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# A COMMON LAW TORT OF PRIVACY? The challenges of developing a human rights tort

Paula GILIKER

*Professor of Comparative Law, University of Bristol.*

1 The interests protected by the law of tort vary considerably in character, from injury to the person to protection against wrongful harm to one's reputation. Yet, as society advances and technology permits more and more intrusion into our personal lives, the means by which harm may be perpetrated against an individual's well-being continue to evolve. Canadian judge, Sharpe JA, commented recently that "[i]nternet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information",<sup>1</sup> but that this must be balanced against the invasions they permit into our personal lives which "cry out for a remedy".<sup>2</sup> Such concerns are, in fact, far from new. In the seminal article of Warren and Brandeis in 1890, the authors commented on the fact that "[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life".<sup>3</sup> Winfield in 1931 further argued that the social exigencies of the day justified the creation of a tort of invasion of personal privacy, either by the courts or (failing that) the legislature.<sup>4</sup> Winfield warned, however, of the dangers of a "sweeping" tort and of the need to identify with some precision a legal framework determining when liability would arise. He identified a number of difficulties which continue to this day. First, how to define a new tort which seeks to protect an interest as imprecise as "privacy",<sup>5</sup> which has been variably described as one protecting our dignity, autonomy or self-esteem,<sup>6</sup> our right to identity, personal development and to establish and develop relationships with other human beings,<sup>7</sup> or simply the "right to be let alone"?<sup>8</sup> Penk and Tobin correctly describe privacy as "multidimensional" in that it may be seen as a right, a value, or a psychological state with links to human dignity and autonomy.<sup>9</sup> Secondly, how to provide criteria such that the tort may be applied with some degree of certainty and predictability? A third question also arises, however. In a modern liberal democracy, freedom of expression (and, in particular, freedom of the press) are perceived as values worthy of protection. On this basis, the right to freedom of expression is expressly recognised in a number of constitutional instruments, for example, under the First Amendment to the US

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<sup>1</sup> *Jones v Tsige* 2012 ONCA 32; (2012) 108 OR (3d) 241 at [67], *per* Sharpe JA.

<sup>2</sup> *Jones v Tsige* 2012 ONCA 32; (2012) 108 OR (3d) 241 at [69], *per* Sharpe JA.

<sup>3</sup> Samuel D Warren & Louis D Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193 at 195.

<sup>4</sup> P H Winfield, "Privacy" (1931) 47 LQR 23.

<sup>5</sup> Many attempts have been made to define "privacy" with various degrees of success, see, notably, Ruth Gavison, "Privacy and the Limits of the Law" (1980) 89 Yale LJ 421; Nicole Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628; Raymond Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1989); and Daniel J Solove, *Understanding Privacy* (Cambridge: Harvard University Press, 2008).

<sup>6</sup> See *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [51], *per* Lord Hoffmann, and *Hosking v Runting* [2004] NZCA 34; [2005] 1 NZLR1 at [239], *per* Tipping J.

<sup>7</sup> *Peck v UK* (44647/98) (2003) 36 EHRR 41 at [57]; *Pretty v UK* (2002) 35 EHRR 1 at [61].

<sup>8</sup> A phrase coined by Judge Cooley and famously cited in Samuel D Warren & Louis D Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193.

<sup>9</sup> Stephen Penk & Rosemary Tobin, "The New Zealand Tort of Invasion of Privacy: Future Directions" (2011) 19 TLJ 191. Wacks indeed argues that the search for a definition is sterile and futile in that privacy is a concept so large that it threatens to devour itself: Raymond Wacks, "The Poverty of Privacy" (1980) 96 LQR 73 at 77.

Constitution,<sup>10</sup> Art 10 of the European Convention on Human Rights<sup>11</sup> (“ECHR”), s 14 of the New Zealand Bill of Rights Act 1990<sup>12</sup> (“Bill of Rights Act”), and s 2 of the Canadian Charter of Rights and Freedoms<sup>13</sup> (“Canadian Charter”). The challenge, therefore, for a modern privacy tort is to reach an acceptable balance between protecting the right to privacy and that of the public to know. As seen in the tort of defamation, this inevitably gives rise to difficult value judgments with which both politicians and judges may be reluctant to become openly involved.<sup>14</sup>

2 In focusing on a particular evolution in the law of tort – the creation of new torts which seek to protect victims against wrongful invasions into their private lives – this article will examine the challenges this has presented to the traditional tort law framework. It will consider three common law jurisdictions where the courts have recently acknowledged to some extent a tort (or torts) protecting privacy rights: England and Wales, New Zealand and the Canadian province of Ontario. These are also jurisdictions in which rights-based instruments such as the ECHR, the Bill of Rights Act, the International Covenant on Civil and Political Rights,<sup>15</sup> the United Nations Convention on the Rights of the Child<sup>16</sup> and the Canadian Charter have influenced the shape of these new forms of tort law. In critically analysing recent developments, this article will consider how the courts have responded to the challenges of integrating human rights principles into the private law of tort and whether the current legal position indicates that, despite the reluctance of politicians to intervene, this is an area of law in which legislative intervention is not only desirable, but necessary.

## I. A TORT OF PRIVACY? THE RESPONSE OF ENGLAND AND WALES.

3 Despite the introduction of the UK Human Rights Act 1998<sup>17</sup> (“the 1998 Act”), the courts of England and Wales have continued to reject the creation of a general tort of invasion of privacy. Lord Hoffmann in *Wainwright v Home Office*<sup>18</sup> was of the view that any perceived gaps in the law could (and should) be filled by judicious development of existing causes of action such as breach of confidence or, following the introduction of the 1998 Act,

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<sup>10</sup> “Congress shall make no law ... abridging the freedom of speech, or of the press.”

<sup>11</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Eur TS No 5; 213 UNTS 221; 1953 UKTS No 71) (4 November 1950; entry into force 3 September 1953) Art 10.1: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

<sup>12</sup> 1990 No 109. “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”

<sup>13</sup> Constitution Act 1982 (Canada) Pt I. See s 2 – Fundamental Freedoms:

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

<sup>14</sup> See, for example, *Flood v Times Newspapers Ltd* [2012] UKSC 11; [2012] 2 AC 273 (revelation of potential police corruption) and the privacy case of *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554 (revelations of possible paternity of child deemed to give rise to a “difficult and sensitive balancing exercise”: at [45]).

<sup>15</sup> 16 December 1966; entry into force 23 March 1976.

<sup>16</sup> 20 November 1989; entry into force 2 September 1990.

<sup>17</sup> c 42.

<sup>18</sup> [2003] UKHL 53; [2004] 2 AC 406.

with claims under the Act for breach of Art 8 of the ECHR (right to a private life).<sup>19</sup> There was, in his view, no need to “distort” the principles of the common law.<sup>20</sup> In so doing, the House of Lords rejected any analogy with developments in US law and tellingly quoted from Sir Robert Megarry V-C in *Malone v Metropolitan Police Commissioner*:<sup>21</sup> “[I]t is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another.”<sup>22</sup>

4 The House of Lords in *Campbell v Mirror Group Newspapers Ltd*<sup>23</sup> (“*Campbell*”) in 2004 confirmed that the approach taken by English law would be to acknowledge that, following the 1998 Act, there has been a “shift in the centre of gravity” of the action for breach of confidence.<sup>24</sup> No new tort would be created, but the action for breach of confidence would be extended to include not only the divulgence of confidential information but also the unjustified publication of *private* information: in this case, a series of articles and photographs of supermodel Naomi Campbell detailing and showing her attendance at meetings of Narcotics Anonymous. In so doing, the House of Lords accepted that an action could be brought even where there was no pre-existing relationship of confidence between the individual and the party obtaining the information.<sup>25</sup> This was, however, more than a mere extension of an existing cause of action. In *OBG Ltd v Allan*,<sup>26</sup> Lord Nicholls recognised that two versions of breach of confidence now existed: the traditional action protecting secret/confidential information; and the new action which sought to protect a different interest: that of privacy.<sup>27</sup>

5 The court also took a further step in *Campbell*. Influenced by the argument that the court as a “public authority” under s 6(3) of the 1998 Act should seek to develop private law in a convention-compatible way,<sup>28</sup> this new action was found to have absorbed the rights protected by Arts 8 and 10 of the ECHR.<sup>29</sup> Buxton LJ in the later case of *McKennitt v Ash*<sup>30</sup> (“*McKennitt*”) declared that to find the rules of what he termed the new “tort of breach of

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<sup>19</sup> Sections 6 and 7 of the UK Human Rights Act 1998 (c 42) provide for civil claims against public authorities for failing to act in compliance with Convention rights.

<sup>20</sup> *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 at [52]. Lord Hoffmann was also of the view (at [51]) that it was not clear that Art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Eur TS No 5; 213 UNTS 221; 1953 UKTS No 71) (4 November 1950; entry into force 3 September 1953) had been breached in this case, but a subsequent appeal to the European Court of Human Rights found otherwise: *Wainwright v United Kingdom* (12350/04) (2007) 44 EHRR 40.

<sup>21</sup> [1979] Ch 344.

<sup>22</sup> *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 372.

<sup>23</sup> [2004] UKHL 22; [2004] 2 AC 457. This built on earlier decisions such as *Douglas v Hello! Ltd (No 1)* [2001] QB 967 and *A v B plc* [2002] EWCA Civ 337; [2003] QB 195.

<sup>24</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [51].

<sup>25</sup> This is a key requirement under the traditional action for breach of confidence: the information in question must have the necessary quality of confidence about it, the information must be imparted in circumstances importing an obligation of confidence, and there must be an unauthorised use or disclosure of that information: see *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47, *per* Megarry J.

<sup>26</sup> [2007] UKHL 21; [2008] 1 AC 1.

<sup>27</sup> *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 AC 1 at [255].

<sup>28</sup> For a debate as to the extent of this obligation on the court, see Gavin Phillipson, “Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act” (2003) 66 MLR 726 and Murray Hunt, “The ‘Horizontal Effect’ of the Human Rights Act” [1998] PL 423 (which argues for strong indirect horizontal effect).

<sup>29</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [17].

<sup>30</sup> [2006] EWCA Civ 1714; [2008] QB 73.

confidence”, the courts should look in the jurisprudence of these articles which were not merely of persuasive or parallel effect but provided the very content of the domestic tort that the English court had to enforce.<sup>31</sup>

6 From these cases, a new methodology can be identified whereby liability is determined by asking two questions:

- (a) Is there a reasonable expectation of privacy? This will be shown if the information is private in the sense that it is protected by Art 8 of the ECHR.
- (b) Where Art 8 is engaged, is interference with this right justified in all the circumstances by Art 10 of the ECHR (freedom of expression)?<sup>32</sup>

In determining whether a reasonable expectation of privacy exists, a number of factors may be relevant, for example, the attributes of the claimant; the nature of the activity in which the claimant was engaged; the place at which it was happening; the nature and purpose of the intrusion; the absence of consent and whether it was known, or could be inferred; and the effect on the claimant and the circumstances in which (and the purposes for which) the information came into the hands of the publisher.<sup>33</sup> The court will take account of all the circumstances of the case and, indeed, in many cases, the information in question may be obviously private, for example, information relating to health (as in *Campbell*), personal relationships (as in *McKennitt*) or financial matters.<sup>34</sup> At stage two, the court will have to ask whether the intrusion into the claimant’s privacy is proportionate to the public interest alleged to be served by it.<sup>35</sup> The courts take the view that Arts 8 and 10 are of equal weight.<sup>36</sup> On this basis, where the values inherent within the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary and the justifications for interfering with or restricting each right must be taken into account and the proportionality test must be applied to each.<sup>37</sup> This has been called the ultimate balancing test.<sup>38</sup>

7 This leads to an unusual pattern of legal development in which European human rights law is helping to shape national forms of actions. The action, which Lord Nicholls suggested in *Campbell* would be better encapsulated as “the tort of misuse of private information”,<sup>39</sup> has recently been acknowledged by the Court of Appeal in *Vidal-Hall v*

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<sup>31</sup> *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73 at [11].

<sup>32</sup> See *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73 at [11]; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [17]–[21]; and *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481 at [40].

<sup>33</sup> *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481 at [36]. For criticism that this gives insufficient guidance to courts, see Amedeo F Cappuccio, “The Private Nature of Information” [2014] IPQ 159.

<sup>34</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [136]. See also *Tugendhat and Christie: The Law of Privacy and the Media* (Mark Warby, Nicole Moreham & Iain Christie eds) (Oxford: Oxford University Press, 2nd Ed, 2011) at paras 5.28–5.79.

<sup>35</sup> See *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [14], *per* Eady J.

<sup>36</sup> *Re S (a child)* [2004] UKHL 47; [2005] 1 AC 593 at [17], *per* Lord Steyn.

<sup>37</sup> *Re S (a child)* [2004] UKHL 47; [2005] 1 AC 593 at [17], *per* Lord Steyn.

<sup>38</sup> See generally *Clerk and Lindsell on Torts* (Michael A Jones, Anthony Dugdale & Mark Simpson gen eds) (London: Sweet and Maxwell, 21st Ed, 2014) at para 27-44: “Balancing art 8 and art 10”.

<sup>39</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [14].

*Google Inc*<sup>40</sup> to be correctly labelled as a tort. The English courts have thus created a distinctive form of tort law which differs both in character and focus from traditional causes of action. This pattern of legal development also differs, as will be shown below,<sup>41</sup> from the incremental development of new forms of tort law in other common law jurisdictions.

## II. PRIVACY TORTS IN OTHER COMMON LAW JURISDICTIONS: THE US, NEW ZEALAND AND ONTARIO

### A. *The US*

8 Other common law jurisdictions have been willing to create new torts which protect privacy interests and the most well known – and indeed the inspiration for developments in New Zealand and Ontario which will be examined below<sup>42</sup> – is the law stated in the US *Restatement (Second) of Torts*<sup>43</sup> (“US Restatement”). Section 652A identifies four types of intrusion against which the law should offer some protection:<sup>44</sup>

- (a) unreasonable intrusion upon the seclusion of another, as stated in 652B; or
- (b) appropriation of the other's name or likeness, as stated in 652C; or
- (c) unreasonable publicity given to the other's private life, as stated in 652D; or
- (d) publicity that unreasonably places the other in a false light before the public.

9 The US approach, therefore, is to address invasion of privacy rights by means of four separate torts which protect distinct (if overlapping) interests. While the English action for misuse of private information may be seen to resemble the protection provided by section 652A(c), important differences exist. Section 652D provides that:

... one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

The US Restatement therefore uses the “highly offensive” test as a limiting factor, reflecting concerns that the law of tort should not unduly restrict freedom of expression, as protected by the First Amendment to the US Constitution. This limitation is not one, however, which the English courts have adopted. Lord Nicholls in *Campbell* argued that such a test should be used with caution as it represented a stricter test than that of reasonable expectation of privacy,<sup>45</sup> although it might be relevant to proportionality during the stage two exercise of balancing Arts 8 and 10.<sup>46</sup> This test has nevertheless proven influential elsewhere in the common law world, notably in New Zealand and Ontario where the courts have shown

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<sup>40</sup> [2015] EWCA Civ 311 (albeit in the context of the rules providing for service of proceedings out of the jurisdiction). The Court of Appeal held nevertheless that while the actions for breach of confidence and misuse of private information rested on different legal foundations and it was helpful to label the latter correctly, the courts were not creating a new cause of action: *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 at [51].

<sup>41</sup> See paras 8-18 below.

<sup>42</sup> See paras 10-18 below.

<sup>43</sup> American Law Institute, *Restatement (Second) of Torts* (American Law Institute, 1977).

<sup>44</sup> Note the influence of Prosser, notably in William L Prosser, “Privacy” (1960) 48 Cal L Rev 383, on US privacy law. See also Neil M Richards & Daniel J Solove, “Prosser’s Privacy Law: A Mixed Legacy” (2010) 98 Cal L Rev 1887.

<sup>45</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [22]. Contrast, however, the views of Lord Hope: at [94].

<sup>46</sup> See also *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481 at [26].

themselves to be far more willing to recognise distinct torts protecting individuals against invasions into their privacy.<sup>47</sup> No jurisdiction, however, has adopted a general privacy tort.

### **B. New Zealand**

10 In New Zealand, the courts in *Hosking v Runting*<sup>48</sup> (“*Hosking*”) and more recently in *C v Holland*<sup>49</sup> have accepted the need for common law torts which protect against the wrongful publication of private information and intrusion into one’s private affairs.<sup>50</sup> Indeed, in the 2004 decision of *Hosking*, the majority of the court established a two-stage test for breaches of informational privacy. The plaintiff must prove:

- (a) the existence of facts of which there is a reasonable expectation of privacy;  
*and*
- (b) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.<sup>51</sup>

11 It added that there should be available a defence enabling publication to be justified by a legitimate public concern in the information. This would ensure that the scope of privacy protection did not exceed the limits on freedom of expression as justified in a free and democratic society.<sup>52</sup> Such developments build on existing case law<sup>53</sup> and statutes,<sup>54</sup> but also international treaties to which New Zealand is a party.<sup>55</sup> Despite the absence of any express right to privacy in the Bill of Rights Act,<sup>56</sup> an incremental approach is adopted to create a new tort with its own specific requirements. In *C v Holland*, Whata J argued that it was “functionally appropriate” to extend the common law to establish a second tort equivalent to the US Restatement section 652B tort of intrusion upon seclusion. In this case, Holland had secretly videoed his flatmate’s girlfriend while showering and kept the video on his laptop, but had not distributed or publicised the video in any way. His counsel therefore argued that,

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<sup>47</sup> Contrast, however, Australia where in *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199 the High Court of Australia held that the question of a privacy tort has yet to be resolved with finality. See also Kit Barker *et al*, *The Law of Torts in Australia* (Australia: Oxford University Press, 5th Ed, 2012) at pp 392–393.

<sup>48</sup> [2004] NZCA 34; [2005] 1 NZLR 1.

<sup>49</sup> [2012] NZHC 2155; [2012] 3 NZLR 672 (*Hosking v Runting* [2004] NZCA 34; [2005] 1 NZLR 1 had left open the question whether an intrusion tort should be recognised: at [118]).

<sup>50</sup> Note also the 2010 report of the New Zealand Law Commission on privacy law (New Zealand, Law Commission, *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3* (NZLC R113, February 2010)) which recommended that the tort of invasion of privacy be left to be developed by the courts.

<sup>51</sup> *Hosking v Runting* [2004] NZCA 34; [2005] 1 NZLR 1 at [117].

<sup>52</sup> *Hosking v Runting* [2004] NZCA 34; [2005] 1 NZLR 1 at [129]–[135]. This places the burden of proof on the defendant to provide evidence of the concern in question. See also *Aubry v Editions Vice-Versa* [1998] 1 SCR 591 (Canada).

<sup>53</sup> *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *P v D* [2000] 2 NZLR 591.

<sup>54</sup> See, for example, the Privacy Act 1993 (1993 No 28), Broadcasting Act 1989 (1989 No 25) and the New Zealand Bill of Rights Act 1990 (1990 No 109).

<sup>55</sup> *Eg*, privacy rights in Art 17 of the International Covenant on Civil and Political Rights (16 December 1966; entry into force 23 March 1976) and Art 16 of the United Nations Convention on the Rights of the Child (20 November 1989; entry into force 2 September 1990).

<sup>56</sup> Section 21 of the New Zealand Bill of Rights Act 1990 (1990 No 109) confers a right to be secure against unreasonable search and seizure, but the Act does not incorporate a general right to privacy: *Lange v Atkinson* [2000] 3 NZLR 385 at 396.

in the absence of publicity of private information, the facts fell outside *Hosking*. The court refused to deny the plaintiff a claim, arguing that a tort of intrusion upon seclusion was, in view of case law development, entirely compatible with and a logical adjunct to the *Hosking* tort of wrongful publication of private facts and consistent with the role of the common law to adapt in the light of a changing social context.<sup>57</sup> This new tort would thus reflect both the influence of the US Restatement but also the case law of the domestic court. It requires:

- (a) an intentional and unauthorised intrusion;
- (b) into seclusion (namely intimate personal activity, space or affairs);
- (c) involving infringement of a reasonable expectation of privacy; *and*
- (d) that is highly offensive to a reasonable person.<sup>58</sup>

The latter two requirements mirror the *Hosking* test. Whata J added that a legitimate public concern in the information would provide a defence to the privacy claim.<sup>59</sup>

12 The New Zealand courts are thereby constructing, incrementally, a tortious framework for the protection of privacy interests. Whata J rejected the *Campbell* reasonable expectation of privacy test as “not sufficiently prescriptive”,<sup>60</sup> preferring a test which set out clear criteria for liability and which would thus set a boundary for judicial intervention. Both courts recognised that the importance of freedom of expression signified that any tort of privacy must be tightly confined.<sup>61</sup> On this basis, the requirement that publication would be “highly offensive” to a reasonable person and the defence of legitimate public concern were deemed necessary to ensure that appropriate respect would be given to this right which is expressly acknowledged in the Bill of Rights Act. This does, however, create a division between the approach taken in New Zealand and that adopted in England and Wales. In *Hosking*, photographs taken of a celebrity couple’s 18-month-old twins in the street without their accompanying mother’s knowledge or consent were not found to satisfy the twofold test. The court was not convinced that a person of ordinary sensibilities would find the publication of these photographs, taken in a public place and not disclosing anything more than could have been observed by any member of the public on that day, highly offensive or objectionable even bearing in mind that young children were involved. In contrast, in *Murray v Express Newspapers plc*<sup>62</sup> photographs taken of author JK Rowling’s 19-month-old son on a family outing in a public street did raise an arguable case for liability. In this instance, Art 8 of the ECHR may be seen to have encouraged the English court to adopt a more generous approach to the claimant’s right to privacy in contrast to a system influenced by the US Restatement which places greater weight on freedom of expression (as protected by the First

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<sup>57</sup> *C v Holland* [2012] NZHC 2155; [2012] 3 NZLR 672 at [75]. See also *Faesenkloet v Jenkin* [2014] NZHC 1637 in which the court stressed the common elements of both torts and, indeed, questioned the need for two separate torts.

<sup>58</sup> *C v Holland* [2012] NZHC 2155; [2012] 3 NZLR 672 at [94]. The requirements are similar but not identical to section 652B of the US *Restatement (Second) of Torts*:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

<sup>59</sup> Following *Hosking v Runting* [2004] NZCA 34; [2005] 1 NZLR 1 at [134].

<sup>60</sup> *C v Holland* [2012] NZHC 2155; [2012] 3 NZLR 672 at [97].

<sup>61</sup> *Hosking v Runting* [2004] NZCA 34; [2005] 1 NZLR 1 at [130].

<sup>62</sup> [2008] EWCA Civ 446; [2009] Ch 481.



Amendment to the Constitution) in privacy actions.<sup>63</sup> It is clear that the different legal framework within which each system operates has led to divergence in decision-making in privacy actions.

### C. Ontario

13 Ontario provides a third example of incremental common law development of a limited privacy tort. In *Jones v Tsige*<sup>64</sup> (“*Tsige*”), the Court of Appeal for Ontario was prepared to recognise a tort of intrusion upon seclusion.<sup>65</sup> In reaching this conclusion, the court made express reference to the US Restatement and other domestic provisions, notably case law under the Canadian Charter which, in the court’s view, provided significant support for the recognition of a specific tort protecting against intrusion upon seclusion. Charter jurisprudence, in particular, was found to have already specifically identified as worthy of protection a right to informational privacy, despite the fact that the Canadian Charter contains no provision which explicitly protects the right to privacy.<sup>66</sup> The test adopted again reflects US influences, namely the plaintiff must show that:

- (a) the defendant’s conduct was intentional or reckless;
- (b) the defendant invaded the plaintiff’s private affairs or concerns without lawful justification; *and*
- (c) a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.<sup>67</sup>

14 In this case in which the defendant had examined the plaintiff’s private bank records at least 174 times, apparently out of curiosity arising from the fact that the defendant was in a relationship with the plaintiff’s ex-husband, the court noted that the law of Canada seemed to be drifting closer to the American model.<sup>68</sup> In view of explicit recognition of a right to privacy as underlying specific Charter rights and freedoms<sup>69</sup> and the principle that the common law should be developed in a manner consistent with Charter values, it was time to recognise a civil action for damages for intrusion upon seclusion. Such a move “would amount to an incremental step that is consistent with the role of [the] court to develop the common law in a manner consistent with the changing needs of society”.<sup>70</sup>

15 In so doing, the Canadian court again was keen to stress the limits of this new action. It will be confined to deliberate and significant invasions of personal privacy, and intrusions which (viewed objectively on the reasonable person standard) would be described as “highly

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<sup>63</sup> Query too much weight in that commentators have noted the shockingly low success rate for actions for wrongful intrusion and disclosure in the US: see, for example, David Anderson, “The Failure of American Privacy Law” in *Protecting Privacy* (Basil S Markesinis ed) (Oxford: Oxford University Press, 1999); Diane Zimmerman, “Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort” (1983) 68 Cornell L Rev 291.

<sup>64</sup> 2012 ONCA 32; (2012) 108 OR (3d) 241.

<sup>65</sup> The position in Ontario concerning privacy should be contrasted with other provinces such as British Columbia, Saskatchewan, Manitoba and Newfoundland which have made statutory provision for a civil cause of action. For example, see the British Columbia Privacy Act (RSBC 1996, c 373).

<sup>66</sup> *Jones v Tsige* 2012 ONCA 32; (2012) 108 OR (3d) 241 at [39]–[46].

<sup>67</sup> *Jones v Tsige* 2012 ONCA 32; (2012) 108 OR (3d) 241 at [71].

<sup>68</sup> See Allen M Linden & Bruce Feldthusen, *Canadian Tort Law* (Toronto: LexisNexis, 9th Ed, 2011) at p 59.

<sup>69</sup> *Eg*, s 8 of the Canadian Charter of Rights and Freedoms on protection against unreasonable search and seizure.

<sup>70</sup> *Jones v Tsige* 2012 ONCA 32; (2012) 108 OR (3d) 241 at [65], *per* Sharpe JA.

offensive”. On this basis, the court believed that proper weight could also be given to the constitutional value of free expression on matters of public interest and that there was no risk of the floodgates being opened to a multitude of claims.<sup>71</sup> Further, absent proof of actual pecuniary loss, damages awards should be modest and awards of aggravated and punitive damages, while not excluded, should not be encouraged either.<sup>72</sup>

16 In New Zealand and Ontario, therefore, the courts have been prepared to address what they perceived as a gap in the law by developing the law of tort to provide compensation for those whose privacy has been invaded. In neither case was the “reticence” of Parliament in failing to legislate deemed a valid reason for failing to develop the common law to fill this gap.<sup>73</sup> Tipping J in *Hosking* was in no doubt that it was:<sup>74</sup>

... legally preferable and better for society’s understanding of what the Courts are doing to achieve the appropriate substantive outcome under a self contained and stand-alone common law cause of action to be known as invasion of privacy.

The torts which follow, however, possess strict requirements with concern being expressed to limiting their scope and giving some level of predictability and certainty. Importance is also placed on ensuring that freedom of expression is still seen to be valued as a right inherent in a liberal democracy.

17 Such an approach presents an obvious contrast to the apparent timidity of the English courts until recently to recognise a new tort protecting against intrusions into informational privacy. The preference instead to “shoehorn”<sup>75</sup> protection into the existing action for breach of confidence rather than create a new tort does suggest a reluctance to engage in change, and yet the practical effect of the courts’ decisions has been to offer protection against photographs taken in public places<sup>76</sup> and even award super-injunctions (that is, interim non-disclosure orders which prohibit disclosure of even the fact that an injunction has been granted) which necessitated the publication of *Practice Guidance*<sup>77</sup> by the courts to regulate their use in view of freedom of expression concerns.<sup>78</sup>

18 It is submitted that in all these jurisdictions the common law courts have been developing the law to meet the changing needs of society, but that in view of the different legal framework, this has led to very different approaches. For Canada and New Zealand, legal development by analogy and incrementally represents the typical “common law” method of legal evolution in which the legislator is only to be called upon when necessary to resolve matters the courts are unable to resolve themselves. It is England and Wales which is the outlier, and the reason for this lies with the impact of the ECHR on private law legal development.

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<sup>71</sup> *Jones v Tsige* 2012 ONCA 32; (2012) 108 OR (3d) 241 at [72].

<sup>72</sup> *Jones v Tsige* 2012 ONCA 32; (2012) 108 OR (3d) 241 at [87]–[88]. Proof of harm to a recognised economic interest is not, however, an element of the cause of action.

<sup>73</sup> See *C v Holland* [2012] NZHC 2155; [2012] 3 NZLR 672 at [88] (“[I]t is the function of the Courts to hear and determine claims by litigants seeking to vindicate alleged rights or correct alleged wrongs”) and *Jones v Tsige* 2012 ONCA 32; (2012) 108 OR (3d) 241 at [54].

<sup>74</sup> *Hosking v Runtig* [2004] NZCA 34; [2005] 1 NZLR 1 at [246].

<sup>75</sup> *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125 at [96].

<sup>76</sup> As seen in the cases brought by Naomi Campbell and on behalf of J K Rowling’s son and, more recently, that of *Weller v Associated Newspapers Ltd* [2014] EWHC 1163.

<sup>77</sup> *Practice Guidance: Interim Non-Disclosure Orders* [2012] 1 WLR 1003.

<sup>78</sup> *Terry v Persons Unknown* [2010] EWHC 119; [2010] 1 FCR 659.

### III. THE PROBLEMS OF CREATING A (EUROPEAN) HUMAN RIGHTS TORT IN A COMMON LAW SYSTEM OF TORTS.

19 In developing tort law, the common law has traditionally demonstrated a reluctance to engage in radical legal development. In the words of Brennan J, “[i]t is preferable, in my view, that the law should develop ... incrementally and by analogy with established categories”.<sup>79</sup> One sees, therefore, emphasis on categorisation and the identification of tests which are able to determine the scope and limits of liability without undermining the stability of the current legal position.<sup>80</sup> This approach is reflected in the case law examined above:<sup>81</sup> the courts rejecting a tort of privacy *per se* as far too vague and broad-ranging, but accepting that *aspects* of privacy are worthy of protection, notably the publication of private or personal information and intrusion into the private affairs of another. Lisa Austin has identified in the context of privacy a palpable “containment anxiety”<sup>82</sup> in which courts try to juggle an obvious need to provide some action against privacy invasion against its fears of an ill-defined and amorphous action which unduly restricts freedom of expression. This leads, in her view, to a preference for protecting privacy rights by expanding existing causes of action or at least by proceeding incrementally. In particular, she finds a general distrust of high-level principle.<sup>83</sup> Her analysis does appear to be relevant to the common law systems in this article. Austin argues that containment anxiety has encouraged the courts to require that the publication of private facts be highly offensive (US, New Zealand and Ontario), that other values (such as freedom of expression) should be privileged (US) and to resort to existing causes of action (England and Wales). On this basis, it is not surprising that a common law academic, such as Mulheron, in advocating a tort of privacy in England and Wales, prefers to follow the path taken in New Zealand and the US and propose a tort which protects particular, defined interests such as territorial privacy, privacy of the person and informational privacy.<sup>84</sup> Arguably in a world without the ECHR and the 1998 Act, this is exactly what would have happened. However, as both a signatory to the ECHR and by virtue of national legislation, England and Wales has evolved a “tort” of misuse of private information which, unlike its New Zealand and Ontario counterparts, is not merely an incremental development of national case law and legislation influenced by international conventions and contemporary policy concerns, but one whose content is embodied in the tensions between Arts 8 and 10 of the ECHR.<sup>85</sup> The English common law is developing a tort of privacy incrementally, but under the influence of the ECHR and, by virtue of s 2(1) of the 1998 Act, the case law of the European Court of Human Rights (“ECtHR”). This causes an inevitable divergence in the common law world. It is to Strasbourg, not Auckland or Toronto, to which the English judges must turn. What is created is a distinct cause of action.

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<sup>79</sup> *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43; (1985) 157 CLR 424 at 481.

<sup>80</sup> For criticism, see Ken Oliphant, “Against Certainty in Tort Law” in *Tort Law: Challenging Orthodoxy* (Stephen G A Pitel, Jason W Neyers & Erika Chamberlain eds) (Oxford: Hart Publishing, 1st Ed, 2013) which argues that the pursuit of “bright lines” rules of tortious liability may, in reality, lead to unjust results.

<sup>81</sup> See paras 3-16 above.

<sup>82</sup> Lisa M Austin, “Privacy and Private Law: The Dilemma of Justification” (2010) 55 McGill LJ 165.

<sup>83</sup> Lisa M Austin, “Privacy and Private Law: The Dilemma of Justification” (2010) 55 McGill LJ 165 at 175. See, for example, *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 at [18], *per* Lord Hoffmann.

<sup>84</sup> Rachael Mulheron, “A Potential Framework for Privacy? A Reply to *Hello!*” (2006) 69 MLR 679 at 713.

<sup>85</sup> In *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [17], Lord Nicholls recognised that, following the UK Human Rights Act 1998 (c 42), “[t]he time has come to recognise that the values enshrined in Articles 8 and 10 are now part of the cause of action for breach of confidence”.

20 Yet this new cause of action faces a number of difficulties which do not arise in other common law jurisdictions.<sup>86</sup> First, it must identify the extent to which ECHR case law will influence the application of the two-stage test for liability. Secondly, it must seek to integrate this new tort within the existing system of nominate torts. The challenges this presents for the courts of England and Wales will be examined in more detail below.<sup>87</sup>

**A. Applying a “human rights” tort.**

21 In examining the nature of the English cause of action, it is necessary first of all to outline the distinctive nature of Art 8 ECHR rights.<sup>88</sup> The Art 8 right to a private life is a qualified right. Paragraph 2 provides that:

there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

By its very nature, therefore, Art 8 envisages a balancing of competing rights, none of which is predominant, in determining whether the interference with Art 8 is lawful and a necessary or proportionate response. It has also been found to create negative and positive obligations on the State, to abstain from arbitrary interference in private or family life, but also to adopt measures designed to secure respect for private life even in private disputes.<sup>89</sup> While the State has a margin of appreciation in choosing the means by which to secure compliance with Art 8,<sup>90</sup> the nature of the State’s obligation will depend on the particular aspect of private life that is at issue.<sup>91</sup> This position does signify, however, that there remains a lack of clarity as to the nature and extent of the positive obligations imposed by Art 8.<sup>92</sup>

22 Such a framework, in contrast to the other common law jurisdictions discussed above, entails that freedom of expression has equal, but no more, importance compared to that of the right to a private life. This is inherent in the two-stage test for the misuse of private information action and serves to distinguish the English tort. Yet the differences from other common law jurisdictions are more fundamental. Section 2(1) of the 1998 Act requires the court to “take into account” case law of the ECtHR in interpreting ECHR rights and this means that in applying the two-stage test, the courts are expected to, at least, refer to

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<sup>86</sup> Save, of course, the Republic of Ireland. The Irish courts have developed a constitutional right to privacy on the basis of Art 40.3.1 of the 1937 Constitution under which the State guarantees to respect, defend and vindicate the personal rights of the citizen.

<sup>87</sup> See paras 21-36 below.

<sup>88</sup> See generally David Harris *et al*, *Harris, O’Boyle, and Warbrick: Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 3rd Ed, 2014) ch 12.

<sup>89</sup> *X and Y v The Netherlands* (8978/80) (1986) 8 EHRR 235 at [23].

<sup>90</sup> See *Handyside v UK* (A/24) (1979–1980) 1 EHRR 737. A wide margin of appreciation will exist in cases where the State is required to strike a balance between competing private and public interests or rights set out in the Convention for the Protection of Human Rights and Fundamental Freedoms (Eur TS No 5; 213 UNTS 221; 1953 UKTS No 71) (4 November 1950; entry into force 3 September 1953) (*Evans v UK* (6339/05) (2008) 46 EHRR 34), although the court has indicated that where the interference involves a most intimate aspect of private life, the margin allowed to the State will be narrowed: *Söderman v Sweden* (5786/08) (2014) 58 EHRR 36 at [79].

<sup>91</sup> *Söderman v Sweden* (5786/08) (2014) 58 EHRR 36. See also *X and Y v the Netherlands* (8978/80) (1986) 8 EHRR 235 at [24]; *Von Hannover v Germany* (No 2) (40660/08) (2012) 55 EHRR 15 at [104].

<sup>92</sup> David Harris *et al*, *Harris, O’Boyle, and Warbrick: Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 3rd Ed, 2014) at p 533.

Strasbourg case law for guidance. In this field, the ECtHR's decision in *Von Hannover v Germany*<sup>93</sup> ("Von Hannover") has proven to be of particular importance. Here, the ECtHR extended the protection provided by Art 8 and found that the publication of photographs of Princess Caroline of Monaco enjoying such innocuous activities as shopping or playing tennis violated her Art 8 rights even when the photographs were taken in a public place. The court found that there was "a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'".<sup>94</sup> Buxton LJ in *McKennitt* commented that to identify the content of Arts 8 and 10 rights, "we do have to look to *Von Hannover*".<sup>95</sup> It seems clear, therefore, that citation of ECtHR case law will be necessary in English cases, particularly in determining the scope and application of the misuse of private information action.

23 This raises problems, both practical and political. The judgments of the ECtHR are often orientated to the facts of a particular case, giving little general guidance. Lord Mance warned in *Rabone v Pennine Care NHS Trust*<sup>96</sup> that individual decisions of the ECtHR would rarely respond well to the "same close linguistic analysis that a common lawyer would give to, binding precedents". A good example may be found in relation to Art 8 itself where the Strasbourg court has consistently refused to provide a clear definition of the meaning of the term "private life". In *Reklos v Greece*<sup>97</sup> ("*Reklos*"), it stated that:<sup>98</sup>

... according to its case-law 'private life' is a broad concept not susceptible to exhaustive definition. The notion encompasses the right to identity ... and the right to personal development, whether in terms of personality ... or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees.

Article 8 has been rightly described as "the least defined and most unruly of the rights enshrined in the Convention".<sup>99</sup> ECtHR judge, Mahoney, recently acknowledged that when it comes to balancing conflicting rights, Strasbourg rarely gives a concrete answer and can at

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<sup>93</sup> (2005) 40 EHRR 1. Note also the European Court of Human Rights' subsequent decisions in *Von Hannover v Germany (No 2)* (40660/08) (2012) 55 EHRR 15 and *Axel Springer AG v Germany* (39954/08) (2012) 55 EHRR 6, cited in recent case law such as *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 at [31] and *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 at [52].

<sup>94</sup> *Von Hannover v Germany* (2005) 40 EHRR 1 at [50]. For criticism, see Gavin Phillipson, "The 'Right' to Privacy in England and Strasbourg Compared" in *New Dimensions in Privacy Law: International and Comparative Perspectives* (Andrew T Kenyon & Megan Richardson eds) (Cambridge: Cambridge University Press, 2006).

<sup>95</sup> *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73 at [64], thereby dismissing the earlier authority of the Court of Appeal in *A v B* [2002] EWCA Civ 337 in a somewhat questionable use of precedent: see Nicole Moreham, "Privacy and Horizontality: Relegating the Common Law" (2007) 123 LQR 373. This should be compared with *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465: in the event of a conflict between a decision of the Supreme Court and the European Court of Human Rights, lower courts must follow the former.

<sup>96</sup> [2012] UKSC 2; [2012] 2 AC 72 at [123].

<sup>97</sup> (1234/05) [2009] ECHR 200; [2009] EMLR 290.

<sup>98</sup> *Reklos v Greece* (1234/05) [2009] ECHR 200; [2009] EMLR 290 at [39]. See also *Peck v UK* (44647/98) (2003) 36 EHRR 41 at [57] and *Pretty v UK* (2002) 35 EHRR 1 at [61].

<sup>99</sup> *R (on the application of Wright) v Secretary of State for Health* [2006] EWHC 2886; [2007] 1 All ER 825 at [60], per Stanley Burton J.

best only provide a source of guidance as to the philosophy, values or considerations to be weighed in the balance by national courts when applying their own domestic law.<sup>100</sup>

24 Such uncertainty is exacerbated by the status of the ECHR as a “living instrument”,<sup>101</sup> that is, one which evolves over time in response to changes in society across the democracies of Europe. This ensures that the ECHR, first drafted in 1950, responds to contemporary concerns, but also signifies that its meaning is never static and that the Strasbourg court is encouraged (backed by the absence of any doctrine of precedent) to develop the law proactively which, in the view of the majority of commentators, requires the court to act to enhance further the content of human rights.<sup>102</sup> While such flexibility may seem desirable in terms of changing social and economic concerns, it can raise problems in determining exactly what the Strasbourg position is on matters such as the balance between the right to privacy and the right to freedom of expression. In *Von Hannover*, as indicated above, the Strasbourg court suggested a very broad interpretation of privacy, but in a second case brought by Princess Caroline (*Von Hannover v Germany (No 2)*)<sup>103</sup> a slightly different approach to the same complaint can be identified: the publication of photographs taken in a public place. In the second case, the Strasbourg court appeared to be willing to place more weight on freedom of expression and was prepared to accept the argument that a photograph of Princess Caroline on a skiing holiday did not violate Art 8 on the somewhat generous ground that it was linked to a discussion regarding the health of her father, Prince Rainier of Monaco.<sup>104</sup> This was deemed to be consistent with its earlier view that an initial essential criterion was that such photographs should contribute to a debate of general interest.

25 These cases do indicate that the very nature of the case law of the ECtHR will often render it difficult for a common law court to find clear guidance. Some commentators, notably politicians, have also questioned to what extent the Strasbourg court *should* inform our interpretation of privacy rights. Does, in other words, a duty to “take into account” Strasbourg decisions indicate that the English courts are obliged to follow its rulings? While the *Ullah* principle (stated by Lord Bingham) indicates that the duty of the national court “is to keep pace with the Strasbourg jurisprudence as it evolves over time, no more, but certainly no less”,<sup>105</sup> the impact of the *Ullah* principle on judicial reasoning, particularly in the UK Supreme Court, remains a matter for debate.<sup>106</sup> To what extent may English law provide its own gloss on the application of Arts 8 and 10 rights? Is it obliged to follow the interpretation

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<sup>100</sup> Paul Mahoney, “The Relationship between the Strasbourg Court and the National Courts” (2014) 130 LQR 568 at 578.

<sup>101</sup> See Judge Garlicki in *Van Colle v United Kingdom* (7678/09) (2013) 56 EHRR 23 and *Tyrer v United Kingdom* (5856/72) (1979–1980) 2 EHRR 1 at 31.

<sup>102</sup> Bernadette Rainey, Elizabeth Wicks & Clare Ovey, *Jacobs, White and Ovey: the European Convention on Human Rights* (Oxford: Oxford University Press, 6th Ed, 2014) at p 74.

<sup>103</sup> (40660/08) (2012) 55 EHRR 15. See also *Axel Springer AG v Germany* (39954/08) (2012) 55 EHRR 6 and *Von Hannover v Germany (No 3)* (8772/10) (2013) ECHR 264 at [50] where the court has indicated a more “light touch” form of supervision to privacy claims, whereby only serious reasons would lead it to substitute its own view for that of the national court.

<sup>104</sup> See Elspeth Reid, “Rebalancing Privacy and Freedom of Expression” (2012) 16 Edin L Rev 253.

<sup>105</sup> *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 at [20], stating the so-called “mirror principle”.

<sup>106</sup> See *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657 at [70], *per* Lord Neuberger. This question is further discussed in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] AC 271, notably by Lord Mance (at [25]–[27]) and Lord Sumption (at [121]).

(and balance reached) by the Strasbourg court?<sup>107</sup> Lord Sumption, speaking extra-judicially, questioned the extent to which matters of legitimate national debate are now being resolved by an external court:<sup>108</sup>

This perfectly straightforward provision [Article 8] was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, and a great deal else besides. None of these extensions are warranted by the express language of the Convention, nor in most cases are they necessary implications ... The effect of this kind of judicial lawmaking is in constitutional terms rather remarkable. It is to take many contentious issues which would previously have been regarded as questions for political debate, administrative discretion or social convention and transform them into questions of law to be resolved by an international judicial tribunal.

26 While not all judges are as critical as Lord Sumption,<sup>109</sup> there is clearly concern that the formulation of legal policy is being determined in Strasbourg, not in England and Wales. This debate has received particular attention in the light of the political furore created by the prisoners' rights debate, that is, whether the UK would be bound to follow the view of the Strasbourg court that prisoners should be given the right to vote.<sup>110</sup> Indeed, the policy of the Conservative Party (having won the UK general election in May 2015) is to repeal the 1998 Act and replace the ECHR with a *British* Bill of Rights.<sup>111</sup>

27 Political jostling aside, these constitutional debates do have relevance to the application of substantive law. In developing a cause of action whose content reflects ECHR rights, the courts must consider to what extent privacy protection in England and Wales should be consistent with the interpretation of Art 8 by the Strasbourg court. As Phillipson has noted, this question arose immediately as commentators sought to ascertain how to reconcile the protection granted in *Campbell* to a celebrity photographed in the street with the more generous treatment of Princess Caroline of Monaco in *Von Hannover*.<sup>112</sup> It was the influence of *Von Hannover* arguably which led to the more privacy-friendly treatment of

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<sup>107</sup> See, for example, Jane Wright, "Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights" [2009] PL 595; Brenda Hale, "*Argentoratium locutum*: Is Strasbourg or the Supreme Court Supreme?" (2012) 12 HRLR 65; and Roger Masterman, "Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?" [2004] PL 725.

<sup>108</sup> Lord Sumption, "The Limits of Law" 27th Sultan Azlan Shah Lecture, Kuala Lumpur (20 November 2013) at pp 7–8. Note also the concerns expressed in Lord Hoffmann, "The Universality of Human Rights" (2009) 125 LQR 416.

<sup>109</sup> Contrast, for example, the speech of Lady Hale, "What's the Point of Human Rights?" The Warwick Law Lecture (28 November 2013).

<sup>110</sup> See *Hirst v UK* (74025/01) (2006) 42 EHRR 41, discussed in Tom Lewis, "'Difficult and Slippery Terrain': Hansard, Human Rights and *Hirst v UK*" [2006] PL 209. Former UK Justice Secretary, Chris Grayling, has argued that it is a "totemic issue" that shows how the European Court of Human Rights has "lost democratic acceptability": Owen Bowcott, "Conservatives Clash over European Court Ruling on Prisoner Voting Rights" *Guardian* (20 November 2013).

<sup>111</sup> United Kingdom, Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014).

<sup>112</sup> Gavin Phillipson, "The 'Right' to Privacy in England and Strasbourg Compared" in *New Dimensions in Privacy Law: International and Comparative Perspectives* (Andrew T Kenyon & Megan Richardson eds) (Cambridge: Cambridge University Press, 2006).

photographs taken in a public place in the J K Rowling case.<sup>113</sup> More recently, the Strasbourg court has sought to expand the content of privacy rights. In its 2013 decision in *Söderman v Sweden*<sup>114</sup> (“*Söderman*”), the court expressly recognised that there were positive obligations on Member States to protect citizens from unwanted photography and video surveillance. On this basis, the courts should ensure that they protect against intrusion into the intimate aspects of one’s private life, even where physical violence, abuse or contact are not involved. In the earlier case of *Reklos*,<sup>115</sup> the court also found a violation of Art 8 when photographs of a newly born baby had been taken without the parents’ consent and where the hospital had refused to return the negatives.

28 What is noticeable about *Söderman* and *Reklos* is that liability goes beyond the dissemination of private information and extends to intrusion into the private lives of the applicants, albeit in both cases to obtain information. This seems closer to the situation in *C v Holland* rather than *Campbell*. As Moreham has recognised, such decisions raise real difficulties for the English courts. ECHR jurisprudence adopts a wide interpretation of Art 8 which goes beyond protection of private information to include freedom from interference with one’s physical and psychological integrity and with the right to develop one’s own personality and identity and live one’s life in the manner of one’s choosing.<sup>116</sup> In the light of such cases, should the English courts then extend the tort of misuse of private information to include behaviour such as unjustified surveillance or recordings even where the information has not been published?<sup>117</sup>

29 At present, English law has not gone this far, although there have been hints that such an extension might be possible if “misuse” of private information is interpreted broadly to include not only publicising such information but also its mere acquisition without the victim’s consent.<sup>118</sup> Even if this step were taken, however, a tort of misuse of private information could only extend to situations where information was accessed and could not therefore amount to a full “intrusion upon seclusion” tort. Bennett has concluded that:<sup>119</sup>

... there is no indication, at the present time, that English courts are inclined to develop tortious protection for pure intrusions into the private sphere that do not involve publishing or acquiring private information without authorisation. Moreover, it remains unclear whether an unsuccessful *attempt* to acquire private information would also be actionable ... Clearly these points require more academic and judicial work before they can be satisfactorily answered. [emphasis in original]

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<sup>113</sup> *Murray v Express Newspapers plc* [2008] EWCA Civ 446.

<sup>114</sup> (5786/08) (2014) 58 EHRR 36 (stepfather videoing his 14-year-old stepdaughter when naked in the bathroom without her knowledge or consent).

<sup>115</sup> Comment: Kirsty Hughes, “Photographs in Public Places and Privacy” (2009) 1 JML 159.

<sup>116</sup> Nicole Moreham, “The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination” [2008] EHRLR 44.

<sup>117</sup> Nicole Moreham, “Beyond Information: Physical Privacy in English Law” (2014) 73 Camb LJ 350 at 357.

<sup>118</sup> Commentators, for example, Moreham, have seized on comments in *Tchenguz v Imerman* [2010] EWCA Civ 908; [2011] 2 WLR 592 at [68] (in the context of a traditional breach of confidence claim) and *R (ex p Wood) v Metropolitan Police Commissioner* [2009] EWCA Civ 414; [2010] 1 WLR 123 at [34] (claim for judicial review) which indicate that bare intrusions may be actionable.

<sup>119</sup> Thomas D C Bennett, “Emerging Privacy Torts in Canada and New Zealand: An English Perspective” (2014) 36 EIPR 298 at 303.



30 Bennett identifies the problems caused by the lack of clarity as to the exact nature of the relationship between the English and Strasbourg court. Put simply, should *Söderman* or *Reklos* be regarded as guidance which the English courts should follow or are they merely statements of the court's approach towards particular factual situations arising in the context of Swedish and Greek law and therefore not necessarily directly transposable to other countries where the circumstances differ? The key problem here is that the courts are dealing with a new cause of action which requires them to reconcile two sources of case law which are not necessarily consistent: domestic and European. The tensions this causes practically and politically have been outlined above,<sup>120</sup> but, importantly, have yet to be resolved. Given the multi-faceted character of this action and uncertainty as to its content and application, the next section will examine whether it is indeed possible to integrate this action into the existing tort law framework.

***B. Integrating the “tort” of misuse of private information into the common law of torts.***

31 The above analysis has noted the influence of European human rights in the development of what is now commonly referred to as the tort of misuse of private information.<sup>121</sup> The action, nevertheless, by virtue of its incremental development, has been built upon the foundations of breach of confidence which is an equitable action based on good faith. The origins of the action are not irrelevant. The legacy of breach of confidence is a focus on informational privacy and an apparent willingness to use the equitable remedy of account of profits as an alternative to damages when appropriate.<sup>122</sup> To complicate matters, in many leading cases, such as *McKennitt*,<sup>123</sup> the claimants are able to raise both breach of confidence and misuse of private information claims. In *McKennitt*, for example, the complaint related to the disclosure by a close friend of personal confidences in a memoir. Such misconduct would, in fact, satisfy both the old action and the new and the courts do not always draw a clear analytical distinction between the two actions. The vestiges of the traditional breach of confidence action together with the influence of Arts 8 and 10 of the ECHR, therefore, render this a cause of action very different from that normally found in the domestic law of torts.

32 The move towards formal recognition of misuse of private information as a tort has led a number of scholars to contemplate how such a tort would fit within the existing tort law framework. Roderick Bagshaw has argued that, in reality, the post-*Campbell* privacy tort is at odds with the design of English tort law.<sup>124</sup> If, he argues, one of the aims of tort law is to regulate behaviour, how is this to be achieved by a cause of action which simply balances competing rights and where it may be difficult for an ordinary individual to determine the

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<sup>120</sup> See paras 21-29 above.

<sup>121</sup> See, for example, *Imerman v Tchenguiz* [2011] Fam 116 at [65], per Lord Neuberger MR: “[T]here is now a tort of misuse of private information.” See also *PNM v Times Newspapers Ltd* [2014] EWCA Civ 1132 at [13], per Sharp LJ and *Vidal-Hall v Google Inc* [2015] EWCA Civ 311.

<sup>122</sup> *Douglas v Hello! Ltd* [2005] EWCA Civ 595 at [249]. Consider also *Weller v Associated Newspapers Ltd* [2014] EWHC 1163: disagreement between the parties whether a reasonable expectation of privacy had to be known or ought to have been known by the publishers – an integral element of a breach of confidence claim but necessary for misuse of private information?

<sup>123</sup> See also *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776; [2008] Ch 57 (former employee revealing the content of the Prince of Wales' diary).

<sup>124</sup> Roderick M Bagshaw, “Tort Design and Human Rights Thinking” in *The Impact of the UK Human Rights Act on Private Law* (David Hoffman ed) (Cambridge: Cambridge University Press, 2011) at p 128.

precise balance between freedom of expression and the right to privacy?<sup>125</sup> Donal Nolan further argues that the introduction of human rights principles into private law threatens to undermine the structural underpinnings of the law of tort.<sup>126</sup> Such a view has received some support in recent case law. In *Michael v Chief Constable of South Wales Police*,<sup>127</sup> for example, the majority of the Supreme Court found that:<sup>128</sup>

Convention claims [have] different objectives from civil actions ... Whereas civil actions are designed essentially to compensate claimants for losses, Convention claims are intended to uphold minimum human rights standards and to vindicate those rights.

Jenny Steele comments that the current approach, which favours “shoehorning” claims into an existing cause of action, is far more appealing to common lawyers who prefer not to deal with broad general principles, in particular those deriving from that most diverse and elusive of ECHR rights: Art 8.<sup>129</sup> Such views are important. They indicate that even if the English courts do expressly acknowledge the action of misuse of private information as a tort, this will not resolve the current conceptual confusion as to the interests this tort will seek to protect, its content or future direction.

33 Formal classification, therefore, as a tort will not take us much further if the courts do not address the “exceptional” nature of this cause of action which introduces new forms of reasoning into the law, based on Strasbourg’s broad conception of the content of Art 8 of the ECHR. As the Court of Appeal recognised in *Vidal-Hall v Google Inc*, integrating misuse of private information into the law of tort will also require a number of practical questions to be resolved.<sup>130</sup> Should, for example, the new tort be confined to protecting against misuse of private *information*, or should it extend to claimants such as the Wainwrights subjected to an invasive strip search?<sup>131</sup> Would a broader tort be difficult to define with any degree of certainty and open the floodgates to claims to the ultimate detriment of freedom of expression? Further questions arise as to the remedies which should be available to claimants. Would classification as a tort signify that courts are no longer able to grant equitable remedies such as account of profits which are not usually awarded in tort?<sup>132</sup> What of

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<sup>125</sup> Roderick M Bagshaw, “Tort Design and Human Rights Thinking” in *The Impact of the UK Human Rights Act on Private Law* (David Hoffman ed) (Cambridge: Cambridge University Press, 2011) at p 134. For the regulatory role of tort, see Peter Cane, “Tort Law As Regulation” (2002) 31 CLWR 305.

<sup>126</sup> Donal Nolan, “Negligence and Human Rights Law: The Case for Separate Development” (2013) 76 MLR 286.

<sup>127</sup> [2015] UKSC 2; [2015] 2 WLR 343.

<sup>128</sup> *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] 2 WLR 343 at [127], *per* Lord Toulson. The Supreme Court did, however, accept that the development of a partial law of privacy was an exceptional case where the common law had been defective and the UK Human Rights Act 1998 (c 42) provided a means for reform: at [124].

<sup>129</sup> Jenny Steele, *Tort Law: Text, Cases and Materials* (Oxford: Oxford University Press, 3rd Ed, 2014) at p 799.

<sup>130</sup> *Vidal-Hall v Google Inc* [2015] EWCA Civ 311 at [51], although it did not attempt to answer these questions:

We are conscious of the fact that there may be broader implications from our conclusions, for example as to remedies, limitation and vicarious liability, but these were not the subject of submissions, and such points will need to be considered as and when they arise.

<sup>131</sup> See, for example, Nicole Moreham, “Beyond Information: Physical Privacy in English Law” (2014) 73 Camb LJ 350.

<sup>132</sup> Contrast Linda Clarke, “Remedial Responses to Breach of Confidence: The Question of Damages” (2005) 24 CJQ 316 and Normann Witzleb, “Justifying Gain-based Remedies for Invasion of Privacy” (2009) 29 OxJLS 325.

authority indicating that exemplary damages should not be granted as they are not permitted under ECHR case law?<sup>133</sup> There are no signs at present of the courts resolving these points.

34 This leaves English law with a dilemma. The current legal position is uncertain; a position exacerbated by the fact that more than 15 years after the implementation of the 1998 Act fundamental questions such as the indirect horizontal effect of the 1998 Act remain unresolved.<sup>134</sup> Intervention is, therefore, needed. The current law rests in a no man's land in which neither the courts nor the legislator<sup>135</sup> are prepared to take decisive action to ensure the coherent development of the law. Previous experience has shown that the courts are prepared to develop the law incrementally, but are unwilling to engage in more detailed examination of the conceptual basis for a privacy law or matters of "high principle". It also indicates that the legislator is not prepared to accept sole responsibility for developing a tort of privacy. It is submitted, therefore, that intervention realistically must come from a third party and here assistance may be found in another common law jurisdiction: Australia. The Australian courts have also struggled to determine whether they should recognise a tort protecting privacy rights. In the leading 2001 case of *ABC v Lenah Game Meats Pty Ltd*,<sup>136</sup> the High Court of Australia did not rule out the possibility of a common law tort of privacy, but left the question open.<sup>137</sup> In June 2014, the Australian Law Reform Commission ("ALRC"), at the request of the Attorney General of Australia, published a report, *Serious Invasions of Privacy in the Digital Era*<sup>138</sup> ("the ALRC report"), which outlined how a statutory cause of action for serious invasions of privacy could be designed.<sup>139</sup> The ALRC recommended the introduction of an action which protected against invasions of privacy which were committed intentionally or recklessly by either intrusion upon seclusion or by misuse of private information. The opportunity was taken to set out the essential features of the tort including its conditions for liability, defences, limitation periods and other procedural matters. By describing the action as a tort, the ALRC hoped that this would encourage the courts to draw on established principles of tort law, providing a measure of certainty, consistency and coherence to the law.<sup>140</sup>

35 While these recommendations have yet to be followed, the ALRC report illustrates the assistance which may be provided by a report by a law reform commission, notably in seeking to resolve legal uncertainty where the courts have struggled to provide the guidance which litigants need. The ALRC set out a framework for a new statutory tort, delineating its

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<sup>133</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 at [196].

<sup>134</sup> See Gavin Phillipson, "Clarity Postponed: Horizontal Effect after *Campbell*" in *Judicial Reasoning under the UK Human Rights Act* (Helen Fenwick, Gavin Phillipson & Roger Masterman eds) (Cambridge: Cambridge University Press, 2007).

<sup>135</sup> Consider, for example, the failure of the legislator to follow the recommendations of the Calcutt *Review of Press Self-Regulation*, which had recommended that the government should give further consideration to the introduction of a new tort of infringement of privacy: United Kingdom, Department of National Heritage, *Review of Press Self-Regulation* (Sir David Calcutt QC) (Cmnd 2135, 1993) at para 17.

<sup>136</sup> [2001] HCA 63; (2001) 208 CLR 199.

<sup>137</sup> See Robert Dean, "A Right to Privacy?" (2004) 78 ALJ 114 and Greg Taylor & David Wright, "Privacy, Injunctions and Possums: An Analysis of the High Court's Decision" (2002) 26 MULR 707.

<sup>138</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era: Final Report* (Report 123, 2014).

<sup>139</sup> For comment, see Thomas D C Bennett, "Privacy, Free Speech and Ruthlessness: The Australian Law Reform Commission's Report, *Serious Invasions of Privacy in the Digital Era*" (2014) 6 JML 193.

<sup>140</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era: Final Report* (Report 123, 2014) Executive Summary at para 1.9.

content and form. Likewise, consideration of the nature of the tort of misuse of private information by the Law Commission of England and Wales could play a vital role in placing the current law on a more conceptually coherent basis. In particular, it is suggested that the Law Commission should consider the following:

- (a) What areas of privacy should be protected? Should the tort extend to intrusion upon seclusion?
- (b) What degree of fault is required? Will negligence suffice or is intentional misconduct/recklessness needed?
- (c) What remedies should be available and, in particular, should aggravated and exemplary damages be awarded? An opportunity arises to include a remedy for account of profits, not usually granted in tort, which would provide a valuable addition to the court's armoury of remedies.
- (d) Should the limitation period be reduced to one year? Rather than simply adopting the tort provisions of the English Limitation Act 1980,<sup>141</sup> there is a clear argument that the hurt caused by invasion of privacy bears a closer analogy to the tort of defamation or breaches of the 1998 Act for which the limitation period is one year.<sup>142</sup> Equally, provision may be made that the action should not survive the death of the claimant if this is deemed desirable.
- (e) Should the action exist for both natural persons and, more questionably, legal persons?
- (f) What defences should exist in addition to the balancing of freedom of expression and privacy in the two-stage test? The ALRC report, for example, provides for defences of consent, necessity and, more contentiously, an exemption for children and young persons. A debate on defences would be a desirable step forward.

Further clarification could also be provided in relation to the application of the two-stage test, and, assuming that the 1998 Act survives beyond the May 2015 general election, the extent to which reference to the ECtHR is necessary in developing English law.

36 While some of the reforms, for example, the matters dealt with at (d), would require statutory intervention, the real benefit of a Law Commission report in this area of law would be to provide an analytical framework for the coherent development of the law, which could be adopted by either the courts or the legislator. A future Supreme Court would therefore be in a position to introduce the kind of detailed tests seen in *Hosking, C v Holland* and *Tsige*. Equally, the foundations would exist for legislative intervention should this become a realistic option. In terms of common law evolution, rebooting the common law by means of intervention by a law reform commission is far from unknown, as seen in areas such as occupiers' liability and contributory negligence.<sup>143</sup> Given the real difficulties experienced by the courts in applying this new cause of action and integrating any tort of misuse of private

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<sup>141</sup> c 58.

<sup>142</sup> See s 4A of the English Limitation Act 1980 (c 58) (defamation) and s 7(5) of the UK Human Rights Act 1998 (c 42). Extensions may, however, be permitted at the court's discretion.

<sup>143</sup> Consider, for example, in England and Wales the influence of the Law Reform Committee report, Law Reform Committee, *Occupiers' Liability to Invitees, Licensees and Trespassers* (Cmnd 9305, 1954) on the Occupiers' Liability Act 1957 (c 31) and of the Law Revision Committee's eighth report, Law Revision Committee, *Contributory Negligence* (Cmnd 6032, 1939) on the Law Reform (Contributory Negligence) Act 1945 (c 28).

information into the ordinary law of torts, it is submitted that relying on the courts to continue to develop incrementally this area of law is unlikely to provide the certainty and structure expected in the common law legal tradition. Intervention is needed. The referral of this matter to the Law Commission of England and Wales is a necessary first step towards resolving the substantive and constitutional issues identified in this article.

#### IV CONCLUSION

37 In examining the development of privacy torts in England and Wales, New Zealand and Canada, this article has identified the extent to which the current state of the law is influenced by the courts' interpretation of the existing constitutional framework (both international and national). Protecting interests as ill-defined as privacy in a context in which they are granted constitutional protection may be seen to raise particular challenges for the traditional incremental approach to tort law development. While the discourse in England and Wales has been dominated by the ECHR, that of New Zealand and Ontario has reflected the influence of US law and, in particular, the fourfold division of privacy into torts in the US Restatement. It is perhaps significant in the latter jurisdictions that the Bill of Rights Act and Canadian Charter expressly provide for protection of free speech, but that more general privacy protection has had to be inferred, tipping the balance more generally in favour of freedom of expression. On this basis, the natural comparator for these jurisdictions would seem to be the US. The differences between the constitutional framework of these jurisdictions and England and Wales are too great to provide assistance in the development of any English human rights tort.

38 The English action for misuse of private information is, in reality, a distinct form of liability, which may be characterised as a hybrid of European human rights law and the common law. The English courts do seem to be attempting to superimpose some level of certainty by means of the two-stage test and a growing body of case law which gives guidance. Equally, in common with other jurisdictions, they have sought to confine liability to particular aspects of privacy (here the right to be protected against unwarranted publication of private information), rejecting a general privacy tort. However, there is an added level of tension arising from the need to integrate a European human rights action into the common law of torts. This has led to a lack of conceptual coherence. Simply changing the name of the action from "new breach of confidence" to the "*tort* of misuse of private information" is unlikely to give greater clarity overnight. This is an area of law in which the English courts are struggling to reconcile European human rights with common law forms of reasoning and practice. What is needed is consideration of how this cause of action should be integrated into domestic law and practical guidance about how this action is framed, both substantively and procedurally.

39 The time has come to recognise that there is a need to stabilise the centre of gravity of the tort of misuse of private information. A Law Commission report would provide a valuable first step, but this will need to be followed by judicial or legislative intervention if the current situation is to improve. Failing this, it is likely that the courts will continue to take small incremental steps to develop the tort, but that progress will be slow and at the expense of conceptual clarity. Evolution in tort law can be unpredictable and create uncertainty, but it is argued here that it is the role of the law to provide victims injured by unwarranted intrusions into their personal life with a clear basis on which to seek a remedy for the wrong committed against them.

