Presentation on Privacy
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Up until the Human Rights Act 1998, it was a truism that the United Kingdom did not have privacy laws. Whether this is exactly true, is open to question.

Certainly, there are some older Scottish cases which suggest that privacy was a value attracting respect in the legal system of this country. In Adamson v Martin 1916 SC319, photographs taken by the police and wrongly retained had to be destroyed. In Robertson v Keith 1936 SC29, it was suggested that police surveillance, in appropriate cases, could be an actionable wrong. In Henderson v Chief Constable of Fife Police 1988 SLT 361, the removal of clothing while in custody was described by the Judge as "an invasion of privacy" and financial damages were awarded to the woman concerned. In Dalgleish v Lothian & Borders Police Board 1992 SLT 721, the court essentially held that names and addresses on staff files were private.

Whether or not there was a self-standing, independent legal concept of "privacy" in the United Kingdom as a whole, there have always been a plethora of remedies to protect certain aspects of what we now think of as the Article 8 right to privacy of the home, family and correspondence.

In Earl & Countess Spencer v The United Kingdom in 1998, App.No.28851/95 (1998) 25 EHRR CD 105, the brother and sister-in-law of the late Princess of Wales complained about adverse publicity. Photographs of the Countess in the grounds of a private clinic treating eating disorders and alcoholism were published, together with information about the Spencers' family problems.

The Spencers argued before the European Commission on Human Rights that the British Government had failed to provide effective protection for their privacy rights. The Government argued that, having regard to the Article 10 right to freedom of expression, the domestic system as a whole - including remedies in breach of confidence and against trespass, nuisance, harassment, defamation and malicious falsehood, together with access to the self-regulatory Press Complaints Commission, did protect Article 8 rights. In that case, the European Commission held the Earl & Countess Spencer's application to be inadmissible, on the basis that they could have taken a breach of confidence action.

In addition, in the recent Scottish case of McKie v Orr 2002 SC40, Lord Elmslie observed that any unwarranted affront or invasion of privacy was capable of being classified as an assault.

The action of breach of confidence has a long and expansionist history. One of its earliest uses was by Prince Albert, Queen Victoria's husband and consort. The Prince obtained an injunction against Mr Strange stopping him from publishing a catalogue of private etchings made by Queen Victoria and Prince Albert. The catalogue falsely implied that the publication had Royal consent. It had been compiled from copies surreptitiously made by the employer of a printer in Windsor, to whom the Prince had entrusted making private copies. (Prince Albert v Strange, (1849) 2 DeG&Sm 652, 64 ER 293).

The action of breach of confidence has been used for a variety of business purposes, to protect trade secrets, client lists, research and development, and the like. It has covered official secrets in the famous 'Spycatcher' case involving the spy Peter Wright's memoirs. That case resulted in the United Kingdom being found to have violated certain newspapers' rights to freedom of expression under Article 10 (Observer and Guardian v UK, 26th November 1991, A219; 15 EHRR 34).

Several of the cases in the latter half of the 20th century relate to so-called "kiss and tell" journalism, where one party to a relationship spills the secrets of the other. A key stage in the development of this sort of breach of confidence arose out of the divorce of the Duke and Duchess of Argyll in the 60s; Argyll v Argyll [1965] 1 All ER 611. In that case, the notoriously romantic Duchess had written a string of articles about her former husband's motives for marrying her, conduct during the marriage and alleged infidelities. When he

attempted to respond in kind, she obtained an injunction against his publication. The court took the view that confidences exchanged during a marriage were sacred, regardless of subsequent dissolution of the union. In the increasingly tolerant atmosphere of the 1980s and 90s, this principle was extended to cover non-marital relationships, including homosexual ones (Stephens v Avery [1988] 1 Ch 449; Barrymore v News Group [1997] FSR600).

It will be seen from this that breach of confidence was extended to cover business relationships, personal relationships, relationships with the police, official secrets, unofficial secrets, as well as the traditional professional obligations of the doctor, lawyer, priest, etc. Disgruntled media lawyers were beginning to wonder whether there was, in fact, any situation where breach of confidence could not be argued. At the same time, other statutory incursions on the exchange of information, predicated on a privacy right, were making themselves felt by way of the Data Protection Acts of 1984 and 1998 and the Protection from Harassment Act 1997.

On the other side of the fence, those who felt their privacy was being invaded - whether by the media or by the increasing availability and use of various forms of electronic surveillance and monitoring - were complaining about the lack of a financial remedy. One particularly controversial case was that of Kaye v Robertson [1991] FSR 62. There, a popular comedy actor, Gordon Kaye, was hospitalised with very serious head injuries after a road accident. A tabloid journalist lied his way into the hospital, took photographs of Mr Kaye in his sickbed and published an apparently fabricated interview with him. When Mr Kaye took legal action later, the court stated with clear regret that there was no actionable right of privacy in English law at that time. It is seldom remembered, first, that Mr Kaye did not attempt to sue for breach of confidence and, secondly, that he did succeed in obtaining damages from the newspaper for malicious falsehood. Nonetheless, the incident provoked a good deal of public indignation and sympathy, as well as disquiet about the adequacy of the self-regulatory Press Complaints Commission in stopping privacy violations.

The most fundamental development in UK privacy law occurred with the passage of the Human Rights Act 1998. Broadly speaking, this incorporates the European Convention on Human Rights into the domestic law of the United Kingdom. Among these rights is, of course, Article 8 of the Convention, which states:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the European well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Here, clearly, is common Franco-British ground.

Even though both our States are signatories to, and have ratified the Convention, however, differences of approach remain. First, the English word "home" has, to the English-speaker, an entirely domestic connotation. This word lacks the broader significance of your equivalent "domicile". Thus, some of the Strasbourg case law on invasion of privacy in relation to offices and business premises, such as Niemetz v Germany (1992) 16 EHRR 97 and Banco de Finanzas v Spain (27th April 1999, App.No.36876/97) or Roemen & Schmidt v Luxembourg (25th February 2003) have come as a counter-intuitive culture shock to the British. Hence perhaps the ill-fated decision of the police force in Halford v UK (1997) 24 EHRR 523 to tap the office phone of a senior policewoman who had been specifically advised that she could use that telephone line for confidential purposes concerning her own employment litigation. Even the British attitude to the sanctity of the front garden has been held lacking in Strasbourg - McLeod v UK (App.No.24754/94 (1988) 27 EHRR 493).

Secondly, although the Human Rights Act 1998 does have a special position within the law of this State - for example, the Scottish Parliament cannot legislate in contravention of it - it does not enjoy the special constitutional status of Article 9 of the Civil Code or Article 226 of the Criminal Code in France.

In fact, from the perspective of the media, it was seriously questioned whether the tabloid press could be brought to book for invasion of privacy under the Human Rights Act at all.

The Human Rights Act applies to "public bodies". Thus, the BBC would be caught, but it was doubted whether Article 8 would have "horizontal direct effect" between a News of the World paparazzo and his victim.

In practice, since the UK courts themselves are public bodies, they have taken the view that they have to pay heed to Article 8 in any dispute coming before them where the matter is raised, regardless of whether the parties involved are private entities or public bodies.

A brief examination of the media case law since the Human Rights Act came into force will make this clear.

In Beckham v MGN, 28th June 2001 QBD (Eady J), David and Victoria Beckham were able to prevent covertly-taken photographs of the inside of their sitting-room from being published, even though there was some evidence that the couple planned to sell similar photographs to a rival publication.

In the well-known case of Douglas & Zeta-Jones v Hello!, 11th April 2003, Ch D (Lindsay), although Michael Douglas and Catherine Zeta-Jones did not succeed in getting an injunction against the publication by Hello! of covertly-taken wedding photographs where an exclusive of such photographs had been promised to Hello!'s competitor, OK! magazine, they did succeed in establishing an entitlement to damages for breach of confidence.

In Gary Flitcroft v Mirror Group (2002) 2 All ER 545, a little-known footballer was unsuccessful in suppressing a tabloid article about an extra-marital affair. Similarly, in Jamie Theakston v MGN Ltd (2002) EMLR 22 and 398, a better-known children's television presenter also failed to get an injunction against a tabloid article showing that he had been consorting with prostitutes in a sauna/brothel. He did, however, manage to suppress photographs of him in the brothel.

Heather Mills, Paul McCartney's wife, also failed in her action against News Group Newspapers ((2001) EMLR 957) to get an injunction preventing the disclosure of her new address - which she would, apparently, have been in a position to do in France.

Nearly all of these cases have used the action of breach of confidence to bring about what are, in practice, privacy cases. However, the Data Protection Act 1998 has also given rise to some interesting privacy manoeuvres. Naomi Campbell was briefly successful in her claim against the Mirror Group for disclosing that she was a drug addict in Narcotics Anonymous, and publishing photographs of her outside a Narcotics Anonymous meeting; this was reversed on appeal in a Judgment dealing both with data protection and breach of confidence: (2003) HRLR 2.

It should not be thought that all UK "privacy" law concerns itself with the photographs and peccadilloes of celebrities. The incorporation of the Article 8 right in the Convention, together with domestic statutes like the Regulation of Investigatory Powers Act and its Scottish equivalent, have had a particular impact upon the way in which public bodies such at the police and Customs & Excise carry out their investigation and pass on information obtained.

Although there have been many challenges, both in Scotland and England, to police, Revenue and other regulatory investigations on the basis that they invade the Article 8 rights of those involved, comparatively few reported cases show that evidence has been excluded in a court action on these grounds (see Paper A, Section 1). This is true even in civil actions (see Paper A, Section 2). Bodies such as the police and prisons have also been given a good deal of discretion by the court when they choose to pass on private information (see Paper A, Section 3).

That said, in our increasingly rights-conscious society, policing and other procedures are becoming more circumspect, which may account for the lack of reported cases taking a strong view on privacy.

In the media arena, too, the privacy rights of criminals have been to the forefront. The law of breach of confidence has been used there to protect the new identities of convicted child-killers. This process was begun in the case of Venables & Thomson v News Group Newspapers (2001) 1 All ER 908; (2001) HRLR 19, when the killers, who at the time of their crime were aged 10, of the toddler James Bulger, were released from detention in 2001. In May of this year, life-long anonymity was given to Mary Bell (21st June 2003, QBD, Dame

Butler-Sloss P), who at the age of 11 had killed two toddlers. Similar protection under breach of confidence law was also given to Mary Bell's daughter, who had of course committed no crime but was vulnerable to media harassment.

In A v BBC (10th June 2002, QBD, Ouseley J), a convicted paedophile attempted to prevent a television programme which disclosed his name and face (although not his address). This application was unsuccessful. Another unsuccessful attempt to prevent the broadcast of a BBC programme was made in Jockey Club v BBC, (2003) EMLR 5, where a Panorama dealing with corrupt practices in the arena of British horse-racing and betting, was based on confidential material revealed by a former Jockey Club official. The court allowed this programme, too, to be broadcast.

The most recent injunction to be granted for breach of confidence was one by Lady Archer, wife of the now-released convict, author and Conservative peer, Jeffrey Archer. Mary Archer successfully sought an injunction against her PA of eleven years, Jane Williams, from publishing her memoirs of life in the Archer household. (3rd July, 2003, QBD, Jackson J).

From all of the above, it would seem that, since the Human Rights Act, the UK now has a privacy law - albeit a less-perfectly drafted, more higgledy-piggledy one than the beautifully concise Article 9 of the Civil Code. However, even that is controversial in some quarters. In Wainright v Home Office, 2001 EWCA Civ 2081; [2002] 3 WLR 405, the English courts declined to accept that in the year 2000, there was a free-standing privacy right not to be subjected to an irregular strip-search.

Perhaps worse than the uncertainty of whether a privacy law per se exists in this country, or the uncertainty over how and when such a law might be invoked, is the uncertainty over how much it will cost. Costs of changes to policing and investigative regimes are literally incalculable: they may be huge or nil - in fact, they may ultimately even save the State money, although that seems doubtful. From the perspective of the media, a large payout is anticipated in relation to Catherine Zeta-Jones and Michael Douglas's wedding photographs, although it is likely to be less than the six-figure sums sought by the couple. Naomi Campbell originally received £3,500 in damages in relation to the drugs article and photograph, before The Mirror's successful appeal. In another data protection case, Adeniji v London Borough of

Newham (16th October 2001 Garland J), a settlement in the sum of £5,000 was reached with a child whose photograph had misused in relation to Council advertising material about the HIV virus.

Modest as these sums appear to be, though, it must be borne in mind that in both Scotland and England, the losing party generally pays the other side's legal costs, as well as the damages themselves. In other words, although the Duchess of York would be most unlikely to receive the £70,000 in this country for the toe-sucking photographs which she received from the French courts, her opponent might well end up paying out double or triple that figure to the British lawyers on both sides.

# Paper A

Section 1

HMA v Hoekstra (2000) UKHRR 578
Connor v HMA 2002 GWD 11-330
R v X, Y & Z TLR 23/5/2002
R v Wright & McGregor [2001] EWCA Crim 1394
R v Erdinch Uchkach and Fitzroy Livingstone Webb, Manchester Crown Court, HH Judge Owen, 3rd April 2001

Section 2

Mearns v Smedvig, 25th November 1998, Court of Session, Lord Eassie
Patricia McMurray v Safeway, 4th July 2000, Court of Session, Lady Paton
Martin v McGuiness, 2nd April 2003, Court of Session, Lord Bonomy
Jean Jones v University of Warwick, 4th February 2003, Court of Appeal
Rall v Hume [2001] EWCA Civ 146

Section 3

HM, Petr, 24th April 2003, Lord McCluskey
R v Governor of HM Prison Dartmoor, exp N (2001) QBD, Turner J, 13th February 2001
R v Worcester County Council (2000) HRLR 702, QBD 28th July 2000, Newman J