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THE PRIVATE LIFE AFTER *DOUGLAS v. HELLO!*

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In the aftermath of *Douglas v. Hello! Ltd.*, in which pictures surreptitiously taken of a New York wedding were published in a United Kingdom magazine, it is becoming increasingly apparent that privacy invasions are not restricted by national borders. The equitable doctrine of breach of confidence, which gave a remedy in that case, has shown adaptability in the face of changing circumstances and practices. The challenge for the future will be ensuring greater international harmonisation of substantive legal protection of privacy. Already there are some positive signs.

"… [N]ew times and new manners may call for new standards and new rules".[1]

I. INTRODUCTION

There are several reasons to think a comparative perspective on privacy protection is worthwhile and even essential. *Douglas v. Hello! Ltd.*,[2] a case that has spent considerable time in the English courts, raises three in particular.

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1 Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 88.

2 *Douglas and Others v. Hello! Ltd.* [2001] Q.B. 967 (application for an interlocutory injunction preventing publication of unauthorised wedding photographs refused by Court of Appeal, on appeal from Buckley J. at first instance) [*Douglas*]; *Douglas and Others v. Hello! Ltd. and Others (No. 3)* [2003] All E.R. 996 (in final proceedings claimants held entitled by Lindsay J. to damages for publication of photographs on basis of breach of confidence and Data Protection Act 1998 (U.K.)) [*Douglas (No. 3)*]. On 12 July 2003 Lindsay J. reserved judgment on the quantum of damages. On 7 November, damages in the order of one million pounds (most going to co-claimant *OK!* Magazine) were awarded. At time of writing, *Hello!* is contemplating appeal: see Ciar Byrne, "Hollywood Stars Win £14,600 Damages from Hello!", *Guardian Unlimited* (7 November 2003), online: MediaGuardian.co.uk <http://media.guardian.co.uk/presspublishing/story/0,7495,1080318,00.html>.

First, bizarre as it may seem to those looking from outside, a general fascination with the domestic affairs of international public figures virtually guarantees publication anywhere of information about them.[3] Hollywood actors Michael Douglas and (Welsh-born) Catherine Zeta-Jones enjoy international celebrity status. It therefore comes as no surprise to learn that the predominantly English readers of *Hello!* magazine were avid for details of their New York wedding held in November 2000—so avid that they could not wait for approved publication in *Hello!'s* rival, *OK!* Even the litigation embarked on by Douglas and Zeta-Jones in an effort first to prevent and later simply to remedy *Hello!'s* unauthorised publication of the photographs received extensive media coverage throughout the world. Readers in Melbourne, London, New York, Singapore and elsewhere were told of the claimants' distress in finding their security breached, their anger at the thought that less than flattering portraits of them dancing and eating might be published without their permission or control, and even of their appearance on the days they attended the London court. In response, a community of followers expressed their allegiance—or not—to the claimants' cause. The case illustrates how in matters of popular culture national borders may be relatively unimportant.

Second, the 20th century's technological revolution has ensured that information can easily be obtained in one state and published in another (or many others) within a very short space of time. The immediate question is whether their laws have kept up. The facts of *Douglas v. Hello!*—involving the carefully guarded wedding in New York secretly photographed by an audacious interloper with a hidden miniaturised camera working under a plan orchestrated by paparazzi in California, a contract of sale concluded overnight via telephone and fax, and delivery of the photographs through the internet to London and Madrid for distribution in *Hello!* two days later—provides a clear example. In the circumstances, the Spanish-owned magazine's apparently imperfect knowledge of the current state of U.K. privacy law proved to its disadvantage. That it underestimated the new data protection law's capacity to target privacy breaches is understandable, and it was only in the final proceedings that the privacy-as-data issue was even raised.[4] But there could be less sympathy for *Hello!'s* attempts to argue in court that the

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[3] Especially international celebrities—for a celebrity as the paradigmatic public figure, a result of a cultural shift wrought by the 20th century rise of advertising/entertainment industries, see Daniel Boorstin, *The Image: Or What Happened to the American Dream* (Middlesex: Penguin, 1963).

[4] The issue was raised after private information was treated as data by the Court of Appeal in *Campbell v. Mirror Group Newspapers Ltd.* [2003] Q.B. 633. As Lindsay J. commented in *Douglas (No. 3), supra* note 2, the judges' analyses in the latter case "fortunately, make an understanding of the Act easier than do the unvarnished provisions of the Act itself": at 1062. (Breach of the Act was found.)

equitable breach of confidence doctrine would not avail on the facts of the case—in particular, that it did not extend to surreptitious obtaining, would not treat as "confidential" matters revealed in confidence to those present at the wedding (admittedly some 350 in number) and to be published on strictly controlled terms, and exonerated "innocent"—or rather carefully immunised—third parties. Such arguments rightly received little endorsement in the judgments in the various interlocutory and final judgements in the case to date.[5]

Third, any state concerned to progress its reputation for human rights protection must confront the possibility that respect for privacy is an important social value in many parts of the world, as important in some as freedom of speech. And with the spread of international norms of privacy and their endorsement in a series of international human rights conventions in the post-Second World War period,[6] national laws come under increasing pressure to conform. In *Douglas v. Hello!* the U.K.'s implementation in the *Human Rights Act 1998* (U.K.) of the European Human Rights Convention including within it a European style right to a "private life" (as well as a right to freedom of speech)[7] forced a judicial re-examination of the scope and limits of privacy protection under national law. The breach of confidence doctrine was found capable of providing the privacy protection required, although differences emerged as to the appropriate remedy where protagonists were found to have "sold" their privacy to a rival magazine. (The Court of Appeal in the interlocutory proceedings permitted *Hello!'s* publication leaving the claimants with a monetary claim,[8] while Lindsay J. in the final decision was prepared to award an injunction against further publication.)[9] But hidden in

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5 The judges in the proceedings were not persuaded of the need for a pre-existing "relationship" of confidence (although Brooke L.J. might be persuaded on fuller argument), nor a confidentiality standard beyond inaccessibility to the general public (although for Keene J. imminent publication in *OK!* was a factor in assessing confidentiality), nor that third parties once notified could avoid liability for future actions: *Douglas, supra* note 2, Brooke L.J. at 984–9, Sedley L.J. at 998–1001, Keene L.J. at 1011–2; *Douglas [No. 3], supra* note 2, Lindsay J. at paras. 183, 184, 186 and 189.

6 Most important are the *Universal Declaration of Human Rights 1948* which specifies that privacy is a right alongside freedom of thought, opinion and expression (arts. 12, 18 and 19); the *European Convention on Human Rights and Fundamental Freedoms 1950* which specifies rights to a private life (art. 8) and to freedom of thought and expression (arts. 9 and 10); and the *United Nation's International Covenant on Civil and Political Rights 1966* which provides for rights of privacy, thought, opinion and expression (arts. 17–19), and whose membership includes the U.K., U.S., Australia, Canada and New Zealand.

7 See *ibid*.

8 *Douglas, supra* note 2, Sedley L.J. at 1006 (claimants' privacy, being traded, "falls to be protected if at all, as a commodity"; any retained element of privacy is not "sufficient to tilt the balance of justice and convenience"). *Cf.* Brooke L.J. at 996 and Keene L.J. at 1013.

9 *Douglas (No. 3), supra* note 2, Lindsay J. at 1057 (a desire to maintain control or to make commercial profit is not an "improper objective" of the law of confidence, which has historically

the background was awareness that although U.K. law governed there were factual links with the United States where privacy has rhetorical support but historically—and in Constitutional terms—far greater value is placed on freedom of speech. The conundrum faced by the U.K. courts was the appropriate account to be taken of apparently different U.S. legal and social norms.

Initial confusion as to how U.S. courts would respond to the privacy claims raised by *Douglas v. Hello!* led to different pictures painted as to the relevance of U.S. law. At the interlocutory stage Sedley L.J. in the Court of Appeal suggested U.K. courts should more explicitly acknowledge a "right of privacy" in their law, giving continental European and U.S. authorities in support.[10] But Lindsay J. in the final decision, confronted with an expert brief stating that under New York privacy law a broad privilege could be found in favour of newsworthy publications and the Douglas' wedding would be newsworthy,[11] insisted publication by *Hello!* in England would not "be any less unconscionable in the view of an English Court had publication in New York been lawful".[12] The judge may have been concerned that in the United States (or at least New York), privacy may be less well-regarded than originally thought and public debate more under influence of the free speech mandate of the Constitution's First Amendment—whereas pressure from Europe was for greater privacy protection. In fact, recent statements in the U.S. Supreme Court suggest the Constitutional position is changing in the United States as well. Private discourse is emerging as a new category of First Amendment protected speech, and a right of privacy has been found implicit in the Constitution's due process clause.[13] But without a vehicle for courts in other common law jurisdictions to become properly informed, there is limited scope at the grassroots level for any real understanding or consensus to emerge.

The solution I suggest lies with the courts. As custodians of the common law (in the broadest sense),[14] their function is to pronounce authoritatively

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protected trade secrets as well as private information) and para. 278 (a permanent injunction as well as damages would be available to the claimants).

10 *Douglas, supra* note 2, Sedley L.J. at 997 (it may well turn out at trial that Hello's pictures "were obtained by some means which were unlawful in the state of New York"—although there talking more specifically about inducement to breach of contract); at 1000 (referring to a seminal Harvard Law Review article of Samuel Warren and Louis Brandeis which led to development of the U.S. privacy tort—see note 37, *infra*, and ff.); and at 1001 ("at lowest" the plaintiff has a "powerfully arguable case" to advance a right of privacy at trial—giving French and German privacy law as the model).

11 See *Douglas and Others v. Hello! Ltd. and Others* [2003] E.W.C.A. 139, Rix L.J. at para. 41 (referring to a brief submitted by California paparazzo Philip Ramey, said to have masterminded the operation, in an attempt to resist joinder and service out of jurisdiction).

12 *Douglas (No. 3), supra* note 2, Lindsay J. at 1074.

13 See footnotes 111–116, *infra*.

14 In the broadest sense the term includes not only doctrines that originated in common law courts but those of courts of equity, as well as jurisprudence of constitutional and statutory

on the customary law of their times.[15] They are entitled to adapt their laws to the needs of an international age and they have an obligation to do so. The great American legal realist and judge Benjamin Cardozo said: in 1921, "[n]ew times … may call for new standards …",[16] and we live in new times. Already, a close look at non-statutory privacy laws reveals similarities across the common law world. Although the available legal doctrines differ on the surface and protection may vary, especially in the privilege accorded to free public debate, there is much common ground rooted in the shared history of the equitable confidentiality doctrine and the U.S. privacy tort. As the value of allowing free public debate over private matters becomes *itself* a subject of debate in recent cases, residual conflicts in legal and social norms may ultimately be resolved. Courts' adherence to a substantive harmonisation principle would, irrespective of whether formal legal doctrines are aligned, further this desirable end.

II. An Historical Look at Privacy and Confidentiality

The common law's idea of a "private life", a personal sphere to be kept distinct from public discourse, has roots in Continental Europe. An impetus was the Reformation—a period marked by populist Protestant uprising against the Catholic aristocratic order and then religious and social oppression by representatives of the new powerful order (and also by those who came after).[17] As social historian Kenneth Clark observed, what "could an intelligent, open-minded man do in mid-sixteenth century Europe? Keep

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meaning. *Cf.* David Strauss, "Freedom of Speech and the Common Law Constitution" in Lee Bollinger and Geoffrey Stone (eds.), *Eternally Vigilant: Free Speech in the Modern Era* (Chicago: U. Chi. Press, 2002) at 34–36 (First Amendment law is common law in sense of evolving through court decisions, reflecting customary norms and "acceptability to successive generations").

15 American legal realists understood that the common law is a species of customary law with courts the arbiter and guide; its authority deriving from a respect that lies "deep in … [the] nature" of the civilised person: Judge Learned Hand, "The Contribution of an Independent Judiciary to Civilisation", quoted by Kirby J. in *Dow Jones & Company Inc. v. Gutnick* (2002) 210 C.L.R. 575 at 619. See also Cardozo, *supra* note 1 (courts' role to reflect and direct social norms). For historical parallels in English writing, see also Stroud Francis Milson, *Historical Foundations of the Common Law* (London: Butterworths, 1969) at 2 ("[t]he materials of the common law [at its inception], therefore, were the customs of true communities …").

16 *Ibid.* at 66.

17 See generally Philippe Ariès and Georges Duby (eds.), *Histoire de la Vie Privé* (Paris: Seuil, 1985–87). In introducing Vol. III ("Passions of the Renaissance"), Ariès observes at 2–4 the most important influence in the transition to the modern age was "the change in the role of the state, which from the fifteenth century steadily established itself in a variety of guises" and not unrelated to that was "the development of new forms of religion" which sought to establish and maintain stringent control over "inward piety". Ariès notes the Reformation began but did not complete the process of the church's involvement in deeply personal domestic affairs: the Counter-Reformation that followed in parts of Europe saw the Catholic church

quiet, work in solitude, outwardly conform, inwardly remain free".[18] Privacy became a social norm of the quiet minority. Although under Queen Elizabeth's rule, England was for a while relatively immune from the religious wars sweeping Europe; her death in 1603 saw the end of that. English citizens in turn found themselves at risk of losing their possessions, their livelihood and more, if their true beliefs became known. To use the words of Sir Edward Coke reporting *Semayne's Case*,[19] the home became the Englishman's "castle and fortress, as well for defence against injury and violence, as for his repose".[20] And even friendships were doubted in the period of political turmoil with warnings of their unreliability in cases of adversity a common theme of private discourses.[21] The value of privacy, a concept pertaining to intimacy and trust, became received wisdom as the wars came to their end.[22] And in the age of peace and enlightenment that followed it did not take long for privacy claims to emerge in cases argued and decided in the new equity courts whose role was to record and determine legal obligation according to conscience. An emerging doctrine of breach of "trust" or "confidence", expressions used interchangeably, provided the obvious basis.[23]

Not surprisingly, the first cases concerned print publications, the result of a technology that was by the end of the 17th century cheap, popular, and formidable in the breadth of audience it could reach.[24] Of course—as today—of those who might have sought access to the courts, only the wealthier citizens had the financial resources and energy for matters not directly relevant to their material well-being or even reputation (unless a reputation for dignified reticence is counted part of the equation; but that was not explicit in the judgments nor in the recounting of the arguments).[25]

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seeking control over inward devotion (with, for instance, the establishment of the confession): *ibid.* at 4. See also Asa Briggs and Peter Burke, *A Social History of the Media* (Cambridge: Blackwell, 2002) at 77 (observations about the privatising effect of the Reformation "may well be right").

18 Kenneth Clark, *Civilisation* (London: B.B.C. Books, 1969) at 161.

19 *Semayne's Case* (1603) 5 Co. Rep. 91; 77 E.R. 194.

20 *Ibid.* at 195.

21 For several such texts quoted, see Lena Cowen Orlin, *Private Matters and Public Culture in Post-Reformation England* (Ithaca: Cornell University Press, 1994) at 164–65.

22 Thus entries in the *Oxford English Dictionary*, 2nd ed. (O.U.P., 1989) show usages of "privacy" and "confidence" pertaining to intimacy and trust dating back to the 16th and 17th centuries.

23 The confidentiality doctrine's origins are obscure but the *Statute of Uses, 1535* (27 Henry VIII., c. 10) spoke of "use, confidence, or trust" and a couplet attributed to Lord Chancellor, Sir Thomas More (1 Rolle's Abridgment 374) averted that, "[t]hree things are to be helpt in Conscience. Fraud, Accident and breach of confidence": see *Coco v. A.N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, Megarry J. at 46.

24 Ariès also identifies the spread of reading and writing (and printing) as instrumental in the development of ideas about privacy: *supra* note 19 at 4.

25 Breach of trust and rights of property (drawing on natural law ideas) were the two-pronged arguments made in the early breach of confidence cases, not reputation—albeit precedents

Some distinguished claimants could be identified in the early reported cases. For instance, in *Pope v. Curl* (1741),[26] the poet Alexander Pope obtained an injunction against inclusion of personal letters in the defendant's book. Again, in *Thompson v. Stanhope*,[27] Lord Chesterfield's private letters to his son were prevented from being circulated as a work of general instruction. Later, in *Wyatt v. Wilson*,[28] an engraving of the ill King George III was the subject of dispute. Its reproduction was treated under copyright infringement but Lord Eldon L.C. observed that "[i]f one of the late king's physicians had had kept a diary of what he had heard and seen, this Court would not in the king's lifetime, have permitted him to print or publish it".[29] And in the famous case of *Prince Albert v. Strange*,[30] an injunction was granted against publication of etchings made by Queen Victoria and Prince Albert (given to the printer so that copies for private circulation would be made) together with a catalogue describing them. Lord Cottenham L.C. held that the defendant should not profit from a "breach of trust, confidence or contract" that most likely occurred in the printer's establishment (although the wrongdoer was never discovered):

> The Plaintiff's affidavit states the private character of the work or composition, and negatives any licence or authority for publication (the gift of some of the etchings to private friends not implying any such license or authority); and states distinctly the belief of the Plaintiff that the catalogue, and the descriptive and other remarks therein contained, could not have been compiled, except by means of the possession of several etchings, surreptitiously and improperly obtained. To this case no answer is made … And upon the evidence on behalf of the Plaintiff, and the absence of any explanation on the part of the Defendant, I am bound to assume that the possession of the etchings or engravings, on the part of the Defendant or Judge [the defendant's partner], has its foundation in a breach of trust, confidence or contract ….[31]

It is interesting that trust, alongside confidence and contract, was still identified as the basis of the cause of action. In the 18th century, the use of this word by an equity judge could be taken as reflecting some notion of moral

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already existed for the protection of reputation under laws of libel and deceit: see for instance, *Southern v. How* (1618) Cro. Jac. 468; 2 Roll Rep. 26 and *Dean v. Steal* (1626) Latch 188 and generally William Morris, "Unfair Competition and Passing Off" (1956) 2 Syd. L. Rev. 50 at 53–55.

26 *Pope v. Curl* (1741) 2 Ak. 342, 26 E.R. 608.

27 *Thompson v. Stanhope* (1774) Amb. 737, 27 E.R. 476.

28 *Wyatt v. Wilson* (1820) cited in *Prince Albert v. Strange, infra* note 30.

29 *Ibid.*

30 (1849) 1 H. & Tw. 1, 47 E.R. 1302.

31 *Ibid.* at 1311. Later, in considering the appropriateness of the injunction remedy, the judge refers in passing to privacy as "the right invaded": at 1312.

rights (although, in the particular context, perhaps more likely in the Kantian sense of the dignity of the person rather than the Lockean sense of ownership of labour).[32] But in 19th century Britain the overtone for those familiar with philosophical influences of the period was more likely a utilitarian one—with the Scottish philosopher David Hume in 1740 identifying security in trustworthy conduct of strangers as essential to productive social activity[33] and the influential liberal-utilitarian philosopher John Stuart Mill by 1863 calling this the "most indispensable of all necessities".[34] Thus, if breach of trust is added to privacy (itself easily able to be justified in Mill's liberal-utilitarian terms of promoting personal flourishing free from interference of others),[35] privacy would most likely outweigh any contrary public interest that might be invoked in favour of publication. But, of course, nothing of this utilitarian reasoning was explicit or elaborated in Lord Cottenham's judgment in *Prince Albert v. Strange*. As Mill observed, courts operated "chiefly by stealth".[36]

The latter case, among others, eventually became the basis of an 1890 article by American lawyers Samuel Warren and Louis Brandeis advocating that courts should embrace a right to privacy, or to be "let alone" (as they termed it).[37] In fact, it is clear these distinguished authors thought such a right was already implicit in the cases they discussed, albeit in an embryonic

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[32] See Megan Richardson, "Owning Secrets: Property in Confidential Information?" in Andrew Robertson (ed.), *The Law of Obligations: Principles and Boundaries* (forthcoming, University of London Press, 2004) 145 at 147–53.

[33] Thus, speaking of promise-keeping Hume observed that:

> Men being naturally selfish, or endowed only with a confined generosity, they are not easily induced to perform any action for the interests of strangers, except with a view to some reciprocal advantage, which they had no hope of obtaining but by such a performance … But so much corruption is there among men, that, generally speaking, this becomes but a slender security … Here then, is the mutual commerce of good offices in a manner lost among mankind, and every one reduced to his own skill and industry for his well-being and subsistence.

David Hume, *Treatise on Human Nature* (1739–40), Lewis Selby-Bigge (ed.) (Oxford: Clarendon Press, 1888, 1951 reprint) at 519–520.

[34] John Stuart Mill, "Utilitarianism" (1863) in Mary Warnock (ed.), J.S. Mill, *Utilitarianism, On Liberty, Essay on Bentham* (London: Collins, 1962) at 310 (a sense of "security" in the restrained conduct of others identified as fundamental to the well-being of a civilised society).

[35] See further John Stuart Mill, "On Liberty" (1859) in Warnock, *supra* note 34 at 136: "I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of a man as a progressive being" and *passim*; and generally for the influence of Mill's liberal-utilitarianism, Megan Richardson, "Whither Breach of Confidence: A Right of Privacy for Australia" (2002) 26 Melb. U. L. Rev. 381.

[36] John Stuart Mill, "Essay on Bentham" in Warnock, *supra* note 34 at 108.

[37] See Samuel Warren and Louis Brandeis, "The Right to Privacy" (1890) 4 Harv. L. Rev. 193.

and obscure form.[38] Their purposes were to find a philosophical basis for protection of privacy—grounding this in a Kantian idea of the dignity of the person (not utilitarianism, somewhat surprisingly)[39] and allow for greater transparency in the law in the hope that the representatives of the media would pay it greater respect.[40] The article led to subsequent development of a U.S. privacy tort,[41] coinciding with the American legal realist movement's rejection of the traditional mystification of the common law in favour of more open textured policy based rules. But British courts, steeped in the positivist tradition by the early 20th century, saw no need to trade their breach of confidence doctrine for a privacy tort that, albeit more clearly reflective of the policies to be served, would involve a break with established practice. They preferred to maintain their incremental approach.

In any event, the U.S. tort was not an unqualified success. Given the tort depended on reception under state law, it was slow in the making.[42] Some state courts including those of New York refused to accept it, raising utilitarian fears of its impact on social discourse and difficulties in confining its scope. The early case of *Rochester v. Folding Box*[43] is an example. The plaintiff complained her photograph had been surreptitiously taken and that 25,000 copies were displayed prominently and without her consent in stores, warehouses, saloons and other public places in posters advertising the defendants' products, becoming a matter of great embarrassment to her. But she was denied a remedy in privacy. Justice Parker warned that:

> If such a principle be incorporated into the body of law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation,

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38 *Ibid.* at 206–7: "[t]he principle which protects personal writings and all other personal productions, not only against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of inviolate personality".

39 For divergent strands of Kantianism and utilitarianism developing in U.S. tort law during this period, see David Leebron, "The Right to Privacy's Place in the Intellectual History of Tort Law" (1991) 41 Case W. Res. 769.

40 Warren and Brandeis, *supra* note 37 at 196 and 199–203 especially.

41 See generally William Prosser, "Privacy" (1960) 48 Calif. L. Rev. 383 (an article promoting further reception of the tort); *Restatement of the Law Second: Torts* (St. Paul, Minn.: American Law Institute, 1977) chapter 28A (itself an influential secondary source of common law development in the U.S.).

42 As Prosser points out, *supra* note 41 at 384–5. It may be noted, however, that some of the plaintiff's claims seemed hardly deserving of the privacy label: see for instance *Schuyler v. Curtis* 42 N.E. 22 (1895) (objection to statute of a deceased aunt); *Corliss v. Walker* 64 Fed. Rep. 280 (1894) (complaint about publication of a photograph already published 10,000 times); *Atkinson v. John E. Doherty & Co.* 80 N.W. 285 (1899) (concerning use of deceased's name for cigarettes).

43 *Robertson v. Rochester Folding Box Co.* 64 N.E. 442 (N.Y. 1902), reversing the Supreme Court of New York by a narrow majority of four to three.

> but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment on one's looks, conduct, domestic relations or habits. … [Thus a] vast field of litigation … would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by an injunction, and by damages where they seem necessary to give complete relief.[44]

(In the end it was left to statute to frame a quasi-tort basis for privacy protection under New York law.)[45] Further, to the extent the privacy tort was accepted in the various U.S. states,[46] it was in a fragmentary form. A motley collection of (sub)torts of intrusion on seclusion, public disclosure of private facts, false light disclosure, and appropriation of name or likeness emerged by the mid-20th century as specific categories into which a privacy claim had to be channelled.[47] Moreover, courts latched onto the dignity rationale for a privacy right, being the rationale articulated by Warren and Brandeis, as a reason to *narrow* its scope—for instance eliminating corporate and for the most part commercial interests from the purview of protection offered in the name of privacy.[48] Concerns about the "absurdness" of privacy litigation and the implications of this for social discourse and participation in civic life led to further constraints. Courts insisted that offending a community standard of reasonable behaviour was a threshold to be met and that the threshold was a high one.[49] Some jurisdictions, such as California, gave

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44 *Ibid*. at 443.

45 The New York Civil Rights Law in 1907, providing for a "right of privacy" in terms specifically directed against unauthorised use of a name or image for advertising purposes: §50–51.

46 One impetus, along with the Warren and Brandeis article, was an early Georgia Supreme Court decision in *Pavesich v. New England Life Insurance Co.* 50 S.E. 68 (1905) extolling privacy as a "natural right" (in a case involving unauthorised use of an artist's photograph in a newspaper advertisement for insurance) and preferring the minority judgment of Justice Gray to that of the majority in *Robertson v. Folding Box, supra* note 43.

47 See Prosser, *supra* note 41 at 389; Restatement, *supra* note 41 at §652A. Not all States have accepted all torts even if almost all have accepted some: see, for instance *Renwick v. News and Observer* 312 S.E. 2d 405 (1984) and *Hall v. Post* 372 S.E. 2d 711 (1988) (false light disclosure and public disclosure of private facts rejected in North Carolina) and *Denver Publishing Company v. Bueno* 54 P.3d 893 (2002) (false light disclosure rejected in Colorado).

48 The Restatement reported in §652I that "[e]xcept for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded": *supra* note 41. It is questionable whether appropriation of name or likeness is privacy tort or an aspect of the publicity right also recognised in U.S. law: see note 61, *infra* ff.

49 Restatement, *supra* note 41 §§652B, 652D and 652E and comments. (The exception again is appropriation of name or licence, where liability is strict: §652C.)

more latitude.[50] But in others such as New York successful privacy claims were few and far between.

It has been said the free speech values of the First Amendment ensured that the U.S. privacy tort never saw full development for fear of clashing openly[51]—and there were open clashes, especially where publications were deemed "newsworthy" in cases such as *Time Inc. v. Hill*[52] (where a newspaper's identification of a fictionalised portrayal of a family held under siege by burglars as referring to a particular real-life event was objected to by the father of the family in question) and *Florida Star v. B.J.F.*[53] (where a rape victim's name was negligently published in a newspaper): in both instances free speech which was equated to a free media prevailed. But underneath and behind the constitutional rhetoric lay a general perceived community preference for public airing of ideas and opinions.[54] In such a climate, claimed interests in privacy were often given short shrift when matched against the public's interest in knowing the information. Sometimes it was suggested privacy was only of private concern. In *Sidis v. F-R Pub Corporation*,[55] where a former child prodigy who renounced his public life in favour of anonymity objected to a mocking exposè detailing his failure to achieve his earlier promise, Clark C.J. stated that "[e]veryone will agree that at some point the public interest in obtaining information becomes dominant over *the individual's desire* for privacy"[56]—as if there were no social value to be found in affording a degree of privacy protection. However, the *Sidis* case received adverse comment[57] and courts since have been more

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50 As, for instance, in *Melvin v. Reid* 112 Cal. App. 285; 297 Pac. Rep. 91 (1931) (reformed prostitute who now lived an "exemplary, virtuous, honorable and righteous life" held entitled to damages for wrongful publication of details of her former life in the defendant's movie). See more recently *Michaels v. Internet Entertainment Group Inc.* 5 F. Supp. 2d 823 (1998) (broadcast of videotape recording of sexual relations between famous actress and rock star enjoined) although in subsequent proceedings publication of short extracts were permitted on grounds of newsworthiness: *Michaels v. Internet Entertainment Group* (1998) 48 U.S.P.Q.2D (B.N.A.) 1891.

51 See David Anderson, "The Failure of American Privacy Law" in Basil Markesinis, *Protecting Privacy* (Oxford: O.U.P., 1999) at 139.

52 *Time Inc. v. Hill* 385 U.S. 374 (1966) [*Time Inc.*].

53 *Florida Star v. B.J.F.* 491 U.S. 524 (1989).

54 First Amendment scholar Lee Bollinger so concludes in *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford: Clarendon Press, 1986), although later to worry that the tide may have swung too far in the direction of public debate, at the cost of other important values: *Images of a Free Press* (Chicago: U. of Ch. Press, 1991) at 38–39 especially. Of course, as David Anderson points out, in part social preferences "are shaped by practices" (and by laws which permit practices): *supra* note 52 at 151 and *passim*.

55 *Sidis v. F-R Pub Corporation* 113 F. 2d 806 (1940).

56 *Ibid.* at 809 [emphasis added].

57 See, for instance, moral philosopher Sisella Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage Books, 1984) at 250–2 ("Sidis felt violated—and *was* violated").

circumspect, preferring to extol freedom of public debate rather than derogate privacy.[58] Where First Amendment values were not in issue, judges quite readily acknowledged that privacy is not just of individual concern; the society itself may be better for treating its members with civility.[59]

The 20th century also saw a resurrection of breach of confidence in the U.S., but in a more restricted form than in *Prince Albert v. Strange*—now transformed into a quasi-fiduciary trust obligation.[60] In addition, new torts of publicity invasion and promissory estoppel emerged as alternative sources of privacy protection (outside of contract, where parties were left free to dictate their terms) and they have filled some of the gaps the older torts left. Neither is specifically concerned with privacy. The publicity right's concern is the proper exploitation of publicity as a commercially valuable commodity[61]—a characterisation that might have assisted Douglas and Zeta-Jones, had their case against *Hello!* been argued under New York law but is of less value to privacy claimants whose purpose is to keep their information *out* of the public domain.[62] Promissory estoppel is a quasi-contractual action with foreseeability and reasonable reliance substituting for consideration but depends on a promise and (as with breach of contract) rarely gives rise to a coercive remedy.[63] However, both have offered incidental

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[58] See, for instance, *Time Inc., supra* note 52, Brennan J. for the court at 388 ("[e]xposure of the self to others in varying degrees is a concomitant of life in a civilised community. The risk of this exposure is an essential incident of life in a society which places a primary value in freedom of speech and of the press"); *Florida Star v. B.J.F., supra* note 53, Marshall J. for the court at 538 (referring to the "extreme step of punishing truthful speech"). As Bollinger observes in *The Tolerant Society, supra* note 54, public debate was seen as a preferable (and safer) option for a community of tremendous variety and discord.

[59] Thus a right of privacy was identified in search and seizure cases, invoking the Fourth and Fifth Amendments to the U.S. Constitution: for the authorities discussed, see the dissenting judgment of Fortas J. (joined by Warren C.J. and Clark J.) in *Time Inc., supra* note 52 at 413–14.

[60] A development carefully assessed by Susan Gilles, "Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy" (1995) 43 Buff. L. Rev. 1.

[61] See, for instance, *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.* 202 F. 2d 866 (2nd Cir, 1953) (unauthorised use of baseball stars' photographs in connection with chewing gum advertisements enjoined on basis of a person's "right in the publicity value of his photograph"); *Zacchini v. Scripps-Howard Broadcasting Co.* 433 U.S. 562 (1977) (damages granted for unlawful televising of a human cannonball act) [*Zacchini*]; and generally Huw Beverley Smith, *The Commercial Appropriation of Personality* (Cambridge: Cambridge University Press, 2002) at 171–87 and *passim*.

[62] Although in some cases courts appear to see both publicity and privacy interests as equally implicated: see, for instance, *Michaels v. Internet Entertainment Group Inc., supra* note 50 and *Michaels v. Internet Entertainment Group (No. 2), supra* note 50 (privacy and publicity arguments treated in much the same way).

[63] See *Restatement of the Law Second: Contracts* (American Law Institute, 1981) §90 and *Cohen v. Cowles Media Co.* 457 N.W. 2d 199 (damages granted on this basis for breach of a newspaper's promise of confidentiality given to an informant under Minnesota promissory estoppel law), later held to withstand a First Amendment challenge): see note 66, *infra*.

support to privacy interests. And they have also sometimes proved more resistant to First Amendment defences than privacy torts, albeit on limited and shaky grounds (in the one case the inviolability of a property right found in the information;[64] in the other the value of promises and laws that protected them, classed as laws "of general application" giving no special privilege to the media—as the Supreme Court held by a narrow majority in *Cohen v. Cowles Media Co.*[65] where a newspaper was forced to pay damages for breach of a promise of confidentiality given to an informant).[66] Thus it cannot be said U.S. courts failed to offer protection to privacy when seen to conflict with free public debate. However, protection has undeniably been patchy.

By the same token, British Commonwealth courts took a while to provide wide-scale protection to privacy interests. Breach of confidence eventually became established as an effective mechanism for protecting private information (outside of contract, which proved relatively unnecessary given the breadth of the equitable doctrine). By the end of the 20th century it had become more established than the fledgling doctrine of *Prince Albert v. Strange* which Warren and Brandeis thought should be substituted with a privacy tort and it covered a great range of information: its focus was by no means limited to private personal information. But for most of that period its development was held back by a perception in the courts that if not a contract then a pre-existing "relationship of confidence" was necessary. Although 19th century cases including *Prince Albert v. Strange* treated surreptitious obtaining as entailing an obligation of trust and confidence, at least in some contexts, this was largely overlooked from the end of the First World War.[67] By 1949 in *Saltman Engineering Co. Ltd. v. Campbell*

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64 Thus an analogy to intellectual property rights was drawn in *Zacchini, supra* note 61 as a reason to override First Amendment considerations. In later publicity right cases, however, lower courts have given more latitude to newsworthy publications: see, for instance, *Michaels v. Internet Entertainment Group (No. 2), supra* note 50 and generally J. Thomas McCarthy, *Rights of Publicity and Privacy* (New York: Clark Boardman, 1987), Chapter 8 (a balancing of interests is required).

65 *Cohen v. Cowles Media Co*. 501 U.S. 663 (1991).

66 *Ibid*. White J. for the court at 668–71. The incoherence of *Cohen's* "law of general application" principle is shown by, for instance, *New York Times v. Sullivan* 376 U.S. 254 (1964) (defamation actions subject to an First Amendment inspired "actual malice" defence clearly tailored to media concerns) and *Hustler Magazine Inc. v. Falwell* 485 U.S. 46 (1988) (in another action involving a media defendant, tort of intentional infliction of emotional distress held subject to same First Amendment qualification as for defamation). This suggests it was the promise of confidentiality in *Cohen* that made the difference: and see White J. at 671 ("Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed").

67 Cambridge academic Jonathan Morgan has recently argued that the original notion of "trust" necessitated a pre-existing relationship of confidence ("Privacy, Confidentiality and

Engineering Co. Ltd.[68] it was questioned whether an equitable obligation existed apart from contract. Although the Court of Appeal found that it did,[69] the case (which concerned a trade secret) was thought so generally uninteresting that it was not reported in the mainstream reports for another 15 years.[70] In any event, more influential for the shape of the doctrine was the judgment of Megarry J. in *Coco v. A.N. Clark (Engineers) Ltd.*[71] Having identified the roots of the doctrine as lying in trust and confidence this respected equity judge posited that "normally" information must be imparted and received in confidence[72]—*viz.* within a relationship of confidence albeit loosely construed—for the obligation to arise.[73] Further, in *Malone v. Metropolitan Police Commissioner*[74] Megarry V.C. rejected any possibility of surreptitious obtaining being covered, insisting those in possession of information had the burden of keeping it secret.[75] And, if *Coco* could be put aside as a trade secret case, *Malone* was about privacy (although the plaintiff who complained after finding his telephone tapped by the police seemed particularly unsympathetic).

For a while it might have been thought sufficient that privacy interests could be protected as "confidential" where a confidential relationship was breached. There were several cases where claimants were successful. For instance, in *Pollard v. Photographic Company*[76] a

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Horizontal Effect—'Hello' Trouble" [2003] Cam. L.J. 444). But that idea seems to have become a more rigid feature of 20th century cases (especially post World War I). In *Prince Albert v. Strange*, for instance, Lord Cottenham talked of surreptitious obtaining in circumstances involving another's breach of trust, confidence or contract as a reason for the obligation to extend to the third party as well—as if the surreptitiousness of the obtaining implicated the third party in the others' breach of trust, confidence or contract: *supra* note 31. In other cases, admittedly of patchy authority, the surreptitiousness of the obtaining in itself was identified as giving rise to the obligation: see Megan Richardson, "Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law" (1994) 19 Melb. U. L. Rev. 673, 690–1.

68 *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203.

69 In broad terms, Lord Greene M.R. accepting that "[i]f a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff there will be an infringement of the plaintiff's rights": at 213.

70 The case was subsequently reported as a note at [1963] 3 All E.R. 413.

71 *Coco v. A.N. Clark (Engineers) Ltd.* [1969] R.P.C. 41.

72 *Ibid.* at 46.

73 Although the actual circumstances where that might happen were not narrowly stated, Megarry J. added at 48: "[i]t seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence".

74 *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344.

75 *Ibid.* at 376 ("a person who utters confidential information must accept the risk of any unknown overhearing that is inherent in the circumstances of the communication …").

76 *Pollard v. Photographic Company* (1888) 40 Ch. 345.

photographer's unauthorised use of his subject's photographs for advertising purposes was found in breach of confidence, as was an attempt to publish lurid details of a former society marriage (by the former husband) in *Argyll v. Argyll*.[77] In *Stephens v. Avery*[78] public revelation of a story told to a friend in confidence was easily held in breach of confidence, notwithstanding claims that the information (concerning a lesbian affair and peripheral involvement in a high profile murder) was "trivial" and not worth protecting. And in the Australian case of *Foster v. Mountford & Rigby Ltd.*[79] publication of tribal secrets told to a visiting anthropologist who many years later wrote about them in a book was enjoined on confidentiality grounds. The most implicit of promises and lenient of confidentiality thresholds seemed sufficient if the court thought an obligation was reasonable, which generally they did where the information to be protected was of a private personal character.[80] For a brief period in the 1970s it was suggested that if the plaintiff had sought the limelight, a distinction might be drawn. The public interests in the public knowing the truth might then prevail.[81] But after the House of Lords made plain its view that the public interest did not necessarily equate to the interest of the public (an "objective" judgment by courts was required)[82] this authority diminished.[83] Rather the line was simply drawn at obtaining without a relationship of confidence. However, it was

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77 *Argyll v. Argyll* [1967] Ch. 302.

78 *Stephens v. Avery* [1988] 2 All E.R. 477.

79 *Foster v. Mountford & Rigby Ltd.* [1977] 14 A.L.R. 71.

80 Courts were generous in finding the requisite relationship of confidence and they also construed "confidentiality" generously, as in *Foster v. Mountford, supra* note 79 (the fact that the information was already known to male members of the tribe did not preclude its confidentiality). In another the Australian case, *G. v. Day* [1982] 1 N.S.W.L.R. 24, even the fact that that a prior television broadcast had disclosed a police informant's identity did not prevent the information being treated as confidential *vis-à-vis* a later publication. Yeldham J. said the broadcast was "brief and transitory" and unmemorable by "anyone who did not already know the plaintiff": *ibid.* at 40. And Megarry J. in *Coco v. A.N. Clark (Engineers) Ltd.*, following the standard set in *Saltman Engineering*, defined confidentiality as simply not "public knowledge": *supra* note 71.

81 Lord Denning M.R. especially saw this as an answer to self-publicising conduct of those who sought to claim confidentiality when "the truth" was revealed: *Woodward v. Hutchins* [1977] 2 All E.R. 751 [[1977] 1 W.L.R. 760] (C.A.), at 753–754, Lawton and Bridge L.J.J. concurring; *Lennon v. News Group Newspapers Ltd.* [1978] F.S.R. 573 (C.A.), at 574–575, Browne L.J. concurring.

82 See *British Steel Corporation v. Granada Television Ltd.* [1981] A.C. 1096 (the Law Lords variously referring to the "interests of justice" (*per* Viscount Dilhorne) or "legitimate interests of the public" (*per* Lord Wilberforce)). *Cf. Malone v. Metropolitan Police Commissioner, supra* note 74, Megarry V.C. at 377, identifying the public interest with protection of the public.

83 Australian courts were sometimes more circumspect in framing any public interest exception (suggesting the "exception" only permitted the publication of iniquity), although the weight of authority now appears in favour of the broader proposition: *infra* note 100.

also becoming apparent that a doctrine centred around a relationship of confidence could not hope to offer effective privacy protection where, as was increasingly occurring, the wrong complained of was a deliberate and even surreptitious taking with a view to publication. Moreover, new technology and practices meant the burden of preventing this was becoming exceedingly onerous for those in possession of private information. Breach of confidence confined to a relationship of confidence could do little to prevent or remedy aerial surveillance, long-range photography, hidden cameras, or simple determined aggressiveness on the part of a new paparazzi bent on obtaining information of the most personal kind—as in *Kaye v. Robertson*[84] where, after a serious car accident, an actor found his hospital room invaded by reporters who proceeded to photograph and question him as he lay a befuddled state. Without a property right accepted in private information that could sustain an action for trespass,[85] or a tort (or torts) directed specifically to privacy, or even a developed "publicity right" (outside of Canada which chose a different path in the 1980s),[86] there were clear gaps in the protection.

Eventually, however, the authority of *Coco* diminished; and notice and reasonableness, or "conscience" to use the language of equity, became identified as the basis of a confidentiality obligation. Less than a decade after *Coco*, Dunn J. in the Queensland Supreme Court had observed in the little known case of *Franklin v. Giddins*[87] that the wrongful conduct of a surreptitious intruder in stealing the plaintiff's budwoods and seeking to exploit their genetic information was equivalent to a confidant breaching confidence.[88] A few years later, the U.K. Court of Appeal held in *Francome v. Mirror Group Newspapers Ltd.*[89] that an unlawful telephone tap gave rise to a confidentiality obligation, with the lawful police action in *Malone* distinguished.

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84 *Kaye v. Robertson* (1981) 18 F.S.R. 62.

85 The possibility of even extending the notion of trespass to land to encompass the air space above it was rejected in *Bernstein of Leigh (Baron) v. Skyviews & General Ltd.* [1978] 1 Q.B. 479 where the defendants flew over the plaintiff's property to take photographs. See also the Australian case of *Victoria Park Racing & Recreation Grounds Ltd. v. Taylor* (1937) 58 C.L.R. 479. Those were most obviously trade secret cases but for a similar result in a clear privacy case (trespass to the person unhelpful, and no privacy tort *per se*, leaving a remedy only for malicious falsehood) see *Kaye v. Robertson, supra* note 84.

86 See generally (on the Canadian treatment of privacy and publicity: a half way house between the U.S. and U.K.) Gerald Fridman, *The Law of Torts in Canada* (Toronto: Carswell, 1990), Vol. 2, Chapter 9. See also more recently (publication of photographs taken in a public place held a violation of Quebec's Charter of Human Rights and Freedoms on appeal to the Supreme Court of Canada) *Aubry v. Editions Vice-Versa Inc.* [1998] 1 S.C.R. 1.

87 [1978] Qd. R. 72.

88 *Ibid.* at 78 ("[t]he thief is unconscionable because he plans to use and does use his own wrong conduct to better his position in competition with the owner, and also to place himself in a better position than that of a person who deals consensually with the owner").

89 *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892.

Then in 1992 a Hong Kong court in *Chih Ling Koo v. Lam Tai Hing*[90] dealt with theft and misuse of academic research under the equitable doctrine. A pattern seemed to be developing of courts treating surreptitious obtaining as overcoming the need for a relationship of confidence.[91] But most influential was a statement of Lord Goff in *Attorney-General v. Guardian Newspapers Ltd (No. 2)* (the "Spycatcher" case)[92] that the confidentiality doctrine extended to cases where notice is given of confidence with the result that "it would be just in all the circumstances" for the obligation to arise.[93] On this framing, the line may not even be drawn at surreptitious obtaining. And notably Lord Goff had privacy cases in mind when he added:

> I have expressed the circumstances in which the duty arises in broad terms … to include certain situations, beloved of law teachers—where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in some public place, and then picked up by some passer-by …[94]

By the end of the century breach of confidence was positioned to take a central role in policing misuses of private confidential information in British Commonwealth courts. It was pointed out that the circumstances in which it could be relied were of far greater practical relevance than Lord Goff's quaint examples of documents wafted out of a window or dropped in a street.[95] Despite the suggestion of Sedley L.J. at the interlocutory stage of *Douglas v. Hello!* that more explicit legal treatment of privacy was needed—and notwithstanding occasional calls for a tort of privacy and even some recent tentative moves in that direction[96]—the simpler step was to use the obvious

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90 *Koo Chih Ling v. Lam Tai Hing* [1992] 1 H.K.C. 193. Approved on appeal: [1993] 2 H.K.C. 1.

91 See generally Richardson, *supra* note 67, although other commentators of the period were more circumspect: see, for instance, George Wei, "Surreptitious taking of confidential information" (1993) 13 Legal Studies 302 (a separate unlawful act is required).

92 *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109.

93 *Ibid.* at 281.

94 *Ibid.* at 281–2.

95 See, for instance, *Hellewell v. Chief Constable of Derbyshire* [1995] 1 W.L.R. 804, Laws J. at 807 (publication of a picture of a private act taken with a telephoto lens would "as surely amount to a breach of confidence as if [the photographer] had found or stolen a letter or diary in which the act was recounted and proceeded to publish it"); *A v. B plc.* [2002] Q.B. 195, Lord Wolf C.J. at 207 (bugging of someone's home and other surveillance techniques obvious examples of intrusion requiring justification). The line between obtaining and confidential disclosure also became very thin in cases where security measures were evident: see *Shelly Films v. R Features* [1994] E.M.L.R. 134 and *Creation Records Ltd. v. News Goup Newspapers Ltd.* [1997] E.M.L.R. 444.

96 See, for instance, Morgan, *supra* note 67. Although U.K. courts appear to have rejected the possibility for now (see further below), a Queensland District Court did not: *Grosse v. Purvis* [2003] Q.D.C. 151, decision of Skoien J., 16 June 2003 (finding breach of tort of privacy,

tool at hand to address privacy invasions. In a series of cases including *A v. B plc.*,[97] *Naomi Campbell v. Mirror Group Newspapers Ltd.*[98] and the Australian case of *Australian Broadcasting Corporation v. Lenah Game Meats Pty. Ltd.* (notwithstanding some divergence across the High Court)[99] judges have generally responded to Sedley L.J. by pointing to breach of confidence as the option first to be considered. At the same time, mindful of the limitations of a doctrine centred around unauthorised *publication* of confidential information and with some scepticism about how far "confidentiality" itself could extend (especially for information that was only partly secret and a great deal public already),[100] courts have begun referring to new possibilities of relying on old and emergent torts such as negligence,[101] trespass and allied rights,[102] defamation, passing off, nuisance

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although acknowledging the conduct in the case would equally come within a more narrowly defined tort of harassment). The issue of recognition of a tort of privacy is also currently before the New Zealand Court of Appeal, on appeal from a negative finding of Randerson J. in *Hosking v. Runting* [2003] 3 N.Z.L.R. 385.

97 *A v. B plc., supra* note 95 and see further note 107.

98 *Naomi Campbell v. M.G.N., supra* note 4 and see further note 107.

99 *Australian Broadcasting Corporation v. Lenah Game Meats Pty. Ltd.* (2001) 208 C.L.R. 199. For a discussion of the judgments in the case, which gave some support for breach of confidence as a continuing source of protection for privacy interests (although Gummow and Hayne suggested a tort of privacy protection might not be ruled out if a more suitable case was before the court—especially one not involving a corporate claimant seeking to protect commercial interests), see Richardson, *supra* note 35.

100 See especially *Peck v. United Kingdom* (2003) 36 E.H.R.R. 41 (where the European Court of Human Rights concluded CCTV filming in a public street did not entail the "necessary quality of confidence" for breach of confidence to be found after information revealing Peck's attempted suicide was publicly broadcast—thus U.K. law did not adequately protect Peck's private life right under the European Convention); and *A.B.C. v. Lenah Game Meats Pty. Ltd., supra* note 99 (operations of an abattoir open to the public and surreptitiously filmed conceded not to be confidential, a concession which Gleeson C.J. at least apparently approved). Arguably confidentiality could properly have been found in both cases on traditional relative secrecy standards (see *infra* note 105). Intrusion *per se* is difficult to categorise as *breach* of confidence, although there may be an available remedy in tort: see *Wainwright, infra* note 102.

101 Negligence might have been claimed in response to the Council's insensitive disclosure of Peck's information (to publicise success of CCTV cameras) in *Peck v. U.K., supra* note 99. For a case where negligence was found after confidential information was allowed in breach of a duty of care to reach the public domain, see *Swinney v. Chief Constable* [1997] Q.B. 464.

102 See *Wainwright v. Home Office* [2002] Q.B. 1334 (tort of intentional infliction of emotional distress accepted to be potentially available, under limited circumstances, in a strip-searching case, although not on facts of the case—only the conceded trespass by battery arising out of physical contact with one of the claimants gave rise to damages); approved on appeal by the House of Lords [2003] U.K.H.L. 53. The facts of the case predated the U.K.'s implementation of the European Human Rights Convention but Lord Hoffman suggested there was nothing in the jurisprudence of the European Court which made necessary the adoption of "some high level principle of privacy" in the U.K.: para. 32.

and harassment[103] to address conduct the equitable doctrine may not reach. But confidentiality is not an inflexible standard and intrusion, especially where the media is concerned, is commonly coupled with publication.[104] For many cases, still, a doctrine framed in terms of breach of confidence can provide significant protection to privacy. *Douglas v. Hello!* is a case in point. The decision of Lindsay J. that *Hello!* had in publishing the surreptitiously, and rather intrusively, obtained wedding pictures breached an obligation of confidentiality owed to Douglas and Zeta-Jones (as well as *OK!*, albeit its interests were more in the nature of trade secrecy than privacy) continued along an established track. Although sceptics might still question whether "confidentiality" could be maintained in information known to 350 wedding guests and shortly to be widely published by consent, the conclusion of that it could is consistent with authorities that—for the most part at least—require that the information simply be not "public knowledge".[105]

Nor did freedom of speech set a significant hurdle to the claimants' success. In *Attorney-General v. Guardian Newspapers*, Lord Goff operating in the utilitarian tradition had said that if necessary the public interest in privacy would be balanced against any counterveiling public interest, and that view has prevailed since.[106] The notion that an interested public did not equate to public interest may have diminished a little by the early 21st century—the public interest in knowing "the truth" about those who seek to maintain a false public image is a feature of recent cases such as *A v. B plc.* and *Naomi Campbell v. M.G.N.* which have suggested that public figures have trust obligations of their own, although how far this will be taken remains to be

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[103] See Gummow and Hayne JJ. in *A.B.C. v. Lenah Game Meats, supra* note 99 at 255, listing torts which (together with breach of confidence) cover some ground of U.S. privacy tort/s. For a Singapore case where harassment was found (the defendant having made repeated unsolicited telephone calls, electronic mail and SMS messages targeting the claimant) see *Malcomson v. Naresh* [2001] 3 S.L.R. 454 and, for a useful analysis, Tan Keng Feng, "Harassment and Intentional Negligence" [2002] S.J.L.S. 642.

[104] As distinguished privacy scholar Raymond Wacks has pointed out "[the paparazzi's] intrusive conduct is often conflated with the publication of its fruits", although adding "there is general recognition that … [the] law is inadequate": "Pursuing Paparazzi: Privacy and Intrusive Photography" (1998) 28 Hong Kong L.J. 1 at 1 and generally *Privacy and Press Freedom* (London: Blackstone Press, 1995).

[105] In *Douglas (No. 3), supra* note 2, Lindsay J. at para. 1050–1 disagreed with the Court of Appeal in *Naomi Campbell v. M.G.N., supra* note 4 which held a higher standard of offensiveness to the reasonable person should apply. As Lindsay J. noted, the threshold is not supported by *Coco v. A.N. Clark: supra* note 80.

[106] See Lord Goff in *A-G v. Guardian Newspapers, supra* note 92 at 282 (public interest that confidences should be preserved and protected by the law may be outweighed by "some other countervailing public interest which favours disclosure"). See also *Hellewell v. Chief Constable, supra* note 95, Laws J. at 809–10; and (although more ambiguous on the priority to be given to free political discussion) *A.B.C. v. Lenah Game Meats, supra* note 99, Gleeson C.J. at 224.

seen.[107] In general, the idea, dating back to *Prince Albert v. Strange* (and Mill and Hume) that, when trust enters the equation on the privacy side, privacy should in general prevail has not changed; prompting Lindsay J. in *Douglas v. Hello!* to observe on the character of the claimants' (innocent) and defendants' (morally questionable) conduct as well as the character of the information itself, in deciding that the public interest weighed in favour of the claimants.[108] Notwithstanding the European Human Rights Conventions' more equivocal treatment of the relationship between privacy and free speech, the public interest exception largely remains that—an exception—to the principle that confidentiality should be maintained.

At time of writing, *Douglas v. Hello!* may still be appealed.[109] Already the *Naomi Campbell* case, another case with U.S. connections, albeit less powerful than in *Hello!*,[110] is scheduled for the House of Lords early 2004. If the issue of free public debate is raised in either of these cases it is hoped the U.K. courts will take account of developments in the U.S. as a jurisdiction well advanced in contemplating the benefits and sometimes the costs of a very broad freedom. Recent U.S. Supreme Court cases reveal some new thinking on the nexus between privacy and self-expression, suggesting the line between privacy and free speech is less stark than previously was thought. Thus in *Bartnicki v. Vopper* (a telephone tapping case revealing behind the scenes talks regarding union negotiations),[111] a court led by Stevens J. held that the First Amendment's general privilege for truthful publications may be qualified if the publication "would have a chilling effect on private speech".[112] Although in that case publication prevailed over confidentiality (for one thing the words entailed threats of physical violence and the background discussions behind collective bargaining negotiations leaked to the media involved matters of some public interest), it

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[107] In *A v. B plc., supra* note 95, a sports figure's extra-marital affair permitted to be revealed by ex-lovers, on basis that claimant had presented himself as a role model; in *Naomi Campbell v. M.G.N., supra* note 4 the claimant model who "courted rather than shunned the press" and publicly lied about her drug addiction held un-entitled to prevent publication of pictures showing her leaving a Narcotics Anonymous meeting.

[108] *Douglas (No. 3), supra* note 2, Lindsay J. at 1055, 1059–60.

[109] *Supra* note 2.

[110] Ms. Campbell is an international model who works and lives in the U.S. *The Mirror*, a U.K. paper, is published on the internet and viewable around the world (including in the U.S.). Thus Ms. Campbell's position is somewhat analogous to that of the plaintiff, Joseph Gutnick, in the Australian case of *Dow Jones v. Gutnick* who claimed his reputation was damaged in Victoria due to a publication in *Barron's Online*. The case is discussed, *infra* note 120.

[111] *Bartnicki et al. v. Vopper* 532 U.S. 514 (2001).

[112] See Stevens J. (O'Connor, Kennedy, Souter, Ginsburg and Breyer JJ. joining) at 532; Breyer J. referring more broadly to the individual's interest in "basic personal privacy": at 540. The minority (Scalia J., Rehnquist C.J. and Thomas J. concurring) agreed private speech enjoyed First Amendment protection.

was accepted there could be public interests on both sides.[113] Further, in *Lawrence v. Texas*[114] Kennedy J., delivering the opinion of the court, held that the petitioners (arrested and prosecuted for sodomy as consenting adults in a private home) "are entitled to respect for their private lives …" and guaranteed protection under the due process clause of the Constitution's Fourteenth Amendment.[115] Although the discussion was directed against the state and First Amendment issues were not raised, the language gives support for future privacy claimants; and the court's references to European and other overseas authorities as indicating "values we share with a wider civilisation" is helpfully outward looking.[116] If the trends continue, individuals who find their private gatherings invaded by unwanted guests and details reported to the world may find they have better recourse in U.S. courts. British Commonwealth Courts in turn would do well to acknowledge that it is especially where privacy claims are essentially about private expression that, viewed from a liberal-utilitarian perspective, they should weigh most strongly over any claimed interests in free public debate[117]—as, for instance, in *Douglas v. Hello!* where the claimants' wedding was by all accounts little more than a symbolic and personal expression of mutual devotion and good cheer.

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[113] The difference between the majority and minority judges came down to whether the publication of a surreptitiously tapped conversation was protected under the First Amendment. By a majority the First Amendment was held to support publication (thus the Pennsylvania wire-tapping statute which would have constrained the publication was unconstitutional)—although there were some differences in the reasoning: Stevens J. appeared to accept a blanket privilege for "truthful information of public concern", stating that "[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy": *ibid.* at 532 (citing *Time v. Hill*); Breyer J. favoured a genuine balancing of interests: at 540–41.

[114] *Lawrence v. Texas* 123 S. Ct. 2472 (2003).

[115] *Ibid.* at 525–6 *per* Kennedy J. (Stevens, Souter, Ginsburg and Beyer JJ. joining). Thus a Texas statute which sought to criminalise the conduct violated the substantive due process imperative of the 14th Amendment of the U.S. Constitution. O'Connor J. concurred on the narrower ground of the claimants' entitlement to equal treatment. The position of Scalia J. (Rehnquist C.J. and Thomas J. joining) that "sodomy is not a fundamental value" appeared to overlook the privacy issue.

[116] *Ibid. per* Kennedy J. at 524, citing European court of human right decisions and a *amicus curiae* brief signed by Mary Robinson (former United Nations High Commissioner for Human Rights) *et al*. citing other overseas cases which have treated consensual sodomy between adults as a matter of individual choice. Contrast the more dismissive and parochial tone of Scalia J.'s observation (quoting Thomas J. in *Foster v. Florida* 537 U.S. 990 (2002)) that "this Court … should not impose foreign moods, fads or fashions on Americans" (at 539).

[117] For an enlightening discussion of these issues, see Eric Barendt, "Privacy and Freedom of Speech" (Centre for Media and Communications Law seminar, the University of Melbourne, September 2003; copy on file). For John Stuart Mill, simple self-expression—especially if pure speech is the vehicle used—was unlikely to find utilitarian justification for interference (the *only* utilitarian justification according to Mill was avoidance of harm to others; and "harm" did not extend to mere disapproval of others' opinions or actions): *supra* note 35, Chapter IV (Society and the Individual) especially.

III. Towards a Harmonised Common Law?

Cases like *Douglas v. Hello!* show how easily modern privacy issues may have international dimensions. In such cases, common law courts have choices—harmonise their laws (in substantive terms at least) or treat them as competing for control. The High Court of Australia recently acknowledged in *Gutnick v. Dow Jones*[118] that the challenge of the 21st century is to ensure defendants are not restrained under legal standards that violate their fundamental social norms and plaintiffs find adequate protection of interests they have become accustomed to believe are their entitlements. The solution the Australian court saw was for courts applying their laws to take account of other states' relevant laws.[119] That was an internet defamation case[120] but a like principle may be applied to claimed privacy violations whose implications are felt in more than one place. Against that, the notion that one state's laws should simply prevail on the basis that it has most to say about the dispute seems fixated in an earlier age where sovereignty was equated to absolute control. The third alternative canvassed by Kirby J. in *Gutnick* was that courts should decide which state's norms should prevail on the basis of some higher principle.[121] But, as Kirby J. observed, "there are limits on the extent to which national courts can provide radical solutions".[122] A substantive harmonisation approach is less radical and more consistent with the original intent of the common law: to represent the customs of "true communities".[123] And, at least at the moment, it appears to be a feasible possibility for privacy protection.

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[118] *Dow Jones and Company Inc. v. Gutnick, supra* note 15,

[119] *Ibid.* at 609, although framed by the court in vague terms ("it is of the first importance to identify the precise difficulty that must be addressed"). For more specificity, see *infra* note 120.

[120] The case concerned an article published in the U.S. in *Barron's Online*, which could be read via the internet in Victoria, Australia, where the plaintiff—who found himself criticised—resided. The plaintiff sued for defamation under Victorian law. The High Court upheld the conclusion of a Victorian court that Victoria was an appropriate forum and service out of jurisdiction could be ordered on the basis that a tort was committed in Victoria (with the result that Victorian law would also govern). Anticipating the decision would be criticised for failing to give due deference to the First Amendment principles, Gleeson C.J., McHugh, Gummow and Hayne JJ. added that "in cases where the publisher of material which is said to be defamatory has acted in one or more of the United States, any action that is brought in an Australian court in respect of publications that were made in America, would, in applying the law of the place of commission of the tort, have to give effect to the rather different balance that has been struck in the United States between freedom of speech and the individual's interest in reputation": at 609.

[121] Although in the end preferring legislative reform and international agreement: at 642–3.

[122] *Ibid.*

[123] See Milson, *supra* note 15.