

# Development of right to privacy in uk law



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' Critically evaluate how privacy is protected and what extent a right to privacy has been developed in English law.'

The law of privacy remains a fast moving and chaotic area of law, where newspapers and Courts have something new to say almost on a weekly basis[1]. However, at present there is no single comprehensive tort of privacy in statute law in the United Kingdom, the House of Lords confirmed this view in the *Wainwright v Home Office* [2]. Yet, even with no protected rights to privacy enshrined in domestic law, people have now never been in a better situation to protect their privacy. This essay will therefore attempt to evaluate the evidential paradox England has in relation to how individuals are protected. In order to answer the initial question of how privacy is protected, this essay will firstly address the significance of the pre-existing torts and implementation of Human Rights Act (HRA) being the " catalyst for legal change"[3]. Whilst in conjunction examining the relevant case laws which have been at the forefront of these claims. Secondly, in order to answer the latter part of the question this analysis will explore the allegations of an infringement of personal privacy that have emerged from the Campbell ruling. Lastly, it will then conclude by summarising the points made within this evaluation and a proposal into the future of the law.

First off, in order to consider the extent to which privacy is protected it is important to examine the values that underpin this somewhat vague concept. Privacy by its nature consists of many differing paradigms, which vary wildly between context and environment; it is therefore difficult to rely on a single interpretation. This was emphasised by the Calcutt Committee in 1990 with the Report of the Committee on Privacy and Related Matters who

concluded that they couldn't find " a wholly satisfactory statutory definition of privacy"[4]. The climate of uncertainty can be related to the fact that even within the 21<sup>st</sup> century; the legal definition of privacy remains in its infancy, still deriving from the 19<sup>th</sup> century Judge Cooley " the right to be let alone"[5].

What then makes Privacy law such a problematic area for journalists is the fact that journalists work to publish what is considered in the public interest, which are both eager to sell and hungry to devour any salacious information about celebrities. Nevertheless what newspaper proprietors and the public want are not considered a legitimate test[6]. Thus, creating a tense relationship between interests of privacy and interest of freedom of expression. Because there is no privacy law journalists must work within other laws which provide privacy.

For the purpose of a chronological analysis into English law, the starting point concerning the debate between privacy and freedom of expression for journalists involves the era pre HRA. A pivotal case which emerged from this period was the *Kaye V Robertson*[7] when the actor Gordon Kaye was ' interviewed' and photographed by a journalist whilst he was heavily sedated and recovering from brain surgery. He was granted a legal case under malicious falsehood, even though Lord Justice Bingham acknowledged it was a " monstrous invasion of privacy"[8]. The laws of trespass and nuisance provided a slight protection against physical intrusions by the media when Kaye obtained a partial injunction; however, it evidently failed to provide protection against the publication of private facts when they have been

obtained by other means. So prior to the enactment of HRA, the potential remedies available to an individual to media intrusions were severely limited and the breach of confidence was often the most useful remedy for protecting information.

Recognising the problematic void within the law the British judiciary attempted to bridge the gap by adapting a pre-existing tort into a general right to privacy. Therefore breach of confidence has undergone some significant developments, extending the types of confidential information into a relevant stepping stone to decide privacy cases. Traditionally, this tort was developed in 19<sup>th</sup> century in common law to protect secrets to *Albert v Strange*[9], not specifically designed to protect privacy. However, Later cases including *Coco v A. N. Clark*[10] and the *Spy catcher case*[11] could be argued to have narrowed the area of the law down which lay the parameters for the *Megarry* test. This test extended privacy to where there is no relationship between the parties and that the information will likely to have damaging consequences if published. Taking the *Francome v Mirror Group Newspapers*[12] as an example; the defendant was able to claim damages when a journalist acquired private information by tapping the telephone of John Francome. So whilst breach of confidence no longer requires a pre-existing relationship. It can now make it entirely possible for it to become a move towards protecting privacy, as opposed to primarily protecting Confidence. Which was further emphasised in *Douglas v. Hello!, Ltd*[13] where actors Michael Douglas and Catherine Zeta-Jones won an injunction against a tabloid magazine for publishing covertly taking photos of

their wedding when the rights had already been sold to its rival. Depending that the requirement of a relationship of confidence as Hello! were not never a party to the relationship.

The crucial stage of privacy law lies with the implementation of the HRA which came into effect in October, 2000. It became clear early on that this development would be responsible for developing a legal concept of privacy beyond the law of confidentiality[14]. As whilst Breach of confidence faces us with a simple balancing exercise between how information is collected, when we turn to the HRA, we're faced with something more complex. As in accordance with Section. 1 of the HRA it contains the rights and fundamental freedoms set out in Article. 8 " everyone has the right to respect for his private and family life"[15]. Yet, Article. 10 asserts " everyone has the right to freedom of expression"[16]and these rights set out in both Articles are both qualified and neither article has precedence over the other blurring the line between what can be reported on.

The leading case to come before the English courts post HRA was the Campbell v Mirror Group Newspapers Ltd[17]. This case was concerned with two articles that were published by the Mirror on Naomi Campbell's drug addiction and treatment. The news articles were accompanied with a covertly obtained photograph of the claimant leaving Narcotics Anonymous. The Mirror Group asserted that they should not be liable as the information published was in the public interest, since Campbell had deceived the public in regards to her drug addiction. What remains pivotal about this case is that the majority did rely upon the HRA in its decision. Furthermore, the discussions surrounding confidence laid the foundation for a new tort, which <https://assignbuster.com/development-of-right-to-privacy-in-uk-law/>

has come to be known by the name given to it by Lord Nicholls: “ misuse of private information”[18]. Stating that ‘ the description of information as ‘ confidential’ is not altogether comfortable, information on an individual’s private life would not, be called ‘ confidential’. The more natural description is that such information is private and is better encapsulated now as misuse of private information[19].

By contrast, the misuse of private information is directly aligned to the protection of private information which is governed by the Data Protection Act 1998 providing regulation of the processing of information relating to individuals including the obtaining, holding, use or disclosure of such information[20]. Meaning the claimant only needs to establish a reasonable exception to privacy with the information in question. This is a clear juxtaposition to pre HRA as the balancing act is tipping in favour of Article 8. For instance, when John Terry[21] applied for an injunction to restrain a publication of details about his extra marital affairs, the person possessing the information is referred to as ‘ persons unknown’. Although, the judge did not uphold the injunction, he firmly established that if there was a real risk that intrusive details about Mr Terry’s relationship in the article, he would have ordered that publication be prohibited. The development of this breach is therefore the underlying foundations to a kind of tort of privacy.

**The media were therefore undoubtedly concerned about results of these cases calling for a comprehensive legislation which the media have always adamantly discouraged. As suggesting tougher sanctions on what is considered private could potentially ‘gag’ them from any form of investigative journalism in fear of legal letters over any individual who claims they have had their privacy invaded. This claim can be related to The Bureau of Investigative Journalism who published a story about two Staffordshire NHS surgeons, Mr Hutchinson and Mr Ravikumar. These surgeons had been criticised over deaths at then Britain’s worst hospital and yet did still carrying out operations without patients knowing about their record. The paper that was running the story backed off running the piece due to a legal letter from the lawyers claiming the information was ‘plainly private information’[22]. Clearly, this valuable investigation should be able to be published without fear of prejudice, as effectively the only thing that is being hindered is the truth[23].**

**It seems the evolution of the judge-made law of misuse of private information has allowed less known individuals, children[24]and vulnerable adults (under the mental health act) to be protected against privacy infringements by the media. Yet, it also seems this area of law has become disproportionately swamped by vanity driven celebrities complaining about photos taken by paparazzi's[25]. There is no disregarding the significance of the Campbell case as it has established several important precedents, but what it seems that injunctions have become only the rich and powerful are able to fend off the media. These gagging orders have stopped newspapers reporting allegations of everything from extramarital affairs to legal disputes. Premiership footballers, actors, television personalities, bankers and celebrity chefs are among those who have successfully used the courts to stop such disclosures entering the public domain[26]. So where does this leave article 10 of the HRA in relation to the balancing act? Because as stated earlier in this analysis neither articles have precedent over each other. Yet, these gagging orders which have become a common phenomenon is highlighting that something is failing. Take McKennitt v Ash[27]when the court ruled someone's right to protect their private life outweighs someone else's freedom to tell their story it cast shadow over the media industry.**

So following the historic 3: 2 decision in the Lords, it should now be addressed of where do we go from here? Despite some feeling that the Wainwright and Campbell case could signal a completion of the development of a new remedy in English private law. It seems that these cases have merely become a staging post on route to the evolution of a fully-fledged tort[28]. However, a A symbolic case that demonstrates the delicate balance

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between the right to privacy and the freedom of expression post implementation of the misuse of private information lies with the Max Mosley case[29]. This case was brought to the courts attention on the 30, March 2008 when the News of the World published an article titled “ F1 Boss Has a Sick Nazi Orgy with Hookers”[30], also making reference to Mosley being a sadomasochist Sex Pervert[31]. This judgment further tipped the balance in the favour of greater privacy where there was no public interest. As clearly this article was not in the public interest as it did not affect the job and revealing immoral behaviour is not a legitimate public interest because it does not expose illegal wrong doings. Mosley won his privacy claim and award £60, 000, although Eady J in the Mosley case stated: “ It has to be recognised that no amount of damages can fully compensate the claimant for the damage done. He is hardly exaggerating when he says that his life is ruined”[32]. It could be argued that the convention is therefore intended to guarantee rights that are practical and effective so injunctions against potential life changing stories are better to be blocked than to have a remedy of a substantial pay-out.

In respect to the Campbell and Mosley decision it is clear that most media organisations and lawyers will agree that privacy is now based upon a case to case basis, which must be applied through confidentiality and the Human Rights Act. Whilst the verdict came as a damaging blow to media organisations, they can take solace in the statements from the dissenting judges for example Lord Nicholls and Hoffman expressed; “ from a journalistic point of view, photographs are an essential part of the story. The picture carried the message, more strongly than anything in the text alone...

in my opinion...should be allowed"[33]. Some however have vented their frustration that this development of a backdoor law is " driven by a deep loathing of the popular press, the judges have long been itching to bring in a privacy law by the back door. Thus free speech is to be made conditional on the prejudices of the judiciary"[34].

The reporting on private matters only became harder when the media's reputation went into free fall during the Leveson inquiry of 2011, following the revelation that mainstream newspaper organisations had been tapping into phones of officials, celebrities and even the deceased in order to generate content. This subsequent down fall of the media brought from the ashes a new regulatory body which itself is responsible for the protection of privacy. This Royal Charter which was proposed appears on the face of things baring similar characteristics to the press complaints commission. Yet, there are some distinctive differences. Unlike the PCC the body will be an independent from both the judiciary and the press meaning it should allow a balanced decision. Furthermore an independent regulatory body that has the power to impose heavy sanctions (capped at £1 million) will initiate the first step of weighting right to privacy over the freedom of the press.

Furthermore, this leads onto the quintessential debate of who should be developing this law? Has Parliament failed to address this issue? Mr Justice Lindsay stated in the Zeta Jones case, " Parliament has failed so far to grasp the nettle...if Parliament doesn't act soon the less satisfactory course of the Courts creating a law bit by bit"[35]. However, the HRA is not the only tort which has been passed through the Houses that deals with the issue of privacy. There are a number of overlapping Acts which address this issue.

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For example, the theSexual Offences Act add a criminal offence to the act of voyeurism, and, theProtection from Harassment Act creates both criminal sanctions and civil remedies against harassment, to which all have been employed in the decisions made by judges. So even though David Cameron has expressed his concern and ' unease' about judges formulating a law. It is difficult to suggest that even though Parliament has not legislated on privacy issues, reviewing the evidence it would be extremely difficult to draft a new or improve our existing laws. Without moving too far away from the restraints being held over the UK for being a member of the European Union.

In conclusion, the liberty of the press is indeed an essential cornerstone of a free state; and to forbid this, is to destroy democracy[36]. However, Lord Denning accepted that even though this remains an absolute right it is still subject to limitations stating " the press shouldn't be free to ruin a reputation, break confidence or to pollute the course of justice"[37]. To a large degree most if not all journalists and judges would accept this statement as ethically factual. So after examining the evolving tort throughout this essay with the various debates which have been highlighted by both journalists and the judiciary it is clear that some progress has been made as the ' position for victims of shameful intrusions ... is better now than it ever was in the past'[38]. Appeals such as *Wainwright v Home Office* [39]and *Mosley v News Group Newspapers Ltd* [40]emphasise that over the past twenty three years something fundamental has happened into how were protected. The induction of a HRA has ultimately been the spring board that has helped develop the law of privacy that protects us today. Even though there have of course been improvements made there still remains a

significant way to go in regards to privacy in English law. For instance, there still contains many inconsistencies into how article 8 is applied to cases on such a broad scale this includes the recent judgment on *ZH v The Commissioner of Police for the Metropolis* [41] as at trial, Sir Robert Nelson held the police liable in tort assault, battery, and false imprisonment and trespasses to the person. The judge also identified the police as having breached the HRA; inhuman and degrading treatment (article. 3); deprivation of liberty (article. 5); and privacy (article. 8). Which given the past history of cases would have been dismissed by some English law judges. Finally, what this essay finds is that for every wrong there is a remedy. Trespass, Nuisance Defamation, malicious falsehood, Breach of confidence, Protection from Harassment and Data Protection Act 1998 so whilst there are piecemeal protections, why do judges or parliament need to make a grand step?[42]

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[1]Hertfordshire law Journal 2(2), 30

[2][2003] UKHL 53

[3]Harris, O' Boyle and Warbrick, 2009, p 31

[4]Report of the Committee on Privacy and Related Matters, London: HMSO, at 7.

[5] *Cooley on Torts* , 2nd ed (1888), p29

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[8]Court of Appeal *Kaye v Robertson and Sports Newspapers Ltd* [1991] FSR 62

[9]Prince Albert -v- Strange : [1849] 1 H&T 1

[10]Coco -v- A N Clark (Engineers) Limited : 1969 [RPC 41, 47]

[11]Attorney General -v- Guardian Newspapers [1999] 1AC 109

[12][1984] 1 WLR 892

[13]Douglas and Zeta Jones & Ors -v- Hello : [2001] QB 967, 997 CA Sedley LJ

[14]Hertfordshire law Journal 2(2), 30-40

[15]

[16]

[17]Naomi Campbell -v-MGN Limited: [2004] UKHL 22

[18]Ibid [2004] UKHL 22

[19]Ibid [2004] UKHL 22

[20]Plymouth Law and Criminal Justice Review (2014) p182

[21]John Terry(previously ' LNS') vPersons Unknown[2010] EWHC 119

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[36]British Steel Corporation v Granada Television Ltd [1981] AC 1096.

[37]Ibid AC 1096

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