

W626 WHITTINGTON, N. Privacy, solitude and breach of confidence

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**PRIVACY, SOLITUDE AND BREACH OF  
CONFIDENCE: THE NEED FOR A NEW TORT**

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## I INTRODUCTION

It is trite that the English common law does not recognise a general right to privacy, except in cases where the defendant's conduct overlaps with an existing cause of action.<sup>1</sup> The lack of an effective remedy for an invasion of privacy, where that invasion occurs outside the parameters of common law and equitable actions has long frustrated lawyers and lay-people alike.

For example, in *Peck v United Kingdom*,<sup>2</sup> a Borough Council distributed copies of footage taken at night by a closed-circuit television camera of the aftermath of Mr Peck's attempted suicide. Mr Peck was recognisable in the footage. The courts dismissed his application for a remedy to address the invasion of his reasonable expectation of privacy.

Another example is provided by *Kaye v Robertson*.<sup>3</sup> A journalist and photographer stole into a hospital and took pictures of a seriously injured actor. Despite the obviously intrusive conduct giving rise to the complaint, the judges felt powerless to come to the plaintiff's aid. They bemoaned the toothlessness of the common law to protect personal privacy. In the words of Bingham LJ,<sup>4</sup>

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<sup>1</sup> For example, an invasion of privacy simultaneous with an interference with property rights confers a common law action in trespass to land. An invasion of privacy consisting of the disclosure of private, confidential information is a breach of confidence.

<sup>2</sup> *Peck v United Kingdom* (App no 44647/98) (2003) 36 EHRR 719.

<sup>3</sup> [1991] FSR 62 (CA). See also *Malone v Metropolitan Police Commissioner* [1979] Ch 344 Megarry V-C; *Bernstein of Leigh (Baron) v Skyviews General Ltd* [1978] 1 QB 479 (HC) Griffiths J.

<sup>4</sup> *Kaye v Robertson* [1991] FSR 62, 70 (CA) Bingham LJ.

This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.

More recently, however, English judges have attempted to provide some protection from invasions of privacy by expanding the equitable action of breach of confidence. A prime example of this is Lindsay J's decision in *Douglas v Hello! Ltd*,<sup>5</sup> delivered on 11 April 2003.

*Douglas* is a case concerning the collection of personal data, the disclosure of personal information, and intrusion into the solitude and private sphere of the individual, all of which are familiar and fundamental privacy interests. This paper considers the issues raised by *Douglas*, in particular the interrelationship between the concepts of privacy, and the breach of confidence action at common law. It analyses the way in which Lindsay J dealt with these issues in his judgment. It is submitted that Lindsay J was partially correct in analysing the case as one fitting within the parameters of breach of confidence. But, as this paper will demonstrate, the decision is ultimately deficient in its treatment of the European Convention on Human Rights right to private life, now incorporated into United Kingdom law by the Human Rights Act 1998 (UK). In particular, Lindsay J failed to consider in any meaningful way the privacy claims of the Douglases, especially with respect to the intrusion into their solitude. In the result, the common law principles relating to privacy relied on by Lindsay J lack coherence and are ultimately not Convention-compliant.

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<sup>5</sup> [2003] EWHC 786 (Ch) Lindsay J.

Lindsay J's failure to consider the European Court of Human Rights' recent decision in *Peck* is both surprising and troubling. It is clear from the decision in *Peck* that the action for breach of confidence cannot fully accommodate the same broad considerations of private life that *Peck* requires. As will be seen, *Peck* provides a principled approach for the English courts to ensure that the right to private life is effectively enjoyed.

The paper will consider whether a separate tort of invasion of privacy is needed in order to better and more fully protect the right to privacy. Whether such a tort of privacy should be developed, and its extent, is a subject of particular topicality in New Zealand given the very recent decision of Randerson J in *Hosking v Runtig and Pacific Magazines NZ Ltd*,<sup>6</sup> in which His Honour expressly preferred the English approach to privacy protection espoused by Lindsay J in *Douglas* over the alternative approach of a tort encompassing all aspects of the privacy right. While this paper makes no comment on *Hosking*, which may not survive appeal, Randerson J's preference is particularly worrying given the author's conclusion that the current English approach is unprincipled, and ultimately unsustainable.

## II THE DOUGLAS CASE

Right from the beginning the *Douglas* case promised to be a very significant indication of the extent to which the common law protected

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<sup>6</sup> *Hosking v Runtig and Anor* (30 May 2003) High Court Wellington CP 527/02, Randerson J.

individual privacy. Many called for, and believed it would hasten, a privacy tort which would solve once and for all the continuing conflict between the tabloid press in England and the individual's right of privacy. A newspaper article written one month before the decision was handed down claimed that "[i]t seems certain that moves towards a law of privacy are slowly gathering pace and that no amount of tabloid press-ganging will prevent its arrival."<sup>7</sup> All such commentators were wrong. While the Douglases were successful, and in that sense had their right to privacy vindicated, Lindsay J's decision takes the common law no closer to the recognition of a law of privacy.

#### *A The Facts*

Michael Douglas and Catherine Zeta-Jones (the Douglases) sold to OK! magazine (OK!) the exclusive photographic rights to their wedding, which took place in New York in November 2000. In consideration for such rights, OK! promised to pay the Douglases £1m. Under the terms of the contract, the Douglases were to retain the copyright in the pictures and OK! was to publish only those photographs and captions which the Douglases approved. In order to protect OK!'s investment and the exclusivity of the photographs, the contract provide for the Douglases to:

take all reasonable means to provide such security (approved by OK!  
magazine) during the entirety of the wedding proceedings at the wedding  
venues as is necessary to ensure that third party media ... and/or members of  
the public and/or staff hired or employed for the wedding are unable to gain

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<sup>7</sup> Amber Melville-Brown and Matthew Himsworth "Public Figures, Private Lives" (11 March 2003) *The Independent*, London 7.



access to the relevant wedding grounds and the venues in order to minimize the risk of photographs and/or footage of the wedding (including but not limited to photographs/footage of the wedding dress, the ceremony and the party) may be made available to third party media.

The Douglasses, pursuant to their contractual obligations, made extensive security arrangements. One such measure involved the provision of entry cards to each guest less than 24 hours prior to the wedding (to avoid them being copied). Upon arrival at the wedding, the entry cards were checked and a code, written in invisible ink thereon, was read. If all was well, the guests were handed a gold wedding pin and permitted to enter. Amongst other measures, arrangements were made for cameras to be removed before entry or if a guest was found with one inside the venue. Evidence at the trial showed that six or seven guests in fact had their cameras removed.<sup>8</sup>

The wedding took place without a hitch. Mr Douglas said in evidence, “[w]e could not have wished for a more wonderful wedding.”<sup>9</sup> Unfortunately, two days into their honeymoon the couple learned that a paparazzo, eventually identified as Rupert Thorpe, had managed to infiltrate the wedding and had taken with a hidden camera photographs that Hello! magazine (Hello!) planned to publish.

On the basis of a considerable amount of evidence, most of which is reproduced in the judgment, His Honour Justice Lindsay found that while

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<sup>8</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 65 (Ch) Lindsay J.

<sup>9</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 70 (Ch) Lindsay J.

Hello! had not pre-commissioned the particular paparazzo,<sup>10</sup> it had in fact purchased the photographs,<sup>11</sup> in the knowledge that OK! had an exclusive contract to cover the wedding and that OK!'s exclusive would have involved the implementation of security arrangements to ensure that only authorised photographs were taken.<sup>12</sup> His Honour further found that Hello!<sup>13</sup>

knew and ought to have known, ... that what [it] was doing would or might significantly diminish the benefits which OK! would otherwise derive from its exclusive contract with the Douglases, that it would deny the Douglases the picture approval which [it] knew they wanted and which [it] would have expected them to have procured in their contract with OK! and that the taking of the unauthorised photographs, ... would have involved at least a trespass or some deceit or misrepresentation on the photographer's part in order for the photographer to overcome the security arrangements which, in outline, [it] knew or must be taken to have known to have been in place at a wedding which [it] had no reason to think was other than private. ... [T]he photographs had been taken by someone "who had no business to be there."  
... [T]hey had to have been taken surreptitiously.

## **B Procedural History**

The response by the Douglases to hearing of the unauthorised photographs was immediate and resulted in a hectic week for the lawyers of both sides. Following an *ex parte* hearing, the Douglases were granted an injunction preventing Hello! from publishing any photographs of the couple's

<sup>10</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 60 (Ch) Lindsay J.

<sup>11</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 74 (Ch) Lindsay J.

<sup>12</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 79 (Ch) Lindsay J.

<sup>13</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 81 (Ch) Lindsay J.

wedding. The injunction was preserved the next day at an inter partes hearing. In response Hello! moved the Court of Appeal to discharge the injunction, but a two-judge bench could not agree. Finally, after a two day hearing, a second three-judge Court of Appeal discharged the injunction, saying it would deliver its reasons in due course.

One month after the hearing, the Court of Appeal handed down a judgment that has become a significant touchstone in the law relating to confidence and privacy.<sup>14</sup> While acknowledging that the Douglases had a strong case in breach of confidence, the Court held that the balance of convenience favoured discharging the injunction. It reasoned that damages would be an adequate remedy in the circumstances and that the case was not strong enough to warrant the prior restraint of Hello!'s freedom of expression.

The Douglases did not appeal, and the case proceeded to trial before Lindsay J in February 2003. They pleaded, in addition to breach of confidence and a broad claim "under the laws of privacy,"<sup>15</sup> breaches of the Data Protection Act 1998 (UK),<sup>16</sup> interference with contractual relations by unlawful means,<sup>17</sup> and conspiracy to injure by unlawful means.<sup>18</sup> This paper

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<sup>14</sup> *Douglas v Hello! Ltd* [2000] EWCA Civ 353; [2001] QB 967 (CA).

<sup>15</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 180(iv) Lindsay J.

<sup>16</sup> Lindsay J found Hello! to be liable under the Data Protection Act 1998 but would only have made a nominal award of damages given that the Douglases had already succeeded in his judgment under breach of confidence. *Douglas v Hello! Ltd* [2003] EWHC 786 para 239 (Ch) Lindsay J.

<sup>17</sup> Lindsay J held that Hello! was not liable under this head as their actions had not resulted in an actual breach of contract by the Douglases. *Douglas v Hello! Ltd* [2003] EWHC 786 para 241 (Ch) Lindsay J. See also *RCA v Pollard* [1983] Ch 135 (CA); *Rickless and Ors v United Artists Corporation and Ors* [1988] QB 450; [1986] FSR 502 (CA).

<sup>18</sup> Lindsay J could not find on the facts that the predominant purpose behind Hello!'s actions was to harm the Douglases and so was unable to hold that there had been such a conspiracy. *Douglas v Hello! Ltd* [2003] EWHC 786 paras 260-1 (Ch) Lindsay J.

will consider solely the pleaded causes of action in confidence and privacy.

### III THE RIGHT TO PRIVACY

An individual's right to privacy is one of the fundamental principles in a democratic society and is recognised as such in Article 12 of the Universal Declaration of Human Rights, which states:

[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Similarly, Article 17(1) of the International Covenant of Civil and Political Rights states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Article 17(2) provides that "Everyone has the right to the protection of the law against such interference or attacks."

Further to such values as personal autonomy, personal space, democracy, and dignity, two fundamental standards appear to be integral to the right to privacy: the right not to have private, personal information disclosed or broadcast; and the right to be free from intrusions into one's personal space, one's home, or one's solitude.

## A *Privacy and the European Convention*

Article 8 of the European Convention on Human Rights (Convention) states that "Everyone has the right to respect for his private and family life, his home and his correspondence."<sup>19</sup> Article 13 provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority."<sup>20</sup> Pursuant to Article 1, the United Kingdom, as a State party, must secure these rights for everyone in its jurisdiction.

The Convention was incorporated into United Kingdom law by the Human Rights Act 1998 (UK). Under the Act, "It is unlawful for any public authority to act in a way that is incompatible with a Convention right."<sup>21</sup> This section requires the United Kingdom courts to give effect to Convention rights such as Article 8's right to privacy in their decisions.<sup>22</sup> If no cause of action exists before the courts that gives an effective remedy for the violation of a Convention right, the courts must create one. Failure to do so would contravene Article 13. This much is apparent from the decision of the European Court of Human Rights (ECHR) in *X and Y v The Netherlands* where it said:<sup>23</sup>

<sup>19</sup> European Convention on Human Rights, Article 8

<<http://www.echr.coe.int/Convention/webConvenENG.pdf>> (last accessed 28 August 2003).

<sup>20</sup> European Convention on Human Rights, Article 13

<<http://www.echr.coe.int/Convention/webConvenENG.pdf>> (last accessed 28 August 2003).

<sup>21</sup> Human Rights Act 1998 (UK), s 6(1).

<sup>22</sup> Human Rights Act 1998 (UK), s 6(3)(a). "In this section, "public authority" includes a court or tribunal."

<sup>23</sup> *X and Y v The Netherlands* (App no 8798/80) (1986) 8 EHRR 235, 239-40.

The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the *adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.* (Emphasis added).

Pursuant to section 2(1)(a) of the Human Rights Act 1998 (UK) courts and tribunals “determining a question which has arisen in connection with a Convention right must take” this decision into account.

The extent of the right to privacy under the Convention has recently been considered by the ECHR in an action brought against the United Kingdom by a private citizen. Its judgment will have a significant impact on the substantive law relating to privacy in the United Kingdom. In *Peck v United Kingdom*,<sup>24</sup> the Court found the United Kingdom to be in breach of both its Article 13 and Article 8 obligations.

The importance of the judgment lies in the breadth of the definition of private life under Article 8. The ECHR said:<sup>25</sup>

Private life is a broad term not susceptible to exhaustive definition. ...

[Article 8] also protects a right to identity and personal development, and

<sup>24</sup> *Peck v United Kingdom* (App no 44647/98) (2003) 36 EHRR 719.

<sup>25</sup> *Peck v United Kingdom* (App no 44647/98) (2003) 36 EHRR 719, paras 57-9.

the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life". ...The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life. On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations.

The ECHR drew attention to what it had earlier said in *PG and JH v United Kingdom*:<sup>26</sup>

There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive factor.

These two passages sum up the approach the ECHR requires in assessing whether a person's private life is engaged in situations occurring in a public place. The courts must analyse the situation as a whole, considering the impact of the defendant's conduct on the victim's "reasonable expectations as to privacy," to see whether there has been an interference with the right. The orientation is a rights-centred one. This will require a detailed analysis of the defendant's actions. The Court states that simply observing an individual does

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<sup>26</sup> *PG and JH v United Kingdom* (App no 44787/98) paras 59-60.

not interfere with the right, but as soon as the data is recorded in a systematic or permanent nature, private life considerations may arise.

Mr Peck had been filmed brandishing a knife in the immediate aftermath of an attempted suicide by closed-circuit television cameras. The Borough Council that had monitored the camera distributed the video to various broadcasters who showed the footage on television. Mr Peck's face was not adequately pixellated with the result that he was recognisable.

The ECHR rejected the United Kingdom's argument that because Mr Peck was in a public place, his right to private life was not engaged in this passage:<sup>27</sup>

The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of some distress. While he was walking in public wielding a knife, he was not later charged with any offence. The actual suicide attempt was neither recorded nor therefore disclosed. However, footage of the immediate aftermath was recorded and disclosed by the Council directly to the public in its "CCTV News". In addition, the footage was disclosed to the media for further broadcast and publication purposes [and seen by 350,000 people.] ... The applicant's identity was not adequately, or in some cases not at all, masked in the photographs and footage so published and broadcast. He was recognised by certain members of his family and by his friends, neighbours and colleagues.

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<sup>27</sup> *Peck v United Kingdom* (2003) 36 EHRR 719, paras 62-3.



As a result, the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation ... and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995.

Accordingly, the Court considers that the disclosure by the Council of the relevant footage constituted a serious interference with the applicant's right to respect for his private life.

Private life consists, therefore, not only of the traditional concepts of the home, name, gender identification and sexual activity. The concept of private life is a broad one, and exists as a sphere of physical, concrete rights, a zone of interaction that is not abandoned by the fact of being in public.

*Peck* demonstrates that whenever the courts are confronted with an Article 8 issue, they must give full effect to that right in accordance with ECHR jurisprudence if they do not wish to be held in contravention of the Convention. I agree with Sedley LJ that the duty to give effect to Article 8 "arguably gives the final impetus to the recognition of a right of privacy in English law."<sup>28</sup>

#### **IV THE SHAPE OF BREACH OF CONFIDENCE POST-DOUGLAS**

Equity will intervene to protect the disclosure of confidential information by way of the action of breach of confidence by preventing the threatened disclosure, or remedying the past disclosure, of information, the

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<sup>28</sup> *Douglas v Hello! Ltd* [2000] EWCA Civ 353 para 111; [2001] QB 967, 998 (CA) Sedley LJ.

confidentiality of which the defendant has notice, and where justice requires such disclosure to be restrained. In this way, as with all equitable actions, it acts to purge the wrongdoer's conscience by prohibiting the confidant from abusing the trust and confidence of the confider.<sup>29</sup>

The universally accepted formulation of the elements of the action is that of Megarry J in *Coco v A N Clark (Engineers) Ltd.*<sup>30</sup>

[t]hree elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene MR in the *Saltman* case ... must "have the necessary quality of confidence about it."<sup>31</sup> Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

#### A *The "Necessary Quality of Confidence"*<sup>32</sup>

No simple definition has been provided by subsequent cases on what "the necessary quality of confidence" is. In the *Saltman* case Lord Greene MR said that the information "must not be something that is public property and public knowledge."<sup>33</sup> This statement is for the most part unhelpful, as it only explains what the quality of confidence is not; it defines by exclusion. More recent, and equally unhelpful is the statement of Lord Woolf CJ that "usually

<sup>29</sup> See especially *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109, 215 (CA) Bingham LJ; *R v Department of Health, ex parte Source Informatics Ltd* [2001] QB 424, 439 (CA) Simon Brown LJ.

<sup>30</sup> [1969] RPC 41, 47 (HC) Megarry J.

<sup>31</sup> *Saltman Engineering Co v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 215 (CA).

<sup>32</sup> *Saltman*, above, 215.

<sup>33</sup> *Saltman*, above, 215.

the answer to the question whether there exists a private interest worthy of protection will be obvious.”<sup>34</sup> That may be so, but it does not assist in delineating the criteria of the quality of confidence.

It appears that the question whether information has “the necessary quality of confidence” is decided incrementally on a case-by-case basis, though typically it will involve information not in fact in the public domain which the plaintiff has an interest in keeping confidential and private.

Lindsay J had no trouble deciding that the photographs taken surreptitiously and subsequently obtained by Hello! constituted information possessing the necessary quality of confidence. In so doing His Honour was entirely in line with the above-mentioned dictum of Lord Greene MR in the *Saltman* case. The information had been ‘confided’ to a finite number of guests for limited purposes. It was not to be released beyond that group except under the control of the Douglasses and OK! with whom they had contracted. The fact that the wedding scenes could have been described in words or by drawings by those guests does not strip the photographs of the quality of confidence. His Honour cited Keene LJ’s finding on the same issue in the Court of Appeal’s interlocutory judgment where he said:<sup>35</sup>

The photographs conveyed to the public information not otherwise truly obtainable, that is to say, what the event and its participants looked like. It is said that a picture is worth a thousand words. Were that not so, there would not be a market for magazines like Hello! and OK! The same result

<sup>34</sup> *A v B plc* [2002] EWCA Civ 337, para 11(vii); [2003] QB 195, 206 (CA) Lord Woolf CJ.

<sup>35</sup> *Douglas v Hello! Ltd* [2000] EWCA Civ 353 para 165; [2001] QB 967, 1011 (CA) Keene LJ.

is not obtainable through the medium of words alone, nor by recollected drawings with their inevitable inaccuracy.

Lindsay J then considered the photographs from the point of view of commercial confidence. He held in effect that the photographs could be analogous to commercially sensitive information, or to a trade secret, attaching a quality of confidence to the photographs. He said:

given also the lengths to which Miss Zeta-Jones and Mr Douglas went to ensure the privacy of their wedding, I see it as appropriate to examine the applicability of the law of confidence on the basis that the Claimants had here a valuable trade asset, a commodity the value of which depended, in part at least, upon its content at first being kept secret and then of its being made public in ways controlled by Miss Zeta-Jones and Mr Douglas for the benefit of them and [OK!].

It is an appropriate analogy. The photographs are information or data from which, by controlling its release or use, one party wishes to benefit. There is no difference between the information in this case and, for example, the information held by the courts to be confidential time and time again in other typical commercial confidence cases, such as, for example, *LAC Minerals Ltd v International Corona Resources Ltd*.<sup>36</sup> There, diagrammatic representation of the geological layout of land was held to be a commercial or trade secret subject to an obligation of confidence when released to a limited group for limited purposes.

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<sup>36</sup> [1989] 61 DLR 14 (SC).

## **B** *Circumstances Importing an Obligation of Confidence*

The second element of the action is that the information must be disclosed in circumstances importing an obligation of confidence. Most of the case law concerning this element has been in the context of commercial or trade secrets, where the duty of confidence arises out of a particular relationship or transaction. Frequently a prior recognised relationship between the confider and confidant, such as a husband and wife,<sup>37</sup> or employer and employee,<sup>38</sup> or a fiduciary relationship such as lawyer and client, would be present before the circumstances imported such an obligation.

However, breach of confidence has expanded markedly in recent years to the point that now an existing relationship is unnecessary. In *A-G v Guardian Newspapers Ltd (No 2)*,<sup>39</sup> a dictum of Lord Goff of Chieveley placed the foundation of the obligation squarely on the circumstances as opposed to a prior or existing relationship. He said:<sup>40</sup>

A duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.

<sup>37</sup> *Argyll v Argyll* [1967] Ch 302.

<sup>38</sup> *Gilbert v The Star Newspaper Co Ltd* (1894) 11 TLR 3, (HC) Chitty J.

<sup>39</sup> [1990] 1 AC 109 (HL).

<sup>40</sup> *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 (HL) Lord Goff of Chieveley.

It is this broader basis for when a duty of confidence arises, or is imposed, that allows third parties in possession of information that it knows to be subject to an obligation of confidence to be liable in breach of confidence. If third parties were not also subject to an obligation, the law of confidence would be continually circumvented. Where a confidant has breached their obligation, it is the third party with notice of the breach who must be restrained from further imparting the information.<sup>41</sup> As a result, breach of confidence can include:<sup>42</sup>

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 a public place, and is then picked up by a passer-by.

In this respect, the confidence attaches to the information itself, and is actionable against anyone who possesses it with notice of the obligation.

As a result, Lindsay J found the private nature of the event to be an important consideration as to whether the circumstances placed, firstly on the paparazzo, and secondly on Hello!, an obligation of confidence, finding as a fact that “[t]o the extent that privacy consists of the inclusion only of the invited and the exclusion of all others, the wedding was as private as was

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<sup>41</sup> *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 268 (HL) Lord Griffiths; *Prince Albert v Strange* (1849) 1 Mac & G 25; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.

<sup>42</sup> *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 (HL) Lord Goff of Chieveley.

possible consistent with its being a socially pleasant event.”<sup>43</sup> This was held despite Brooke LJ’s finding in the Court of Appeal decision that:<sup>44</sup>

So far as privacy is concerned, the case of [the Douglasses] is not a particularly strong one. They did not choose to have a private wedding, attended by a few members of their family and a few friends, in the normal sense of the words “private wedding”.

It does not follow from inviting a number of guests that the Douglas wedding was not “private”. The Douglasses may have invited 250 guests, but they had established elaborate security measures to include only those guests with whom they wished to share their wedding, and to exclude all media except OK! As Lindsay J put it:<sup>45</sup>

The event was private in character and the elaborate steps to exclude the uninvited, to include only the invited, to preclude unauthorised photography, to control the authorised photography and to have had the Claimants’ intentions in that regard made clear all conduce to that conclusion.

Hello! was held to be tainted by the obligation of confidence because, despite Thorpe not being held to have been acting as their agent, it was aware the photographs were taken in circumstances involving at least a trespass. “The surrounding facts were such that a duty of confidence should be inferred from them,”<sup>46</sup> held Lindsay J. Hello! “either knew, or had they not closed their eyes to the truth, would have known, and hence must be taken to have known,

<sup>43</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 66 Lindsay J.

<sup>44</sup> *Douglas v Hello! Ltd* [2000] EWCA Civ 353 para 95; [2001] QB 967, 995 (CA) Brooke LJ.

<sup>45</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 197 Lindsay J.

<sup>46</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 198 Lindsay J.

that that was the case.”<sup>47</sup> Therefore, Hello! could not conscientiously have used the photographs without the consent of the Douglases.

### C *Detriment or Damage to the Plaintiff*

The third limb requires a threatened or actual disclosure of the information subject to the duty of confidence “to the detriment of the party communicating it.” If a disclosure is merely threatened, or is suspected, an injunction may be sought. If the disclosure has occurred, the remedy will be damages or, more frequently in the context of commercial confidences, an account of profits.

It appears unresolved whether proof of damage or detriment is required to make a disclosure actionable. Despite its inclusion in the *Coco* formulation, Megarry J could “conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity (sic) and yet suffer nothing which could be fairly called detriment to him.”<sup>48</sup> He cited an example where confidential information painted the plaintiff favourably but harmed a close friend or relative. Lords Keith of Kinkel and Goff of Chieveley in the *Guardian* case were cautious about whether detriment was a necessary element, Lord Goff leaving “open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence.”<sup>49</sup>

<sup>47</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 205 Lindsay J.

<sup>48</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 48 (HC) Megarry J.

<sup>49</sup> *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281-2 (HL) Lord Goff of Chieveley.



Whether or not it is a necessary element in breach of confidence, detriment is easily satisfied on the facts of the case. The photographs were of commercial significance to the Douglases and to OK!, and their presence in the market via another source diminished the commercial benefit the Douglases and OK! would derive in exploiting the photographs by lessening the money each would receive under the syndication clauses in the contract. OK! also lost the kudos of being seen to be the only magazine to cover exclusively the "celebrity wedding of the year."

#### V DOUGLAS: EQUALLY A PRIVACY CASE

While *Douglas* was eventually decided as a breach of confidence case, it is equally easy to see why many thought it might be privacy's saviour. Breach of confidence is concerned with the flow of information, and as such, is underpinned by, or at least closely connected to, privacy interests. Yet the history of breach of confidence is rooted in the context of trade secrets and commercial dealings.

In truth, the facts of *Douglas* trigger both bases. The Douglases were concerned not only about the disclosure of information about them that they had not consented to and had no control over, but also the intrusion by an uninvited person into the very private event that was their wedding. As Catherine Zeta-Jones said in evidence, "It was an appalling and very upsetting shock to discover that our wedding had been invaded in that way. Our peace and happiness evaporated. I felt violated and that something precious had been

stolen from me.”<sup>50</sup> Michael Douglas backed this up: “We felt as if our home had been ransacked and everything taken out of it and spread in the street. It was a truly gut-wrenching and very disturbing experience which left both of us deeply upset.”<sup>51</sup>

Some have complained that the *Douglas* decision relegates photographic information to the status of a trade secret,<sup>52</sup> and permits celebrities to exercise control over the media. However, it is submitted that Lindsay J was right so to hold. As His Honour said, this argument “overlooks that control is not an improper objective of the law of confidence.”<sup>53</sup> Every other case decided on the basis of commercial confidence has equally been concerned with the control of flow of information. That control over the media was the core motive behind the Douglases’ claim as opposed to maintaining the confidentiality of the information does not lessen their right to claim in confidence, nor does it lessen their right to have their right to privacy justified. Not only does the action protect the photograph’s commercial worth to the Douglases, it has the simultaneous effect of protecting their privacy.

If this is so, why did the Douglases not succeed in privacy as well? In his judgment, Lindsay J declined to hold that the Douglases had an additional cause of action in an independent law of privacy for five reasons.<sup>54</sup> First, higher authority was inconclusive as to the feasibility of an independent tort of

<sup>50</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 82 Lindsay J.

<sup>51</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 83 Lindsay J.

<sup>52</sup> Jenni McManus “British judge okays chequebook journalism and censorship” (30 April 2003) *The Independent*, London 7.

<sup>53</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 216 Lindsay J.

<sup>54</sup> *Douglas v Hello! Ltd* [2003] EWHC 786 para 229 Lindsay J.

invasion of privacy. Secondly, as the Douglases had been held to succeed in breach of confidence, there was no gap in the existing law that the European Convention required to be filled. Thirdly, the area of personal privacy was so far-reaching that it was a subject more appropriate for Parliament who could consider in more detail the effects it might have than a judge acting alone.<sup>55</sup> Fourthly, citing the judgment of Lord Woolf CJ in *A v B*,<sup>56</sup> it appears that most conceivable breaches of privacy are adequately dealt with by breach of confidence. Fifthly, a claim under a law of privacy would not give the Douglases a greater claim to relief.

The first, second, fourth and fifth propositions amount to the argument that this was not a strong enough case on which to bring a claim for an independent law of privacy. Yet these propositions, even in combination, ought not to have been a barrier to considering the facts of the case from the privacy viewpoint. As outlined above, there is no doubt that some of the elements of the case can be analysed in breach of confidence terms. But Lindsay J's decision fails to give any weight whatsoever to the intrusion into solitude suffered by the Douglases, a consideration to which *Peck* now requires the courts to give effect.

*Douglas* required an analysis of the impact of Hello!'s conduct on the Douglases. The taking of the picture by the paparazzo amounted to a recording into permanent form the data of what the wedding looked like with the result that the receiving of that information and its publication by Hello! can fairly

<sup>55</sup> I do not wish to consider in this paper the competing views as to whether Parliament or the courts are better equipped to protect privacy interests.

<sup>56</sup> *A v B plc* [2002] EWCA Civ 337, para 11(vi); [2003] QB 195, 206 (CA) Lord Woolf CJ.

be regarded as an intrusion into the solitude, and an interference with the private life interests of, the Douglases.

It may be that the fact that the Douglases had succeeded under breach of confidence removed the pressure Lindsay J must have felt to consider the claim from a privacy perspective given the media's expectation that the case would establish a law of privacy. Lindsay J felt it was unnecessary to consider the privacy law position because His Honour had already been able to fit the facts of the case, albeit formalistically, within the elements of breach of confidence, but an analysis of the evidence as a whole provides the ideal basis for a consideration of the privacy tort.

The stance of Lindsay J is a significant point to bear in mind when considering whether the courts will inevitably adopt a tort of privacy in England. Whenever Article 8 issues are raised, as they were in *Douglas*, the courts must provide an effective remedy to put right the violation. The obligation imposed by the Human Rights Act 1998 (UK) on the courts is to ensure that the law is sufficient to protect all of the substantive elements of the privacy right including the right to be free from intrusions into solitude.<sup>57</sup>

At this point, the decision of the European Commission of Human Rights in *Earl Spencer and Countess Spencer v United Kingdom*<sup>58</sup> may be noted. The Countess had been photographed with a telephoto lens walking in the garden of a private rehabilitation clinic and the photographs splashed

<sup>57</sup> *Peck v United Kingdom* (App no 44647/98) (2003) 36 EHRR 719.

<sup>58</sup> *Earl Spencer and Countess Spencer v United Kingdom* (App Nos 28851/95, 28852/85, 16 January 1998) (1998) 25 EHRR CD CD105.

throughout the tabloid press, constituting a clear violation of her Article 8 rights. However, the Spencers did not bring an action in the domestic courts for breach of confidence. The Commission held the complaint to be inadmissible on the ground that they had failed to exhaust domestic remedies, stating that the doubt that surrounds the scope of breach of confidence:

are not such as to warrant a conclusion that the matter should be put to the domestic courts for consideration in order to allow those courts, through the common law system in the United Kingdom, the opportunity to develop the existing rights by way of interpretation.

*Peck*, as will be seen, however, shows that the ECHR considers that the Article 8 right to private life is far broader than breach of confidence can ever accommodate.

## **VI THE NEED FOR A PRIVACY TORT**

The question remains whether in all cases, the law of confidence in its current shape will, where the protection of an individual's right to privacy is necessary, provide the protection required by the Convention. It is submitted that, while the law of confidence as it stands post-*Douglas* will in many cases protect the right to privacy in the sense of the right not to have private, personal information disclosed, it still does not fully protect the right to private life. Furthermore, United Kingdom domestic law is still deficient as regards protection of the other privacy touchstones considered earlier, such as for example, the right to be free from intrusions into solitude, or *Peck*-type

situations. This paper does not attempt to set out what the parameters and elements of such a tort must be, but only to show why its recognition must be regarded as necessary.

#### A *The Disclosure of Private Information*

Sedley LJ's judgment in the Court of Appeal's decision in *Douglas* focused very much on the policy underpinning breach of confidence and its similarities to privacy. It concluded that "the tort of breach of confidence contains all that is necessary for the fair protection of personal privacy, and that it is now a relatively small step to articulate it in that way."<sup>59</sup> In this view he was supported by what he called the "influential" dictum of Laws J in *Hellewell v Chief Constable of Derbyshire*:<sup>60</sup>

I entertain no doubt that disclosure of a photograph may, in some circumstances, be actionable as a breach of confidence... 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 letter or 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.

Lord Woolf CJ in *A v B* similarly stated:<sup>61</sup>

<sup>59</sup> *Douglas v Hello! Ltd* [2000] EWCA Civ 353 para 117; [2001] QB 967, 998-9 (CA) Sedley LJ.

<sup>60</sup> [1995] 1 WLR 804, 807 (HC) Laws J.

<sup>61</sup> *A v B plc* [2002] EWCA Civ 337, para 11(vi); [2003] QB 195, 206 (CA) Lord Woolf CJ.

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

But is it simply a question of semantics, a question of which label is placed on the cause of action, as the final sentence of Laws J's dictum appears to suggest? The question remains whether *every* disclosure of private information comes within the ambit of breach of confidence as it currently stands. Sedley LJ was unsure in the Court of Appeal's decision in *Douglas*. He said it was material that an independent tort of privacy exists because "on the present evidence it is possible that the photographer was an intruder with whom no relationship of trust had been established."<sup>62</sup> As it turned out, the photographer indeed was an intruder with whom no relationship of trust had been established, but Lindsay J had no trouble finding that it was a breach of confidence and imputing sufficient knowledge of the confidence to Hello!

The case of *Kaye v Robertson*<sup>63</sup> was mentioned at the outset of this paper. A seriously injured actor was confronted in his hospital room by a reporter and photographer who threatened to print pictures and a related story concerning his injuries. Breach of Confidence was not pleaded. The actor was not in any state of mind to answer questions or even consent to the interview, yet the Court of Appeal could not prevent the pictures from being printed. Despite the undoubted invasion of privacy, the Court's hands were tied.

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<sup>62</sup> *Douglas v Hello! Ltd* [2000] EWCA Civ 353 para 112; [2001] QB 967, 998 (CA) Sedley LJ.

<sup>63</sup> [1991] FSR 62 (CA).

It is clear that if Mr Kaye sought the aid of the Courts in 2003 he would be granted an injunction. Surely if it is a breach of confidence, as Laws J suggested in *Hellewell v Chief Constable of Derbyshire*, that “someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act,”<sup>64</sup> then by analogy it must also be a breach of confidence to sneak into a hospital room and photograph an equally ignorant victim. This is especially so given the importance placed by Lindsay J in *Douglas* on the tainted conscience of the defendant giving rise to a duty of confidence. It would be inequitable and unconscionable to permit photographs taken in such a way to be published.

Even if it is not a breach of confidence, the legal landscape has changed since 1991. The courts in 2003 would now be obliged under the Human Rights Act 1998 (UK) to provide Mr Kaye a remedy for the undoubted violation of his Article 8 rights.

Yet these examples do not demonstrate categorically that all disclosures of private information that engage the Article 8 right to privacy are capable of being covered by breach of confidence. In fact, as *Peck* illustrates, they do not.

*Peck* involved the disclosure of information recorded in a public place.

The United Kingdom argued that it did not matter whether or not the facts

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<sup>64</sup> *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807 (HC) Laws J.



gave rise to a breach of confidence because in any event there was no right to private life engaged by being filmed in a public place. Nothing was disclosed that anyone else in Brentwood that night could not have seen in person. For the reasons traversed above,<sup>65</sup> this was rejected by the ECHR. It held that the claimant's right to private life had been interfered with by the disclosure of the footage.

However, as is clear from the recent Court of Appeal decision in *Campbell v Mirror Group Newspapers*,<sup>66</sup> breach of confidence does not sufficiently provide for the Article 8 right to privacy in the way that *Peck* requires. In *Campbell*, images of a street scene were held to be not private or confidential information for the purposes of breach of confidence in United Kingdom law. Supermodel Naomi Campbell was photographed in the street outside a Narcotics Anonymous meeting. Lord Phillips MR held that the "photographs published by the Mirror were of a street scene. They did not convey any information that was confidential."<sup>67</sup> She failed to establish a breach of confidence.

As the ECHR said in *Peck*, "the monitoring of the actions of an individual in a public place ... does not, as such, give rise to an interference with the individual's private life."<sup>68</sup> But as soon as the conduct extends to recording or capturing the scene as permanent data, the right is engaged.

Naomi Campbell's Convention right to private life was therefore interfered

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<sup>65</sup> See Part III A Privacy and the European Convention.

<sup>66</sup> *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373.

<sup>67</sup> *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373 para 33 Lord Phillips MR.

<sup>68</sup> *Peck v United Kingdom* (App no 44647/98) (2003) 36 EHRR 719, para 59.

with by the capture of the scene by photograph into a permanent form. The common law's approach in analysing the situation is not Convention-compliant. It involves an attempt to fit the facts into a number of separate elements which, if all are satisfied, will entitle the claimant to a remedy. The ECHR in *Peck* requires the courts to adopt a rights-centred approach and to analyse the situation from a much broader stance so as to determine if private life considerations arise on the totality of the circumstances in the particular case, free from the technicalities and complexities that have at times bedevilled the common law.<sup>69</sup>

On 27 February 2003 the House of Lords gave leave for Naomi Campbell to appeal the Court of Appeal's decision. It will be the first time their Lordships' House has considered the interrelation of privacy and breach of confidence. Because the Human Rights Act 1998 (UK) requires the House of Lords to take into account all decisions of the ECHR,<sup>70</sup> *Peck* will doubtless be an important point of reference in the argument and judgment. It is likely the *Peck* approach and principles will be adopted given the recent trend in the House of Lords. As Lord Slynn of Hadley observed in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*:<sup>71</sup>

In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of

<sup>69</sup> See *R v Te Kira* [1993] 3 NZLR 257, 272 (CA) Richardson J.

<sup>70</sup> Human Rights Act 1998 (UK), s 2(1)(a). "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights."

<sup>71</sup> *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 1 AC 837, 858 (HL) Lord Slynn of Hadley.

Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence.

Prior to *Peck*, the English courts attempted to satisfy the Article 8 right to private life by expanding the breach of confidence action. It is apparent that this has been a wasted exercise. Article 8 imposes considerably broader obligations than breach of confidence can conceivably deal with. Accordingly, breach of confidence is an inadequate and insufficient cause of action to fully protect the Convention right to private life.

### ***B Intrusions into Solitude***

It is clear from the ECHR's decision in *Peck* that, in addition to the fact that breach of confidence does not cover all disclosures of private information, it does not cover another important interest which Article 8 guarantees: the right to be free from intrusions into one's solitude.

The law as it currently stands will only protect the right to privacy where the intrusion into solitude has yielded to the defendant information capable of disclosure that fits within the bounds of breach of confidence. But breach of confidence is impotent if the intrusion complained of is fruitless.

Take the following example. A paparazzo sneaks past the extensive security arrangements into the private Douglas wedding, but is unable to take any saleable photographs, or finds that his camera for whatever reason does

not work, yet decides to stay to watch the remainder of the wedding. In such a situation, the Douglases would not have a cause of action in confidence for there is no disclosure, or threatened disclosure, of information concerning the undoubtedly private wedding. Yet they ought to have a right of suit to vindicate their right to privacy that the paparazzo has breached. The Douglases consented to the intrusion into solitude of all guests invited to, and bona fide present at, the wedding. The paparazzo's presence is an intrusion into their solitude, an invasion of privacy, which ought to be actionable if the right to privacy is adequately protected.

Another example is provided by *Wainwright v Home Office*.<sup>72</sup> Mrs Wainwright and her son Alan had gone to visit another son in prison. The prison, suspecting them of smuggling drugs into the prison, ordered that they be strip-searched. In contravention of the rules relating to the searches in the consent form they had signed, Alan was required wholly to undress, and Mrs Wainwright effectively so. In further contravention of the search rules, Mrs Wainwright's strip-search may have been visible from outside the office, the search being performed in an illuminated room without any blinds drawn. In a situation crying out for redress, the Court of Appeal found that "it is not open to us to grant relief to the claimants on the basis of an invasion of their privacy."<sup>73</sup> Yet surely this is exactly the kind of case in which a remedy must be given. The claimants' privacy has been invaded. They have suffered an

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<sup>72</sup> *Wainwright v Home Office* [2001] EWCA Civ 2081; [2002] 3 WLR 405 (CA).

<sup>73</sup> *Wainwright v Home Office* [2001] EWCA Civ 2081 para 107; [2002] 3 WLR 405, 432 (CA) Buxton LJ. It must be noted that the actions complained of took place just prior to the Human Rights Act 1998 (UK) coming into force. The Court of Appeal's decision expressly related to the common law position as it stood prior to the Human Rights Act. It is therefore still unclear whether the Human Rights Act has ushered in a right to privacy.

intrusion into their private lives. The fact that they cannot bring their case within breach of confidence should not disentitle them to a remedy when there has been such a flagrant breach of Article 8.

This was recognised by Sedley LJ in the *Douglas* case when he concluded:<sup>74</sup>

a concept of privacy ... accord[s] recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.

Many have interpreted this statement, and Sedley LJ's judgment as a whole, to be an approval of the adoption of a "blockbuster"<sup>75</sup> tort of breach of privacy in England which would be directed at both the public disclosure of private facts and intrusion into private life. It is unimportant whether Sedley LJ was advocating such a "blockbuster" tort or simply a tort concerned with intrusion. His Lordship's point remains: the law must provide for those who have suffered an unwanted intrusion into their lives that interferes with the right to private life that is guaranteed under the Convention, regardless of whether the remedy is a tort that encompasses both intrusions into private life and the disclosure of information obtained as a result of an intrusion into

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<sup>74</sup> *Douglas v Hello! Ltd* [2000] EWCA Civ 353 para 126; [2001] QB 967, 1001 (CA) Sedley LJ.

<sup>75</sup> *Wainwright v Home Office* [2001] EWCA Civ 2081 para 60; [2002] 3 WLR 405, 419 (CA). Mummery LJ.

private life, or a tort that acts only to prevent intrusions into private life that do not come within the bounds of breach of confidence.

## VI CONCLUSION

The ECHR's decision in *Peck* is notable for its extended definition of the Convention right to private life. Moreover, the judgment makes it abundantly clear that the right to privacy is not simply a concept to which State parties must pay lip service. It is a real, substantial, concrete right that the states must accept and give full effect to, subject only to the limitations provided for in the Convention. Yet it is clear from such cases as *Malone v Metropolitan Police Commissioner*,<sup>76</sup> *Bernstein of Leigh (Baron) v Skyviews General Ltd*,<sup>77</sup> and *Kaye v Robertson*,<sup>78</sup> recently reaffirmed in *Wainwright v Home Office*,<sup>79</sup> that the English Courts have not recognised a right to privacy at common law.

Instead, the English courts have preferred to develop the law of breach of confidence in order to meet their obligations under the Human Rights Act 1998 (UK) and the Convention.

As *Peck* demonstrates, this development is no longer satisfactory or sustainable. The *Douglas* case, for example, involved a clear invasion of privacy in both the intrusion by the paparazzo into the wedding itself and the

<sup>76</sup> [1979] Ch 344 Megarry V-C.

<sup>77</sup> [1978] 1 QB 479 (HC) Griffiths J.

<sup>78</sup> [1991] FSR 62 (CA).

<sup>79</sup> [2001] EWCA Civ 2081; [2002] 3 WLR 405 (CA).

disclosure by Hello! of the pictures taken. These elements clearly engage the right to private life. Lindsay J, it is submitted, was correct to hold that by publishing the photographs, Hello! had committed a breach of confidence. However, His Honour was incorrect to remove from the assessment of the case the necessary consideration of the right to privacy on the false assumption that the common law had already provided an adequate remedy.

The *Douglas* case does not show, as Lord Woolf CJ supposed in *A v B*, that the majority, if not all, breaches of privacy are covered by breach of confidence.<sup>80</sup> As it stands post-*Douglas*, breach of confidence may cover many of these situations because of its focus on the conscience of the defendant and its abandonment of the prior relationship requirement. There of course still remains the evidential problem for the plaintiff in having to show that a third-party media defendant had the requisite notice of the confidence. Yet as *Peck* also makes abundantly clear, breach of confidence has not expanded to the position where it will cover all disclosures of private and confidential information that engage the Article 8 right to privacy. In addition, the breach of confidence action is not sufficiently rights-centred because of the focus on the defendant's conscience rather than the impact of the defendant's conduct on the plaintiff.

Finally, Article 8 requires protection for those who have suffered an unjustifiable intrusion into their solitude, into their sphere of protected rights. There is no such protection afforded these victims at common law, unless the

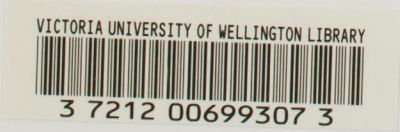
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<sup>80</sup> *A v B plc* [2002] EWCA Civ 337, para 11(vi); [2003] QB 195, 206 (CA) Lord Woolf CJ.

situation, occasionally with a degree of legal gymnastics, can be brought within traditional common law causes of action. This is a gaping hole in the body of the common law which, it is submitted, must be filled by a privacy tort.



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