

# **Critically assess whether there now exists a general tort of privacy under UK law**

Despite the historical application of a number of different torts to protect various aspects of private life, such as preventing harassment or the publication of confidential information, Parliament has never legislated for a general tort of privacy, and the judiciary have been markedly reluctant to encroach into this lacuna. This essay considers whether and to what extent the tide has turned, and will demonstrate how progressive cases have merged pre-existing torts with values protected under the Human Rights Act 1998 to arrive at a distinct tort of privacy.

Whilst a number of causes of action exist in tort which may be used to protect private interests to a limited degree – including the torts of trespass, defamation, and confidentiality – the protection of the right to privacy has historically relied upon the facts of a given case being inappropriately shoehorned into one of the traditionally existent torts. In the case of *Kaye v Robertson* a journalist had sneaked into a hospital to conduct an interview with the plaintiff who was critically ill and clearly unable to consent to the questioning, ignoring notices prohibiting entry to his private room. The defendants sought to publish resulting articles and photographs which claimed that the plaintiff had consented to the interview; this was denied by the plaintiff who had no recollection of the interview only 15 minutes afterwards.

The plaintiff's claim for an injunction was argued on the grounds of libel, malicious falsehood, trespass to the person, and passing off, and was initially successful on the first ground. The Court of Appeal overturned this, however, substituting the injunction for an order allowing publication but prohibiting any implication that the interview had been

obtained by consent, which amounted to malicious falsehood. All three Lord Justices agreed that the defendant had seriously wronged the plaintiff, with Bingham LJ highlighting that had the plaintiff been unable to satisfy one of the traditional causes of action, the courts would have been powerless to interject. Moreover, the bulk of the journalist's material was ultimately publishable but for any implication of consent; even though the court agreed that a 'monstrous invasion of the plaintiff's privacy' had occurred, it 'nevertheless held that that alone did not entitle him to relief in English law.'

The Human Rights Act 1998 ('HRA') protects the right to privacy and further makes provision for the interaction of this right with the right to freedom of expression, typically relied upon by those who may seek to use private information such as journalists. However, as was noted by Phillipson in 2003, 'newspapers are not "public authorities" and therefore not bound, under the [HRA], to act compatibly with the Convention rights.' The protection of privacy therefore began to evolve under the tort of breach of confidence, which consists of three limbs: (a) the information in question has the 'quality of confidence about it'; (b) the information has been 'imparted in circumstances imparting an obligation of confidence', and; (c) there is an un-authorised use of the information in such a way as is 'to the detriment of the party communicating it.' However, this gave rise to the question of any difference between 'confidential' and 'private' information, and moreover as Hughes and Richards explain, the second limb requiring a pre-existing confidential relationship posed a significant restriction against those seeking to protect their privacy using this tort.

The gradual erosion of the first limb of the tort of breach of confidence can be found in *Douglas v Hello! (No. 3)*. This long series of litigation concerned a celebrity couple who contracted with OK! magazine to photograph and write about their wedding. However, a journalist from the rival publication Hello! gained access and photographed the event; the

litigation concerned attempts to restrict publication and seek damages. It was argued that the wedding could not be considered confidential or private, especially considering the plaintiff's agreement to publicise the event in OK! In response the Court of Appeal considered that, once published, there was no further value in attempting to prohibit the further publication of personal or private information. Conversely in relation to the photographs, the court considered:

'Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph, is confronted by a fresh publication of it.'

In *Campbell v Mirror Group Newspapers Ltd*, discussed in greater detail below, the House of Lords departed from asking whether information has a quality of confidence, instead considering whether it carried a 'reasonable expectation of privacy.' Brazell discusses how this creates little difficulty where information is obviously private – such as medical records – whilst where this is not so obvious, the court considers whether a 'reasonable person of ordinary sensibilities' would find the disclosure of similar information regarding themselves as being offensive.

*Campbell* also served to dispense with the second limb of the tort of breach of confidence. The case concerned a story about a famous model and her treatment at narcotics anonymous, accompanied by photographs of her leaving the treatment centre. On the one hand, Lord Nicholls considered that the requirement of a pre-existing relationship of confidentiality had been 'firmly shaken off', whilst Lord Hoffman considered that there had been a 'shift in the centre of gravity' for the tort of breach of confidence and its application to the publication of personal information. Conversely, Lord Hope retained some of the language of the prior tort

in suggesting that a duty of confidence would be inferred where the party revealing information knows, or ought to know, that a reasonable expectation of privacy had arisen.

Whichever view is correct, a pre-existing relationship of confidence between the parties was no longer necessary. Instead, having found a reasonable expectation of privacy, the court proceeded to engage in a balancing exercise between the rights to privacy on the one hand, and freedom of expression on the other. As Smith explains, dicta from LJ Sedley in *Douglas v Hello! (No. 1)* has proven highly influential in conducting this exercise, specifying that neither right takes automatic priority, but rather but be balanced proportionately according to 'the standard of what is necessary in a democratic society.' However, given the balancing test which is applied between the convention rights, UK courts are further obliged to take into consideration jurisprudence of the European Court of Human Rights ('ECtHR').

One of the leading cases from the ECtHR concerning privacy is *Von Hannover v Germany* in which attempts were made to prohibit the publication of photographs of a celebrity out in public with her young children. Whereas the German Constitutional Court considered there to be no breach of privacy for a public figure, the ECtHR took a more holistic approach, considering both the context in which the photographs were taken – without knowledge or consent whilst the plaintiff was engaging in private family activities – and the manner in which tabloid photos are often obtained 'in a climate of continual harassment.' This presents a degree of conflict with UK law; for example, in *Elton John v Associated Newspapers Ltd* the famous singer was unsuccessful in preventing the publication of photographs showing him entering and leaving his home. However, Fenwick and Phillipson submit that the broad interpretation of Article 8 espoused in *Von Hannover* suggests that the publication of any unauthorised photograph 'specifically taken of a particular person engaged in an everyday activity outside their official duties will involve a prima facie violation.'

Having disposed of the requirements of information of a confidential nature and a pre-existing relationship of confidentiality, Campbell presents what Nicholls LJ described as the tort of 'misuse of private information', significantly consisting of three components, two of which are different to those set out for breach of confidence in *Coco*. These consist of: (a) a 'reasonable expectation of privacy' with regards to the information concerned so as to engage Article 8; (b) the actual or threatened publication of said information, and; (c) a balancing exercise between the right to privacy and freedom of expression to 'determine the comparative importance of the rights in the particular case, and decide whether it is proportionate to limit one right in order to protect the other.' As Rowbottom explains, the House of Lords in *Campbell* 'took an approach of "indirect horizontal effect" to apply Article 8 in cases involving the press.' Recalling *Phillipson* (above) on the inapplicability of the HRA to private entities such as newspapers, the HRA could not create the tort of privacy per se. Rather, the court's obligation to interpret the law in accordance with Convention rights 'allowed for the interpretation taken in *Campbell*.'

Having established a cause of action in the misuse of private information, the question remains whether this may stand alone as an independent tort of privacy, or whether it exists as a species of breach of confidence. The recent case of *PJS v News Group Newspapers Ltd* is valuable in answering this question. The case concerned an interim injunction to restrict the publication of a celebrity's extramarital activities in circumstances where their identity was not only well known, but had been published online and in print outside of the UK; the Supreme Court therefore had to consider whether there was any continued value in upholding the interim injunction, which was decided in the affirmative.

Rowbottom draws the first crucial distinction here between breach of confidence and the misuse of private information. In the former cause of action 'it is well established... that once

information is widely known or in the public domain, it will normally cease to be confidential... However, information can still engage privacy rights even when publicity has destroyed any confidential quality.' This draws a clear distinction between the quality of the information that is being protected by the respective torts; confidential information is protected to prevent its wider dissemination to the public, whereas private information received protection on account of its personal nature and the court's obligation to apply the law in accordance with Convention rights, specifically the right to private and family life. Moreover, this distinction between the qualities of information goes beyond *Douglas v Hello!* where photographs received greater protection than written information, as *PJS* concerned only the latter.

The second crucial distinction between the torts is the quality of what is being protected. With regards to confidential information it is the information itself which is the focus of protection. Conversely, whilst the protection of the information per se is a relevant consideration, the Supreme Court in *PJS* further recognised that publication of the article in question would 'generate a media storm', with increased press intrusions into the plaintiff's private life and the lives of his family and children, and increased coverage of the story both online and in print. Thus in upholding the interim injunction despite widespread public knowledge of the private information in question, the court emphasised a 'qualitative, rather than a quantitative, test to determine the effect of dissemination of protected information.' This is suggestive of the broader application of privacy from *Van Hannover*, where considerations of the act of press intrusion into private or family affairs itself were similarly relevant.

It is therefore concluded that UK law does now recognise a tort of privacy. Although developed from breach of confidence, the new tort is clearly comprised of different

components to the older cause of action. Similarly, the two torts protect different qualities of information – confidential information protected to keep it out of the public domain, and private information which may still be protected even where it is widely disseminated in the public domain. Finally, this distinction reveals the underlying values which are being protected. For breach of confidence, it is the secrecy of the information which is at stake or, as in *Douglas v Hello!*, the potential for commercial exploitation by controlling its dissemination. Where misuse of private information is concerned, however, the courts have recognised the broader value of protecting private life from unjustified intrusion, most commonly by the press.

## **Bibliography**

### **Legislation**

The Human Rights Act 1998

### **Cases**

*Von Hannover v Germany* [2004] EMLR 21

*Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22

*Coco v AN Clark* [1969] RPC 41

*Douglas v Hello!* (No. 1) [2001] QB 967, 1005

*Douglas v Hello!* (No. 3) [2005] EWCA Civ 595

*Elton John v Associated Newspapers Ltd* [2006] EWHC 1611

*Kaye v Robertson* [1991] FSR 62

PJS v News Group Newspapers Ltd [2016] UKSC 26

### **Commentary**

Aplin T, 'The Future of Breach of Confidence and the Protection of Privacy' (2007) 7(2)  
Oxford University Commonwealth Law Journal 137

Barendt E, 'English privacy law in the light of the Leveson Report' in Witzleb N, Lindsay D,  
Paterson M & Rodrick S eds., *Emerging Challenges in Privacy Law: Comparative  
Perspectives* (Cambridge University Press 2014)

Bloy D & Hadwin S, *Law and the Media* (2nd ed. Sweet & Maxwell 2011)

Brazell L, 'Confidence, privacy and human rights: English law in the twenty-first century'  
(2005) 27(11) *European Intellectual Property Review* 405

Fenwick H & Phillipson G, *Media Freedom Under the Human Rights Act* (Oxford University  
Press 2006)

Foster S, 'Say 'Allo, 'Allo, wave goodbye: remembering the decision in *Kaye v Rovertson*'  
(2016) 21(2) *Coventry Law Journal* 59

Hughes K & Richards N, 'The Atlantic divide on privacy and free speech' in Kenyon A. eds.,  
*Comparative Defamation and Privacy Law* (Cambridge University Press 2016)

Phillipson G, 'Transforming Breach of Confidence? Towards a Common Law Right of  
Privacy under the Human Rights Act' (2003) 66(5) *Modern Law Review* 726

Rae C, 'Protecting privacy in the digital age: PJS v News Group Newspapers Ltd [2016]  
UKSC 26' (2016) 35(4) *Civil Justice Quarterly* 279



Rowbottom J, 'A landmark at a turning point: Campbell and the use of privacy law to constrain media power' (2015) 7(2) *Journal of Media Law* 170

Rowbottom J, 'Holding back the tide: privacy injunctions and the digital media' (2017) *Law Quarterly Review* 177

Smith S, 'Legal fusion or confusion? the legacy of Hello! litigation' (2004) 15(4) *Entertainment Law Review* 126