



## **THE BENTHAM CLUB, UCL PRESIDENTIAL ADDRESS 2003**

### **PRIVATE LIFE AND PUBLIC INTEREST** By Lord Phillips of Worth Matravers

It was the wedding of the year. Everyone who was anyone was there. That rather larger number who were not were regaled, in detail which the bride and groom considered both personal and embarrassing, with an account of the event through the auspices of the media. Needless to say the media had not been invited. How they obtained their coverage is not clear.

This led to the following protest in a periodical.

“The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.

To occupy the indolent, column upon column is filled with idle gossip, which can only be provided by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”

The wedding in question was not, of course, the wedding of Michael Douglas and Catherine Zeta Jones, but a wedding which took place some 110 years earlier in Boston, Massachusetts. The bride was a Miss Warren. Her mother was a leading member of Boston’s social elite. Her father had just retired from a law firm to take over the family paper business. The periodical was the Harvard Law Review and one of the authors was none other than the bride’s father, Mr Samuel Warren. He had graduated second in his year from Harvard Law School in the class of 1877. First had been the co-author of the article, one Louis Brandeis.

Had he not been born about a hundred years too early, I cannot but think that Jeremy Bentham would have enjoyed the company of these gentlemen. He would certainly have held his own intellectually. His great grandfather was a wealthy pawnbroker and his grandfather and father both practised as attorneys. Bentham was a precocious child and considered to be something of a genius. By four he was studying Latin and Greek and by six or seven he

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had added French to his repertoire. In 1755 he was sent to Westminster School. A serious and studious boy, he showed no aptitude for sport and was out of place at public school. By twelve he was attending Queen's College Oxford. He obtained his degree at the age of sixteen and in the same year began to eat his terms at Lincoln's Inn.

Bentham gave up practice at the Bar, not to take over a family business, but because he had failed to flourish. I suspect that he was not a very good advocate. He hated his time at Westminster School, where he was weedy and bad at games. As for Oxford University, his experience at Queen's College led him subsequently to record that the only sure effects of an English university education were mendacity and insincerity.

He would not, of course, have said this of UCL, the first university to welcome students regardless of their race, creed or political belief, and indeed to welcome, posthumously, Jeremy Bentham himself. I thought that the subject of my lecture would be of interest to him this evening.

Had he been he would not have approved of all present. He had no time at all for barristers and believed that under a proper system of legal procedure the litigants would be brought directly before a judge – certainly not before a jury – who would sort things out between them, without any need for them to pay expensive lawyers fees. With something like 30% of applicants for permission to appeal to the Court of Appeal appearing as litigants in person we seem to be moving in his direction.

All know of Bentham's brilliance in the field of jurisprudence and his promotion of the utilitarian precept of 'the greatest happiness of the greatest number'. How many know, however, that not only was he an enthusiastic proponent of codifying international law, but that he invented both the words 'codify' and the word 'international'? He was a man of rare talent and I am honoured to be here this evening as the President of the Society that bears his name.

In their article in the Harvard Law Review Warren and Brandeis propounded the need of the law to recognise a right to privacy. They identified a number of established causes of action, which they suggested embraced what were, on analysis, claims for breach of privacy – breach of confidence, invasion of property rights, breach of an implied contractual term, breach of trust and defamation. These, they suggested, provided the foundation for the judicial development of a law of privacy.

In this country today the debate is raging as to whether the judges should develop the common law so as to fashion a tort of breach of privacy. Such a question did not trouble Warren and Brandeis. They quoted from Austin's jurisprudence:

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator.

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That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature.”

They identified that at the forefront of the need for an advance in the law was the potential for invading privacy of the camera.

“Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops”

“since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to”

In advocating a law of privacy for the United States, Warren and Brandeis believed that the law of England had already shown the way. They quoted from the judgments of Sir Knight Bruce V-C<sup>1</sup>.

at first instance and Lord Cottenham LC<sup>2</sup> on appeal in the case of *Prince Albert v Strange*.

The subject of this action was some etchings that Prince Albert had had made of sketches that he and Queen Victoria had made for their own pleasure. The etcher decided that he would publish a catalogue of these for his own profit. The court enjoined him from doing so. The decision can be analysed as founded on breach of trust and breach of confidence, but both judgments also used the language of breach of privacy. Listen to this purple passage from Sir Knight Bruce<sup>3</sup>.

“I think, therefore, not only that the defendant here is unlawfully invading the plaintiff’s rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not the more, yet, certainly, not the less, because it is an intrusion – an unbecoming and unseemly intrusion – an intrusion not alone in breach of convention rules, but offensive to that inbred sense of propriety natural to every man – if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life, - into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country.”

Lord Cottenham, for his part, at one point declared that “privacy is the right invaded”.

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<sup>1</sup> [(1849) 1 De G. & Sm.]

<sup>2</sup> [(1849) 1 Mac. & G.25]

<sup>3</sup> [at p. 696]

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It is fascinating to see the extent to which the Warren and Brandeis in their article echoed the current jurisprudence, to which I shall be coming. Thus, they declared <sup>4</sup> ‘The right to privacy does not prohibit any publication of a matter which is of public or general interest’. They went on to explain <sup>5</sup> .

“There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observations.

Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens.”

They added <sup>6</sup>

“Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.”

The Warren and Brandeis article was to be highly influential in the development of the law of privacy in the United States. In fact they had been anticipated by a judgment of a trial judge in New York in a case earlier in the year which received considerable coverage in the New York Times, but was not considered worthy of reporting elsewhere <sup>7</sup> . An actress had appeared on the stage in tights, which at the time was considered scandalous. The defendant took a surreptitious photograph of her from his box.

The judge enjoined him from publishing this. Other decisions followed, which appeared to entertain the concept of a right of privacy. But in 1902 this development of the law received a setback.

In *Robertson v Rochester Folding Box Co* <sup>8</sup> the Claimant, a young lady of some beauty, complained that her picture had been used without her consent to advertise flour. Her claim came before the New York Court of Appeals. By a 4 to 3 majority the court rejected any claim based on privacy, finding that:

“[privacy has] not as yet an abiding place in our jurisprudence, and ... cannot now be incorporated without doing violence to settled principles of law.”

The judgments of the minority were powerful. For instance Gray J held that she had a right to be protected and that:

“Any other principle of decision...is as repugnant to equity as it is shocking to reason”

The majority decision was criticised in the New York Times and produced a storm of public protest.

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<sup>4</sup> [at p. 214]

<sup>5</sup> [at p. 215]

<sup>6</sup> [at p. 216]

<sup>7</sup> [Manola v. Stevens. NY Times 15,18,21 1890.]

<sup>8</sup> [171 NY 338, 64 NE 442 (1902)]

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Three years later – when hearing a similar case *Pavesich v New England Life Insurance Co*<sup>9</sup> – the Supreme Court of Georgia explicitly adopted Gray J’s reasoning and declined to follow Robertson.

The right of privacy was then the subject of a battle in which some States followed *Robertson* and some *Pavesich*. By 1960, however, writing in the *California Law Review*, Dean Prosser was able to record that Warren and Brandeis had triumphed. The vast majority of American State courts recognised a right of privacy in one form or another.

Prosser identified not one tort, ‘*but a complex of four*’. He described them as:

- (a) Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs;
- (b) Public disclosure of embarrassing private facts about the Plaintiff
- (c) Publicity which places the plaintiff in a false light in the public eye and
- (d) Appropriation, for the Defendant’s advantage, of the Plaintiff’s name or likeness.

These four different ways of invading the right of privacy were subsequently recognised in the *Second Restatement*, published in 1977. You will appreciate that in this jurisdiction other areas of our law have addressed some of these types of invasion of privacy – I can mention defamation and harassment by way of examples. This evening I am particularly concerned with that category which Prosser identified as ‘public disclosure of private facts about the plaintiff’. The *Restatement* describes this head as follows:

“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”

So there is the familiar conflict between invasion of privacy and freedom of expression in relation to a matter of public interest.

In one of the Clifford Chance lectures delivered at Oxford at the end of the last century, Professor David Anderson complained that the American judges had proved reluctant to use tort law to protect privacy against the intrusion of the media.

“We expect”, he said, “the media to uncover the truth and report it – not merely the truth about government and public affairs but the truth about people. The law protects these expectations too – and when they collide with expectations of privacy, privacy almost always loses.”

In America privacy often founders on the rock of the First Amendment and the rule against prior restraint. Freedom of speech is valued more than privacy. But at least they have a law of privacy. In California the common law was buttressed in 1999 by a new statute dubbed ‘the anti paparazzi

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<sup>9</sup> [122 GA. 190; SOS.E.68]

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legislation' which has made actionable the recording by film or tape using long range enhancing devices of anyone engaged in 'personal or familial activity' in circumstances where there would be a reasonable expectation of privacy<sup>10</sup>.

If *Prince Albert v Strange* inspired the development of a law of privacy in the United States, the same cannot be said for this country. The nadir of the seeming impotence of our common law was reached in 1990 in the case of *Kaye v Robertson*<sup>11</sup>. Mr Gordon Kaye, a popular television star, was lying in Charing Cross Hospital in a private room recovering from serious brain injuries sustained in a road accident. A photographer from the Sunday Sport gained unauthorised access to his room and took a series of flashlight photographs, including photographs of the scarring of his head. He made no objection, for he was in no condition to do so. Potter J. granted an interlocutory injunction against publishing these photos, but the Court of Appeal reluctantly discharged it, holding that there was no arguable cause of action. Leggatt LJ referred to a similar case which had been held actionable in America, and remarked<sup>12</sup>:

"We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be controlled only by a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature".

That statement was, of course, made over a decade before the Human Rights Act 1998 came into force and I propose to consider whether that Act was a skeleton key which opens the door to the development of a right of privacy by the English judiciary. Before doing that, however, I propose to take you on a brief 'tour d'horizon' to see how some other countries have been addressing the conflict between private life and the freedom of the media. I do this with some diffidence, for it is a topic on which our own Professor Basil Markesinis has written a number of erudite articles, and even books. I propose to adopt his methodology and consider the comparative scene by looking at the cases rather than the jurisprudence.

If Basil has written extensively on the subject, he has been outdone by the High Court of Australia. At the end of 2001 they gave judgments in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*<sup>13</sup>, which ran to 242 pages and contained 638 citations. This was an appeal against the grant of an interlocutory injunction by the Supreme Court of Tasmania. Lenah Game Meats was, as its name suggests, a Company which killed, processed and sold game, including the Tasmanian brush-tail possum. Trespassers installed hidden cameras in its abattoir and filmed the way in which the possums were slaughtered. The film was passed to the defendants, who were not party to

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<sup>10</sup> [California Civil Code section 1708.8]

<sup>11</sup> [1991 FSR 62.]

<sup>12</sup> [p.71]

<sup>13</sup> [208 CLR 199]

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the manner in which it had been obtained and who proposed to broadcast it. Lena did not view this with enthusiasm. It was not suggested that there was anything unlawful about their operation, but as Gleeson CJ remarked<sup>14</sup> :

“a film of a vertically integrated process of production of pork sausages, or chicken pies, would be unlikely to be used for sales promotion”.

The issues were first whether the court had jurisdiction to grant an injunction to restrain unconscientious behaviour, even if there was no cause of action, and secondly whether *Lenah* had an arguable claim in tort for breach of privacy. The majority of the Court answered ‘no’ to both questions, and for present purposes the interest of the case lies in the discussion of the second. The Court was prepared to contemplate the development in Australia of a tort of invasion of privacy, but the majority held, that this would be for the benefit of individuals, not corporations.

Gleeson CJ opined that:

“the law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.”<sup>15</sup>

Borrowing from the American jurisprudence, he suggested that:

“The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private”<sup>16</sup>.

The appellants suggested that development of a tort of privacy was precluded by the earlier decision of the High Court in the *Victoria Park* case.<sup>17</sup> The Plaintiffs in that case had a racecourse outside Sydney. The Defendants had the impertinence to build a tower on adjoining land and broadcast accounts of the races and other information displayed on the racecourse. The Plaintiffs claim for an injunction failed. The majority in *Lenah* held that this decision was not concerned with privacy and, anyway, only applied to corporations. So far as natural persons were concerned, the judgments of all members of the court gave a fair wind to the development of a tort of invasion of privacy along the lines of the American jurisprudence.

In an interesting dissenting judgment, Callinan J., who would have continued the injunction, suggested that the time had come for the law to devise a remedy to protect the rights of the owners of a “spectacle” against unauthorised publication of photographs of it. Mr Douglas and Miss Zeta Jones would, no doubt, concur.

In summary Australia seems poised to develop a tort of invasion of privacy. How about New Zealand?

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<sup>14</sup> [p.221]

<sup>15</sup> [p.225]

<sup>16</sup> [p.226]

<sup>17</sup> [1937 58 CLR 479]

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In 1993 New Zealand passed the Privacy Act. This is essentially concerned with data protection. The common law has not, however, stood still. In a remarkable case tried by the High Court in 1992 Gallen J. declared himself satisfied that a tort of invasion of privacy had become established in New Zealand. The case was *Bradley v Wingut Films Limited*<sup>18</sup>. The defendants had made a film of a type known as a “splatter film” because so much blood and gore is splattered about in the course of it. One scene was shot in a graveyard. Standing proudly in that graveyard, and clearly visible in the film, was a marble tombstone above a grave in which a number of the plaintiff’s close relatives were buried and in which, in the fullness of time, he expected to be buried himself. He was very upset and sought an injunction against the showing of the film relying, inter alia, on invasion of privacy. Gallen J., on reviewing the authorities, identified three strong statements in the High Court in favour of the existence of such a tort and acceptance in the Court of Appeal that the concept was at least arguable. He held that the three elements of the tort were

(1) that there must be a public disclosure (2) that disclosure should be of private facts and (3) that the matter disclosed should be highly offensive and objectionable to a reasonable person of ordinary sensibilities – in effect these were the three factors identified by Dean Prosser. The judge held that, on the facts, only the first element was made out. As to the second, he remarked that there could scarcely be anything less private than a tombstone in a public cemetery. As to the third he found that it was not the depiction of the tombstone that the plaintiff found offensive, but the activities going on in the vicinity of the tombstone which arguably included sexual intercourse with a corpse. The judge ruled that it was not necessary for him to resolve that particular issue.

More recently in *H v D*<sup>19</sup> Nicholson J. granted an injunction restraining publication of information which he held would be a breach of privacy. The information was that the plaintiff had received treatment at a psychiatric hospital. The judge followed Gallen J. in holding that the three ‘Prosser’ factors had to be established but that these had to be balanced against any legitimate public interest in having the information disclosed.

So we now have Both Australia and New Zealand moving in the direction of a common law tort of privacy. How about Canada?

A reference by Brooke LJ in the *Hello* case took me to the decision of the Supreme Court of Canada in *Aubrey v Les Editions Vice-Versa Inc.*<sup>20</sup>. In that case a 17 year old girl recovered \$2000 damages against an arts magazine – not, I hasten to say, of the type to be found on the top shelf of newsagents. The magazine had published, without her knowledge or consent, a photograph of her sitting on the steps of a public building. The Supreme

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<sup>18</sup> [1993] 1 NZLR 415

<sup>19</sup> [2000] 2 NZLR 591

<sup>20</sup> [1998] 1 SCR 591

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Court, by a majority, upheld her right to damages. The minority dissented only to the extent that they did not consider that damage had been proved. All agreed that her rights had been infringed. The rights in question were conferred by the *Charter of Human Rights and Freedoms*, known as the Quebec Charter, which, under its own terms, has horizontal effect. The right infringed was the right to respect for private life conferred by Article 5. This had to be balanced against the right of freedom of expression conferred by Article 3.

The Court was in no doubt that the dissemination of the photograph without the young lady's consent infringed Article 5 in that it constituted 'a violation of her privacy and of her right to her image'. Nor did the right to freedom of artistic expression, and the public's right to information which is the corollary of this, trump the right to privacy in circumstances where her consent to being photographed could so easily have been sought.

The approach of the Court was, not surprisingly, influenced by French law and now is the time to leave the common law jurisdictions and take a look at the position in Germany and France. This task is made the easier by the excellent website maintained by the Institute of Global law. In Germany the judges have built imaginatively on the first two Articles of the Constitution, which provide that '*The dignity of the human being is inviolable*' and that '*everyone has a right to the free development of his personality, insofar as he does not injure the rights of others or violate the constitutional order or the moral law.*'

The jurisprudence seems largely to have developed in the context of journalistic interest - one might almost say obsession - with the activities of Princess Caroline of Monaco. In one case<sup>21</sup> a newspaper published a completely fabricated interview with the princess. The Supreme Court ordered the publisher to withdraw the publications. The Court also indicated that whenever a newspaper intentionally encroaches upon another person's right to personality in order to make money, the resulting damages should be assessed so as to deprive the tortfeasor of his profits.

This is an interesting case. In this country, attempts to establish a law of privacy have focussed on disclosure of true facts about individuals' private lives. In the *Naomi Campbell* appeal the defendants sought to rely upon the fact that some of the information that they had published was untrue as demonstrating that no actionable wrong had been committed. Where a fictitious account of one's private life is not defamatory, it may nonetheless be highly offensive. German law gives a remedy. I do not see how the development of the law of breach of confidence can logically embrace publication of intimate, but not defamatory, personal details which are untrue.

The problem of intrusive photography arose in another case involving Princess Caroline of Monaco<sup>22</sup>. The Princess was photographed having dinner with her boyfriend in a secluded part of a garden restaurant in France. The Court of Appeal acknowledged that public figures were entitled to have

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<sup>21</sup> (BGH 15 November 1994, BGHZ 128, 1416)

<sup>22</sup> BGH 19.12.1995 NJW 1996, 1128

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their privacy respected but found that the photographs in question did not violate her private sphere. The Court took the view that public figures have to accept a greater interference in their private lives, particularly in a public place. The judgment was overturned by the Federal Court.

That court held that where an individual retreats to a place of seclusion and, relying on the fact of seclusion acts in a way in which that individual would not have acted in public, an unjustified intrusion occurs where pictures of that person are published which have been taken secretly or by stealth.

That is just a taste of the German jurisprudence to wet the appetite. I should add that as one would expect the German Constitution also protects freedom of expression and other cases illustrate the familiar tension between this right and the right to privacy.

In France the right to privacy is based on Article 9 of the Code Civil which provides that every person has a right to respect for his private life. This gives effect to Article 22 of an Act of 1970 but the French Courts were giving decisions protecting privacy long before that. Once again, however, there is tension between the right to privacy and freedom of expression of the press, to which France gave statutory effect in 1881. With the development of photography, the French courts have attached particular importance to 'the right to one's own image'. France ratified the International Convention on Human Rights in 1974, but it is not easy to deduce what effect, if any, this had on the development of a law of privacy in France, for it is not normally the practice of the French judges to make reference to the Convention in their reasons.

Article 9 of the Code Civil entitles judges to take emergency interim measures, such as injunctions or the seizure of offending periodicals, where there is an 'atteinte a l'intimité de la vie privée' 'a breach of intimate private life'. The French judiciary have, surprisingly, had a bit of difficulty with this phrase. In 1995 the disclosure of the contents of a dustbin on the day after Christmas day was held to be a breach of 'intimate private life'<sup>23</sup>. On another occasion Alain Delon was granted an injunction restraining publication of details of an alleged affair with his babysitter. The court ruled that publication would be an:

*"..unbearable breach of intimate private life"*

The right to one's own image extends, it seems, to the image of one's property. I understand that the owner of an attractive chateau was recently awarded damages in respect of the unauthorised use of a photograph of the establishment to advertise mineral water.

It will now, I think, have become apparent that at the time of the decision in *Kaye v Robertson* the law of this country was very much out of step with that

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<sup>23</sup> *Cour d'Appel Paris, 30 mars 1995 (Dalloz 1995) IR, p.140*

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of our Continental neighbours and of at least some of the other Commonwealth countries. Just as in America there was a reaction against the flour advertisement case, so in this country there was a revulsion against the decision in *Kaye*. A straw in the wind was this statement by Laws J. in *Hellewell v Chief Constable of South Yorkshire*<sup>24</sup>.

“If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a *right of privacy*, although the name accorded to the cause of action would be breach of confidence”

This was not a field where Parliament showed any enthusiasm to intervene – sorting out the problem was to be left to self regulation or intervention by the judges.

During the course of the debates on the Human Rights Bill the Lord Chancellor suggested:

*“..the judges are pen-poised regardless of incorporation of the Convention to develop a right to privacy to be protected by the common law. This is not me saying so; they have said so. It must be emphasised that the judges are free to develop the common law in their own independent judicial sphere. What I say positively is that it will be a better law if the judges develop it after incorporation because they will have regard to Articles 8 and 10, giving Article 10 its due high value...The experience of continental countries shows that their cautious development of privacy law has been based on domestic law, case by case, although they have also had regard to the Convention.”<sup>25</sup>*

In 1998 the Commission at Strasbourg considered an application against the UK Government by Earl and Countess Spencer<sup>26</sup>. This related to a series of articles in the tabloid press the nature of which can be deduced from the headline in the *News of the World* –‘Di’s sister-in-law in booze and bulimia clinic’. The articles were illustrated by photographs of Countess Spencer in the grounds of a private clinic, taken with a telephoto lens. The applicants contended that the United Kingdom had infringed their Article 8 rights by failing to prevent such publications. The Government succeeded in getting the applications ruled inadmissible on the ground that the law of confidence offered the applicants a satisfactory domestic remedy, which they had failed to exhaust. So here were indications that the Government was leaving it to the judges to use the tool of the Human Rights Act to build a law of privacy on the foundations of the law of confidentiality.

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<sup>24</sup> [1995] 1 WLR 804 at 807

<sup>25</sup> H.L.Debs, Vol 583 col 771 (24 November 1997)

<sup>26</sup> [25 EHRR CD 105].

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There are problems with that exercise. The first is that the Human Rights Convention imposes duties on public authorities, not on private individuals or corporations. How can the courts use it to restrain, for instance, over intrusive journalism?

The answer that some gave was that the courts are themselves public authorities. Their duty to comply with the Convention requires them to make sure that the law that is applied between individuals respects Convention rights. This doctrine gives the Convention what is known as 'horizontal effect', and Professor Wade was one who espoused it. Others, notably Buxton LJ, writing extra judicially in the *Law Quarterly Review*<sup>27</sup>, expressed the view that the Convention gave the courts no power to alter established law.

The second problem is that 'confidence' usually arises out of a relationship between two people. 'Confidential' does not naturally describe an unauthorised photograph. I have already referred to the third. It is hard to describe as 'confidential' offensive information that is fabricated by the author.

In the month after the Act came into force, the Court of Appeal had and seized the opportunity to consider some of these matters. I speak, of course, of the interlocutory application for an injunction in the *Hello* case.<sup>28</sup>

If you have been sufficiently interested to come and listen to this lecture, you will certainly have been made aware of the facts of that dispute by the press converge and I shall not repeat them. The Court refused the injunction on the ground that, if the facts disclosed a cause of action, damages would be an adequate remedy. That conclusion rendered it unnecessary to explore the question of whether the facts did disclose a cause of action, but nonetheless in the week between the hearing and judgment each member of the court produced his own analysis of the law in terms which have been being quoted by common law courts around the world. They were careful, of course, not to express final conclusions on the issues raised.

Brooke L.J., after adverting to both the possibility and the problems of using the Convention as a basis for extending the law, remarked<sup>29</sup> that he had the luxury of identifying difficult issues but was not obliged to solve them.

Keene L.J. spoke of 'the apparent obligation of the English courts now to take account of the right to respect for private and family life under article 8 when interpreting the common law'<sup>30</sup>

Sedley L.J. concluded that the provisions of section 12 of the Human Rights Act put it beyond doubt that the Article 10 Convention right of freedom of

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<sup>27</sup> [(2000) 116 LQR 48

<sup>28</sup> [*Douglas v Hello Ltd* [2001] 2 WLR 992.

<sup>29</sup> [p. 1017]

<sup>30</sup> [p.1036].

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expression was to be given horizontal effect. You will remember that section 12 precludes the court from restraining a publication before trial unless satisfied that an injunction is likely to be granted at the trial. It requires the court, when considering whether to grant such relief, to have particular regard to the importance of the Convention right of freedom of expression and, in relation to any journalistic material, to the extent to which it is in the public interest for the material to be published. Sedley LJ held that this required the court to have regard to the other Convention rights, which by virtue of Article 10(2) qualify the right to freedom of expression<sup>31</sup> He concluded that the claimants have 'a powerful prima facie claim to redress for invasion of their privacy as a qualified right recognised and protected by English law'.

At this moment we await, with bated breath, the conclusions of Lindsay J., who has been trying the substantive action.

The next piece in the jig-saw is the decision of the President in *Venables and Thompson v News Group Newspapers*. The claimants were the Bulger killers. Released from prison under new identities they sought permanent injunctions against all the world restraining solicitation or publication of information that would lead to the disclosure of those identities. They were successful. Dame Elizabeth held that the Convention did not give rise to free standing causes of action, but required the court to act consistently with the Convention, when applying existing causes of action. On this basis, the tort of breach of confidence extended to entitling the claimants to the relief that they sought. If their identities were disclosed their lives would be at risk, so Articles 2 and 3 trumped Article 10.

In *Wainwright v the Home Office*<sup>32</sup> Buxton LJ addressed the issues under discussion in a judicial capacity. The claim was brought by a mother and son who were strip-searched for drugs when making a prison visit. They advanced various causes of action, including the tort of invasion of privacy. The trial judge had upheld this claim, applying Sedley L.J.'s observations in *Hello*. The visit had, however, taken place before the Human Rights Act had come into force, and Lord Woolf held that the judge had been wrong to change substantive law by introducing a retrospective right to privacy that did not exist at common law<sup>33</sup> Mummery LJ declared robustly 'This claim fails, as there is no tort of invasion of privacy.' He went on to observe 'I foresee serious definitional difficulties and conceptual problems in the judicial development of a "blockbuster" tort vaguely embracing such a potentially wide range of situations'<sup>34</sup>.

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<sup>31</sup> [p.1028].

<sup>32</sup> [2002] QB 1334

<sup>33</sup> [p.1347].

<sup>34</sup> [p.1351].

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Buxton LJ identified as the critical issue the question of whether the courts should 'step outside the limits imposed by the requirement of a relationship of confidence, artificial or otherwise'. Relying on authorities which predated the Human Rights Act he answered that question in the negative. He considered the policy question of whether the court should extend the law so as to recognise the tort of breach of privacy and concluded that 'on grounds not merely of rationality but also of democracy the difficult social balance that the tort involves should be struck by Parliament and not by the judges'.<sup>35</sup>

On 17 December the year before last a well known presenter of 'Top of the Pops', a single man, had the misfortune to visit a brothel. I say 'misfortune' not having regard to the activities that he there indulged in with the assistance of one and in the presence of a number of prostitutes, but having regard to the fact that one of the prostitutes took photographs of the activities in question and the photographs and the story were sold to *The Sunday People*. The paper contacted him to seek his comments and he applied for an interlocutory injunction restraining publication.

Ouseley J. approached the task of applying section 12 of the Human Rights Act with some finesse. He held that there was no relationship of confidence between the claimant and the prostitutes. He further held that as the claimant was someone whom young people might treat as a role model, it was in the public interest that the fact that he had visited a brothel should be made public. Thus, even if the fact of his visit had been private for the purposes of Article 8, this would not prevail over the defendants' right of freedom of expression under Article 10. The fact of the visit could be published. As to the details of what went on in the brothel, he held that there was no public interest in the publication of those. Nonetheless the claimant was unlikely to establish at trial that any right of privacy that he enjoyed should take precedence over the Article 10 right of the prostitute herself and of the Sunday People to publish this information. There should be no injunction as to these details. The photographs fell into a different category. The claimant had not agreed to being photographed. There was no public interest in the publication of the photographs.

The Courts had consistently recognised that photography could be particularly intrusive. To restrain publication involved no particular extension of the law of confidentiality. An interlocutory injunction against publishing the photos was granted<sup>36</sup> [

Two days before Ouseley J. Handed down his judgment, the Court of Appeal reserved judgment in an appeal which raised some similar issues. In *A v B*<sup>37</sup> a professional footballer had obtained an interlocutory injunction restraining both a newspaper and a young lady from publishing details of the footballer's sexual relations with the latter. The Court of Appeal set aside the injunction on

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<sup>35</sup> [p.1365]

<sup>36</sup> [*Theakston v MGN Ltd* [2002] EWHC 137]

<sup>37</sup> [2003] QB 195

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the basis that it was most unlikely that a permanent injunction would be granted at trial. Giving the judgment of the Court, Lord Woolf CJ said this

The applications for interim injunctions have now to be considered in the context of articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

These articles have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified.

The court's approach to the issues which the applications raise has been modified because, under section 6 of the 1998 Act, the court, as a public authority is required not to act "in a way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles."

Lord Woolf then went on to lay down 15 guidelines which, alas optimistically, he suggested would spare the courts from being deluged with authorities on this topic in the future. Of particular interest are the following propositions:

- Whether or not the publication is in the public interest, any interference with publication must be justified
- A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be respected.
- Where an individual is a public figure he is entitled to have his privacy respected in appropriate circumstances. He said:

A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure.

The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by

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others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less grounds to object to the intrusion which follows.

In any of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls.”<sup>38</sup>

Later Lord Woolf held that extra-marital sexual relations of the type under consideration lay ‘at the outer limits of relationships which require the protection of the law’. To grant an injunction would be an unjustified interference with the freedom of the press.

In *Campbell v MGN*<sup>39</sup>, the only case to which I shall refer in which I have been involved, we suggested that last comment had been misunderstood:

When Lord Woolf CJ spoke of the public having “an understandable and so a legitimate interest in being told” information, even including trivial facts, about a public figure, he was not speaking of private facts which a fair-minded person would consider it offensive to disclose.

In that case Naomi Campbell sued in respect of the publication in the Mirror of an article which disclosed that she was a drug addict and that she was receiving therapy with Narcotics Anonymous. The article was illustrated by photographs showing her in a public street in Chelsea, having just left the meeting. They had been taken surreptitiously with the aid of a telephoto lens.

Miss Campbell sued for breach of confidence and expressly renounced any contention that she could rely on a separate tort of invasion of privacy. She also conceded that the Mirror had been entitled to publish the fact that she was a drug addict and was receiving treatment. This was because she had publicly stated in the past that she did not touch drugs. She accepted that the press were entitled to correct misleading public statements. What she did not accept was that the press could disclose the nature of the treatment that she was receiving for her addiction, nor publish the photographs taken of her.

In these circumstances we did not need to consider whether there was a separate tort of invasion of privacy. Applying principles of the law of breach of confidence, we concluded that, once it had been conceded that it was legitimate to publish the fact that Miss Campbell was receiving treatment for drug addiction, it was legitimate to publish the additional information, that this was with Narcotics Anonymous.

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<sup>38</sup> [p.208]

<sup>39</sup> [2003] 2 WLR

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The photographs were taken in a public place and we said they were a legitimate, if not an essential part, of the journalistic package designed to demonstrate that Miss Campbell had been deceiving the public when she said that she did not take drugs. Our judgment has been criticised by some as being over-conservative.

It will not have escaped you that I have not in this lecture expressed any personal views on the desirability of the development of a tort of invasion of privacy. That has been for good reason. I would not wish to disqualify myself from sitting on an appeal, should there be one, from the judgment that we are awaiting in the *Hello* case. I recently gave an interview which was broadcast on newscast. Jeremy Paxman asked me if a new law of privacy would make our life easier. I replied that it is usually easier to apply a statute than to apply principles of common law. This mild observation led the editor of the *People* to comment:

Its scary that judges – and politicians – want to give themselves power to decide what goes into newspapers and that somebody such as Lord Phillips is quite so mindless as to suggest privacy legislation on intrusive photography. I find it arrogant to suggest that they should decide what the public should be interested in’.

A very recent decision of the Strasbourg Court suggests that either the Courts or the legislature are going to have to establish a tort of invasion of privacy if this country is to comply with its Convention obligations. *Peck v United Kingdom*<sup>40</sup>, in which judgment was given on 28 January, involved events in 1997, before the Human Rights Act came into force. Brentwood Borough Council had a closed circuit TV system for the purpose of crime prevention. They released to the media some film shot by this system to show how useful it could be. The film showed a man with a knife. In fact, this was the unhappy applicant, Mr Peck, who had just slashed his wrists in a suicide attempt, though this was not apparent from the film. The shot received widespread publicity in the press and on television. Mr Peck tried, unsuccessfully, to obtain judicial review of the council’s decision to release the film. He sought no civil remedy; it was common ground at Strasbourg that he had no claim under English law for breach of confidence, in that he had been filmed in a public place.

Mr Peck claimed that his Article 8 right to respect for his private life had been infringed. The Strasbourg Court upheld his claim. Relevant to this finding were the following facts.

He was walking late at night deeply distressed. While in a public place, he was not a public figure or participating in a public event, and it was late at night. The exposure to which he was subjected far exceeded anything which he could reasonably have anticipated. The Court then went on to conclude

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<sup>40</sup> [Application no. 44647/98]

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that, as Mr Peck had no remedy under our domestic law, the United Kingdom was in breach of its Article 13 obligation to provide Mr Peck with an effective remedy. I understand that those acting for Mr Douglas and Miss Zeta Jones relied heavily on this decision in urging upon Lindsay J. that it was his duty to provide them with a remedy. It remains to be seen how he will resolve the issue between private life and public interest.