

Individual's right to privacy



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Consider whether it is time that the Supreme Court declared there to be a tort of invasion of privacy, or whether an individual's right to privacy is already adequately protected.

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“ We have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.”

Sedley LJ in Douglas v Hello! Ltd. (No. 1) [2001] 2 WLR 992.

“ I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more than a plea for the extension...of...breach of confidence...There [is] a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself.”

Lord Hoffman in Wainwright v Home Office [2003] 3 WLR 1137.

Before examining how it is regarded and analysed in a legal context, it is useful to ask what the definition of privacy is. That is, what does the concept mean to us on an everyday basis. The Oxford dictionary provides two definitions of 'privacy': (1) “ *A state in which one is not observed or disturbed by other people* ” and (2) “ *The state of being free from public attention* ”. When we consider each of these definitions carefully we can understand how, on an everyday basis, a life without any privacy would seem to be inconceivable. Maintaining the privacy of our inner lives allows space for psychological well-being and maturation, for creativity and for the

development of intimate and trusting relationships with others. Some have argued that the reason Marilyn Monroe, one of the world's most famous actresses, committed suicide was because her life was entirely public and exposed. Indeed, this may be argued for many tragic cases of suicide among celebrities or public figures. Our relationship with, and concept of, privacy is changing however.

Privacy is a hot topic today, both in the legal system and in society in general, because of the massive changes in the way we live over the past two decades. It is more and more difficult to be in a state where one is not observed or disturbed by others or where one is free from public attention, because of the widespread intrusion of, for example, mobile phones and smart phones, cameras, videos, CCTV surveillance, GPS, Google Earth and internet cookies (even if we are innocently browsing the internet at home alone, our movements are likely being tracked, monitored and stored). Arguably, one has to go on a technology-free retreat in the wilderness to be guaranteed this state. Interestingly, on the other hand, this increased exposure of our lives to public attention has blurred the lines between what we consider private and public. Many of us willingly share private and intimate information publicly through social media like Facebook, Twitter, Youtube and Blogs so much so that Facebook CEO, Mark Zuckerberg has said privacy is no longer the “ *social norm* ” and “ *People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people* ”. It is true that our levels of comfort with living our lives more and more publicly have changed. In particular, the younger generation today cannot imagine a world without internet, smart phones,

Facebook and Twitter while the older generation are struggling to adapt to life with these additions.

The idea of privacy as a legally protected right in fact originated in the US well over a century ago when an article entitled 'The Right to Privacy' was published in the influential Harvard Law Review by two attorneys, Samuel D Warren and Louis D Brandeis. The article achieved legendary status and led to the birth of the legal recognition of privacy in the US in the early part of the 20th century. Notably, and arguably far more relevant today than at the time it was published, the article referred to " *the intensity and complexity of life* " and argued that invasions of privacy subjected a person to " *mental pain and distress, far greater than could be inflicted by mere bodily injury* " and that people needed to be protected. Today, unlike in the UK, modern tort law in the US offers comprehensive protection in the form of four categories for invasion of privacy. They are: (a) intrusion upon the plaintiff's seclusion or solitude or 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.

Despite these developments in the US, privacy as a legally protected right was far slower to develop in the UK. It was finally recognised when the European Convention on Human Rights (ECHR) was implemented into UK law by way of the *Human Rights Act 1998* (UK). Article 8 of the ECHR explicitly provides a right to respect for one's " private and family life, his home and his correspondence" subject to certain restrictions. This leads to the consideration, having regard to this significant development in 1998 in the <https://assignbuster.com/individuals-right-to-privacy/>

UK, of whether an individual's right to privacy today is adequately protected by the law. In my view, there is adequate protection available today. A rapid evolution of the law of privacy in the UK has happened since 1998 with the Courts finding themselves obliged to give appropriate consideration and effect to Article 8 in the cases that come before them. A review of the significant case law is developed further below. However, it is worth first mentioning that there are numerous other laws which protect aspects of life in which invasions of privacy can occur. By way of example, privacy on your land and in your own home is protected through the cause of action of private nuisance; privacy of your personal space and bodily integrity is protected through the criminal action of battery and perhaps to a great extent by the Protection from Harassment Act 1997; the right to have your personal and professional reputation maintained is protected by the tort of defamation; and finally data protection legislation offers considerable protection for our private information and data when shared.

Most importantly, as referred to above, the Courts have been developing and expanding the law of privacy (without going as far as declaring a tort of invasion of privacy) through the equitable law of breach of confidence to encompass misuses of private information. It has recently been acknowledged by the Court in *Judith Vidal-Hall & ors v Google Inc* [2014] EWHC 13 that there is now an independent tort for misuse of private information. It is worth examining a selection of the most important cases chronologically to consider how the issue has been discussed and dealt with:

Douglas v Hello! Ltd [2001] QB 967, involved the unauthorised and surreptitious taking, and selling to Hello! magazine, of wedding photographs

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of the celebrity wedding of Michael Douglas and Catherine Zeta-Jones by a freelance photographer. While the Court made the important acknowledgement in that case that “ *We have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy* ” ultimately it was held that the claim could be dealt with under the equitable law of breach of confidence.

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22, involved well-known celebrity model Naomi Campbell suing Mirror Group Newspapers for breach of confidence over published photographs of her leaving a Narcotics Anonymous meeting. In that case it was stated that the cause of action for breach of confidence “ *has now firmly shaken off the limiting constraint of the need for an initial confidential relationship* ” and that it should more appropriately be referred to as a cause of action for ‘ misuse of private information’ since the law now imposes a “ *duty of confidence* ” whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as ‘ confidential’ or, what is more appropriately termed ‘ private’.

Wainwright v Home Office [2004] 2 AC 406 involved a strip search of the plaintiffs who had gone to visit a relative in prison. The search had been conducted in accordance with the prison rules and was carried out in a manner which was calculated, in an objective sense, to humiliate and cause distress to the plaintiffs. Lord Hoffman emphatically confirmed that there was no common law tort of invasion of privacy and that the general opinion of the judiciary was that legislating in the area of privacy was a matter for Parliament rather than ‘ the broad brush of common law principle’.

ETK v News Group Newspapers Ltd [2011] EWCA Civ 439 involved an application for an injunction to stop the publishers of the News of the World Newspaper publishing, communicating or disclosing to any other person information relating to the identity of ETK or details of the sexual relationship between ETK and 'X', a person named a confidential schedule to the application. This case is useful as the Court summarised the steps which govern an application for an interim injunction to restrain publicity of private information. They are:

(a) First step: whether the applicant has a reasonable expectation of privacy so as to engage Article 8 of the ECHR. If this criteria is not present the application will automatically fail. A decision as to whether a reasonable expectation of privacy exists will take all of the circumstances into account and generally uses a test of whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, would find the disclosure offensive. Protection may be lost if the information is already in the public domain;

(b) Second step: this step involves a balancing exercise with the right of freedom of expression in Article 10 of the ECHR. The decisive factor is the contribution which the information the subject of the disclosure makes to a debate of general interest.

In conclusion, an acknowledgement that the law of privacy in the UK is adequate today equally acknowledges the fact that the common law is constantly in a state of flux and evolution. As our society changes, and our concepts of privacy change, so to must the Courts be prepared to deal

creatively with the cases of invasion of privacy that come before them as, I would argue, they have done to date by expanding upon breach of confidence law and developing the tort of misuse of private information. When one considers the definition of privacy one starts to appreciate the difficulties encountered by both the legislature and the judiciary, and their reluctance, in attempting to construct uniform laws, regulations and rules around that definition. As Chief Justice Gleeson noted in the Australian case of *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 “ *the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends .*” Some have argued that privacy itself is beyond the scope of the law because it is a natural human right in the same way as freedom is. Furthermore, like freedom, privacy can mean different things to different people depending, for example, on their upbringing, age group, gender, culture, global location, education or faith. Accordingly, the extent to which privacy may be seen to be invaded or intruded upon will depend on the individual and his or her relationship with society. Finally, I would venture to say that Mark Zuckerberg of Facebook may in the near future be proved right. As technology and interconnectivity continue to explode and expand privacy may eventually no longer be considered a social norm.

Bibliography

Books

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