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An engineering company would not be vicariously liable where, without more, an employee sexually assaulted another employee on the employer's premises: carrying on an engineering business does not (as far as we know) materially increase the risk of assaults between employees on the employer's premises.

Majrowski offers limited guidance on this issue, although Lord Nicholls stated that “[i]n most cases courts should have little difficulty in applying the ‘close connection’ test”.¹¹ I am far from convinced. I strongly suspect that establishing when an employer has created, or at least increased, a risk of harassment is likely to prove troublesome.

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Wainwright v United Kingdom: Bringing Human Rights Home?

A. BRINGING HUMAN RIGHTS HOME TO ENGLAND

When the European Convention on Human Rights became directly enforceable in the United Kingdom by virtue of the Human Rights Act 1998, the government declared that it was bringing “human rights home”.¹ For the sceptical, however, the puzzle was how English law, a remedies-based system, would accommodate the Convention, a rights-based document. That conflict was particularly apparent in relation to privacy. The right to privacy was clearly within the ambit of Article 8 of the Convention, but it had not previously been protected by any specific English remedy.² Nonetheless, Lord Irvine of Lairg, the then Lord Chancellor, pronounced that the government was “not introducing a privacy statute”;³ and, although a cull of “sacred cows” was predicted,⁴ the judiciary, in varying degrees, was unpersuaded that the creation of a tort of invasion of privacy was, in the first place, within the bounds of judicial creativity or, in the second place, necessary. By 2003, Gavin Phillipson reflected in relation to privacy that the English courts had “not even gone as far as enquiring explicitly whether the common law is in harmony with the Convention, let alone determining what should be done if it is not”.⁵

And so the “P word”⁶ has remained largely unspoken in the English courts. Although

11 [2006] 3 WLR 125 at para 30.

1 HL Deb 3 Nov 1997 col 1228 (Lord Irvine of Lairg), echoing the Labour Party's 1997 manifesto pledge.

2 See *Kaye v Robertson* [1991] FSR 62; *R v Khan* [1997] AC 558; but see also *Khan v United Kingdom* (2000) 31 EHRR 1016.

3 HL Deb 3 Nov 1997 col 1229.

4 By Lord Slynn in *R v Lambert* [2002] 2 AC 545 at para 6.

5 “Towards a common law right of privacy” (2003) 66 MLR 726 at 731.

6 The expression coined by Lord Justice Sedley in “Towards a right to privacy” *London Review of Books* 8 June 2006.

Article 8 has frequently been invoked, privacy has been protected piecemeal, using extra-judicial codes of practice,⁷ statutory remedies such as under the Protection from Harassment Act 1997 and the Data Protection Act 1998, and by drawing upon a range of other torts, such as trespass, nuisance, defamation and malicious falsehood,⁸ and the law of passing off.⁹ A further, crucial, development has been the remarkable expansion of breach of confidence – in England an equitable, not a tortious, doctrine.

In the classic formulation of breach of confidence, an action lay where information: had the necessary quality of confidence; was imparted in circumstances importing an obligation of confidence; and was used in an unauthorised way to the detriment of the original party communicating it.¹⁰ However, the English courts have accommodated a wide range of privacy cases within breach of confidence by progressive reinterpretation of the second requirement (obligation of confidence). In *Attorney-General v Guardian Newspapers* (the “Spycatcher” case), Lord Goff observed that a duty of confidence could arise “in equity” between parties where there was no contractual or similar relationship,¹¹ and these remarks have formed the basis for the extension of the doctrine to situations where there is little if any previous relationship between defendant and owner of the confidential information. Private information may have been obtained by subterfuge, for example by a rogue photographer taking surreptitious photographs of an unwitting and unwilling subject.¹² Nevertheless, in the words of Lord Nicholls in the leading recent case of *Campbell v MGN*:¹³

This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship... Now the law imposes a “duty of confidence” whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.

As yet, however, breach of confidence has not proved infinitely elastic in England. The need for a pre-existing confidential relationship may have been discarded, but information must still “have the necessary quality of confidence”. The difficulty is that all that is private, meriting protection under Article 8, cannot necessarily be “shoe-horned”¹⁴ into the definition of confidential. Privacy may have been invaded in a public place, in which case it is artificial to argue that confidentiality has been breached.¹⁵ Or private information may have lost confidentiality through publication, but still be sufficiently sensitive to merit protection. And by no stretch of the most

7 E.g., under the Press Complaints Commission Code of Practice and the Ofcom Broadcasting Code.

8 *Wainwright v Home Office* [2004] 2 AC 406 at para 19 per Lord Hoffmann.

9 Penalising bogus celebrity endorsements: see *Irvine v Talksport* [2002] EMLR 32; [2003] EMLR 36 (damages).

10 *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415 at 419 per Megarry J.

11 [1990] 1 AC 109 at 281.

12 *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444; *Douglas v Hello* [2006] QB 125; *Campbell v MGN* [2004] 2 AC 457.

13 [2004] 2 AC 457 at para 14; see also H L MacQueen, “Protecting privacy” (2004) 8 EdinLR 420.

14 *Douglas v Hello* [2006] QB 125 at para 53 per Lord Phillips, echoing the term used by A Sims in “‘A shift in the centre of gravity’: the dangers of protecting privacy through breach of confidence” 2005 *Intellectual Property Quarterly* 27 at 51.

15 See, e.g., *Peck v United Kingdom* (2003) 36 EHRR 41.

flexible definition could the wrong suffered in *Wainwright v United Kingdom*,¹⁶ an inappropriate strip-search, be categorised as breach of confidence or even as “misuse of private information” (the “essence” of breach of confidence as now “encapsulated” in *Campbell*).¹⁷ Even now, therefore, breach of confidence cannot be made to do all the work of a law of privacy.

B. THE IMPLICATIONS OF *WAINWRIGHT v UNITED KINGDOM*

The Wainwrights, mother and son, pursued a claim through the English courts after suffering a humiliating strip-search during a prison visit to another son of the family in January 1997. The prison officers involved had not followed the statutory procedures for such searches, and the Wainwrights were awarded damages in Leeds County Court for trespass to the person, on the basis that they had been caused to do something which infringed their right to privacy. That award was overturned by the Court of Appeal,¹⁸ whose decision was upheld in the House of Lords.¹⁹ Their Lordships declined counsel’s invitation to declare that a tort of invasion of privacy existed,²⁰ and held that common law principle could not be extended to admit such a tort. In the absence of a general privacy tort, no other ground of liability was found,²¹ although a modest, undisputed, sum was awarded to the son under the head of battery, since he had been touched inappropriately by an officer. In Lord Hoffmann’s view, there was nothing in the court’s reading of the jurisprudence of the European Court of Human Rights to suggest “that the adoption of some high level principle of privacy is necessary to comply with article 8 of the Convention”.²²

The Wainwrights subsequently argued before the European Court of Human Rights that the strip-searches had infringed Article 3 (protecting against inhuman and degrading treatment) and Article 8 (protecting respect for private life) of the Convention. In its judgment, which was issued on 26 September 2006,²³ the Court distinguished between Article 3 and Article 8. The treatment received by the Wainwrights was not, it was said, sufficiently extreme to be regarded as “degrading” within the meaning of Article 3, but it showed inadequate respect for their private life in terms of Article 8. The Wainwrights had been visiting a member of their family in the prison. Given the background of drug abuse among inmates at the prison, body searches might in principle have been justifiable, but the prison staff had failed to observe the proper procedures to protect the dignity of those being searched. Moreover, strip-searching in this manner could not be regarded as “necessary in a democratic society”, within the meaning of Article 8(2). Consequently, the UK government had infringed

16 Case 12350/04, ECtHR, 26 Sept 2006, *The Times*, 3 Oct 2006.

17 [2004] 2 AC 457, e.g. at para 14 per Lord Nicholls.

18 [2002] QB 1334.

19 [2004] 2 AC 406.

20 Para 35 per Lord Hoffmann.

21 The Wainwrights had also argued, unsuccessfully, that they had suffered intentional infliction of distress, relying on the authority of *Wilkinson v Downton* [1897] 2 QB 57.

22 Para 32.

23 Case 12350/04, ECtHR, 26 Sept 2006, *The Times*, 3 Oct 2006.

Article 13 of the Convention (failure to provide an adequate remedy for violation of Convention rights).

Since the incident in question had occurred in 1997, before the Human Rights Act 1998 came into force, Article 8 could not be directly invoked against the authorities responsible for the prison, and no alternative avenue was available to the Wainwrights in English law. The Court noted that:²⁴

the House of Lords found that negligent action disclosed by the prison officers did not ground any civil liability, in particular as there was no general tort of invasion of privacy. In these circumstances, the Court finds that the applicants did not have available to them a means of obtaining redress for the interference with their rights under Article 8 of the Convention.

On this basis, damages were awarded to mother and son.

The problem brought into focus by *Wainwright v UK* is that privacy may be infringed in a way which violates Article 8; yet, in the absence of a general privacy tort, there are some situations in which the claimant may be left without a remedy in English law. While sections 6 and 7 of the Human Rights Act 1998 make Convention rights directly actionable against public authorities throughout the UK, that avenue is not open in disputes between private parties. Yet the European Court of Human Rights has previously ruled that Article 8 imposes a positive obligation on states “to secure respect for private life even in the sphere of the relations of individuals between themselves”.²⁵ Indeed, shortly after its decision in *Wainwright*, the House of Lords stated, in *Campbell v MGN*, that “the values underlying articles 8 and 10 are not confined to disputes between individuals and public authorities”.²⁶ The immediate problem for English lawyers is therefore how the common law can make good any further gaps in the protection of rights secured under Article 8 – and indeed other Convention rights – in disputes between individuals. This might be done by the creation of a privacy of tort, or by further decanting of privacy into other categories. The question, however, is no longer whether this development is necessary, but how it can be achieved.

C. COMPARATIVE PERSPECTIVE

In its continuing reluctance to give direct recognition to protection of privacy, England remains apart from other European jurisdictions. It is of course unlikely that Portalis and his colleagues had considered the possibility of egregious strip searches or lurid tabloid exposés when they set about composing the *Code Napoléon*. But, contrary to comparative law stereotype, in the codified systems of mainland Europe it has often been judges rather than the legislators who have led in responding to changing social and cultural expectations by developing a case law on privacy through the interstices of the Code. In France, for example, the amendment of the *Code civil* to include the right to privacy in Article 9²⁷ is widely regarded as codifying well-established

²⁴ Para 55.

²⁵ *Von Hannover v Germany* (2005) 40 EHRR 1, judgment of the court at 25, para 57.

²⁶ *Campbell v MGN Ltd* [2004] 2 AC 457 at para 18 per Lord Nicholls.

²⁷ Law 70-643 of 17 July 1970. Art 9 reads: “Chacun a droit au respect de sa vie privée. Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une atteinte à l’intimité de la vie privée...”.

judge-made law.²⁸ It is somewhat paradoxical that judicial creativity has been rather more inhibited in Europe's leading Common Law jurisdiction. Moreover, England is becoming increasingly isolated even in the Common Law family. In the jurisdictions of the United States, a law of privacy has been recognised for a century or more, the New Zealand Court of Appeal has recently resolved to call privacy exactly that,²⁹ and a Privacy Bill was laid before the Irish legislature in the summer of 2006.³⁰

D. THE FUTURE FOR PRIVACY IN SCOTS LAW

Scotland, of course, has had its own "*Wainwright*", in the form of the 1988 Outer House case of *Henderson v Fife Police*³¹ in which a woman detainee was awarded damages after being compelled to remove her bra while in police custody. Lord Jauncey's judgment takes a broad-brush approach, reasoning that this was an invasion of "privacy and liberty".³² Ironically, the central authority upon which he relied was an English case, also arising out of an inappropriate strip search – *Lindley v Rutter*.³³ Both *Henderson* and *Lindley* were apparently cited to the House of Lords in *Wainwright*, although it is not clear why their Lordships were unpersuaded by them. *Henderson* apart, there is little evidence that protection for privacy is more securely established in Scotland than in England.³⁴ Nonetheless, some important points of difference require comment.

(1) Privacy by other names: breach of confidence

Like English law, Scots law protects privacy under a variety of other names. Defamation, for instance, may be used,³⁵ although the defence of *veritas* means that much that is private is outwith its reach. Passing off may well develop along the same lines as in the English courts. However, the use of breach of confidence to make good gaps in protection of privacy is problematic. As *Wainwright* demonstrates, there are some aspects of an individual's private life which cannot be categorised as confidential information. Additionally, in Scotland, where breach of confidence is located in the law of

28 This process is analysed in R Lindon, *Les droits de la personnalité* (1974) 64-67; H Beverley-Smith et al, *Privacy, Property and Personality* (2005) 147-153. On the role of the judges in developing protection for rights of personality in German law, see R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 1092-1094; H Beverley-Smith et al, *Privacy, Property and Personality* (2005) 113: "The vague language of these [codified] provisions makes them impossible to apply by mere reference to the wording. Rather, these rules provide a frame for case-law the development of which has, in terms of legal methodology, a striking resemblance with the application of common law rules and principles."

29 *Hosking v Runting* [2005] 1 NZLR 1

30 Text available at <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2006/4406/document1.htm>.

31 1988 SLT 361; see H L MacQueen, "Protecting privacy" (2004) 8 EdinLR 249.

32 At 367-368.

33 [1981] QB 128.

34 The most positive recent statement is perhaps Lord Bonomy's observation in *Martin v McGuinness* 2003 SLT 1424 at para 28: "Of course it does not follow that, because a specific right to privacy has not so far been recognised, such a right does not fall within existing principles of the law. Significantly my attention was not drawn to any case in which it was said in terms that there is no right to privacy."

35 E.g., *Robertson v Keith* 1936 SC 29.

delict,³⁶ while there may be authority for the extension of confidentiality to a third party receiving information *knowing* it to be confidential,³⁷ there is no clear authority to extend it in the open-ended way now apparently accepted for English law by the House of Lords in *Campbell v MGN*. Indeed there is at least Outer House authority doubting the basis for such extension.³⁸

(2) Recognition of privacy in Scots Law?

As argued previously in this journal,³⁹ Scots law, unlike English law, cannot be characterised as primarily a remedy-based system, and the forms of action, which have constrained the development of new English torts, have no counterpart in Scots law. Of course, there is no disputing the substantial convergence of the English and Scots law of negligence, and the structural resemblance between the intentional delicts and the English torts as a “tangle of crisscrossing categories”.⁴⁰ However, the “intellectual superstructure”⁴¹ of the law of delict remains distinct from that of the English law of torts. The law of delict remains in the singular, and the nominate heads of liability are underpinned by general principle.⁴² Thus there are no structural reasons why the list of protected interests should be regarded as closed, and it may exceptionally be capable of further development if there are cogent reasons why a particular category should be recognised.⁴³ There is therefore no compelling need for Scots law to “shoe-horn” protection of privacy into another ill-fitting category of liability, and certainly no assistance to be derived from the law of equity in so doing. Equally, there is no fundamental reason why, if privacy requires recognition, as evidently it does in terms of Article 8, the Scots courts must share the squeamishness of the English in pronouncing the “P word”. Doing so may permit them to articulate more clearly not only the boundaries of privacy but also the important values which must be balanced against it.⁴⁴

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36 And so not, as in England, in equity. See, e.g., M Earle and N R Whitty, “Medical Law”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2006) para 299.

37 See *Lord Advocate v Scotsman Publications* 1989 SC (HL) 122 at 164 per Lord Keith.

38 *Quilty v Windsor* 1999 SLT 346 at 356 per Lord Kingarth, commenting on Lord Goff’s remarks in *Attorney General v Guardian Newspapers* (text to n 11 above).

39 N R Whitty, “From rules to discretion: changes in the fabric of Scots private law” (2003) 7 *EdinLR* 281.

40 P Birks, “Harassment and hubris” (1997) 31 *Irish Jurist* 1 at 32.

41 See H L MacQueen and W D H Sellar, “Negligence”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 2, 517 at 547.

42 K McK Norrie, “History and function of delict”, in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 15 (1996) para 213. On the development of general principle from the writings of the institutional writers, see D W McKenzie and R Evans-Jones, “The development of remedies for personal injury and death”, in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 277 at 286 ff.

43 See, e.g., *Micosta SA v Shetland Islands Council* 1986 SLT 193 at 198 per Lord Ross, under reference to D M Walker, *The Law of Delict in Scotland*, 2nd edn (1981) 9; *Report of the Committee on Privacy* (Cmnd 5012: 1972) 306: “...in Scotland it has been said that the remedy depends upon the right rather than upon the remedy as in England, and, the Scottish Court might grant a remedy in an extreme case even though the remedy had never been granted before.”

44 Notably in terms of ECHR Arts 8(2) and 10.