph of an actress in the nude.¹⁴⁸

The second caveat is associated with wider, 'structural', difference between French law on the one hand and English and American law on the other. Two in particular are relevant here. The first is the absence in French law of punitive damages and the second is related to the fact that in French law there seems to be no clear distinction

140. *Infringement of Privacy*, Consultation Paper, July 1993.

141. In *Z v. Finland* [1997] 25 EHRR 371.

142. *Halford v. United Kingdom* [1997] 24 EHRR 523.

143. *Cornelius v. De Taranto* [2001] EMLR 329.

144. For which see full details in Markesinis and Unberath, and the case law given by Damm/Rehbock, WIDERRUF, UNTERLASSUNG UND SCHADENSERSATZ IN PRESSE UND RUNDfunk (2nd ed. 2001), pp. 351-371. Compensation in money (only available for serious infringements of personality rights anyway) usually ranges from £200-15,000; and even the exceptional award of around £60,000 in HansOLG Hamburg NJW 1996, 2870 only reached this level due to the fact that it was granted for a total of three (separate) infringements of Princess Caroline's privacy rights – publication of 1) a freely invented interview, 2) a photo allegedly taken from the family album and 3) an incorrect marriage announcement.

145. C.A. Paris 11 February 1987, *G.P.* 11-12 March 1987, p. 18.

146. C.A. Paris 12 May 1986, *D.* 1986, *I.R.*, 445.

147. T.G.I. 30 June 1984, *D.* 1985, *I.R.*, 15.

148. C.A. Paris 4 January 1988, *D.* 1989, *Somm. com.*, p. 92, obs. D. Amson.

between the right of publicity as distinct to privacy. Thus, first, when the circumstances of the case show gross and recurrent infringements of the claimant's privacy or high profits for the defendant, French judges tend to depart from a purely compensatory approach and (unexpectedly) increase the level of damages. Secondly, the absence of clear distinction between a right of publicity and a right of privacy may also help explain why there seems to be a correlation of higher awards and publicity claims and lower awards and invasion of privacy complaints.

(ii) *Economic losses*. In addition to the above, the intrusion into one's private life may entail economic consequences. Here, depending on the nature of the intrusion and whether one is talking of true privacy cases or tort of publicity cases (which, in our view, are the *Douglas* cases), the measure of damages could be different, i.e. compensatory or restitutionary (taking the form of an account of profits). This distinction is important not only in order to determine the test of remoteness of damage but also in order to decide on the possibility of exemplary damages under what is clearly a developing law of exemplary damages. After *Kuddus v. Chief Constable of Leicestershire Constabulary*,¹⁴⁹ exemplary damages should be possible against public officials as well as rapacious media defendants exploiting the plight of others for gain. But Lord Nicholls' opinion in that case implies further developments which might allow exemplary damages to be awarded whenever the defendant's conduct amounted to "an outrageous disregard of the plaintiff's rights". This could prove most appropriate in cases of non-commercial breach of confidence or 'true' privacy violations where the 'non-economic' damages would, as stated above, be likely to be modest. By making it difficult for the media to evade or ride roughshod over the developing privacy law by reason of being likely to have to pay the aggrieved claimant a nominal sum only, it would thus act as a suitable deterrent to outrageous and aggressive journalism for profit.

On the other hand, excessive damage claims for commercially-based publicity cases need to be resisted – infringements upon a person's control of their personal image should not be equated with gross intrusions upon personal privacy, and this needs to be well established in judicial guidance from the higher courts. The very moderate damages awarded to Michael Douglas and Catherine Zeta-Jones following the success of their confidence claim ((£14,600 was awarded, with the plaintiffs initially claiming a much larger sum) indicates that the English courts are willing and able to recognise this distinction.¹⁵⁰ The question of who actually suffers from a publicity right

149. [2001] 2 WLR 1789.

150. See *The Guardian*, "Hello! To Pay Hollywood Couple £14,600 in Damages," 7 November 2003.

infringement should be crucial – in the case of Douglas and Zeta-Jones, it is at least arguable that the majority of any loss incurred was by OK! magazine, whose exclusive on the wedding was ruined by the publication by Hello magazine of the photos obtained in breach of confidence, and the pecuniary loss suffered should not in any circumstances be conflated with the damages linked to the alleged distress caused by the intrusion on the couple's wedding. The award of £1,033,156 to OK! by the English courts in contrast to the much lower sum awarded to Douglas and Zeta-Jones reflects this approach, and shows a welcome sensitivity to the relative nature of the harm incurred by the different plaintiffs.

This point has already been raised in Germany, where the Federal Constitutional Court stated that

“there is no protection of the private sphere against public attention if a person has agreed to the publication of particular matters which are usually regarded as private, for example by entering into exclusive contracts concerning press coverage of events taking place in the private sphere. The constitutional protection of the private sphere on the basis of Articles 2(1) and 1(1) of the Basic Law is not granted in the interest of commercialising the own person. No one is restricted from permitting access to the private sphere, but a person cannot at the same time invoke the protection of this sphere against public attention. The expectation that the public will not (or only to a limited extent) take notice of matters or activities emanating from a sphere which secures individual private life must be expressed consistently and without exceptions.”¹⁵¹

This approach introduces a distinction between the protection of the right to exploit one's own publicity and personality rights. Applied to a *Douglas v Hello* setting, the latter could still be infringed due to the distress caused by the intrusion itself, the subsequent publication of material in a category of journal or newspaper very different from the one chosen by the victim (e.g. in the German context, *Bild* instead of the *Frankfurter Allgemeine Zeitung*) and the way the material is presented by the intruder. Damages will, however, not reflect the commercial value of the exclusivity agreement rendered ineffective by the intrusion unless the victims were under a contractual obligation to secure this exclusivity and thus suffer a commercial loss due to the breakdown of the agreement. But this would have to be argued under a different heading altogether.

(iii) *Inheritability*. But just as important is another point which, again, has been considered by German law. ‘True’ privacy cases involve personality violations and thus claims arising under them should come to an end with the death of the aggrieved claimant. This

151. BVerfGE NJW 2000, 1021, 1023.

is the established position in Germany, where courts and academics focus on the main function of compensation for pain and suffering (*Schmerzensgeld*), which is to provide satisfaction for the victim (*Genugtuung*). Though deterrence is also part and parcel of these claims (especially in the case of gross infringements by the Press, e.g., invented interviews or manipulated images), claims for *Schmerzensgeld* due to infringements of the right to privacy are thus of a highly personal nature and end with the death of the victim.¹⁵² As clarified by the Federal Supreme Court in its Marlene Dietrich decision of 1999, tort of publicity claims, on the other hand, resemble more proprietary rights and thus may be inheritable:¹⁵³

“The elements of financial value in the right of Marlene Dietrich to her own picture and name have passed to the claimant as sole heir. This is because, regardless of their transferability between living persons, these elements are – in contrast to the highly personal elements which protect non-material interests – inheritable. Insofar as the rights of personality protect non-material interests, they are indissolubly bound to the individual and, as highly personal rights, cannot be renounced or taken away and are, therefore, neither transferable nor inheritable. . . . It is true that, according to constant case law, the continuing image of the personality is also protected after death against serious distortions. Likewise, the right to one’s own picture and possibly also the right to a name continue to have an effect beyond death. But, on a posthumous violation of these rights, only defensive claims are granted to the person entitled to exercise them, and not claims to compensation for harm, because a deceased person could not suffer harm which is compensatable by a money payment. . . . The defensive claims granted are of little use, however, if the violation of the right – as is frequently the case – has already ended before the person entitled to the claim obtains knowledge of it. Besides this, it seems unfair to surrender the financial value created by the achievements of the deceased and embodied in his picture, his name or his other personality features after his death to the clutches of just any third party, instead of giving this financial value to his heirs or relations or other persons who were close to him when he was alive.”¹⁵⁴

152. For details see, e.g., Damm/Rehbock, *WIDERRUF, UNTERLASSUNG UND SCHADENSERSATZ IN PRESSE UND RUNDFUNK* (2nd ed. 2001), pp. 340-342.

153. BGH 1 December 1999, BGH 1 ZR 49/97 (engl. translation) on Basil Markesinis’ Website of German and French Legal Materials at University College London/University of Texas at Austin, http://www.ucl.ac.uk/laws/global_law. In favour of the introduction of a right of publicity in French law, see G. Loiseau, “Des droits patrimoniaux de la personnalité en droit français” (1997) *McGill Law Journal*, 319.

154. In the same decision, the BGH points out that heirs may exercise these rights only in accordance with the presumed wishes of the deceased and only for a limited period of time.

This position of German law again reflects the dichotomy between 'true' privacy issues and (commercial) publicity interests already highlighted above.

In France, the *Jean Gabin* case law,¹⁵⁵ by which privacy rights were recognised as inheritable from deceased persons, has been overruled.¹⁵⁶

Given the varying consequences that could therefore flow from the distinction between non-commercial 'true' privacy and publicity cases (and which are well-established in German law and not unknown, though blurred, in French law), appropriate guidance via judicial dicta should be directed to establishing and clarifying the position in UK law. Such distinctions have yet to be made in the law of confidence, again due to its initial origins and concerns being far distant from the privacy context, even if the level of damages in privacy cases appears to be converging with the ECHR and German standards. At present, as all privacy violations come under the common rubric of breach of confidentiality, there is a real danger that the different forms of privacy intrusion involved – whether 'true' privacy claims or commercial publicity claims – and the quanta awarded for each would be confused.

g) Deciding criteria for protection – privacy v. confidentiality

The most important and as yet not finally resolved question concerns the choice to be made in approach between a privacy-centred approach versus one that retains its umbilical cord link to confidence. The expanded protection for privacy interests that has been described in this article has come to be linked to an expanded notion of confidence, in particular since the decision of the House of Lords in *Wainwright* that English law does not know of a tort of privacy *per se*. All this, however, has come at a price.

155. See Crim. 21 October 1980, *D.1981*, p. 172, note J. Lindon.

156. Civ. 1^{ère} 14 December 1999, *Mitterand*, *JCP.2000.II.241*, Conclusions C. Petit. But pictures of dead bodies must still meet the requirements of human dignity: the photo taken and published of M. le Préfet Claude Erignac, as he was lying dead in a street of Corsica, after being murdered, was held to be contrary to human dignity. See Civ. 1^{ère} 20 December 2000, *D.2001*, p. 872, note J.-P. Gridel. The fact that M. Erignac's face was perfectly recognisable seemed to have been decisive in the Cour de cassation's decision. The *Erignac* case thus confirms – though freedom of expression did not prevail – that privacy rights do not survive the aggrieved person's death. Indeed, in this case it was agreed by all parties, even by the applicants, that the deceased's privacy rights were not at stake. The Cour d'appel (C.A. Paris 24 February 1998, *D.1998*, p. 225, note B. Beignier) still relied on the concept of privacy, but held that the aggrieved person was not the murdered *Préfet* but his relatives, hurt during their time of mourning. This reasoning still held to a survival of privacy rights, albeit indirectly (via the hurt relatives) and temporarily (during the days of mourning). The Cour de cassation upheld the ruling against the journalists but on the ground of human dignity. After death, only human dignity can therefore restrict freedom of expression. Privacy rights can no longer be invoked.

The price has been much ingenuity being spent on whether a duty of confidence has been imposed (i.e. has material that should remain confidential been published) rather than on the nature of the information revealed (i.e. has material whose publication would seriously infringe upon personal privacy been published, with the identities of those involved being more relevant at the justification stage). This has produced confusion and a fundamental lack of clarity, encouraged an emphasis upon the persons and circumstances involved rather than upon the material in question, and ensured that the scope of the expanded breach of confidence action is uncertain. So in *Douglas* the focus was on whether the taking of photos in the particular circumstances of the wedding in question breached a duty of confidence, with much detailed consideration of the particular conditions attached to the wedding invitations and little guidance being provided for future courts and litigants. A better approach, it is submitted, would have simply been to consider whether publication of the images in question violated the right to personal privacy of the plaintiffs, taking into account the agreed commercial publication of other images from the same wedding.

The Court of Appeal decisions in *Campbell* and *A v. B plc* were commendably more concerned with the nature of the information in question and the justifications in each case for publication. However, while the decisions in each case may be entirely supportable, by confining their approach to the rubric of confidentiality both decisions left lower courts with little or no guidance for dealing with future privacy cases that involve material already in the public domain, an area that would appear to lie well outside the cope of a breach of confidence action as traditionally understood but which is central to privacy issues, as demonstrated by *Peck* and *Ellis*.

Notwithstanding these objections, the argument is however made (or more usually, implied) that privacy is an insufficiently precise concept around which to frame a tortious remedy, and that breach of confidence offers a more precise, well-established and doctrinally sound foundation for developing remedies for intrusive invasions of privacy.¹⁵⁷ But is it convincing? Here are some of the most-frequently cited grounds on which the equitable remedy of confidence is based on:

– The jurisdiction in confidence “. . . is based not so much on property or on contract as on a duty to be of good faith”¹⁵⁸ or “on the moral principles of loyalty and fair dealing.”¹⁵⁹

157. See R. Wacks, “The Poverty of “Privacy” (1980) 96 Law Quarterly Review 73.

158. *Fraser v. Evans* [1969] 1 QB 349 CA at p. 361 per Lord Denning M.R.

159. *A.G. v. Guardian Newspaper (No 2)* [1990] 1 AC 109, at p. 269 per Lord Griffiths.

– “Like most heads of exclusive equitable jurisdiction, its rational basis . . . lies in the notion of an obligation of conscience arising from the circumstances”.¹⁶⁰

Well-settled and uncontroversial though these points are, we submit they do not provide the basis of a predictable and principled extension of the law to the area of privacy in general. The two *Douglas* cases, in our view, particularly support this contention; and if we are right in this we further submit that going through the notion of breach of confidence will not provide the law – academics and practitioners – with greater clarity than going through the notion of privacy. The reasons we make this assertion are the following:

Firstly, the opaqueness of the breach of confidence remedy when used to perform the functions of privacy became apparent in the two *Douglas* cases. For when the Court of Appeal denied the grant of an interim injunction restraining the initial publication of the photographs by Hello, at least two judges in *Douglas No. 1* – Brooke and Sedley¹⁶¹ – seemed to assume that the breach of confidence approach would not protect the claimants if it were shown (which it had not been done at that stage of the proceedings) that the unauthorised pictures were taken by an intruder and not a guest who had accepted to come to the wedding subject to the conditions attached to the invitations. This assumption appears to have been based upon the understanding that a breach of commercial confidence could only arise out of a pre-existing confidential relationship. That is why Lord Justice Sedley proceeded to make the “most instructive”¹⁶² observations he made about privacy, presumably since this part of the judgment would determine the outcome had the pictures been taken by “intruders”.

Yet there is no word of that obstacle in *Douglas No. 2* when the case was returned to the High Court for a decision on its merits, where Lindsay J. seemed to have extended the existing remedy to cover this eventuality. He did this because he felt he could treat the claimant’s case as either being akin to the commercial confidence cases or being based on a “hybrid kind” of right, whereby “by reason of it having become a commodity, elements that would otherwise have been merely private became commercial”.¹⁶³ The intruding photographer in question and the defendant publishers were held to have known (or ought to have known) that the wedding images had the quality of confidentiality. As was previously established in respect of

160. *Moorgate Tobacco Co. Ltd. v. Phillip Morris Ltd. (No 2)* (1984) 156 CLR 414 at 437-8, approved by Bingham L.J. (as he then was) in *A.G. v Guardian Newspapers (No 2)* CA, [1990] 1 AC 215-6.

161. *Op. cit.*, at paras. 59 and 112 of the respective judgments.

162. The way Lord Woolf L.C.J. described Sedley L.J.’s judgment in *Wainwright*, *op. cit.*, para. 2.

163. *Op. cit.*, para. 49.

information of a private nature, publication of this "hybrid" confidential material was thus held by Lindsay J. to be a breach of confidence even in the absence of a pre-existing relationship that was presumed to be necessary in *Douglas No. 1*.¹⁶⁴

The word "hybrid" could be taken as indicating that the learned judge was, himself, aware of the novelty of his solution; and it certainly leaves one wondering why, if confidence could have provided the answer, Brooke and Sedley L.J.s did not think of this point. It clearly shows the malleability and opaque nature of the breach of confidence remedy, and the lack of predictability as to how it will be applied and expanded. The extent to which this new twist on the law will alter the way the right to control one's own image for commercial purposes is applied is unclear. The basic principles of "good faith" and "obligation of conscience" that underpin the breach of confidence action do little to provide conceptual clarification or a sound principled basis when image rights are at stake, and as argued above, this lack of clarity has potentially considerable consequences for the award of damages.

As it currently stands, it is also uncertain (as discussed above) whether the confidence action is capable of providing the protection for privacy that the UK is obliged to provide as a consequence of *Peck*, and whether and to what extent material already in the public domain can be protected. Lindsay J.'s previously cited comments in *Douglas No. 2* that the judiciary may have to move beyond the law of confidence to establishing a privacy action if Parliament does not act reflect the concern and uncertainty generated by the inability of the law of confidence to give a clear principled steer in such cases. If breach of confidence is now to be extended to cover the publication of

164. Lindsay J. cites Megarry J. (as he was then) in *Coco v. A.N. Clark (Engineers) Ltd* [1969] RPC 41:

"It seems to me that if 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."

Lindsay J. considered that within that description are cases in which a third party defendant has received information with notice that he received it by way of a breach of confidence by the confidant to whom it was given and includes also cases where that third party has deliberately closed his eyes to the obvious, citing in support of this Lord Goff in *A-G. v. Guardian Newspaper (No 2)* [1990] 1 A.C. 109, at 281, as well as Lord Griffiths in the same case at 268 and 272. However, Brooke LJ had referred also to Lord Goff's comments in the *Guardian* case, and appeared to consider that they would not apply to an uninvited intruder (see *Douglas No. 1*, paras 58 and 59). Lindsay J. also expressed the view that even if he was incorrect in recognising this "hybrid" category that he would have been prepared to treat publication as a breach of confidence on the grounds that the wedding images could be considered confidential private material, and that the subsequent fact of their publication did not alter the private nature of the images (see para. 50).

such material,¹⁶⁵ then what will be protected is intimate information of a private nature, not “confidential material” as traditionally classified. Breach of confidence will only suffice as a remedy capable of satisfying the ECHR requirements if the scope of the action is extended beyond “confidential” information to protect against unjustified intrusions upon privacy in general, including material that may technically be within the public domain, and the “confidential” tag given to the material protected by the action becomes a mere terminological fig-leaf.¹⁶⁶

If this happens (and the approach taken by Butler-Sloss P. in *Venables* and *Bell*, as well as the Court of Appeal in *A v. B* and *Campbell* seems to be going down this road), then breach of confidence will have essentially mutated into a form of privacy action.¹⁶⁷ However, the vestigial categories left over from breach of confidence have the potential to keep on causing persistent confusion and conceptual lack of clarity, as *Douglas* illustrates. The development of this new remedy will in the absence of a coherent principled basis rooted in the recognition of the right to personal privacy rely on gradual and incremental evolution via long-drawn out litigation, imposing costs on litigants and publishers alike. The effect of this will be in all likelihood to deter less well-off complainants, in turn reinforcing the impression that privacy litigation is simply the province of pampered celebrities.¹⁶⁸

We would also emphasise that the principles of good faith and obligation of conscience underpinning breach of confidence are not capable of providing a strong foundation for the development of a privacy action capable of meeting the ECHR requirements. They provide little or no guidance where what is at stake is intrusion into personal privacy where no imputation of bad faith in the traditional equitable sense on the part of the publisher is involved. The initial use and dissemination of the footage in *Peck* was done in apparent ignorance of the true circumstances of the case, and so no ‘bad faith’ in the conventional sense was involved. It is worth noting as a demonstration of our concern that the original purpose and role of the confidence action is so removed from its current task of protecting privacy that breach of confidence was not argued or discussed by the Court of Appeal in *Kaye*, despite the wide ranging nature of the arguments in that case.

165. The Strasbourg court in *Peck* considered that at the time of the complaint (1995), the law of confidence did not provide a remedy.

166. See R. Singh and J. Strachan, “Privacy Postponed?” (2003) EHRLR Special Issue: Privacy 2003 12, 24.

167. Lord Woolf in *A v. B plc* appeared to suggest that breach of confidence could extend to cover “an intrusion in a situation where a person can reasonably expect his privacy to be respected”: see *A v. B plc*, op cit., para. 11 (x).

168. See R. Singh and J. Strachan, op cit., 19.

Confidence also offers no guidance or obvious relief where an intrusion into privacy does not result in a publication as such.¹⁶⁹ The breach of confidence action is solely concerned with restraining publication. An intrusion into personal privacy similar to that in the *Wainwright* case or where photojournalists intrude into personal privacy but their pictures are not actually used is beyond the scope of the confidence action. Buxton L.J. made this clear in *Wainwright*, noting that *Douglas* and other confidence cases “do nothing to assist the crucial move now urged, that the courts in giving relief should step outside the limits imposed by a requirement of a relationship of confidence, artificial or otherwise.”¹⁷⁰ This is a serious gap, that lacks any justification in principle: serious intrusions in privacy should be capable of giving rise to a legal remedy, irrespective of whether that intrusion has resulted in publication or not.

It is therefore our opinion that far from providing a stable foundation for the development of privacy remedies, breach of confidence offers a less than coherent framework. In the wake of *Douglas, A v. B plc, Venables, and Campbell*, the breach of confidence remedy is mutating at an exponential rate, being used as it is to fill gaps in the law that arise from the lack of a coherent privacy action. The remedy has now been stretched a sizeable distance from its original role of protecting the integrity of pre-existing confidential relationships. However, the requirement that any such private information be capable of being shoehorned into the category of ‘confidential’ to satisfy the requirements of the confidence action will in all likelihood continue to produce conceptual difficulties and gaps in protection.¹⁷¹

It would be more intellectually honest, as well as doctrinally more satisfying, if the emergence of a distinct law of privacy on firm principled foundations from the chrysalis of the law of confidence were to be recognised and developed by our courts. It is now apparent in the wake of *Peck* that for the action to be sufficiently stretched to meet the requirements of the ECHR while retaining coherence, the principles underlying the remedy need to be recognised as rooted in privacy rather than confidence. The Strasbourg court in *PG and JH v. UK* referred to Article 8 of the ECHR as protecting a “right to identity and personal developments and the right to establish and develop relationships with other human beings and the outside world”.¹⁷² If the UK courts are to ensure that this fundamental aspect of human personality is adequately protected in the common law, then judicial courage is needed to recognise the existence of a tort of privacy emerging from the needlessly tortured evolution of the

169. See J. Morgan, *op cit.*, 457.

170. [2001] EWCA Civ 2081, para. 99.

171. See R. Bagshaw, *Obstacles on the Path to Privacy Torts*, in P.B.H. Birks (ed.) *PRIVACY AND LOYALTY* (Oxford: Clarendon, 1997); J. Morgan, *op cit.*, 468-473.

172. (2000) EHRR 1016, para. 56.

breach of confidence action. *Wainwright* as a decision can be seen as singularly lacking in courage.

We are reinforced in this view by the following bold and, we submit, helpful admission found in the judgment of the Master of the Rolls in *Campbell v. MGN Ltd* (CA) where the learned Lord said:¹⁷³

“The development of the law of confidentiality since the Human Rights Act 1998 came into force has seen information described as “confidential” not where it has been confided by one person to another, but where it relates to an aspect of an individual’s private life which he does not choose to make public. We consider that the unjustifiable publication of such information would be better described as breach of privacy rather than breach of confidence.”

This is both conceptually and terminologically accurate, and ultimately more honest. What is now necessary is judicial boldness to translate this terminological shift into a fully-fledged privacy action based on a solid formulation of clear principles. The Indiana Appellate Court in *Continental Optical Co. v. Reed*¹⁷⁴ seems to us to have come up with a workable formula to define a privacy violation which is no vaguer than the ones used to base the notion of confidentiality while also being closer to the heart of the matter. The court defined actionable violation of privacy as:

“the unwarranted appropriation or exploitation of one’s personality, the publicising of one’s private affairs with which the public has no legitimate concern, or the wrongful intrusion into one’s private activities, in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.”

The statement has received the approval of one of England’s most experienced (former) judges¹⁷⁵ who is widely acknowledged as an expert in this area of the law and is repeated here by us in the hope that it may be used as the basis of a new and more meaningful elaboration of our developing law of privacy.

5. OBJECTIONS AGAINST THE CREATION OF A GENERAL TORT OF PRIVACY

What we propose here is of course not a novel idea. However, the idea of establishing a general tort of privacy has continually met with judicial and political disapproval. It therefore is germane to ask why is the development of such a right resisted so fiercely. Those who fear the creation of a tort of privacy express their anxieties either by using evocative language – e.g., the “blockbuster” tort – or by ominously alluding to other factors which, however, they then fail to take head

173. [2003] 2 WLR 80, para. 70.

174. 14 ALR 2d 743 (1949).

175. See Sir Brian Neill, *Privacy: A Challenge for the Next Century in* PROTECTING PRIVACY 4 (Basil Markesinis ed., Oxford: OUP, 1999), p. 4.

on and explore in the light of day. So here we have assembled some of these fears, gleaned from newspaper cuttings, papers from the Press Complaints Commission or even judicial utterances – official or extra-judicial. Most ‘privacy observers’ will recognise them instantly, so it will serve no purpose to attribute them specifically to individuals or organisations.

a) *The recognition of a general tort of privacy will impede investigative journalism.*

The former Chairman of the Press Complaints Commission, Lord Wakeham, made this point strongly on many occasions. Thus, in a lecture delivered on 23rd January 2002 he argued that:

“a privacy law would provide a severe blow to the ability of newspapers to investigate, scrutinise, and – where necessary – intrude in the public interest. The freedom of the Press, which has been a central plank of Britain’s democracy since 1689, would be seriously eroded.”

One wonders how many fall for this doomsday-day scenario with its emotional appeal to the birth of civil liberties in modern Britain. One hopes, very few. For, firstly, the vast majority of the privacy cases in both the UK and abroad are not concerned with fundamental media freedoms but rather with incidental and intrusive news pieces. Secondly, neither the defences provided by the UK Press’s own Code of Practice or anything the courts of this country or any other have said or done would inhibit politically related intrusions (e.g., the Guardian’s pursuit of the Aitken affair) but only restrict offensive intrusions, revelations, or disclosures which had as their main aim to increase the revenues of the publishing medium. The public interest remains in every jurisdiction a defence of very wide scope. Thirdly, a rich case law from common law and civil law jurisdictions proves the correctness of the assertion that investigative journalism will be able to avail fully of such a defence and operate untrammelled. Thus, in German law, a system possessing a developed law of privacy, freedom of expression and freedom of the press¹⁷⁶ are seen as core elements of the constitutional framework and valued as absolutely fundamental (“schlechthin konstituierend”) for a democratic society. To be sure, human dignity is an over-arching notion in German constitutional law. Nonetheless, German constitutional theory does not accept the notion of a hierarchy of protected rights and thus accords constitutional protection to both ‘serious’ journalism and the tabloid press with its focus on entertainment.¹⁷⁷

176. Both protected by Article 5 of the German Constitution.

177. BVerfGE 35, 202 (223) (Lebach).

Even in French law, where privacy has historically been endowed with a very high value,¹⁷⁸ freedom of expression is nowadays seen as a constitutional value,¹⁷⁹ and has been so long before privacy was expressly consecrated as another fundamental right by the Conseil constitutionnel.¹⁸⁰ Both privacy and freedom of expression therefore benefit from constitutional standing in the hierarchy of norms. Consequently, neither the judiciary nor the legislature can intervene in these fields, except to increase protection guarantees or to ensure that the exercise of these rights is compatible with other constitutional rights and principles. French judges cannot therefore simply sacrifice freedom of expression and investigative journalism to the benefit of privacy rights. A harmonious coexistence between those two often conflicting interests must be found and privacy will not systematically prevail; and the French courts are laying increasing emphasis upon this principle, especially where investigative journalism and exposure of corruption is concerned.¹⁸¹

In practice therefore investigative journalism attracts particular attention on the Continent when in conflict with other basic rights, and the number of senior German and French politicians who have seen their careers destroyed by such journalistic work attests to this conclusion.

b) A general right of privacy would greatly restrict freedom of expression

The previous objection is often phrased in a different manner, the argument being made that a privacy tort would not alone restrict investigative journalism but also free comment and expression in general. This is an argument one often finds in that part of the Press which opposes the introduction of a tort of privacy. The reality is very different. A privacy tort is entirely reconcilable with strong respect for freedom of expression, as evidenced in particular by the approach

178. The importance of privacy in French law appears in the particular treatment it attracts in tort law: unlike other torts, where the plaintiff must prove that his alleged harm originates from the defendant's faulty or negligent behaviour, violation of privacy rights in itself justifies remedies (See Article 9, paragraph 2 of the Civil Code).

179. The Conseil constitutionnel in its decision « *Entreprises de presse* », on 10-11 October 1984 declared that freedom of expression was a fundamental principle, and the source of other rights and liberties. See, Favoreu-Philip, *Les grandes décisions du Conseil constitutionnel*, Sirey, 1999, n°36, p. 599.

180. The right of privacy was only explicitly conferred with constitutional value on 23 July 1999, in the Conseil constitutionnel's decision « *Couverture maladie universelle* », as part of individual freedom recognised by Article 2 of the 1789 Declaration. See, D.2000, Somm. com., p. 422, obs. L. Gay & M. Fatin-Rouge.

181. See Civ. 2^{ème} 24 January 1996, *Bull. civ.*, n°9, holding that "the revelation that a *maire* was unduly receiving redundancy benefits after having wrongly registered as unemployed did not violate the *maire*'s right to privacy". See also Cour de cassation, Civ. 1^{ère} 23 April 2003, D.2003, n°28, p. 1854, note C. Bigot.

of the German courts. Because of lack of space we thus reproduce below only a small selection of statements from some key German decisions to illustrate this and add that these are not just words. It is also worth emphasising that in many of these cases, defendants who in our system would be found guilty of defamation have been absolved from all liability precisely because the German courts have taken the view that freedom of expression is an important right which often trumps reputation and privacy.

In France, it is arguably true to say that considerable emphasis is placed upon the protection of privacy interests. However, as previously discussed, judges aim to balance privacy with freedom of expression: each alleged privacy infringement is considered within its particular context, and the balance between privacy and the crucial constitutional value of free expression is struck on the basis of flexible general guidelines broadly similar if less structured than the categories utilised in the German case-law.¹⁸² Also, it is again worth noting that the mildness of privacy-related sanctions compared to the level of damages granted in English courts in cases of defamation is revealing of the proportionality French judges strive to ensure between privacy rights on the one hand and the interests of free speech on the other.¹⁸³

Thus, in cases where speech clashes with privacy we find the German courts – but also to some extent the French courts – weighing such factors as: (i) the motives of the publisher¹⁸⁴ which, in the context of privacy protection, has been taken to mean that if the invasion was motivated by a wish to make money at the expense of the plaintiff, damages should be assessed in a way that would deprive the tortfeasor of his ill-gotten gains (so-called “Gewinnabschöpfung”);¹⁸⁵

182. Article 9 of the Civil Code reflects a duality between the right to privacy, which is recognised in the first paragraph, and the right to intimacy to which the sanctions stated in the second paragraph only apply. However, judges do not usually refer to the restrictive precision in paragraph two. See lately, Civ. 1^{ère} 12 December 2000, *D.2000*, p. 2434, note J.-C. Saint-Pau. The restriction stems from the 17 July 1970 Act which introduced a right to privacy into the Civil Code. Thanks to this more restrictive concept of intimacy, the legislature purported to reach a compromise between privacy and freedom of expression. See M. Pleven, *JOAN*, session of 27 May 1970, p. 1987. Journalists were thus ensured that coercive measures would be confined to the limited number of cases where the core of privacy (the intimate sphere) had been interfered with. However, instead of refining on the definition of concepts like privacy and intimacy, French judges have preferred to maintain a balancing approach between privacy and freedom of expression, and have done without precise and abstract definitions. Even when the infringement affects the plaintiff's intimate sphere, freedom of expression may prevail and vice versa.

183. For example, see C.A. Paris 3 March 2000, *n°2000/08537* and 30 May 2001, *n°2001/03705*. See also C.A. Paris 31 May 2000, *n°2000/04335*.

184. Contrast BVerfGE 7, 198 (Lüth) with BVerfGE 25, 256 (Blinkfuer).

185. See, for instance, BGH 19 September 1961, BGHZ 35, 363, 369 ff and, more recently and in a more elaborated manner, BGH 15 November 1994, BGHZ 128, 14-16. This introduction of “punitive” damages into German law has generated much (and not always favourable) comment from academic commentators. See, for instance,

(ii) the importance of the speech in question (e.g., does it advance knowledge and public debate or merely benefit the speaker financially¹⁸⁶); (iii) the way in which the information about the plaintiff was obtained: by illegal means,¹⁸⁷ telephoto lens¹⁸⁸ (indicating to the 'intruder' that the plaintiff wished to be left alone); (iv) the extent of the dissemination of the information;¹⁸⁹ (v) the accuracy of the statement or whether it was fabricated by a news medium;¹⁹⁰ (vi) the breadth of the restriction which the plaintiff wishes to place on the defendant's speech rights;¹⁹¹ (vii) other, wider societal objectives

Stoll, *Haftungsfolgen im bürgerlichen Recht* (1993), 57-67; 79-82; 210 ff.; Rosengarten, "Der Präventionsgedanke im Zivilrecht" NJW 1996, 1935-1938. In France, the Cour de cassation when approving preference being given to privacy over freedom of expression often underlines in these instances the lack of informative substantive content of the speech act in question and the publisher's solely commercial motive. See Civ. 2^{ème} 12 July 1966, *D.1967*, p. 181; Civ. 1^{ère} 18 May 1972, *J.C.P.*1972.II.17209. The publisher's purely financial motive may then be one of the factors justifying more coercive remedies such as seizure. The award of punitive damages, based on the defendant's profits, is however not accepted in France. The traditional, albeit changing, absence of any right of personal publicity, coupled with the non proprietary interest vested in the "true" personal right of privacy precludes such a punishment. See on this point, C.A. Paris 31 May 2000, n°2000/04335: "the award of damages in a claim relating to privacy should not have a deterrent or punishing function on the Press. Its aim is to compensate the harm suffered by the plaintiff ». Many authors and judges would however welcome the introduction of punitive damages in French Law: see B. Beignier, "Réflexions sur la protection de la vie privée", *Droit de la famille*, November 1997, n°11, p. 4; see also C.A. Versailles 23 September 1999, *CCE* 2000, n°25.

186. BVerfGE 7, 198, 219 (*Lüth*). See also the decision of the Cour de cassation, Civ. 1^{ère} 25 January 2000, *D.2000*, *Somm. com.*, p. 270, obs. C. Caron; *JCP*.2000.II.10257, Conclusions Jerry Sainte-Rose, holding that the newsworthiness of an image prevails over the image right of an individual who happens to appear in the photo of an important topical event, without being the main subject of the photo.

187. BVerfGE 66, 116 (1984) (*Bild-Wallraff*). Also, in France, see T.G.I. Paris 1 April 1997, *Legipresse*, 1998, n°151-I, p. 52 (where a hidden camera was used).

188. BGH 19 December 1995, BGHZ 131, 332. The overall damages for Princess Caroline's harassment were fixed at 180,000 DM: Court of Appeal of Hamburg, 25 July 1996, NJW 1996, 2870. French courts take the same view, see T.G.I. Paris 29 May 1996, *Legipresse*, 1996, n°135-I, p. 122. However, a photograph taken through telephoto lens will not automatically be held illegal and contrary to privacy rights: see C.A. Versailles 16 January 1998, *D.1999*, *Somm. com.*, p. 166, obs. C. Bigot.

189. BVerfGE 35, 202 (*Lebach*); OLG Saarbrücken NJW 1997, 1376, 1379. In France, limited dissemination will rarely stop judges from holding that a privacy right has been interfered with, but the extent of the dissemination will be taken into account at the remedy stage. See Civ. 1^{ère} 31 January 1989, *Bull. civ.*, n°949, where the Cour d'appel was reproached for having extended the effects of a seizure order of intrusive material to the whole of the French territory, instead of limiting its ambit to the area where the potential victims were all residing.

190. See: BVerfGE 34 269 (1973) (*Soraya*); BVerfGE 54, 208 (1980) (*Böll*); BGHZ 128, 1 (first Caroline Case). In France, it is well established that journalists cannot avail themselves of freedom of expression if their statements seriously distort reality, cf. T.G.I. Paris 17 avril 1996, *Legipresse*, 1996, n°134-I, p. 105.

191. BVerfGE 42, 143 (1976). In contrast, this factor has no real bearing on French judges' reasoning as, under Article 9, §2 of the Civil Code, judges have discretion to choose the most appropriate remedies, as long as the measures chosen are less stringent than the one sought by the plaintiff and that the two parties are given opportunity to exchange their arguments (see *Dalloz action, Droit et pratique de la procédure civile*, 2002-2003, n°3275).

which may be involved in the dispute,¹⁹² and (viii) the conduct of the plaintiff.¹⁹³ The German courts also take the view that a severe attack may justify an otherwise excessive counter-attack (the *Gegenschlag* theory of speech).¹⁹⁴ In this way, freedom of expression is given due weight in a balancing exercise that gives appropriate recognition and protection to all forms of socially valuable free speech.

It is important to add and emphasise the fact that the identification of these factors has, over the decades, led to a nuanced approach in the protection of privacy under German law. A number of gradated levels of protection have been developed, including in ascending order of protection the public sphere (*Öffentlichkeitssphäre*), the social sphere (*Sozialsphäre*), the private sphere (*Privatsphäre*), the confidential sphere (*Geheimsphäre*) and the intimate sphere (*Intimsphäre*) of human life. These gradations may be seen as Germanic (too Germanic by some) in their attempt to achieve doctrinal accuracy and perfection. Nonetheless, the basic idea behind them is emerging in English law; and it also has the added bonus of showing how – in the absence of a hierarchy of rights – two conflicting positions such as privacy and freedom of expression can, if at all possible, be brought to a harmonious co-existence and both accorded the largest possible amount of protection. These categories in German law should also be seen as an attempt to establish broad guidelines for the resolution of concrete conflicts and to that extent they are helpful even if not necessarily transplantable.

The five categories can roughly be outlined and delineated as follows (bearing in mind that the real difficulty comes in the application of the facts of each case under the ‘right’ heading):

192. BVerfGE 35, 202 (1973) (Lebach). See also, the Cour de cassation, Crim. 15 November 2000, *Procedures*, 2001, n°497, p. 26: protection of public order may warrant intrusions upon people’s privacy.

193. BGH 5 May 1964, NJW 1964, 1471 offers a good example of the position taken by German courts that not everything that interests the public can be published in the public interest but that the conduct of the plaintiff may have a bearing on whether relief is given. In that case, the defendant magazine wrote an article about a criminal prosecution brought against the plaintiff. In it, it also referred to his repeatedly adulterous life. The court stressed that, normally, such revelations will be treated as amounting to actionable instances of violated privacy. In this case, however, the revelation was left unpunished since the plaintiff had, in the past, held himself out as a moralist. In France as well, the Tribunal de Grande Instance in Paris has pointed to the plaintiff’s behaviour to refuse remedy for his violated privacy right. On 3 December 1997 (*J.C.P.* 1998.II.10067), the Tribunal refused to grant compensation to the plaintiff – the manager of *Voici* newspaper – because he had expressed himself publicly as being in favour of press intrusions on people’s privacy. This decision, although satisfying on moral grounds, contradicts the principle that mere violation of privacy is actionable under Article 9, §2 of the Civil Code without proof of any damage.

194. BVerfGE 12, 113 (1961) (Schmid-Spiegel), re-confirmed by BVerfGE 54, 129 (1980) (art critic).

(i) The *public sphere*, which includes freely observable activities. Individuals who seek publicity must accept potential interest in and discussion of their behaviour. This does not exclude privacy rights altogether, though, and German courts will always focus on the particular circumstances of a case in order to strike a balance between privacy and freedom of expression.¹⁹⁵ French judges will similarly pay attention to the public context of the case put to them,¹⁹⁶ albeit without any prior formal characterization of the facts into the public sphere.

(ii) *Social sphere*. This covers everyday participation in social life. Without attracting any particular publicity, individuals working, attending public events, walking down streets, eating in restaurants or shopping, move in public by their own free will and must, in principle, accept coverage of this activity by the Press.¹⁹⁷ Weddings and divorces are equally regarded as social events, and individual protection will be limited to the requirement that any coverage must be truthful. In contrast, there is no recognition of a social sphere as such in French law. Rather, the relevant question is whether the social event aims at fulfilling a private or a public purpose.¹⁹⁸

(iii) *Private sphere*. This sphere concerns areas which are not accessible without consent of the individual. This applies to family relationships and activities conducted in the private household setting, and there is, in principle, no distinction between celebrities and 'normal' individuals. Here, in France even more than in Germany, the protection of privacy will carry stronger weight than in the two spheres mentioned previously, but the special interest of society in

195. Thus, while the publication of photos showing Princess Caroline of Monaco and her future husband Prince Ernst August of Hanover kissing on the fringes of a dressage tournament was regarded as permissible by the Landgericht Hamburg (unpublished decision by OLG Hamburg 11 August 1997, 324 O 554/97), privacy took pre-eminence in the case of photos showing a nude sunbather in a public garden (OLG München NJW 1988, 915) and a drunken construction worker on an openly visible worksite (OLG Frankfurt NJW 1987, 1087).

196. See C.A. Versailles 27 June 2002, *Legipresse*, 2002-I, n°110: "the borders of Article 9 of the Civil Code shift where Princes are involved". See also Civ. 1^{ère} 23 April 2003, C. Bigot, *Dalloz*, 2003, n°28, p. 1854, where the statement announcing Prince Karim Aga Khan's divorce was held to be capable for further dissemination as relating to an official event.

197. BVerfGE NJW 2000, 1021 (*Princess Caroline of Monaco*).

198. In principle, French judges consider that Press coverage of public exhibitions or public everyday life cannot be paralysed by privacy or image rights (see C.A. Paris 12 May 1995, *D.*1997, *Somm. com.*, p. 719, obs. J.-Y. Dupeux). But the private *purpose* of an event, whether familial (for a wedding see T.G.I. Paris 2 March 1989, *G.P.* 5-6 June 1989; C.A. Paris 6 October 1999, *D.*2000, *Somm. com.*, p. 267, obs. A. Lepage), religious or other (for participation in a gay rights demonstration see C.A. Versailles 31 January 2002, *D.*2003, n°23, *Somm. com.*, p. 1533, obs. C. Caron), may take precedence over the right to report on the event in particular circumstances. Under French law, it is thought that the publicity characterizing such social activities should not go beyond the limits of the publicity that the affected person wishes to confer upon these essentially private events.

individuals who are a part of public life will again affect the balancing exercise and this can outweigh privacy rights.¹⁹⁹

(iv) *Confidential sphere*. The confidential sphere covers material which is clearly not meant to reach the public. This includes confidential thoughts and ideas committed to paper,²⁰⁰ audio material²⁰¹ and highly personal data.²⁰² In this area, freedom of expression will yet again not be restricted in each and every case, but there is a very strong bias in favour of privacy.

(v) Finally, the *intimate sphere* is the only area where privacy will usually rule supreme. Fortified by the constitutional notion of human dignity, which requires that every individual must be allowed a sphere of life which may not in any way be penetrated by others, this covers, e.g., written and audio-visual material especially related to sexuality, medical information, and information confided to priests, doctors or legal representatives. The level of protection will thereby increase as it becomes more intimate.²⁰³ Even so, German law provides (as in the other, less protected spheres) that previous activities of the person involved can in turn undermine even this high level of protection. Thus, a celebrity's voluntary participation in por-

199. Factors to be taken into account include the importance of the information, the previous behaviour of the person involved (e.g., a search for publicity; the 'opening' of the own private sphere for commercial purposes; the continued public expression of strong moral views by a politician), and his/ her position as a permanent public figure or even someone who attracts public attention only for a limited period of time. This again shows that the balancing exercise conducted by German courts is flexible, always performed on the basis of the individual facts of a case, and that the potential for exposure of hypocritical behaviour by politicians or moral leaders is adequately protected. In this context, two further points are of interest. In BGH NJW 1999, 2893 (the Prince August of Hannover adultery case), the *Bundesgerichtshof* stressed that Article 5 of the Basic Law also covers publications focusing merely on entertainment and/ or sensationalist coverage. This clearly strengthens the position of the tabloid press, as evidenced by the commercial strength and prominence of *Bild!* A different, slightly earlier decision, potentially widened the area belonging to the private sphere. Here, photos showing Princess Caroline of Monaco in a secluded garden restaurant were taken from a great distance and with the help of long-lens cameras. Both the Federal Supreme Court and the Federal Constitutional Court accepted that these pictures, though taken outside the private premises of the plaintiff, constituted an infringement of the right to privacy because the individual had chosen discreet surroundings and had obviously intended to be left alone on that particular occasion. All this goes to underline our earlier point that the actual facts of each case ultimately reign supreme, something with which no common lawyer would feel inclined to challenge.

200. E.g., letters, diaries or the internal memorandum of a lawyer.

201. E.g., telephone conversations recorded contrary to criminal law.

202. E.g., the so-called 'genetic fingerprint' of a human being.

203. Under French criminal law, intrusions into the intimate sphere by means of certain specific devices (Article 226-1 of the Criminal code), revelations of the information obtained as a result (Article 226-2) and the setting up and sale of the said devices (Article 226-3) are severely punished. Interference with the intimate sphere thus allows criminal proceedings whereas infringements of privacy generally speaking only give rise to damages or coercive measures.

nographic films will shift the balance towards freedom of expression where the publication of otherwise intimate images is at stake.²⁰⁴

Overall, and despite admitted difficulties of classification at the fringes of each category, we submit that these criteria are not only more rational than our own attempts to stretch medieval torts to modern situations not envisaged when these torts became part of our legal scene. We further submit that these criteria are all transplantable into our own system and, indeed, this may be beginning to happen already, albeit under other headings such as breach of confidence. We also submit that in light of the German experience in particular, there is no reason to fear that a law of privacy would impact negatively upon the vital role of freedom of expression in public debate, the scrutiny of public figures and fair comment in general. In actuality, the restraints in English law on freedom of expression imposed by its excessively rigid defamation laws constitute a far greater potential impediment than a law of privacy ever would.²⁰⁵

c) Our knowledge of comparative European civil law is very limited and we cannot thus use it either as a guide or even as a source of inspiration and ideas

Of course, judges and academic lawyers in the UK are broadly aware of some of the comparative experience discussed here, even if they have a distorted and partial picture, or even if such experience is ignored, as in *Wainwright*. Nevertheless, there has been a great reluctance to see the commonsensical positions developed in the German and French contexts as capable of providing any real guidance for the UK. This is often based upon the lazy assumption that 'foreign law' is inaccessible, alien and non-transplantable and so therefore it

204. Though courts have taken into account in favour of individuals mitigating factors such as the length of time since the last 'cinematic' engagement and previous disclosure of this intimate personal history. See Landgericht Berlin 19 November 1996, NJW 1997, 1155 where the participation of the applicant in pornographic films dated back some 20 years and had already been the subject of extensive public discussion before the respondent yet again (years later) reported on this topic in an unduly sensationalist way. The applicant had by then established himself as a TV anchorman, distanced himself from his participation in the production of pornographic material, and overcome the family crisis triggered by the previous revelations. In France, even the first revelation of the applicant's pornographic past would probably have been held to violate his right to privacy, on the ground that voluntary participation in pornographic films does not entail consent to publicity beyond the films' audience, especially when the piece of information relates to such an intimate sphere. This analysis of the plaintiff's expectations and implied consent thus inhibits to some extent a true confrontation between privacy and freedom of expression. This position – derived from the « personal » nature attached to the right of privacy – is however gradually changing, through the influence of comparative law and the ECHR.

205. We cannot but feel that one of the reasons for the reluctance to reform our defamation law in a sensible and pro-free speech manner is precisely the lack of an adequate and principled law of privacy which in turn ensures reluctance on the part of politicians to give the Press any quarter in the field of defamation.

is impossible to form an adequate picture of how freedom of expression and privacy interact in jurisdictions which do in fact extend legal protection to privacy.

This used to be so but is becoming less and less convincing – partly because so many of our lawyers are, these days, studying European civil law at foreign universities and partly because the amount of material available in English (primary and secondary) has increased exponentially in recent years. Increasing academic and judicial cross-fertilisation of ideas and the ever-greater development of personal and professional points of contact for practitioners have also contributed to eroding the knowledge barriers between different jurisdictions.

In addition, the development of cross-border cases means that English judges can no longer be oblivious to foreign law. At present, whenever the circumstances or consequences of the events which constitute a tort arise in a foreign country, English judges must refer to Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (in force since 1 May 1996). The Act states as a general rule that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.²⁰⁶ The possibility of English judges having to apply a foreign privacy law is therefore far from remote. Obviously, like in any private international law cases, the application of a foreign rule is subject to the requirements of public policy.²⁰⁷ But, as it has been observed, “there is certainly nothing so extreme or objectionable about a foreign law on invasion of privacy which would justify not applying it in England”.²⁰⁸ How come then English judges have remained hostile to a right of privacy, even in international cases?²⁰⁹

The root of this persistent position appears to be the broad exclusion provided for in Section 13 (1) of Part III of the 1995 Act. According to Section 13 (1), any defamatory claim – widely defined – falls outside the scope of Part III of the 1995 Act. This exclusion covers any claims brought in England for libel under English law, for slander under Northern Ireland law, verbal injury under the law of Scotland, as well as any claims for other malicious falsehood. Besides, Section 13 (2) refers to claims under the law of any other country corresponding or otherwise in the nature of the above mentioned claims. Is it imaginable that an issue, characterised as one of privacy under French law for example, be treated as a defamation case, under the broad meaning of Section 13? Section 13 would surely apply to a derogatory but true statement, published in France, which is

206. Section 11 (1).

207. Section 14 (3).

208. Cheshire and North's *Private International Law*, 13th ed., Butterworths, p. 646.

209. See Lord Lester in *Hansard* (HL) 27 March 1995, cols 1410-1413.

denied the *exceptio veritatis* under French law because it relates to privacy matters.²¹⁰ As a result, such an issue would be excluded from the statutory rules and subjected to the common law rule of double actionability.²¹¹ Under this rule, the plaintiff will have to overcome a double hurdle: he will have to prove that there is actionability both by the law of the forum and by the law of the place of the tort, with a flexible exception in favour of the law of the country which the issue has the most significant relationship with. In practice, this double actionability rule allows a defendant to rely when it applies on defences available under English law, even though the publication was abroad and such a defence is not available under the law of the country where the tort was committed. Why favour in such an anomalous way the defendant, i.e. the Press?²¹² A return to less extreme solutions is feasible. Harmonization of private international rules may come in the form of a new EC regulation, known as *Rome II*, whose enforcement would be under the ECJ's supervision.²¹³ If the regulation is finalised and the U.K. decides to opt in, application of foreign laws which recognise privacy rights would become common practice. In turn, this may work as an incentive to the introduction of a right of privacy in English domestic law. But why waste time; why not turn to comparative law spontaneously?

d) *European civil law codal structures make the use of foreign law difficult or impossible*

The critics of a comparative approach would however also argue that the different legal contexts, in particular the codal structures of civil law countries, make any comparisons invidious. The answer to this canard is a simple "no", since in all the three major continental European systems of Italy, France and Germany, the development of the law of privacy has been largely the product of judicial activity proceeding from case to case in a manner which is both reminiscent of

210. Article 35 of the French Press Act of 29 July 1881 – as modified by the Ordinance of 6 May 1944 – forbids journalists and newspaper editors defending themselves against defamation claims to give evidence that the fact is true when the fact encroaches on the plaintiff's privacy.

211. *Phillips v. Eyre* (1870 LR 6 QB 1, pp. 28-29), as modified by the House of Lords, in *Chaplin v. Boys* (1971) AL 356 and by the Privy Council, in *Red Sea Insurance Co Ltd v. Bouygues SA* (1995) 1 AL 190.

212. For an explanation, see the vigorous campaign of the Press for the exclusion of defamation from the scope of Part III of the Act, House of Lords Paper 36 (1995), Memoranda by the Guild of Editors, pp. 79-80; *The Times*, 19 January 1995, pp. 5, 18-19.

213. Under the proposed text – see (1998) NILR 465; R.C.D.I.P. 1998, p. 802 – privacy issues and defamation cases would be governed by the same law, the law of the country which the case has the most significant relationship with (Section 3.1). Such a law should presumptively be taken to be the law of the country where the damage has taken place or threatens to take place and that country is presumed to be the country where the plaintiff was habitually resident at the time of the wrong (Section 4 a).

the common law method but also makes the result transplantable into our own system.²¹⁴ Indeed, as one sees our law developing in recent times and compares these developments with, say, what has been said and done in Germany during the last thirty to forty years, one is struck by a feeling of *déjà vu*. The German case law has in particular made use of proportionality tests to balance free expression and privacy considerations in a manner that will be entirely familiar to British lawyers who have but even a passing acquaintance with the case-law of the ECHR and now of the UK courts in applying the Human Rights Act.

e) *Different social and legal weight is given to the importance of press freedom in other European jurisdictions*

Underlying many of the arguments used to discount comparative experience in this area is the assumption that greater value is given to the importance of press freedom in UK law and social attitudes than in other European countries, and that as a result the UK should adopt a very different approach. As noted above, the importance given to free expression and to press freedom in the German case law acts as an immediate rebuttal to this assumption. Indeed, from a German perspective, UK defamation law appears highly restrictive of the freedom of speech of the Press. It has been our common experience that each European country tends to have a high regard for its own degree of press freedom, and a strong suspicion that its European partners lack a similar degree of concern. Casual assumptions of this nature should be treated with suitable scepticism in considering the value of comparative approaches to privacy. Lindsey J. in *Douglas No. 2* understated the case when he put forward the proposition: "that other jurisdictions, in general terms no less free or democratic than this one, have apparently workable laws of privacy which neither oppress nor stifle is at least arguable".²¹⁵ Our detailed discussion above of German and French law shows that free expression is balanced via a nuanced, proportionality-based approach that will be familiar and reassuring to any English lawyer.

214. The right of privacy in France for example has judicial roots. It stems from decisions of the 1950s, holding book or newspaper publishers liable to damages for wrongly divulging memories, personal feelings or confidential correspondence, see C.A. Paris 16 March 1955, *Marlène Dietrich*, D.1955, p. 295; Civ. 2^{ème} 12 July 1966, *Veuve Gérard Philippe*, D.1967, p. 181; C.A. Paris 15 mai 1970, *Jean Ferrat*, D.1970, p. 466. A right of privacy was finally enshrined into the Civil Code, at Article 9, on 17 July 1970, after the Cour de cassation, in its yearly report of 1968-1969, had suggested such a reform.

215. *Op cit.*, para. 51.

f) *The Press Complaints Commission (and other regulatory bodies) are sufficient to police the Press and other broadcast media*

The argument is also made that while privacy laws may be appropriate in other jurisdictions, the Press Complaints Commission (PCC) is a sufficiently effective self-regulation mechanism for policing the Press in this jurisdiction, while regulatory bodies such as Ofcom are adequate to supervise the broadcast media. Obviously, the development of the law of confidence and the finding of the Strasbourg court in *Peck* that the PCC complaint mechanism constituted an unsatisfactory redress mechanism for the purposes of the ECHR has made the much-vaunted self-regulation argument look hollow, with *Peck* effectively putting the final nail in its coffin.

Nevertheless, a parallel argument is often also advanced that the regulatory bodies are sufficient for the vast bulk of privacy cases, and that the development of any privacy remedy via the law of confidence should be limited in scope and designed merely to supplement regulation in those exceptional cases where no adequate remedy can be obtained. The answer to this argument is again “no”, for several reasons.

The first set of arguments arise on grounds of justice and particularly apply to the Press: it is not desirable to allow the industry to decide for itself if it has fallen foul of rules that it has itself helped fashion to regulate its conduct. There is no reason why the *nemo iudex in causa sua* principle should be disregarded in this context, especially when such a fundamental right as personal privacy is at stake.

Secondly, existing regulatory mechanisms are often ineffective and lack sufficient powers to uphold privacy rights in an effective manner. A finding by the Press Complaints Commission that one of its members has fallen foul of the Press Code entails no serious consequences for the offender and thus no real satisfaction for the victim of Press intrusion. Some regulatory bodies concerned with violations of human privacy, including the PCC, can only act *ex post* and not *ex ante* when the need for protection is most needed. This, for instance, was the case with the Broadcasting Complaints Commission, which was previously the body which deal with matters of fairness, taste and decency in broadcasting media (now replaced by the new regulator, OFCOM). Mr Justice Sedley (as he then was) thought this state of affairs was unacceptable as well as in breach of Convention rights in *R v. Broadcasting Complaints Commission, ex p. Barclay*.²¹⁶ The inadequacy of existing regulatory mechanisms, in particular that of the Press Complaints Commission, as well as concerns as to its composition and independence, were highlighted in the recent report of

216. (1997) 9 Admin LR 265.

the House of Commons Culture, Media and Sport Committee, *Privacy and Media Intrusion*.²¹⁷ In *Bell*, Butler-Sloss P. considered that the PCC Code was inadequate to give sufficient protection to Mary Bell and her child, citing in particular the *ex post facto* nature of any remedies.²¹⁸ The inadequacy of the PCC's capacity for granting redress was demonstrated recently in the Sara Cox litigation, where the limited apology issued by the Sunday People in response to the PCC adjudication was so insufficient that Ms. Cox successfully commenced legal proceedings.²¹⁹ Moreover, the decisions of these bodies (such as the PCC) cannot be appealed; and it was only very recently (in another unsatisfactory decision) that the PCC accepted that it was "clearly arguable" that its decisions were subject to judicial review.²²⁰ Newspaper editors have recently been very critical of the PCC's rulings exonerating the News of the World tabloid for its part in the collapsed prosecution brought against individuals alleged to have prepared a plot to kidnap David Beckham's son, despite the judge in the case referring the tabloid to the Director of Public Prosecutions.²²¹

The argument that regulation of the media should be left to specialist bodies, and in the case of the Press, to a self-regulatory body, remains unconvincing. In the Republic of Ireland, the Legal Advisory Group on Defamation, a specialist advisory body, concluded following a comprehensive survey of global regulatory practice that while "press freedom is fundamental in a democratic society. . . the Group was somewhat sceptical as to whether it necessarily follows that any statutory intervention would run counter to such desiderata. . .".²²²

217. HC 458-I, Fifth Report 16 June 2003, available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcomeds/458/45802.htm> (last accessed 24 June 2003). See also A. Rusbridger, *The Guardian* (Media Section) 10 March 2003.

218. *Bell*, *op cit.*, para. 57. By contrast in France, remedies can – in case of a precise and imminent threat of a violation – be obtained *ex ante*, to avoid the occurrence of any damage: C.A. Versailles 2 October 1996, *Legipresse*, 1996-II, p.146; Civ. 2^{ème} 11 juillet 1985, *D.1986, I.R.*, 50.

219. See R. Greenslade, "Sara Cox wins privacy case", *The Guardian*, 7 June 2003, but see the PCC's response to the Sara Cox case for a divergent perspective, published on their website <http://www.PressComplaintsCommission.org.uk>

220. *R (Ford) v. Press Complaints Commission* [2002] EMLR 95. Even this admission had to be "dragged out of the PCC over a period of time (and at a certain cost to the litigants) for in an earlier case the concession made was that the point was "at least arguable". See *R. v. Press Complaints Commission, ex p. Stewart-Brady* [1997] EMLR 185 (our italics.)

221. See, e.g., *The Guardian*, July 2003. Responses to the PCC's adjudication on the same day that the Guardian newspaper had breached the Press Code by paying a prisoner for an article written on the disgraced peer Jeffrey Archer's spell in prison were similarly critical.

222. Report of the Legal Advisory Group on Defamation, March 2003 (Dublin: Department of Justice 2003), available at [http://www.justice.ie/802569B20047F907/vWeb/flRXHR5NSG5U/\\$file/report+of+the+legal+advisory+group+on+defamation.pdf](http://www.justice.ie/802569B20047F907/vWeb/flRXHR5NSG5U/$file/report+of+the+legal+advisory+group+on+defamation.pdf) (last accessed 26 June 2003).

This is not to suggest that regulatory bodies, even self-regulatory bodies, cannot play a role if acting as an informal dispute resolution mechanism in tandem with a developed law of privacy. The position in Germany, where the existence of a self-regulating body was explicitly modelled along the lines of the then British Press Council, shows how court intervention can coincide with its own, more informal and inexpensive procedures, but its history also demonstrates the inadequacy of a self-regulatory model operating on its own. The *Deutscher Presserat* was created in 1956 in an attempt to avert federal legislation regulating the Press, with the German Press (like the contemporary English Press) being anxious to avoid both statutory regulation and a court-created right of privacy. Operating on the basis of two documents, a code of practice enunciating principles of sound journalistic practices (*publizistische Grundsätze*)²²³ and a set of rules establishing the complaints procedure itself (*Beschwerdeordnung*), the *Presserat* proved an active but, in terms of remedies, largely ineffective body. For the remedies it had (and continues to have) to offer are restricted to three options, namely a recommendation (*Hinweis*), an expression of disapproval (*Mißbilligung*) and a reprimand (*Rüge*). Only the latter will reach the attention of the public due to the obligation imposed on the newspaper in question to publish reprimands.²²⁴ Mere recommendations and expressions of disapproval are, in practice, restricted to the parties in dispute. Recent statistics show a constant annual increase of individual complaints from about 400 instances in 1998 to over 700 instances in 2002.²²⁵

How can the existence (and, apparently, increasing popularity) of this self-regulating body be reconciled with the development of German privacy protection by judicial means? First, there are indications that applicants seek the assistance of the *Presserat* (rather than go to court) for strategic reasons of their own. Among them is the fact that deliberations of the complaints committees are private and confidential, and prominent individuals in particular, who seek to defend themselves against interferences by the Press, may choose this course of action in order to avoid the additional public scrutiny that comes with a court hearing.²²⁶

223. First presented to Federal President Gustav Heinemann in December 1973.

224. See section 16 Pressekodex. The reprimand also appears in the publicised reports of the *Presserat* itself.

225. The number of official hearings leading to a formal decision is, however, far lower since as many as 75% of the applications are screened by the Secretary of the *Presserat*, acting in consultation with the chairmen of the complaints committees. Complaints for which the *Presserat* does not feel competent to sit in judgment or which are regarded as obviously unfounded are rejected by decision of the Secretary. These statistics for the years 1997-2002 are taken from the website of the *Presserat*, see <http://www.presserat.de/site/doku/statist/index.shtml>.

226. This is, for instance, frequently true of politicians who want to 'put their foot down' without having any particular need for the legal remedies obtainable through a court hearing. We stress this point in the light of the fact that some German politi-

This is not the place to speculate on the effectiveness of these various strategies; but it is nonetheless interesting to bear them in mind in order to realise that in Germany (unlike England) the courts and the *Presserat* are, in practice, viewed as distinctly different forums. Apart from being free of cost (a factor which is regarded as less important in the light of substantially lower litigation costs in Germany), the lower profile of the *Presserat* hearings also has the advantage of being less risky in complaints with an uncertain outcome. Defeat will thus seem less dangerous for the image of a potentially unsuccessful applicant.

Secondly and more importantly, we feel that the remedies offered by the courts and the *Presserat* procedure complement each other rather than represent two sets of alternatives. While the plaintiff can claim damages, revocation, an injunction or the publication of a corrective statement in a court of law, remedies offered by the *Presserat* seem to aim at the condemnation of unacceptable journalistic practices themselves.²²⁷

This difference is highlighted by the fact that the *Presserat* may (as the PCC can) initiate investigations in its own right, and further evidence to support this point can be gleaned from the statistical data pertaining to the specific issues raised in the complaints submitted to the body. In 2002, section 8 of the *Presserat's* Code of Conduct (addressing the right to privacy and data protection) was invoked in 77 applications, amounting to a mere 14% of the total number of issues raised.²²⁸ To the German mind, self-regulation of the Press and judicial protection of privacy are thus two sides of the same coin rather than distinct alternatives. This is underlined by the fact that individuals who approach the *Presserat* are not precluded from seeking judicial remedies.

cians (e.g., the present Chancellor Gerhard Schröder) have proved more eager to take the Press to court than others (e.g., his predecessor Helmut Kohl, who preferred to 'punish' what he regarded as undue interferences of the Press by shunning certain journalists, wherever possible, when they applied for interviews). Yet others, for instance the former Prime Minister of Northrhine-Westphalia and present Federal Secretary of Commerce and Labour Wolfgang Clement, known for his tough attitude towards members of the Press, has frequently complained to the *Presserat*, but has rarely opted to sue.

227. To be sure, German court decisions can contain seething remarks on the way the rights of individuals were violated by the Press in a given case; but German tort law and the statutes regulating the Press (*Landespressegesetze*) are generally concerned with compensation rather than the notion of deterrence. The main idea of the judicial remedies is thus to restore as far as possible the position of the individual, and the wider aim of a Press committed to sound journalistic work only features indirectly as a reflex of the private-law relationship between the plaintiff and the defendant. The *Presserat*, by contrast, seeks to influence the behaviour of its members.

228. Other matters include the thoroughness of journalistic research (38%), unfounded allegations (12.8%), discrimination (8.5%), conflict of interests (6.5%) and the unnecessarily violent presentation of material (4.6%).

The German experience therefore illustrates that self-regulation can work in tandem with a law of privacy, providing all the benefits of flexible, low-profile and cheap remedies and procedures that the PCC currently provides while the law ensures complainants of the possibility of an effective remedy in the case of egregious violations that self-regulation cannot redress.²²⁹

g) A general right to privacy would open the floodgates of litigation

The possible development of a law of privacy has provoked fears of an avalanche of litigation. Similar fears were of course generated by the Human Rights Act, and connoisseurs of false legal prophecies will be unsurprised that just as those fears proved groundless, foreign experience once again, gives the lie to this assertion in the context of privacy. Thus, a list of all published decisions by German Courts of Appeal and the Federal Supreme Court (BGH) between the years 1980 and 2000 reveals a total number of only some 223 privacy-related judgments. One could, of course, challenge this figure by saying that (i) it does not include first instance judgments (which, due to their number and subject-matter are often entrusted to specialist chambers of the *Landgerichte*); and (ii) does not include suits that

229. Judicial remedies are the only remedies available in France but they combine both efficiency and rapidity, thanks to an easy recourse to summary proceedings, known as "procédure de référés". Article 9, §2, of the Civil Code states that judges may, without prejudice to compensation for injury suffered, prescribe all measures such as sequestration, seizure and others, appropriate to prevent or terminate an attack on privacy. The paragraph specifies that these measures may, in urgent cases, be prescribed by means of summary proceedings. Initially, the use of summary proceedings was restricted to violations to the intimate sphere, the core of privacy, and to urgent cases. Both restrictions have nowadays disappeared. See Civ. 1^{ère} 12 December 2000, *D.2001*, p. 2434, note J.-C. Saint-Pau. The emergency requirement has been bypassed by judges who refer to Article 809, §2, of the New Code of Civil Procedure, providing judges with general powers in summary proceedings, irrespective of urgency. The alleged aggrieved or potentially aggrieved person now has to show that she/he is faced with a precise and imminent threat of violation. See C.A. Versailles 2 October 1996, *Legipresse*, 1996-II, p. 146. Moreover, summary proceedings are only supposed to lead to provisional measures. See E. Derieux, "Référé et liberté d'expression", *JCP.1997.I.4055*; *Dalloz Action, Droit et pratique de la procédure civile*, 2002-2003, n°1001. But in practice, harsh provisional sanctions, like seizure or prohibition to publish, may permanently impair the defendant's rights of free speech. Aware of this risk, recent decisions seek proportionality between efficient privacy protection measures and the restrictions placed on freedom of expression. Thus some judges have limited their prohibition to publish to a fixed period of time, within which the parties are to start ordinary proceedings. See Civ. 1^{ère} 16 July 1997, *Bull. civ.*, n°249. Others allow defendants who have had to pay provisional damages to go to court in order to establish that the level of the damages in question has turned out to be excessive. See T.G.I. Nanterre 27 January 1999, n°15191/98. These restrictions ensure that summary proceedings retain their natural purpose – efficiently and rapidly protecting privacy – without permanently affecting rights of publication, at the expense of freedom of expression. Thanks to this recent awareness, judicial protection offers, for a relatively low cost and without delay, a satisfying balance between privacy and freedom of expression.

were settled out of court. In counter argument, however, one should consider the following points: (i) The number of suits that are decided by full judgment in Germany is significantly higher (closer to 40% of all actions started) than it is in Great Britain (where the figure of cases resolved finally by full judgment is closer to 1, 5% to 4% depending on the kind of claim involved).²³⁰ (ii) The number of reasoned judgments handed down each year by the German Federal Supreme Court is over one thousand or so; compared to this overall figure (and the much higher figure of total judgments handed down by the sixteen Courts of Appeal), the privacy figure of 223 is very small.²³¹ (iii) The costs of litigation in Germany are significantly lower than they are in England. Thus, whereas the recent *Douglas* case was reported in the Press to have generated costs of the order of £3-5 million the equally important and protracted Caroline litigation in Germany generated costs closer to one third of a million German marks – at the time approximately £100,000. Even though these figures are neither precise nor confirmed, they raise the very legitimate question why would privacy litigation in England explode given the costs of litigation, the unavailability of legal aid, and the well-known (though arguably changing) English reluctance to go to court? It should finally also be noted that the current celebrity-driven set of breach of confidence cases have arisen to a large extent precisely because of the inadequacy of existing remedies and the uncertain state of the law and the incremental and piecemeal development of the law of confidence. Nothing seems to us to generate a flow of litigants and a lack of clarity for publishers and complainants more than the current stumbling, long-drawn out foot-dragging towards the establishment of the privacy action.

h) The constitutional role of the judiciary

The final objection to the creation of a privacy action in English law stems from the concern that any judicial attempt to frame a law of privacy would constitute a usurpation of the legislative role of Parliament, especially given the high political profile of this issue. This appears to presume that the days of the bold and creative judge referred to at the beginning of this paper are over, that any attempt to combine existing remedies within a single tortious principle along the lines of the seminal case of *Donoghue v. Stevenson* would in this day and age be an excessive exercise of the common law powers and functions of the courts. This self-imposed reticence is very questionable,

230. For comparisons on this see Basil Markesinis, *Litigation Mania in England, Germany and the United States: Are We so Very Different?* (1990) CAMBRIDGE LAW JOURNAL 233-276, reprinted as chapter 20 in FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS (Oxford: Hart, 1997).

231. Markesinis and Unberath, *op. cit.*, pp. 476-8.

being as it is a partial abdication of the role of a common law judge to providing coherence and a firm principled basis to the ongoing evolution of the common law. It is especially questionable in the privacy context, where the fig-leaf of confidence is used to provide a false blanket of reassurance to cover over the development of new remedies.²³² Judicial reluctance to grasp the nettle of developing a full privacy action runs the risk – as discussed throughout this paper – of ensuring that these new remedies develop in an incoherent and unsatisfactory manner.

Thankfully, however, there is now no need to go into constitutional discussions of the role of the judiciary in developing the common law. S. 6 of the Human Rights Act, in requiring the courts to give indirect horizontal effect to the contents of the ECHR, places the courts under an obligation to develop where necessary the common law to give effect *inter alia* to Article 8 of the Convention with its guarantee of privacy as a core element of human autonomy.²³³ This obligation, and the potential implications that it would have for the development of a law of privacy, was clearly indicated as a necessary consequence of the enactment of the HRA by the Lord Chancellor during the Act's passage through Parliament.²³⁴ The *Peck* decision of the Strasbourg court has since made it clear that domestic law must be capable of protecting this right via some form of legal redress. As a consequence, there can be no serious doubt that the English courts are under a statutory obligation to develop adequate protection for the right to privacy, and the recognition of a freestanding privacy tort represents the most honest and effective way of discharging this obligation. As Morgan has recently said:

“The current approach of incremental development is at best timorous, at worst intellectually dishonest, and in practice it means incomplete protection, and the most disastrous uncertainty in an area of law central both to the “stuff of people’s souls” and the freedom of the press. In Utopia, Parliament would grasp the nettle and provide a

232. See J. Morgan, *op cit.*, 470.

233. The academic literature on the horizontal effect of the HRA and its implications for privacy has of course been voluminous. A specimen sample includes the following: M. Hunt, “The ‘Horizontal Effect’ of the Human Rights Act” [1998] *Public Law* 423; W. Wade, “Horizons of Horizontality” (2000) 116 *Law Quarterly Review* 217; I. Leigh, “Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth” (1999) 48 *International Comparative Law Quarterly* 57; R. Singh, “Privacy and the Media: The Impact of the Human Rights Bill” in B. Markesinis (ed.) *Protecting Privacy* (Oxford: OUP, 1998); G. Philipson, “The Human Rights Act, Horizontal Effect and the Common Law: a Bang or a Whimper?” (1999) 62 *Modern Law Review* 824; I. Hare, “Vertically Challenged: Private Parties, Privacy and the Human Rights Act” [2001] *European Human Rights Law Review* 526. For a comparative perspective, see B. Markesinis, “Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Act: Lessons from Germany” (1999) *Law Quarterly Review* 47.

234. HL Deb. Nov. 24th, 1997.

democratically approved solution, but until that fabulous day the best we can hope for is a bold and open engagement with the questions by the courts. Distraction from the task by the form and limits of a host of ancient actions would be downright harmful.”²³⁵

Lord Hoffmann in *Wainwright* takes an opposite view, arguing that the *Peck* decision is confined to its factual context, and that the Strasbourg court is only concerned whether “English law provides an adequate remedy in a specific case” where a breach of privacy is at stake.²³⁶ This disregards the crucial role of the Strasbourg jurisprudence in establishing norms and requirements as to what interests a national legal system should protect. It also attempts to ignore the reality that, in identifying the absence of adequate legal protection for Mr. Peck, the Strasbourg court has identified a systemic failure to address privacy issues of which the *Peck* decision is merely one instance. Lord Hoffmann also assumed that existing methods of protection for privacy interests in English law, including the Human Rights Act itself, were sufficient. As we have argued here, this presumption is progressively accepted by authors, academics *and* practitioners alike, to be flawed. The development of confidence cannot be viewed as discharging the responsibility of the judiciary under the Human Rights Act to redress privacy violations. Lord Hoffmann may choose to ignore the literature that points out the weaknesses of approaching these issues through ‘confidence.’ But its presence is as much a fact as is its growing volume so it would be better for the science of law if he chose to tell us why it is wrong rather than strive to give the impression that the judicial function cannot benefit from academic speculation.

6. CONCLUSIONS

The study of foreign law is rarely meant to lead to wholesale transplantations of foreign concepts, notions, and solutions but it can lead to new ideas infiltrating national law; it may also help dispel myths about threatened and imagined consequences in the event of a local change in the law. We hope that the preceding discussion has furthered both of these aims. More particularly, we note that the reasons which led the House of Lords to use foreign ideas in their seminal *Fairchild*²³⁷ decision also exist in this case. The publication of news is thus increasingly international; ownership of media is global; dissemination of news is rapid and world-wide. In such circumstances, legal diversity is often not a sign of healthy legal pluralism but a state of affairs waiting to be exploited by those who have the financial means to do so. To conclude this essay we thus wish to sug-

235. See J. Morgan, *op cit.*, 473.

236. *Op cit.*, para. 32.

237. *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] 3 All ER 305

gest - in summary form - seven points which deserve further consideration.

First, much change has taken place in our law in recent times; and in the topic under discussion, the enactment of the Human Rights Act has proved a useful catalyst. This process is bound to continue in a linear way, reflecting the growing acceptance of the importance of privacy as a fundamental right, and all that the opponents of change can and will succeed in doing is to retard its development. In this context, we draw our readers' attention to the fact that every time a call was made to reform the law, the Press Complaints Commission (or its predecessor) complained, whinged, objected, fought against any idea of change, but, in one way or another, gave in if the public pressure was sustained and made incremental concessions. We find no evidence of these changes having made our Press less free or less wealthy.

Secondly, the change which is taking place is, in legal terms, still timid in so far as it is taking the form of an expansion of one type of remedy, that of breach of confidence. We have given our reasons *in extenso* why this way of proceeding, though understandable for lower courts, does not offer the best prospects for a principled and workable expansion of the law in the future. In our view the incremental development of the law of confidence is an inadequate, flawed, and dishonest way of proceeding with this very important task. The most recent academic literature is reflecting this view with increasing force. The time has come for our courts to pay attention to these arguments and give serious thought for a change in approach.

Thirdly, we have reached the stage where the recognition of a general right of privacy is now, technically speaking, beyond the realm of the possible or hypothetical, and could be said to be mandated by the requirements of Article 8 of the ECHR and the obligation in the Human Rights Act to give the Convention horizontal effect in the development of the common law. Many judges have, as we have seen, already prepared the ground for admitting it into our legal system. If we are moving in that direction, we submit it is better to call a spade a spade rather than have resort to subterfuges that will create their own complications. Again, in this piece we have tried to point out some of them.

Fourthly, if the time is ripe for a change, this must be brought about by the courts by virtue of the obligations imposed by the Human Rights Act given the inertia of the legislature in this context (which arguably is – and will remain – paralysed by the pressures its members are subjected to by sections of our Press). Those who argue that there is no real call or need for a change of current practices are indulging in illusion or self-delusion, as demonstrated by the *Kaye* and, more recently, the *Peck* decisions. The argument, apparently ac-

cepted by the House of Lords in *Wainwright*, that this kind of change must be left to the legislator must thus be seen for what it is: unacceptable obfuscation. The legislature simply shows no sign of acting at present. Barely a few months earlier, the Government made it clear that it had no intention of legislating on the subject, even when it had been asked to do so by a Parliamentary Committee that was chaired by a senior Labour figure. Has any government dared to legislate against the interests of the Press at a time when its popularity is waning? Is it likely to happen at a time when the Blair Government seems to be faltering on so many fronts? If there is no action by the courts to ensure adequate protection by a suitable route for an individual's privacy entitlements under Article 8, then the UK's Convention requirements will remain unfulfilled. Again, we emphasise that the most appropriate and effective route to ensure this protection given legislative inertia is to develop a free-standing privacy tort.

Fifthly all of us accept that no amount of evidence will convince those who have an interest not to be convinced. But the record, at least, can and should show that the evidence does *not* support the view that political speech, investigative journalism and even idle gossip will suffer from an enhanced protection of human privacy from unjustified intrusions by the Press.

Sixthly, we express the hope that if new departures are sanctioned (or at least tolerated) by their lordships, the opportunity will also be taken to signal to greedy celebrities that the recognition of privacy rights should not be seen as a licence to print money. For celebrities, more than others, must be reminded that an equitable legal system does not allow and will not tolerate those who wish to have their cake and eat it – for which, in the present case, read those who wish to exploit the Press when it suits them and complain when it shows an interest in them which does not conform with their own expectations. The law of defamation has, generally speaking, moved in this direction during the last ten years or so; and the related law of privacy protection should not be allowed to hit troubled waters before it settles on an even keel.

Finally, it would have been desirable if the first case to reach the House of Lords under the new regime had the clarity and significance of the *Kaye* facts. Litigation, however, is not as clean-cut and as accommodating as that. There is thus little doubt that the *Wainwright* case did not provide the ideal set of facts around which to frame a coherent law of privacy, because the worst of the invasions was potentially actionable as a battery. In other words, despite the appellant's attempt to base their case largely on privacy, there was no compelling need for the Law Lords to choose this atypical case to make such far-reaching statements about privacy.

Notwithstanding the problematic nature of this case, the judgment of the Law Lords, delivered through the pen of Lord Hoffmann, cannot be characterised as anything other than timid, tunnel-visioned, insular, and we hope short-lived. The disregard of recent writings – by practitioners as well as academics – is notable in the judgment of Lord Hoffmann which blithely assumes the adequacy of existing remedies in our law. A citation (to an excellent essay by Lord Justice Neill) tells us that English law does, indeed, protect privacy by having recourse to multiple torts, but this only makes one wonder why Lord Hoffmann feels the need to include one on this, so obvious a point?

More regrettably, Lord Hoffmann omits to mention, let alone address, the concerns voiced in the same article by Lord Justice Neill about our current law of privacy; fails to imitate him in his declared interest in foreign law; and does not cite him for his doubts about the wisdom of the Strasbourg judgment in the *Spencer* case and is only willing to follow him in his prediction that the expansion of confidentiality may hold the answer to the future. But on this point the recent doubts of practitioners and academics about the viability of confidentiality as an adequate remedy for breach of personal privacy are, again, ignored. In Lord Hoffmann's world, England thus has nothing to learn from France. The same fate is reserved for German law - an even more surprising neglect from the President of the Anglo-German Association of Jurists who, one suspects, agreed to chair the Society in the belief that we have something to learn from one another. Our Canadian relatives are, likewise, ignored - presumably for daring to do what Lord Hoffmann regards as impossible! Even American law's most daring recent moves to inhibit and penalise the obtaining of information through telephoto lens and directional microphones²³⁸ are obscured by the shadow of an old (and famous) article.²³⁹ If their lordships were not personally aware of such recent developments, they could have asked counsel to address them on these points as they did in their *Fairchild* judgments.

The above is quite an indictment of a decision from the highest court of the land. But there is more. Just as worrying is the assumption in *Wainwright* that the gradual "judicious development of an existing principle" is how the common law works, as opposed to the identification of an underlying principle and the shaping of the future evolution of the law in line with such a principle. Such an exaggerated embrace of a cautious, pragmatic approach is a remarkable abdication of the historic role of the common law courts in shaping and giving coherence to the law by the application of core principles.

238. Cal. Civ. Code s. 1708.8.

239. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy* 4 HARVARD L. REV. 193 (1890).

Analysed in this way, the *Wainwright* decision makes the English common law appear as a very tame creature when compared to its more lively Australian or Canadian counterparts. Indeed, it could even be seen as a capitulation before lazy assumptions as to the impossibility of defining a tort of privacy, couched in the language of pragmatism and deference to Parliament. If this was acceptable thirty years ago, it does not seem so now given the clear requirement imposed by the Human Rights Act for the courts to give effect in the common law to the principles and values explicitly protected in the ECHR, including the Article 8 privacy guarantee. Thus, instead of a principled approach based upon the recognition of privacy, the Law Lords have opted for the timid, obfuscating approach that has repeatedly been proved flawed, lacks clarity, and produces more not less litigation. In particular, as we have argued here *in extenso*, the reliance upon the law of confidence is likely to prove misguided and incapable of protecting the private life of individuals from illegitimate intrusion.

And one final observation. If these concluding criticisms appear too harshly phrased, it is because we all feel that the science of law is not served by excessive deference to judicial authority when it fails to perform its work in a transparent, informed, and convincing manner. Law Lords can respond with thunderbolts from their heavenly heights or, reversely, adopt a state of deafening silence towards their critics. But academics must keep reminding their students that the members of the House of Lords are not final because they are infallible, but infallible because they are final. Indeed, when it comes to privacy, the Law Lords are not even final any more: now we have the Strasbourg court as the ultimate authority in matters of human rights, who will doubtless before long decide that the timidity of the English courts is unwarranted and unjustified, as they have so many times in the past.

POSTSCRIPT

Since the completion of this article, the law of privacy in the UK continues to evolve with great rapidity, as the inadequacy of the confidence action as a remedy requires constant judicial revision to patch up its deficiencies. The House of Lords has delivered its long-awaited decision in the *Campbell* case, and by a narrow 3 to 2 majority held that the Daily Mirror violated Ms Campbell's privacy rights by its publication of photographs of her arrival at a meeting of Narcotics Anonymous.²⁴⁰ The approach taken by most of the Law Lords represents a significant step in the right direction, but still falls short of intellectual and doctrinal clarity and coherence. *Campbell* repairs

240. *Campbell v. MGN Ltd.* [2004] UKHL.

some of the defects in the evolution of the confidence remedy that have been highlighted throughout this article, but the inherent conceptual limitations of the action remain.

What is to be particularly welcomed in *Campbell* is the willingness of the majority to give a wide ambit to what can be classified as “private facts”. Lord Hoffman in his dissenting judgment still considered that photographs taken in a public place would have to reveal someone in a situation of “humiliation or severe embarrassment” before an infringement of personal privacy is established.²⁴¹ However, the three judges in the majority (all gave separate opinions) in contrast considered that information would be protected where a reasonable expectation of privacy existed on the part of the person concerned, even in public places.²⁴² Along with Lord Nicholls (in his dissenting judgment), the “highly offensive” test propounded by Lord Hoffman, the Court of Appeal in *A v B* and by Gleeson CJ in the Australian High Court in *Lenah Game Meats* was comprehensively sidelined.

Alongside this welcome expansion of the scope of the protected sphere of privacy, the majority were also willing to reject any notion of awarding free speech presumptive primacy, to use the language of privacy rights rather than the terminology of confidence, and to adopt a contextual balancing test similar to, albeit in a diluted form, that adopted by the German courts and as argued for in this article. Lady Hale was particularly willing to assess the public interest at stake in the publication of the photos in question, and to recognise that the courts should be prepared to distinguish between different levels of justification for publication and to attach a lower value to free speech claims where no genuine compelling public interest was at stake.²⁴³ Ms Campbell’s status as a public figure was also not considered to remove any privacy entitlement she may have: the *carte blanche* given by Lord Woolf in *A v B* to intrusions upon the privacy of public figures and to justifications that equate what sells with the public interest has been replaced by the tentative beginnings of the required balancing approach.

These developments are all to be welcomed. However, the conceptual distortions introduced by reliance upon the confidence action framework remain. This can be seen in the dissenting judgments, with Lord Nicholls defining protected material as “private information”, and Lord Hoffman’s emphasis upon the exceptional quality required of information obtained in a public place before it could qualify for protection. Even the majority judgments are not wholly satisfactory, with all three steering clear from any citation of relevant and

241. See para. 75.

242. See Lord Hope, para. 96; Lord Carswell, para. 166; Lady Hale 135-138.

243. See para. 148-159.

illustrative comparative jurisprudence, or any real guidance as to the application of the balancing test in other factual contexts. *Campbell* is a decision which is firmly founded upon its own facts. Lower courts are still condemned to struggle with the incoherence produced by reliance upon the confidence action, and to try to glean some vague guidance from the uncertain indicators offered by the majority. Finally, it still appears to be too easy to demonstrate sufficient public interest, with the majority accepting that a legitimate public interest existed in publicising that Ms Campbell was seeking treatment. The tentative smuggling of privacy rights via the back-door of the confidence action has resulted in a great judicial reluctance to require a strong public interest rationale for intrusive press stories.

This stands in great contrast to the ground-breaking decision of the European Court of Human Rights in *Von Hannover v Germany*²⁴⁴, which followed hot on the heels of *Campbell* and was the culmination of Princess Caroline of Monaco's decade-long campaign to assert her right to personal privacy. In this major decision, the Strasbourg court emphasised the crucial importance of privacy to individual well-being, and emphatically acknowledged the very real extent to which press intrusion can violate this essential value.

The court proceeded to find that the German balancing test gave too much leeway to press intrusions upon the lives of public figures *par excellence* (i.e. persons permanently in the public eye, *absolute Personen der Zeitgeschichte* as described above) in permitting the publication of intrusive photos of the Princess and her partner going about their daily lives. For privacy intrusions to be justified, the court considered that they must be capable of contributing to a pressing matter of public debate or concern: the curiosity of the public was deemed to be an utterly inadequate justification. *Von Hannover* puts the final nail in the coffin of the approach initially taken by the Court of Appeal in *A v B*, with its equation of public curiosity with the public interest. In its scope and readiness to grasp the nettle of ensuring adequate protection for celebrity privacy interests, it also graphically demonstrates the timidity of the *Campbell* decision. The Strasbourg court found that the approach of the German courts was not sufficient to give those exposed to unjustified press intrusion a "legitimate expectation" that their privacy rights would be upheld: given the inadequacy of the confidence remedy in comparison to the German case-law, it therefore appears inconceivable that the current English law meets the requirements of the Convention. *Wainwright* and *Campbell*, far from marking the completion of the development of a new remedy in English private law, seem now to be just staging posts on the route to the evolution of a fully fledged tort of privacy.

244. Application no. 59320/00, judgment 24 June 2004.