CINDERELLA'S SLIPPER

An overview of British Privacy Law

1. To those coming from the French legal tradition the common law approach to the judicial development of law may seem somewhat alien. Article 5 of the Code Civil in France forbids judges from giving a judgment in general or regulatory terms. French law does not have a principle of case law precedent such as we have in the United Kingdom. The power of the judges to incrementally develop and gradually remake the law may strike French listeners as somewhat odd. It is, of course, not uncommon for British judges to regular deny that they are making the law. Megarry VC in Malone v Metropolitan Police Commissioner [1979] 2 All ER 620 at 642 in the context of the law of privacy stated:

> "It is no function of the courts to legislate in a new field. The extension of existing law and principle is one thing, the creation of an altogether new right is another – no new right in law fully fledged with all the appropriate safeguards can spring from the head of a judge deciding a case; only Parliament can create such a right."

2. Notwithstanding this type of judicial comment an examination of the development of English law since then shows that the courts have indeed developed the law to a point where in effect there is now something which amounts very much to a new law of privacy though it is a law which has developed piecemeal and in a somewhat unstructured way.

3. It must be recognised that there always have been common law tort remedies and some statutory protections available to individuals in the context of the invasion of rights that equate to what we would now call privacy rights. The torts of trespass and nuisance can, in English law, give privacy protection to those with an interest on lands protecting them against direct invasion or indirect interference with the land owner's privacy. Those protections, however, protect the owner of an interest in land but not a person without an interest in land. He cannot rely on these remedies as was demonstrated in Hunter v Canary Wharf Limited [1997] AC 655. The torts of defamation or malicious falsehood may provide some protection (see for example Tolley v Fry [1931] AC 333 and Kaye v Robinson [1991] FSR 62). What is clear, however, from the case law was that there was no free standing tort or delict of invasion of privacy. If a person had a grievance about his privacy being wrongfully invaded he had to formulate his claim within some existing tort or a claim for breach of some statutory duty.

4. Before turning to recent case law developments I will deal with two cases which have formed an important part in the debate about the law of privacy in the common law world. Firstly, I refer to the case of Kaye v Robinson [1991] FSR 62 which amply demonstrated the inadequacies of the then state of the English law to protect privacy. Gordon Kaye was the star of a very popular comedy series set in war-time occupied France called "Allo Allo", in which he played the philandering café owner who played a double game of serving his French and German clients and helping escaping RAF pilots. The unfortunate Gordon Kaye was seriously in a car crash during a storm and received severe head injuries. A tabloid newspaper journalist gained access to his hospital bedroom in spite of privacy notices. He interviewed Kaye and photographed him when he was in a state of confusion. Kaye sought an injunction preventing the publication of the interview and photographs. In his case he alleged malicious falsehood and invasion of his privacy rights on the grounds that he was not in a fit state to consent to the interview. The English Court of Appeal ruled that under English Law the court had no power to protect his privacy. All the court could do was to grant an injunction restraining the papers from publishing any photographs or materials which could be reasonably understood to convey to a reader that Mr Kaye had voluntarily permitted the interview. This injunction was worthless because the newspaper published photographs with a statement that the interview was not given by consent. The inability of English law as it then stood to give any protection to the plaintiff was summed up in two judicial statements:

> "It is well known that in English law there is no right to privacy and accordingly there is no right of action for a breach of person's privacy" (per Glidewell LJ).
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> "If ever a person has a right to be left alone by strangers with no public interest to pursue it must surely be when lies in hospital recovering from brain surgery and in no more than partial command of his facilities. It is this invasion of his privacy which underlines the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law" (per Bingham LJ).

5. The inadequacy of English law to protect the privacy of individuals was thus clearly recognised by the courts which could see the unfairness of the law. Successive Governments and Parliament were aware of the shortcomings as evidenced by the frequency with which a number of committees of inquiry were established to consider the topic of privacy. The topic was the subject of private members Bills in Parliament. None of the private members Bills came to anything largely because the Government did not want to take on the power of the press, particularly the tabloid press. Private members Bills were brought forward in 1961, 1967, 1969, 1987, 1988

and 1989. Various committees made suggestions but the most that emerged was an attempted at self-regulation by the press itself.

6. The second case I want at this stage to mention is Lenah Game Meats v Australian Broadcasting Corporation [2001] CLR 199, a decision of the High Court of Australia which has exerted some influence on the development of English law. The plaintiff's claim in that case arose out of a trespass by animal rights activists who entered the plaintiff's abattoir and video photographed the process involved in the killing of Australian possums for export. The trespassers passed a copy of the video tape to the Australian Broadcasting Corporation. The plaintiff's sought an injunction to prevent the broadcasting of the video on the grounds that it was obtained as a result of the invasion of the plaintiff's privacy. The High Court held that the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of a kind which the plaintiff's contended. The activity of slaughtering the possums was not a private act. An activity was not be regarded as private simply because it was not done in public. Leeson CJ in an influential passage at 226 stated:

> "Certain kinds of information about a person, such as information relating to health, personal relationships or finances may be easy to identify as private, as may certain kinds of activity which a reasonable person, applying contemporaneous standards of morality and behaviour, would understand if he meant to be unobserved. The requirement that disclosure or observation of the information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

7. A comparison between Kaye and Lenah shows that at least in Australian common law there had been some development of privacy law away from the stark conclusion in Kaye. Since Lenah and with the arrival of the Human Rights Act 1998 the law of privacy in the United Kingdom has developed and moved forward but as we shall see it has not been in an entirely satisfactory manner.

8. The real impetus for development of the law indeed came from the incorporation of the European Convention on Human Rights into domestic British law by the Human Rights Act 1998. English law fell short of complying with the Article 8 requirements of the Convention. It will be recalled that Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
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> 2. There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In Hannover v Germany [2004] 16 BHRC 545 the European Court of Human Rights said:

> "Article 8 does not merely compel the state to abstain from interference by public authorities; in addition to this primarily negative undertaking there may be a positive obligation 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 a sphere of the relations of individuals between themselves."

In introducing the Human Rights Bill in Parliament the then Lord Chancellor, Lord Irvine, on 24 November 1997 stated that the Government did not intend to introduce legislation in relation to privacy but expected that the judges would develop the law appropriately having regard to the requirements of the Convention (583 House of Lords Official Reports (5th series) Column 771). This seemed to be an invitation to the judges to re-draw the law of privacy (and thus make new law) and to some it might appear to have been an abdication of Governmental responsibility. The invitation to the judges, as Lord Phillips stated in Douglas v Hello! Limited [2005] 4 All ER was not accepted with whole-hearted enthusiasm. However, the obligation of the courts as public authorities to give effect to Convention rights did impose a duty on the court to do something to make the existing law Convention compliant.

9. The British courts, however, have turned their face against the creation of a free standing tort of invasion of privacy. Where a public authority has breached a citizen's right to privacy then that individual as a victim may have a remedy against the state for breach of the Convention duty but the Human Rights Act and the Convention will not be interpreted so as to give, by way of horizontal effect, a civil remedy for breach of privacy per se between individuals. This was made clear by the House of Lords in Wainwright v Home Office [2004]

2 AC 406. In that case one claimant had been touched during a prison strip search. He was awarded damages for physical interference which resulted in psychiatric injury. The other claimant had not been touched and suffered only distress. The House of Lords recognised that there were a number of common law and statutory remedies which protect the underlying values of privacy (for example the torts of trespass, nuisance, defamation and malicious falsehood and the statutory remedies under the Protection Against Harassment Act 1997 and the Data Protection Act 1998). Of particular significance was the developing law of the equitable action for breach of confidence. Lord Hoffman, however, distinguished between the identification of:

(a) privacy as an underlying value in the rule of law; and
(b) privacy as a principle of law.

10. The equitable action for breach of confidence has turned out to be a vehicle enabling the courts to develop the law to protect in some measure the principle of privacy. The courts of equity have for a long time afforded protection against wrongful use of private information. Originally it was like a claim for breach of trust. Confidential information was treated as akin to a form of property bound by inequitable or fiduciary duty against its misuse. The leading nineteen century case was the famous case of Prince Albert v Strange [1849] 2 DeG and SM 652. In that case somebody had gained access to Prince Albert's private etchings and was threatening to make use of them for his own financial gain. The court granted an injunction to restrain the breach of confidence. This form of action has developed in recent years largely under the influence of the Human Rights Act requirements to provide some remedy for invasion of privacy. Its development has occurred in a series of high profile cases involving celebrities or individuals in the public eye who were seeking to protect themselves against the use of information which they considered was private and hence confidential. A breach of confidence claim is not an action for invasion of privacy *per se.* Rather it is an action arising out of the misuse or threatened misuse of information that may relate to private matters. Leading cases have been Campbell v MGN [2004] 2 All ER 905, Douglas v Hello! Limited in a series of decisions in the Court of Appeal, A v B Plc [2002] 2 All ER 545 and Venables Newsgroup Newspapers Limited [2001] 1 All ER 908.

11. The original cause of action for breach of confidence required proof of three elements.

> "First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted on circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

(per Megarry J in Cocoa v A N Clarke (Engineers) Limited [1969] RPC 41 and 47.) The elements have, however, radically changed and developed in recent case law largely as a result of the influence of Article 8.

12. In relation to the first element, the information now need not be confidential in the ordinary sense of the word but only private. Photographs are plainly capable of constituting such information. The second element (circumstances imparting an obligation of confidence) has undergone significant change from protecting confidence disclosed within a relationship of confidence and confidentiality to a variety of different scenarios aligned to intrusions on privacy. The defendant has obligations where he ought reasonably to have known that the information was confidential. This may because of the use of notices, directions, screening of areas or because the information was obtained through improper or illegal means. An obligation may arise from the very nature of the subject matter or activity. In relation to the third element (detriment) it is doubtful whether detriment is either strictly required any longer or adds anything to the other elements.

13. As I have said, it is striking how the modern English law in this field has been driven forward by claims by publicly known figures or celebrities who have asserted that they have been the victims of invasion of their privacy. Their public fame or notoriety puts them in an unusual position and frequently their claims have raised competing issues under Article 10 (the freedom of expression provision in the Convention).

14. In Campbell v MGN [2004] 2 All ER 995 the defendant newspaper published articles about Naomi Campbell, the famous model. These articles revealed that she was a drug addict and that she was attending Narcotics Anonymous. They gave details of the treatment and a visual portrayal by means of photographs secretly taken by the defendant of a claimant leaving the meetings of NA. Campbell accepted that she had publicly lied when she said she was not a drug addict and accepted that the newspapers had been entitled in the public interest to disclose the information that she was a drug addict and was receiving treatment. She brought proceedings against the publishers for breach of confidence and for breach of the Data Protection Act 1998 with respect to the rest of the information. The primary issue was the way in which a balance was to be struck between the right to respect for private and family life and the right of freedom of expression in accordance with Article 10. The majority in the House of Lords considered that the details of the treatment and the photographs should not have been disclosed. The information about the actual treatment and the photographs constituted information of a private nature. It was like information in relation to medical treatment. Where a person is in need of treatment one has to try to put oneself into the shoes of a reasonable person who is in need of that treatment. In this case it was necessary to consider disclosure of the details of the treatment would be liable

to disrupt her treatment. The details were private information which imported a duty of confidence. The assurance of privacy in matters relating to drug treatment was an essential part of the exercise. The effect of Articles 8 and 10 of the Convention was that the right to privacy which lay at the heart of an action for breach of confidence had to be balanced against the respect that had to be given to private life. Neither Article 8 nor Article 10 had any pre-eminence over the other. The questions were whether publication pursued a legitimate aim and whether the benefits that would be achieved by the publication were proportionate to the harm that might be done by the interference with the right to privacy. In the Campbell case there was no political or democratic values at stake nor was there any pressing social need identified. Further the potential for disclosure of the information to cause harm was an important factor to be taken into account. In all the circumstances there had been an infringement of the claimant's right to privacy that could not be justified and publication of the criticised parts of the Articles accordingly was unlawful.

15. Lord Nicholls at paragraph 14 stated:-

> "Now, the law 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. Even this formulation is awkward. The continuing use of the phrase "duty of confidence" and the description of the information as "confidential" is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called "confidential". The more natural description today is that such information is private."

He drew attention to the distinction between identifying whether information is private and identifying whether it is proportionate to prevent disclosure of such information having regard to the competing convention right or freedom of expression. He considered that the test of whether disclosure would "be highly offensive to a reasonable person" advanced by Gleeson CJ when considering the test of what is private in Australian Broadcasting Corporation v Lenah Game Meats Property Limited was more relevant to the latter issue. Lord Hoffman stated:-

> "Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people".

16. In A v B plc [2003] QB 195 the English Court of Appeal had to consider an application to set aside an injunction preventing the first defendant newspaper from publishing details of the claimant's sexual relationships with the second defendant and a woman to whom he was not married. Lord Woolf laid down guidelines applicable in such cases. This include the proposition that in the great majority, if not all, situations where the protection of privacy is justified in relation to events after the 1998 Act an action for breach of confidence will provide the necessary protection. As to interests capable of being subject to a claim for privacy, these will usually be obvious. A duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected. If there is an intrusion in a situation where a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to an action for breach of confidence unless the intrusion can be justified."

17. The case of Douglas v Hello! Limited generated much judicial analysis of the modern law of privacy in England. The case came before the court in a number of forms and the Court of Appeal produced two sets of judgments. One was in the context of an application for an interlocutory injunction to restrain publication of photographs and the other was in the context of the findings of Lindsay J that the plaintiffs had a valid claim for breach of confidence arising out of the breach of their privacy. The proceedings arose out of the publication in England by Hello! magazine of unauthorised photographs taken at the plaintiffs' wedding reception in New York. The plaintiffs had given the exclusive photographic rights of the wedding to OK magazine. A paparazzo gained access to the wedding and took unauthorised photographs which he sold to Hello! which published them. This gave rise to the plaintiffs' claim that their privacy rights had been infringed.

18. In the first judgment dealing with the application for an injunction the court reviewed the state of the law as it then stood on the issue of privacy. The court declined an injunction. While it considered that at trial the plaintiffs would be likely to establish that Hello's publication would be held to be a breach of confidence it considered that the balance of convenience on the injunction issue on the injunction issue was in favour of Hello! in that the plaintiffs had traded the greater part of their privacy and it had to be treated like a commodity. Damages would be an adequate remedy. In the course of the three judgments given in the Court of Appeal Sedley LJ considered that the English courts had "reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy". If Sedley LJ was seeking to say that English law could now move on and recognise a free standing right of privacy, that view has not prevailed in the subsequent decisions. Lord Hoffman accepted Sedley LJ's comments but only by interpreting them as saying that the action of breach of confidence could

accommodate the Convention rights. Subsequent development of the law has not supported a wider view of the law of privacy.

19. In the subsequent trial in Douglas v Hello! the High Court awarded the plaintiff a modest award of damages for breach of confidence and the Court of Appeal upheld that award. In his analysis of the law Lord Phillips expressed himself thus -

> "We conclude that in so far as private information is concerned, we are required to adopt, as the vehicle for performing such duty as falls on the courts in relation to Convention rights, the cause of action formerly described as breach of confidence. As to the nature of that duty, it seems to us that sections 2, 3, 6 and 12 of the 1998 Act all point in the same direction. The court has developed the action for breach of confidence in such a manner as will give effect to both Article 8 and Article 10 rights. In considering the nature of those rights account should be taken of the Strasbourg jurisprudence. In particular when considering what information should be protected as private pursuant to Article 8 it is right to have regard to the decisions of the European Court. We cannot find that we find it satisfactory to be required to shoe horn within the cause of action a breach of confidence claims for publication of unauthorised photographs of a private occasion."

20. Finally, in the context of the leading cases, I will briefly mention Venables v News Group Newspapers Limited [2001] 1 Al ER 908. Dame Elizabeth Butler-Sloss P granted injunctions against the whole world restraining disclosure of any information that might lead to the identification of the murderers of James Bulger after their release from prison. James Bulger was a young child who had been killed by two other children and the case had raised an enormous amount of media interest at the time. The President held that, taking into account the Convention, the law of confidence should extend to cover the injunction sought. Disclosure of the information in question might lead to grave and possibly fatal consequences for the claimants. This factor not merely rendered the information confidential but outweighed the freedom of expression that would otherwise have underpinned the right of the press to publish the information. As Lord Phillips pointed out in Douglas v Hello! a striking feature of the decision was that the nature of the information alone gave rise to the duty of confidence regardless of the circumstances in which the information might come to the knowledge of a person who might wish to publish it.

21. Has the law developed in a satisfactory way and does English law adequately protect the Convention rights of individuals? In A v B Lord Woolf stated that where privacy protection is justified the action for breach of confidence will provide the necessary protection. The question arises, however, whether English law has chosen the correct approach by stretching the breach of confidence action to breaking point as some suggest. If in fact the breach of confidence action has evolved into what is in fact a breach of privacy claim then in fact the law may have reached a satisfactory point, for what is in a name? However, the breach of confidence claim does not fill all the holes in English privacy law and extending protection by widening the net of confidentiality does not provide assistance in all situations. The breach of confidence claim is increasingly being reformulated as a claim for misuse of private information privacy interests extent much further than they misuse of information. Intrusions on personal and in territorial space which do not depend on communication or publication of information from one to another do not fit within the breach of confidence claim. Furthermore, the concept of private information which is increasingly equated with confidential information is itself a difficult concept. Gleeson CJ in Lenah considered a useful test of what is private to be whether disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities. Lord Hope in Campbell considered that while that test was useful the main question to ask is whether the person to whom the information relates "can reasonably expect his privacy to be protected" and if the answer is yes then it is unnecessary to go on to ask whether it will be highly offensive if it were published.

22. The Privacy Task Force of the Canadian Department of Communications and Justice gave a threefold categorisation of privacy – territorial privacy ("a man's home is his castle"); privacy of the person (transcending the physical and encompassing the dignity of the human person) and privacy in the information context. In Kaye v. Robertson, in Lenah and in Douglas v Hello! the facts pointed to an invasion of territorial privacy yet Kaye and Lenah were without remedy. Lord Woolf in A v B pointed out that -

> "If there is an intrusion in a situation when a person can reasonably expect his privacy to be respected the intrusion will be capable of giving rise to liability in an action for breach of confidence unless the intrusion can be justified. The bugging of one's home or the use of other surveillance techniques are obvious examples of such an intrusion."

If, however, the person is subject to unpleasant intrusion and invasion of his privacy but for some reason that intrusion has not produced publishable data

or information the question arises to why he should be effectively left without a remedy. In Peck v United Kingdom the European Court of Human Rights (23 January 2003) held that in the absence of any effective domestic law that could provide the claimant with an entitlement to relief publication by the defendant of footage filmed on CCTV showing the claimant walking down a street late at night with a kitchen knife in his hand and which footage was subsequently broadcast in other media in order to showcase the benefits of CCTV in the fight against crime (whereas in actuality the claimant used the knife for the purposes of a suicide attempt) constituted a disproportionate and unjustified interference with his private life and violation of Article 8 of the Convention. Peck is an example of a case that falls between the cracks of any protection furnished by the extension of the breach of confidence action.

23. For ordinary members of society who are not celebrities the invasion of their privacy may take quite different forms. Anti-social behaviour by delinquents and miscreants can invade their privacy. For them the state has a duty to put in place adequate measures to protect their private and home life. The European Court of Human Rights has recognised as a feature of the citizens' rights under Article 8 of the Convention that the state authorities may on occasions have a duty to take steps to deal with what can be broadly termed third party nuisance behaviour. In Moreno-Gomez v Spain (Application No. 4143-02, 16 November 2004) the court gave a decision on a complaint made against Spain as a result of Valencia City Council's failure to take steps to tackle noise and vandalism near a person's home. It followed a decision in Surugiu v Romania (Application No. 48995-99, 20 April 2004) in which a complaint was made relating to the failure of Romanian authorities to protect a Romanian citizen from serial and malicious manure dumping. In both cases the court held that the state authorities had failed to discharge their obligation to take steps to protect their citizens from what broadly could be termed third party nuisance. In Moreno-Gomez the applicant moved into a flat in Valencia's residential quarter. In 1974 the City Council began to permit bars and nightclubs to open nearby. Local residents first complained of noise and vandalism in 1980. In 1983 the City Council resolved not to permit any more nightclubs to open in the area. The resolution was not implemented and new licences were in fact granted. Despite the designation of the area as an acoustically saturated zone and the enactment of bi-laws prohibiting excessive noise the Council granted a licence for a nightclub to operate from the building where the applicant's flat was located. The Spanish Constitution Court refused her claim for breaches of the Spanish Constitution reflecting Article 8 on the basis that there was no evidence of damage to her health. The European Court of Human Rights held that under Article 8:

> "The individual has a right to respect for his home, meaning not just the right to the actual physical area but also the quiet enjoyment of that area."

It held that breaches of the right to respect of the home are not confined to concrete and physical breaches such as unauthorised entry into a person's home but also include those that are not concrete or physical, such as noise omissions, smells and all forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home. The nuisance must attain the minimum level of severity required for it to constitute a violation of Article 8. On the facts of that case the court was satisfied that there was more than adequate evidence produced in the domestic proceedings to show that the minimum level of severity had been met. The Spanish state acting through the City Council had failed to discharge its positive obligations to take effective steps to address the third parties breaches. The court stated at paragraph 61:

> "Although the Valencia City Council has used its powers in this sphere to adopt measures… which should in principle have been adequate to secure respect for the guaranteed rights, it tolerated, and has contributed to, the repeated flouting of the rules which it itself had established during the period concerned. Regulations to protect guaranteed rights serve little purpose if they are not duly enforced and the court must reiterate that the Convention is intended to protect defected rights, not elusory ones. The facts show that the applicant suffered a serious infringement of her right to respect for her home as a result of the authorities failure to take action to deal with the night time disturbances."

Anti-social behaviour legislation in the UK may be viewed as an attempt by the state to fulfil this aspect of its article 8 obligations.

24. Before leaving the law of privacy I must briefly mention the question of state surveillance in the fight against crime and other social evils. Surveillance by organs of the state of its nature is an invasion by the state of the citizen's privacy. As Lord Woolf pointed out in A v B (see para 22 above). In the UK there are statutory mechanisms contained within legislation such as the Police Act 1997 the Intelligence Services Act 1994, the Security Service Act 1989 and the Regulation of Investigatory Powers Act 2000 designed to provide some forms of protection against abuse by (inter alia) supervision by Surveillance Commissioners. The topic is a complex one and worthy of a talk in its own right. Suffice it to say that there is within this jurisdiction a pending application raising issues as to the compatibility of some aspects of the legislation with the

Convention. It remains to be seen how this law will develop, as indeed it remains to be seen how the law relating to privacy generally will change and grow.