

THE INHERENTLY “PRIVATE” QUALITY OF PROTECTED INTERESTS IN TORT LAW

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I. INTRODUCTION

Does tort law, in a fundamental sense, protect privacy? This is a distinct question from that answered (affirmatively) by a unanimous panel at the Ontario Court of Appeal in *Jones v Tsige*,² which was whether tort law *should* protect privacy, or at least a species of privacy described as seclusion. There, the court considered the claim against an employee of the bank where the claimant had kept several accounts. The employee, who had formed a common law relationship with the claimant’s former spouse, had looked into the claimant’s banking records at least 174 times over a period of four years.³ While the employee did not record, publish or otherwise distribute the information in any way, the Court – finding this to be an intentional, unjustified and highly offensive invasion of personal privacy – held that, as such, it amounted to an unlawful invasion of the claimant’s private affairs, and awarded tort damages in the amount of \$10,000.⁴

The question, *does* tort law protect privacy, need not – outside Ontario, at least – necessarily be answered affirmatively. Until *Jones v Tsige*, Canadian courts – Ontario’s trial court excepted⁵ –

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² 2012 ONCA 32, 346 DLR (4th) 34.

³ *Ibid* at para 2.

⁴ *Ibid* at paras 89-90.

⁵ See, for example, *Lipiec v Borsa* (1996), 31 CCLT (2d) 294 (Ont Gen Div) at 300. Other early Ontario authorities were canvassed in *Dyne Holdings Ltd v Royal Insurance Co of Canada* (1996), 138 Nfld & PEI Rep 318 (PEISC-AD).

had little to say about privacy law in a tort law context.⁶ Outside tort law, however, Canadian courts – notably the Supreme Court of Canada – had been far from silent. “Privacy”, understood as being “[g]rounded in man’s physical and moral autonomy”, was accorded constitutional protection,⁷ and a “right to privacy” has been said by the Supreme Court to be “the driving force” behind the federal *Privacy Act*.⁸ And, of course, privacy is statutorily protected under tort law in four of Canada’s common law provinces,⁹ and in Quebec’s *Charter of Human Rights and Freedoms*.¹⁰ But until *Jones v Tsige*, a remedy in the form of judicial recognition of a nominate tort law right to privacy, understood as such, was elusive. And, even now, the paucity of claims makes it difficult to gauge whether or how widely *Jones v Tsige* will be applied beyond Ontario.¹¹

Tort law’s fit with privacy remains, therefore, very much an open question so far as Canadian positive law is concerned. The question of that fit is timely, inasmuch as the past decade has seen the high courts of the United Kingdom,¹² Australia¹³ and New Zealand¹⁴ recognize privacy

⁶ Privacy-related interests (in the sense of seclusion) had been protected in an appellate decision from Alberta, but not expressly in terms of breach of privacy: in *Motherwell v Motherwell*, [1976] 1 AR 47 (CA), the tort of private nuisance was employed to allow recovery for the defendant’s “abuse of the telephone system”.

⁷ *R v Dymont*, [1988] 2 SCR 417 at 427; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 121 [*Hill*].

⁸ RSC 1985, c P-21.

⁹ *Privacy Act*, RSBC 1996, c 373, s 1(1); *Privacy Act*, RSS 1978, c P-24, s 2; *Privacy Act*, RSM 1987, c P125, s 2(1); and *Privacy Act*, RSNL 1990, c P-22, s 3.

¹⁰ RSQ, c C-12, s 5: [e]very person has a right to respect for his private life.” In *Aubry v Éditions Vice-Versa*, [1998] 1 SCR 591, the Supreme Court unanimously (on this point) held that, where a photograph had been taken of a teenager in a public place without her permission, the defendant’s right under section 3 of Quebec’s *Charter* to free expression was outweighed by the plaintiff’s section 5 right to a private life.

¹¹ As of August 12, 2014, *Jones v Tsige* has been applied in one non-Ontario decision, from Nova Scotia: in *Trout Point Lodge Ltd v Hardshoe*, 2012 NSSC 245 at para 55, the court said that Nova Scotia law does recognize a claim in tort for invasion of privacy (while dismissing the claim in that case). *Jones v Tsige* has also been cited in New Zealand: see *C v Holland*, [2012] NZHC 2155 (although, as will be seen, a tort of invasion of privacy had already been recognized in New Zealand law).

¹² *Douglas v Hello! Ltd No 3*, [2005] 3 WLR 881, 2005 EWCA 595 [*Douglas* (CA)], aff’g (in part) [2003] 3 All ER 996, 2003 EWHC 786 (Ch) [*Douglas* (Ch)]; and *Campbell v MGN Ltd*, [2004] 2 AC 457, 2004 UKHL 22 [*Campbell* (HL)], rev’g [2003] 1 All ER 224, 2002 EWCA Civ 1373 [*Campbell* (CA)], rev’g [2002] IP&T 612, 2002 EWHC 499 (QB) [*Campbell* (QB)]. *Douglas* went to the House of Lords (in *OBG Ltd v Allan*, 2007 UKHL 21), where it was combined

as a protected interest in tort law. As will be seen, two proposed justifications for doing so emerge from these Commonwealth authorities. The first, stated at the House of Lords, would protect the plaintiff's interest in his or her privacy on the ground that it represents a resource from which the plaintiff has *excluded* the defendant. The imperative here is to compensate for the loss of something in which the plaintiff had *a right, such that he or she could exclude the defendant* from making use of it. The second justification which emerges from these cases, expressed at the New Zealand Court of Appeal, is to uphold the *dignity* of persons, which dignity is said to justify a right to a private life. In this paper, I will canvass these authorities and then, in light of their insights, attempt to consider whether tort law is fundamentally suited to protecting privacy.

Before doing so, however, I should address a preliminary matter, being the sense in which I understand "privacy" for the purposes of this paper. There is a substantial but inconsistent body of philosophical, sociological and legal literature which considers privacy's meaning. Even within *legal* scholarship alone, privacy has been variously described as "the right to be let alone",¹⁵ "autonomy",¹⁶ "the reconciliation of community and autonomy",¹⁷ "empowerment" of "sense of [self] as an independent or autonomous person",¹⁸ "secrecy, anonymity and solitude",¹⁹

with another appeal. Most of the judicial commentary at the House of Lords focused on economic torts, and so I do not focus on it here.)

¹³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001), 185 ALR 1 (HC) [*Lenah*].

¹⁴ *Hosking v Runting*, [2005] 1 NZLR 1, 2004 NZCA 34 [*Hosking* (CA)], aff'g [2003] 3 NZLR 385 (HC) [*Hosking* (HC)].

¹⁵ Samuel D Warren and Louis D Brandeis, "The Right to Privacy" (1890) 4 Harv L Rev 193 at 195. This phrase was itself borrowed from a contemporary textbook: Thomas M Cooley, *Cooley on Torts*, 2d ed (1888) at 29.

¹⁶ Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?" (1983) 58 Notre Dame L Rev 445 at 446. Equating privacy with autonomy is criticized in Jeb Rubenfeld, "The Right of Privacy" (1989) 102 Harv L Rev 737 at 750-51.

¹⁷ Robert C Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 Cal L Rev 957 at 969.

¹⁸ *Ibid* at 973.

¹⁹ Ruth Gavison, "Privacy and the Limits of Law" (1980) 89 Yale LJ 421 at 433.

“concealment of information”,²⁰ “concealment of *discreditable* information”,²¹ “preservation of an individual’s dignity”²² and “control over ways in which we present ourselves to others and the ability to present different aspects of ourselves, and what is ours, to different people.”²³ A single specific conception²⁴ of privacy has proven difficult to state because, as these various attempts demonstrate, privacy is a cluster of derivative rights, some of which are derived from rights in property and others from rights in bodily integrity.²⁵

And yet, privacy as a concept must be tamed by confining it to a workable definition, so as to give the later discussion some manageable reference point.

II. PRELIMINARY ISSUE: THE MEANING OF PRIVACY

In *Jones v Tsige*, the Ontario Court of Appeal cited what must be legal scholarship’s most recognized and long-standing definitions of privacy, famously stated by Samuel D Warren and Louis D Brandeis as “the right to be let alone”.²⁶ This definition contemplates that, as an incident of our own liberty, we may conduct our lives as we choose, without unwelcome influence from external forces. Stated at such a high level of abstraction, however, it might do too much work, enabling privacy as a concept to extend not merely to being let alone, but also to embrace antisocial behavior that is impossible to accommodate in a free and crowded civil

²⁰ Richard A Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1983) at 272-73.

²¹ Richard A Posner, “The Right of Privacy” (1978) 12 Ga L Rev 393 at 400. (Emphasis added.)

²² Edward Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 NYUL Rev 962 at 1007.

²³ Andrei Marmor, “What is the Right to Privacy”? [file:///C:/Data/Downloads/SSRN-id2422380%20\(1\).pdf](file:///C:/Data/Downloads/SSRN-id2422380%20(1).pdf) (last accessed August 12, 2014).

²⁴ As opposed to a general *conception*. See, on the distinction between conception and concept, Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 134-36.

²⁵ Marmor, note 23.

²⁶ Warren & Brandeis, note 15 at 195.

society. Hence Justice William O Douglas’s statement that “the right to be let alone” is “the beginning of all freedom”.²⁷

A more nuanced and multifaceted treatment of privacy was offered by William L Prosser,²⁸ and formed the basis of the *Second Restatement*.²⁹ He identified four varieties of breach of privacy:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff individual in a false light in the public eye; and
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

Several observations here are apposite. First, these different forms of privacy are not watertight compartments. The first form of privacy (intrusion upon seclusion and private affairs) will also typically capture claims resembling the second form (public disclosure of embarrassing facts).

Secondly, some of these forms of privacy are already protected by tort law: the third form (publicity which places an individual in a false light in the public eye) relates to one’s interest in reputation, which is protected by the tort of defamation;³⁰ and the fourth form (appropriation of an individual’s name or likeness) is protected under the tort of appropriation of personality.³¹

²⁷ *Public Utilities Commission v Pollack*, 343 US 451 (1952), dissent at 467. (Emphasis added.) Justice Douglas’s views on privacy are thoroughly canvassed in Diana Rachel Hyman, *Defences of Solitude: Justice Douglas, the Right to Privacy and the Preservation of the American Wilderness* (PhD Thesis, Harvard University, 2003) [unpublished].

²⁸ William L Prosser, “Privacy” (1960), 48 Cal L Rev 383 at 389.

²⁹ *Restatement of the Law, Second, Torts*, 2d ed (St Paul: American Law Institute, 1965).

³⁰ See, for example, *Parasuik v Canadian Newspapers Co Ltd* (1988), 53 Man R (2d) 78 (QB).

³¹ See, for example, *Krouse v Chrysler Canada Ltd* (1973), 1 OR (2d) 225 (CA); and Eric M Singer, “The Development of the Common Law Tort of Appropriation of Personality in Canada” (1998), Can IP Rev 65. Note, however, the limits placed on this tort in *Gould Estate v Stoddart Publishing* (1996), 30 OR (3d) 520 (Gen Div), aff’d (1998) 39 OR (3d) 545, which distinguished the use of photographs and interview notes for the purposes of educating the public from their use for the purpose of selling a book.

Even instances involving the first two forms of privacy – intrusion upon seclusion and public disclosure of embarrassing facts – *might* fall within extant nominate torts such as trespass or intentional infliction of emotional distress (where the disclosure was calculated to produce the resulting harm).

Often the difference between when a breach of privacy can be remedied by those extant torts and when it cannot will come down to *how* the information was *obtained* and, if relevant, how it was *used*. This is particularly so where trespass is concerned. Video or audio recordings of persons can be made anywhere, and from anywhere. This was evidently the concern that drove Warren and Brandeis, even 125 years ago:

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous medical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.”³²

Concerns about technology and its ability to circumvent extant nominate torts also impelled Rich J’s famous dissent in *Victoria Park Racing and Recreational Grounds Ltd v Taylor*,³³ in which he presciently invoked “the prospects of television” which might someday force courts to recognize that “protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life.”³⁴ Such concerns have not abated. 70 years after *Victoria Park*, Lord Phillips said in *Douglas v Hello!*:

Special considerations attach to photographs in the field of privacy. They are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances voyeur would be the more appropriate nouns, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive. This is quite apart from the fact that the camera, and the

³² Warren & Brandeis, note 15 at 195.

³³ (1937), 58 CLR 479 (HC) [*Victoria Park*].

³⁴ *Ibid* at 505.

telephoto lens, can give access to the viewer of the photograph to scenes where those photographed could reasonably expect that their appearances or actions would not be brought to the notice of the public.³⁵

The underlying concern here is, of course, to find a workable boundary to “privacy”, such that courts can distinguish between things that are worthy of protection from the sorts of interactions that are unavoidable in a free and crowded civil society. It is not difficult to imagine scenarios that would fit into the first (or second) form of privacy described by Prosser as examples of “private” matters that ought to be protected – for example, the lawful disciplining of a child by parent or the eruption of a family dispute in the home.³⁶ Sometimes, however, the boundary between “private” and “non-private” is fuzzy. The activities I have described might, for example, be easily visible from outside the home, or it might be occurring in a different setting altogether, such as a school parking lot or a supermarket aisle. Perhaps marital vows are occurring in a controlled but nonetheless public setting, such as a park. Different considerations might arise in each of these scenarios, leaving us to consider (assuming extant nominate torts do not furnish a remedy) whether the interests implicated in each case ought to be generally recognized as worthy of legal protection.

While the precise metes and bounds can be specified in later decisions, identifying a justification for using tort law to protect privacy means we cannot avoid tackling the definitional question.

Given the potential breadth of any understanding of “privacy” (even allowing for Prosser’s

³⁵ *Douglas* (CA), note 12 at para 84. The emergence of widely accessible cyberspace has also deepened these concerns: see James B Rule, “Strong Privacy Values: Values, Markets, Mechanisms and Institutions” (2004) 54 UTLJ 183 at 185.

³⁶ Peter Birks offered an even more compelling example in Peter Birks, ed, Editor’s Preface, *Privacy and Loyalty* (Oxford: Clarendon Press, 1997) v at v-vi:

A celebrity is pregnant and goes into labour. Journalists besiege the hospital. At common law, is this outrageous intrusion upon the most private hours of a famous woman an actionable tort? Will an injunction against publication issue, and an order for delivery up? The answer to these questions must be yes. But that answer is still not completely secure.

differentiated forms), some peremptory border-drawing may be unavoidable. Principle is not, however, altogether elusive. For present purposes, it seems helpful to observe that each of the activities I have described – and one can obviously offer up many more – speak to Prosser’s first form of privacy and the form which the Ontario Court of Appeal in *Jones v Tsige* seized upon, being seclusion and private affairs. As the facts of *Jones v Tsige* show, that conception will, given present technologies, not typically (or at least not necessarily) be protected by any of the extant nominate torts. Yet, it arises in almost all of the recent Commonwealth case authorities recognizing privacy as a legally protected interest in tort law.

Further, each of Prosser’s seemingly disparate cases concern control over access to personal information. To understand privacy in terms of seclusion, then – understood as an assertion (whether passive or active) of control over access to oneself and to information about oneself, makes sense. It incorporates many of the disparate definitions found in the academic literature to which I have referred. Seclusion also, uniquely among Prosser’s differentiated forms of privacy, also captures *how* the way in which such information has been obtained. A right to privacy, so understood, is therefore grounded not on *what* becomes known by others, but upon *how* it became known – which is surely the more pertinent question. There is no good reason why we should care about the substance of how others present themselves to the world. So long as in doing so they truly retain a measure of control over that presentation (and do no harm to others), no problem arises. What we should care about (for reasons that are not pertinent to this paper, but which I will allude to towards the conclusion) is whether people are presenting themselves in the manner they choose. That is, problems arise where others intrude into how how people present themselves, asserting control by forcing them to present themselves in ways they do not want.

To be clear, then, by “privacy” I will refer to *seclusion*, as an interest which might be injured by intrusion, whether accompanied or unaccompanied by recording and broadcast of images and activities, where that intrusion does not give rise to a cause of action under extant nominate torts such as trespass, defamation, appropriation of personality or intentional infliction of emotional distress.

Having defined “privacy” for this paper’s purposes, I now turn to considering the cases and their proposed justifications for protecting privacy under the rubric of tort law.

III. AUSTRALIA AND THE UNITED KINGDOM: EXPANSION OF THE TORT OF BREACH OF CONFIDENCE

Unlike (as we shall see) the United Kingdom and New Zealand, a common law tort action for breach of privacy has not yet developed in Australia, although there are stirrings. Two lower state court decisions (in Queensland³⁷ and Victoria,³⁸ respectively) recognized a tort of invasion of privacy and, at the Federal Court, Katzmann J observed that “it would be inappropriate to deny someone the opportunity to sue for breach of privacy on the basis of the current state of the common law.”³⁹ And, most recently, Hall J at the New South Wales Supreme Court refused to strike out a claim based on an invasion of the plaintiff’s privacy.⁴⁰

The basis for supposing that such a tort might in future be recognized in Australia is the 2001 pronouncement of the High Court of Australia in *Australia Broadcasting Corporation v Lenah*

³⁷ *Grosse v Purvis*, [2003] QDC 151.

³⁸ *Doe v Australian Broadcasting Corporation*, [2007] VCC 281.

³⁹ *Dye v Commonwealth*, [2010] FCA 710. Katzmann J, however, refused leave to the plaintiff to amend her pleadings to include such a claim on various grounds.

⁴⁰ *Saad v Chubb Security Australia Pty Ltd*, [2012] NSWSC 1183

*Game Meats Pty Ltd.*⁴¹ The plaintiff, a commercial processor and supplier of the meat of Tasmanian brushtail possums, sued when “a person or persons unknown” broke into one of its abattoirs where it stunned, killed and butchered the animals. The intruders then installed hidden cameras, surreptitiously filming the possum-stunning and killing operations. The film was supplied to Animal Liberation Ltd (a self-described “animal rights organization”) which, in turn, supplied at least part of the film to the defendant broadcaster.

The plaintiff, fearing loss of business,⁴² obtained an interim injunction at first instance to restrain publication on a number of grounds, including breach of its right to privacy. The majority at the High Court discharged the injunction on the strict procedural basis that the lower court justice lacked jurisdiction under the relevant enabling statute to grant it. They did, however, comment on the substantive claim of a breach of a right to privacy. Gaudron, Gummow and Hayne JJ concluded that a right of privacy might someday develop in Australia to embrace these facts, but only for natural persons and, therefore, not for the plaintiff in this case.⁴³ Chief Justice Gleeson rejected even that possibility, preferring to rely instead on the “English approach”.

Chief Justice Gleeson was referring to the course adopted by English courts, which have not recognized a “breach of privacy” tort *per se*, but instead protected privacy interests by treating their breach as a violation of *confidence*, thereby invoking the equitable tort of breach of confidence. As will be seen, this has been the upshot of the coming into full force in the United Kingdom of the *Human Rights Act 1998*,⁴⁴ which occurred in 2000. The law’s association of privacy with confidence, however, predates that statute. As early as 1849, English courts

⁴¹ Note 13.

⁴² This fear was said by Gleeson CJ to be “not inherently improbable”. *Ibid* at 9.

⁴³ As “privacy” is understood in this paper, the chief justice must be taken to have been correct.

⁴⁴ (UK), 1998, c 42 [*HRA*]. It was already partially in force in Scotland.

identified a right to privacy as underlying a breach of confidence, inasmuch as such a right was (contemporarily, at least) understood as furnishing protection from “an unbecoming and unseemly intrusion ... offensive to that inbred sense of propriety ... if intrusion, indeed, fitly describes a sordidly spying into the privacy of domestic life, – into the home (a word hitherto sacred to us).”⁴⁵

While predating videos and widely-available photographic technology, the facts of the case from which this statement is taken – *Prince Albert v Strange*⁴⁶ – resembles the sorts of claims which would come before English courts over 150 years later, in that persons (usually, but not necessarily, famous persons or celebrities) complain that private matters have been either recorded and wrongly broadcast, or wrongly recorded and wrongly broadcast. Queen Victoria and her consort, Prince Albert, had commissioned copies struck from various etchings and drawings they had made. The worker employed to strike those copies printed additional copies which eventually made their way into the hands of the defendant. He published a catalogue with a view to exhibiting them. Prince Albert applied for an injunction, both as to the catalogue and the exhibition, which Knight-Bruce VC granted.

Despite the vice-chancellor’s express reference to privacy reproduced above, his reasons ultimately relied upon a property right which he found Queen Victoria and Prince Albert to have had in the etchings, and not upon a distinct right to privacy. He could not ground the injunction upon breach of confidence, as it required the plaintiffs to show a prior relationship between the parties (which, of course, would not have existed). As a platform for recognizing in tort law a

⁴⁵ *Prince Albert v Strange* (1849), De G & Sm 652 at 698, 64 ER 293 (Ch). Other developments predated the *Human Rights Act 1998*. In 1973, the Scottish Law Commission considered the matter, and even drafted a bill. (Scottish Law Commission, “Breach of Confidence” (1984) Cmnd 9385, [file:///C:/Data/Downloads/26-07-2010_1437_886%20\(1\).pdf](file:///C:/Data/Downloads/26-07-2010_1437_886%20(1).pdf) (last accessed August 12, 2014).

⁴⁶ *Ibid.*

protected interest in privacy, breach of confidence, as it then stood, was therefore severely limited.

In the late 20th century, however, two significant events shifted the law of confidence as it related to privacy. The first was the House of Lords' 1988 pronouncement in *AG v Guardian Newspapers Ltd (No 2)*,⁴⁷ in which the House discarded (or, more accurately, hived off to one side) the requirement of a prior confidential relationship. The key speech is that of Lord Goff of Chieveley, whose criticism of that requirement as illogical where an “obviously confidential document” comes into the hands of someone with whom the injured party had no confidential relationship persuaded the House to recognize expressly the tort of breach of confidence as taking *two* forms. The first form was its more traditional form, concerned with trade secrets arising from “a transaction or relationship between the parties”. Here, a prior relationship of confidence would still have to be shown.⁴⁸ The second form – a “privacy” form⁴⁹ – could ground a finding of breach of confidence in circumstances where a relationship, whether of confidence *or otherwise*, existed. It appears, further, that this “relationship” would not even require prior acquaintance, since all Lord Goff required was the defendant’s knowledge that the information is confidential. As Lord Goff described,

[A] duty of confidence arises when confidential information comes to the knowledge of a person ... in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.⁵⁰

⁴⁷ [1990] 1 AC 109 (HL) [*Guardian Newspapers*].

⁴⁸ *Ibid* at 281.

⁴⁹ In *Campbell* (HL), note 12 at para 105, Lord Hope described “the right to privacy” as “[lying] at the heart of an action for breach of confidence.”

⁵⁰ *Guardian Newspapers*, note 47 at 281. This statement was accepted by the European Commission of Human Rights as representing English law in *Earl Spencer v UK* (1998), 25 EHRR CD 105 [*Spencer*], and was reaffirmed by the House of

Or, as Phillips MR explained for the Court of Appeal in *Douglas v Hello!*, the information must be “confidential in nature”, but “it is recognized that [the requirement of a prior relationship of confidence] is not necessary if it is plain that the information is confidential, *and for the adjective ‘confidential’ one can substitute the word ‘private’.*”⁵¹

I have already made passing mention of the second event which spurred development in England of the law of confidence towards protecting privacy, which was the coming into full force of the *Human Rights Act 1998*. Its effect was more subtle, but just as significant, conferring upon individuals the ability to litigate in British courts to enforce the rights conferred upon them by the *Convention for the Protection of Human Rights and Fundamental Freedoms*,⁵² section 6 of which provides that “it is unlawful for a public authority to act in a way which is incompatible with a *Convention* right”, *and* that “public authorities” include courts and tribunals.⁵³ As to those *Convention* rights, section 8 provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” This guarantee is only as against public authorities, and is unconcerned (at least on its face) with protecting privacy interests against intrusion by private persons, including the newsmedia. Nonetheless, section 6 concerns the failure of *the state* – including *the courts* – to allow recourse against such intrusions. The implication is that a British court would be acting unlawfully if it failed to develop law –

Lords in *Campbell* (HL), note 12. In *Spencer*, the Commission dismissed the Spencers’ claim that the UK had failed to protect them from invasions of privacy by the newsmedia on the basis that they had not yet exhausted their common law remedy of damages for breach of confidence.

⁵¹ *Douglas* (CA), note 12 at para 83. (Emphasis added.)

⁵² 4 November 1950, 213 UNTS 221, Eur TS 5 [the *Convention*]. For an explanation of this process and of its historical and constitutional context, see Joanna Harrington, “Rights brought Home: The United Kingdom Adopts a ‘Charter of Rights’” (2000) 11 Const Forum Const 105. As Professor Harrington explains (at 106-07), individuals in the United Kingdom had since 1966 enjoyed the right to complain of the breach of a *Convention* right to the European Court of Human Rights. The *HRA* expanded their litigation routes by enabling them to litigate *Convention* breaches in British courts as well.

⁵³ *Ibid* at s 6(3)(a).

including the common law of torts – in a manner which conforms to *Convention* rights, including the section 8 right to privacy.⁵⁴

This was not uncontroversial. It is evident from the judicial statements at the time that courts somehow felt *forced* against their better judgment to reform the tort of breach of confidence in this fashion. For example, the English Court of Appeal, having acknowledged that the *Convention* has required English law “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”,⁵⁵ then lamented that “[w]e cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action for breach of confidence [such claims]”.⁵⁶

Before considering the central cases that show the impact of these developments upon the English law, it is worth respectfully observing that the English lament was probably unnecessary since, as many commentators have pointed out, judicial development of the “privacy” branch of breach of confidence in *Guardian Newspapers* had already distorted the principles underlying that cause of action.⁵⁷ Either way, however, – whether *via* statutory legal development in the *HRA* or judicial development in *Guardian Newspapers* – their observation merits some reflection. It *does*, after all, seem curious to treat information as “confidential” which, while

⁵⁴ Harrington, note 52 at 110.

⁵⁵ It elaborated – see *Douglas* (CA), note 10 at para 53: it seems to us that sections 2, 3, 6 and 12 of the *Human Rights Act 1998* all point in the same direction. The court should, in so far as it can, develop the action for breach of confidence in such a manner as will give effect to [*Convention*] rights.

⁵⁶ *Ibid.*

⁵⁷ J Caldwell, “Protecting Privacy Post-*Lenah*: Should the Courts Establish a New Tort or Develop Breach of Confidence?” (2003) 26 UNSWLJ 90 at 121-22; B Markesinis and others, “Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)” (2004) 52 Am J Comp L 133 at 137; J Morgan, “Privacy in the House of Lords, Again” (2004) 120 LQ Rev 563; J Morgan, “*Hello!* Again: Privacy and Breach of Confidence” [2005] Camb LJ 549; R Mulheron, “A Potential Framework for Privacy? A Reply to *Hello!*” (2006), 69 Modern L Rev 679 at 686-89; A Schreiber, “Confidence, Crisis, Privacy Phobia: Why Invasion of Privacy Should be Independently Recognized in English Law” (2002) Eur Hum Rts L Rev 129 at 170-76; and R Singh and J Strachan, “Privacy Dangers of Protecting Privacy through Breach of Confidence” [2005] Intellectual Ppy Q 27.

“private”, might still be within the public domain such that it is manifestly *not* confidential.

Substantial English judicial commentary along these lines has also emerged, to the effect that to press every case calling for a remedy of unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts. For example, the Court of Appeal observed in *Campbell v MGN Ltd*⁵⁸:

The development of the law of confidentiality since the *Human Rights Act 1998* came into force has seen information described as “confidential” not where it has been confided by one person to another, but where it relates to an aspect of an individual’s private life which he does not choose to make public. *We consider that the unjustifiable publication of such information would be better described as breach of privacy rather than breach of confidence.*⁵⁹

Similar sentiments are found in Lord Nicholls’ speech at the House of Lords in *Campbell*, where he said:

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. *The essence of the tort is better encapsulated now as misuse of private information.*⁶⁰

Other comments to this effect were made at the Court of Appeal in *Douglas v Hello!*,⁶¹ acknowledging “[w]e cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion.”⁶² They also found a sympathetic ear in New Zealand where, as we shall see, privacy is protected not under an expanded tort of breach of confidence, but

⁵⁸ *Campbell* (CA), note 12.

⁵⁹ *Ibid* at 663. (Emphasis added.)

⁶⁰ *Campbell* (HL), note 12 at 465. (Emphasis added.)

⁶¹ *Douglas* (CA), note 12.

⁶² *Ibid* at 150.

under a tort of breach of privacy. In *Hosking v Runting*,⁶³ Gault and Blanchard JJ noted that “[p]rivacy and confidence are different concepts.”

I suggest that there may be other problems with dealing with privacy as a species of confidence, and not as its own, discrete protected interest under the rubric of a tort of invasion of privacy. There are several reasons for this. First, breach of confidence is an equitable tort based on unconscionable behaviour, as opposed to a wrong. And, what binds the conscience are the terms of the prior relationship. Because an invasion of privacy does not necessarily contemplate a prior relationship, there is no unconscionable behaviour (in a legally cognizable sense) that requires a remedy. Conversely, by recognizing breach of privacy as a free-standing tort, the law accounts more coherently for the harm that is done. The second reason is based on the pragmatic basis of clarity. Canadian society’s understanding of what its courts are seeking to achieve will be enhanced, and not obscured, if courts describe their goal in clear terms. At base, the Rule of Law requires that law be accessible, meaning that it must be intelligible and clear.⁶⁴ If, therefore, protecting privacy is the objective, why disguise it as a breach of confidence arising from a prior relationship (that may never have actually existed)? And, finally, if privacy is not to be protected under a discrete tort of invasion of privacy, why pick breach of confidence? There is no obvious reason why it should be chosen to furnish the disguise. One might just as well distort the law of defamation, for example.

Turning from questions of nomenclature to legal developments in the UK, the law since *Guardian* and the coming into force of the *Convention* has developed from two incidents, each

⁶³ *Hosking*, note 14.

⁶⁴ Tom Bingham, *The Rule of Law* (London: Penguin, 2010) at 37.

involving celebrities and “paparazzi”. The first, *Douglas v Hello!*,⁶⁵ occurred on November 18, 2000, when actors Michael Douglas and Catherine Zeta-Jones were married at the Plaza Hotel in New York. Extensive security arrangements had been made to ensure that access to the ceremony and reception would be restricted to invited guests. Douglas and Zeta-Jones had, however, sold exclusive photographic rights of the event to a UK magazine (*OK!*), preferring its offer to that of a competitor, *Hello!*. This was not, the couple said (and the judge at first instance found), a money-making scheme, but a privacy-protection scheme. As Lindsay J described it, the idea was to use “an exclusive contract as a means of reducing the risk of intrusion by unauthorised members of the media and hence of preserving the privacy of a celebrity occasion.”⁶⁶ They also retained control over selecting the photographs to be published, had hired their own photographer, and required their guests to pass through a checkpoint to ensure they brought no recording devices.

Unknown to Douglas and Zeta-Jones, a “paparazzo” photographer, Rupert Thorpe, had eluded security and surreptitiously photographed the couple and their event. Thorpe then sold publication rights (for the UK, France and Spain) to *Hello!* for £125,000. *Hello!* published the photographs, and Douglas and Zeta-Jones sued alleging (*inter alia*) that their confidence (in the sense of privacy) had been breached, because the subject matter of the photographs – their wedding – was private.

⁶⁵ *Douglas* (CA), note 12.

⁶⁶ *Douglas* (Ch) at para 52. This was also the view of Sedley LJ (at the interlocutory injunction stage) who held that Douglas and Zeta-Jones “were careful by their contract to retain a right of veto over publication of *OK!*’s photographs This element of privacy remained theirs” (*Douglas v Hello!*, [2001] 2 All ER 289.)

At first instance, Lindsay J found that the event was indeed private “[t]o the extent that privacy consists of the inclusion only of the invited and the exclusion of all others.”⁶⁷ Thorpe, having taken the unauthorized photographs in private circumstances, ought therefore to have known that his presence was unwelcome.⁶⁸ In the result, Douglas and Zeta-Jones were entitled to damages for breach of confidence, coupled with a perpetual injunction.

At the Court of Appeal (which affirmed Lindsay J’s decision as to privacy),⁶⁹ Phillips MR stressed “the nature of the rights enjoyed by [Douglas and Zeta-Jones]”:

Their right to protection of [their interest in the private information] does not arise because they have some form of proprietary interest in it. If that were the nature of the right, it would be one that could be exercised against a third party regardless of whether he ought to have been aware that the information was private or confidential. In fact the right depends upon the effect on the third party’s conscience of the third party’s knowledge of the nature of the information and the circumstances in which it was obtained.⁷⁰

There is something of a paradox to the Master of the Rolls’ reasoning that is worth highlighting, as I will return to the proprietary theme below. The interest, on one hand, is said *not* to be proprietary. At the same time, *Hello!*’s conscience was bound because (as he later explained)

⁶⁷ *Ibid* at para 66.

⁶⁸ A significant factor in this case, both at first instance and at the Court of Appeal, was whether the fact that the wedding had occurred in New York (and not in the UK) would alter the legal conclusion to be drawn regarding the claim of privacy. Lindsay J, in finding that the event was private, relied (at para 211) on a finding that Thorpe must have at least been a trespasser under the law of New York, and *Hello!*’s knowledge of security precautions taken to prevent unauthorized photographs. At the Court of Appeal, Phillips MR concluded (at *Douglas* (CA) at para 1000 that the law of New York had no direct application to the case, the cause of action being based on publication in the UK. He cautioned, however, that, where events to which the information relates occur outside the UK, the *lex situ* may be relevant to the question of whether there is a reasonable expectation that events will remain private. Here, however, Phillips MR observed (at para 101) that the law of New York did not provide that “a member of the public had a right to be present at a wedding taking place in a hotel and to take and publish photographs of that wedding.”

⁶⁹ The Court of Appeal allowed *Hello!*’s appeal against *OK!* on its claim for breach of confidence (in the tort’s traditional commercial form).

⁷⁰ *Douglas* (CA) at para 126.

publishing the photographs “invaded the area of privacy which [Douglas and Zeta-Jones] had chosen to retain.”⁷¹ While, therefore, the basis for their right is ostensibly non-proprietary, it does imply (as, again, I will discuss below) a shared normative quality with property.

The second incident which contributed to post-*Guardian* and post-*Convention* development of the privacy aspect of the tort of breach of confidence in England involved another celebrity, model Naomi Campbell. Her suit for breach of confidence arose from an article in the British tabloid newspaper *The Mirror* which disclosed that she was a drug addict who had been regularly attending Narcotics Anonymous counselling sessions for three months. Several photographs were included, showing her on the doorstep where one of the sessions had just occurred, embracing two other people (whose faces were pixelated).

An interesting aspect to this case is the concession by Campbell’s counsel that the fact of her drug addiction was open to public comment in view of her having gone “on record” in the past disclaiming drug use. Disclosure of that fact was thereby agreed to be unintrusive. Her complaint was that *The Mirror*’s publication of the nature and frequency of the treatment – particularly when accompanied by covertly taken photographs depicting her as she was leaving such treatment – fell within a realm of “privacy” which was entitled to protection.

At first instance, Campbell succeeded, obtaining an award of £3,500 for breach of confidence,⁷² but saw that award overturned by Phillips MR for the Court of Appeal.⁷³ The Court of Appeal held that the information which *The Mirror* had published about her attendance at Narcotics

⁷¹ *Ibid* at para 136.

⁷² *Campbell* (QB), note 12. The defendant Mirror Group Newspapers was also found liable for breach of the *Data Protection Act 1998*.

⁷³ *Campbell* (CA), note 12.

Anonymous meetings was part of a general account of Campbell's drug addiction and of her having sought treatment. This was not, it held, not "private" information. A majority at the House of Lords disagreed. While Campbell had voluntarily raised in public discourse the question of whether she was a drug addict (by denying it), that information pertained only to the general fact of her addiction and, therefore, only that general fact could be disseminated without liability. The details of her treatment, such as information about its nature and frequency, was distinct from that general fact.

The Mirror had not rolled over and played dead. It asserted a right under section 10 of the *Convention* guaranteeing freedom of expression and the right to "impart information without interference by [a] public authority."⁷⁴ This necessitated a judicial balancing exercise, which found Lord Hope considering whether the restriction on *The Mirror*'s section 10 right posed by Campbell's section 8 right to privacy was "sufficiently important to justify limiting the fundamental right to freedom of expression which the press assert on behalf of the public."⁷⁵ Such balancing had to be done carefully, he stressed, where the photographs had been taken in a public place – an event which reasonable people might conclude is one of the ordinary incidents we risk incurring by living in a free and crowded civil society.

Unfortunately, Lord Hope's reasons do not explicitly address this balancing exercise, so we do not have the benefits of his insights. Instead, "the real issue" was thought to be "whether publicising the content of the photographs would be offensive."⁷⁶ Here, he held, it was offensive, owing to the "distress" which anyone in Campbell's position would have felt – such

⁷⁴ *Convention*, note 52, art 10(1).

⁷⁵ *Campbell* (HL), note 12 at para 115.

⁷⁶ *Ibid* at para 122.

distress arising from the “obviously private” quality of the information disclosed. As Lord Hope explained:

Any person in Miss Campbell’s position, assuming her to be of ordinary sensibilities but assuming also that she had been photographed surreptitiously outside the place where she had been receiving therapy for drug addiction, would have known what they were and would have been distressed on seeing the photographs. She would have seen their publication, in conjunction with the article which revealed what she had been doing when she was photographed and other details about her engagement in the therapy, as a gross interference with her right to respect for her private life. In my opinion this additional element in the publication is more than enough to outweigh the right to freedom of expression which the defendants are asserting in this case.⁷⁷

Lord Carswell agreed with Lord Hope’s assessment.⁷⁸

Baroness Hale came to the same conclusion on the balance to be drawn between sections 10 and 8 of the *Convention*, although where dealing with cases where the information is not “obviously private”,⁷⁹ she emphasized the risk to Campbell’s therapy, as opposed to any “offence” which others might feel:

It was not necessary for those purposes to publish any further information, especially if this might jeopardise the continued success of that treatment This all contributed to the sense of betrayal by someone close to her of which she spoke and which destroyed the value of Narcotics Anonymous as a safe haven for her.⁸⁰

In the course of offering instances of “obviously private” information⁸¹ (and in dismissing a test based on “offence”), Baroness Hale added that “[a]n objective reasonable expectation test is

⁷⁷ *Ibid* at para 124.

⁷⁸ *Ibid* at para 169.

⁷⁹ *Ibid* at para 135.

⁸⁰ *Ibid* at paras 152-53.

⁸¹ *Ibid* at para 135. She cited information about health, personal relationships or finances, which would of course include the information that was at issue in *Jones v Tsige*.

much simpler and clearer.”⁸² More specifically, the basis upon which an obligation of confidence would be imposed is, she said, that “the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential.”⁸³

While coming to a different conclusion on liability, dissenting Lords Hoffmann and Nicholls nevertheless applied Baroness Hale’s “reasonable expectation of privacy” threshold. The difference of opinion centred on the narrow point of whether *The Mirror* went too far in publishing certain details about Campbell’s treatment. Whereas Baroness Hale and the majority concluded it had, Lords Hoffmann and Nicholls thought no reasonable expectation of privacy attached to those details. Because Campbell had raised the issue of addiction (thus putting into the public sphere the question of whether she took drugs), “she [could not] insist upon too great a nicety of judgment in the circumstantial detail with which the story is presented.”⁸⁴ Lord Nicholls, citing “the touchstone” of “reasonable expectation of privacy”,⁸⁵ explained that “[b]y repeatedly making these assertions in public, [Campbell] could no longer have a reasonable expectation that this aspect of her life should not be public.”

IV. NEW ZEALAND – THE TORT OF BREACH OF PRIVACY

On a warm summer (mid-December) day in Auckland, Marie Hosking, the recently-separated spouse of nationally known broadcaster Michael Hosking, was pushing their year-old twin daughters in a stroller on a public street. As she did so, and without her knowledge, a

⁸² *Ibid.*

⁸³ *Ibid* at para 134.

⁸⁴ *Ibid* at para 66.

⁸⁵ *Ibid* at para 21.

professional photographer named Simon Runting took photographs of the children. Runting had been hired by *New Idea!* Magazine to take those photographs to supplement an article it was running in its Christmas edition relating to “[Michael] Hosking’s personal life, and the fact that he would be spending Christmas without the company of his children.”⁸⁶ Informed of the photographs and the planned article, both Hoskings sued for an injunction restraining Runting and *New Idea!* from taking and publishing photographs of the children during their minority, on the grounds that it amounted to a breach of the children’s privacy.

At first instance, the claim was framed in both breach of confidence (due, as we have seen, to the direction indicated by UK jurisprudence) and a putative cause of action for “breach of privacy”. As to breach of confidence, Richardson J held that, because the photographs were taken while the children were in a public place, the claim could not be sustained as the subject matter was obviously not confidential. He also concluded that New Zealand courts should not recognize the tort of breach of privacy, and that any gaps in privacy law should be filled by the legislature and not by courts.⁸⁷ And, in any event, he added, even if he had been receptive to a new tort of breach of privacy, the public disclosure of photographs of children taken in a public place would not fall within the scope of such a tort.

The Hoskings appealed, their primary position resting on the existence of a “tort of breach of privacy” in New Zealand. While, they argued, the photographs were taken in a public setting,

⁸⁶ *Hosking*, note 14 at 7.

⁸⁷ In fact, legislative reform was then under discussion in New Zealand. In 2004, the New Zealand Law Commission published Study Paper 15, *Intimate Covert Filming* (Wellington: New Zealand Law Commission, 2004). The Commission concluded that existing law did not respond adequately to the problem of covert filming, although it did acknowledge the advance in tort law represented by *Hosking*. Ultimately, the Commission’s principal recommendation was the creation of a criminal offence to deal with the recording and broadcasting of images “of a very intimate nature” (at 30), punishable by up to three years’ imprisonment for making a recording and one year’s imprisonment for possessing it.

certain “private facts” (said here to include the children’s youth), aggravated by the surreptitious “stalking” of the children by a professional photographer hired by a magazine with a view to commercial exploitation, and the absence of parental consent, all combined to outweigh any countervailing arguments (mostly grounded in freedom of expression) raised by the defendants.

The appeal was heard at the New Zealand Court of Appeal (which was, at that time, the highest court resident in New Zealand).⁸⁸ All five justices dismissed the Hoskings’ appeal on the facts.

The photographs were, they observed, taken from a public place, depicting the children in a public place, and in circumstances which did not have the effect of exposing confidential information. A majority of the justices, however – who, significantly, were later to form the majority at the Supreme Court of New Zealand (Gault, Blanchard and Tipping JJA, as they then were) – recognized the existence in New Zealand of an independent tort of breach of privacy.

The lead judgment, given by Gault JA (with whom Blanchard JA concurred) identified “two fundamental requirements for a successful claim”:

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts which would be considered highly offensive to an objectively reasonable person.⁸⁹

Gault JA’s dual requirements of a “reasonable expectation of privacy” and “highly offensive” publicity recall *both* Baroness Hale’s and Lord Hope’s contrasting thresholds in *Campbell*, taken together. He then proceeded, however, to stipulate two additional considerations. First, the fact

⁸⁸ The Supreme Court of New Zealand first sat on July 1, 2004 – three months after the Court of Appeal pronounced in *Hosking*.

⁸⁹ *Hosking*, note 14 at para 117.

that the claimant is a celebrity does not automatically strip him or her of a right to privacy, although such a person must recognize that his or her public position will inevitably accompany greater public scrutiny.⁹⁰ A celebrity's reasonable expectation of privacy will therefore be viewed as reduced to a degree commensurate with his or her public status, which itself legitimizes public concern in the "information". This also applies to a degree, we are told, *involuntary* public figures (such as, presumably, the Hoskings' children), although not ordinarily to the extent of those who willingly put themselves into the spotlight.⁹¹

Secondly, and conversely, Gault JA considered "the importance of the value of the freedom of expression" which, he explained, is also related to the extent of legitimate public concern in the information published.⁹² Courts must, he said, draw a line between the giving of information to which the public is entitled on one hand, and "morbid and sensational prying into private lives for its own sake" on the other.⁹³ Citing the *Second Restatement*, Gault JA described the threshold which he saw as dividing these two imperatives:

[C]ommon decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.⁹⁴

The difficulty is, of course, in discerning "prying" from the mere production of information to which the public is said to be "entitled". While a preference for case-by-case development might unavoidably preclude concrete guidance for every claim, the facts of *Hosking* might well have

⁹⁰ Here, he was drawing from the US law.

⁹¹ *Hosking*, note 14 at paras 120-21.

⁹² *Ibid.* at para 132.

⁹³ This language is drawn from the *Second Restatement*, note 29 at 391.

⁹⁴ *Hosking*, note 14 at para 135, citing *Second Restatement*, *ibid.*

represented an opportunity to explain the sort of cases that might fall on one side of the divide or the other, since the result in *Hosking* was not particularly obvious. On the one hand, the children's father was a willing celebrity (and, on the evidence, the same could probably have been said of their mother).⁹⁵ It was not, however, the parents' privacy that was at issue, but the children's.⁹⁶ While the article was purported to be about Mr Hosking's Christmas plans (in respect of which the existence of a "legitimate public interest" *might* be demonstrable), it would of necessity have entailed discussion of how *his children* were spending Christmas. On these facts, then, the precise demarcation between disseminating truly "public" information on one hand, and prying for the sake of prying on the other, is not evident.

In sum, Gault JA echoes both the justifications of "offence" and "reasonable expectations" found in *Douglas* for recognizing a tort of invasion of privacy.

The generally concurring judgment delivered by Tipping JA is also notable for offering a defence of privacy as a protected legal interest generally. Privacy, he says, represents a "value" that embodies "the essence of the dignity ... of all human beings."⁹⁷ I will have some observations below on this proposed justification of "dignity" for protecting privacy.

⁹⁵ Mrs Hosking had given interviews to several magazines about using *in vitro* fertilization. That said, after the children's birth, both parents had declined interviews about them, or allowed their photographs to be taken.

⁹⁶ As Gault JA had pointed out, past New Zealand decisions had stressed the need to "accommodate the special vulnerability of children" in the context of privacy protection. *Hosking*, note 14 at para 145. Those past New Zealand decisions included *Re an Unborn Child*, [2003] 1 NZLR 114 (HC) where Heath J referred to the United Nations *Convention on the Rights of the Child*, GA Res 25 UN GAOR, 44th Sess, Supp No 21, UN Doc A/44/49 (20 November 1980), art 16(1) of which states: "No child shall be subjected to arbitrary or unlawful interference with his or her *privacy*, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation." (Emphasis added.)

⁹⁷ *Ibid* at para 239.

V. RECONCILIATION OF PRIVACY WITH TORT LAW

The caselaw reveals, then, three justifications (or groups of justifications) by which we might evaluate privacy's "fit" within tort law: (1) protection from "offence" or "distress" (Lords Hope and Nicholls in *Campbell*, and Gault JA in *Hosking*); (2) protection of dignity (Tipping JA in *Hosking*); and (3) protection of "reasonable expectations" (mainly Baroness Hale in *Campbell*, but also Gault JA in *Hosking*). I respectfully suggest that the third justification may well hold the most promise.

As to the first justification, the concern here is that peremptory, I-know-it-when-I-see-it thresholds such as "offence" or "distress" risk begging more questions than they answer. More to the point, however, "offense" or "distress" has not been viewed by the law as *harm*. Even in claims for nervous shock, mere distress is never sufficient to ground a claim. As a means by which to justify privacy's protection under tort law, it appears to fall short.

What, however, of dignity? While dignity is the basis of much of our contemporary understanding of rights,⁹⁸ it is rarely invoked with a helpful degree of specificity. Indeed, while it encompasses privacy, it encompasses much more and, so, without elaboration or context, it is even more unruly a term than "privacy" itself. For example, a brief Google™ search on "dignity" turns up websites variously advocating *for and against* assisted suicide, and *for and against* access to abortion. Its meaning is therefore exceedingly context-dependent (which becomes obvious when one considers that the innate dignity of the individual has been described

⁹⁸ "Rights" have been described as "the juridical embodiments of the dignity inherent in self-determining agency". (Lorraine E Weinrib & Ernest J Weinrib, "Constitutional Values and Private Law in Canada", in Daniel Friedmann & Daphne Barak-Erez, eds, *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) 43 at 47.) The implication here is that, without privacy, we would be deprived of our dignity by being constantly monitored, as in a totalitarian state. See, on this point, Eric Barendt, "Privacy as a Constitutional Right and Value", in Birks, *Privacy and Loyalty*, note 36, 1 at 7.

as underlying *all* rights guaranteed under the *Charter*⁹⁹). One's dignity might be understood differently in a catastrophic bodily injury case than it might be understood if one's house were destroyed by a runaway truck or, for that matter, if one's family photos were stolen and posted on the internet. Dignity might be invoked in areas where tort law is typically understood as having *no* place, such as where a person is sought to be excluded from employment or from a public benefit upon irrelevant considerations such as race or conscience. Dignity is therefore not helpfully descriptive of a justification for extending tort law protection to privacy.

This leaves us with Baroness Hale's "reasonable expectation" justification for a protected interest in privacy. (While not no longer entirely novel – it forms part of the US cause of action for intrusion upon seclusion seized by the Ontario Court of Appeal in *Jones v Tsige*¹⁰⁰ – Baroness Hale's speech is the first reference to this threshold in the Commonwealth jurisprudence on privacy.) The supposedly "reasonable" quality of the expectation is worth reflecting upon. Why did Baroness Hale think Campbell had a reasonable expectation of privacy? Because it was information going to her treatment for ill health¹⁰¹ which, her general public commentary notwithstanding, was an aspect of her life over which she had chosen to maintain exclusivity. Why did Lords Hoffmann and Nicholls conclude that Campbell did not have a reasonable expectation of privacy? Because she had not made that necessary choice and had instead chosen to forfeit her exclusivity over that aspect of her life by discussing

⁹⁹ *Hill*, note 7 at para 120.

¹⁰⁰ *Jones v Tsige*, note 2 at para 59, citing *Katz v United States*, 389 US 347 at 361 (1967): "In determining the third element [being that the matter intruded upon was private], the plaintiff must establish that the expectation of seclusion or solitude was objectively reasonable."

¹⁰¹ *Campbell* (HL), note 12 at 147: "[A]ll of the information about Miss Campbell's addiction and attendance at [Narcotics Anonymous] which was revealed in the 'Daily Mirror' article was both private and confidential, because it related to an important aspect of Miss Campbell's physical and mental health and the treatment she was receiving for it." (Emphasis in original.)

(specifically, denying) drug use in public, thereby inviting the public into that aspect of her life. Recall also Lindsay J’s finding in *Douglas* that the Douglas’ and Zeta-Jones’ wedding was private “[t]o the extent that privacy consists of the inclusion only of the invited and the exclusion of all others.”¹⁰² Phillips MR’s finding that Douglas and Zeta-Jones had “chosen to retain”¹⁰³ a measure of control over the aspect of their lives depicted by the unauthorized photographs is in the same vein: they had chosen to retain a measure of exclusivity over their wedding by selling sole and exclusive photographic rights to a single newsmedia outlet. In both *Campbell* and *Douglas*, the courts are presupposing *a starting point of exclusion*, thus narrowing the judicial inquiry to the factual issue of whether that exclusivity subsists in light of the plaintiff’s subsequent conduct. (And, both *Campbell* and *Douglas* show how “exclusivity” – in contrast to “dignity” – has tangible meaning when applied to the facts of cases.)

I should add that I offer no comment on the results reached in any of these cases. My point, rather, is that Baroness Hale has given us a framework for analysis, and even a norm, which might be usefully assessed, in light of the failure of “dignity” as a workable rationale, for fit with tort law. It turns the question “is privacy, understood as the means by which exclusivity might be retained over aspects of a person’s life, a protected legal interest?” into this: “does tort law recognize and protect a right to exclusivity over aspects of our lives?”.

I suggest that exclusivity goes to the very heart of what justiciable rights mean in tort law.¹⁰⁴

Rights, after all, imply exclusivity – or, at least exclusivity against a non-rights holder. If I lack a right to something, I cannot take the thing from someone who has a right to it. His or her right

¹⁰² *Douglas* (Ch), note 12 at para 66. (See note 67.)

¹⁰³ *Douglas* (CA), note 12 at para 136. (See note 71.)

¹⁰⁴ I elaborate upon the meaning of rights in the context of recovery for pure economic loss in Russell Brown, *Pure Economic Loss in Canadian Tort Law* (LexisNexis, 2011) at 35-41.

trumps any lesser interest I might claim such that he or she may exclude me from using it. Tort law (indeed, private law generally) is grounded upon the notion that, to recognize a right in the plaintiff to something (property, compensation for bodily injury, contractual performance), the plaintiff must demonstrate an interest in the subject matter sufficient to exclude the defendant from using or possessing it (and, by necessary implication, invading or otherwise harming it.)¹⁰⁵

Accepting that a right in tort law denotes an interest sufficient to exclude others from using and harming its subject matter, what is that subject matter? It bears reminding ourselves that not every harm amounts to a breach of someone's rights. We do not have the right, in a legally cognizable sense, to live a life free from stress, bother, or nasty people who say and do things that irritate us. Or, as it was put more colourfully at the Ontario Superior Court of Justice recently,

There is no claim for pooping and scooping into the neighbour's garbage can, and there is no claim for letting Rover water the neighbour's hedge. Likewise, there is no claim for looking at the neighbour's pretty house, parking a car legally but with malintent, engaging in faux photography on a public street, raising objections at a municipal hearing, walking on the sidewalk with dictaphone in hand, or just plain thinking badly of a person who lives nearby.¹⁰⁶

The things in which we have rights are, I suggest, the things that belong to us. They are our resources, by which each of us try to live our own particular idea of the good life.¹⁰⁷ Take, for example, the paradigm – in fact the very instance of a right which jurists since Aristotle

¹⁰⁵ Peter Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", in David Owen, ed, *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 427; and Russell Brown, "Justifying the Impossibility of Recoverable Relational Economic Loss" (2005) 5 Oxford U Comm LJ 155.

¹⁰⁶ *Morland-Jones v Taerk*, 2014 ONSC 3061 at para 26. I note, however, that "pooping and scooping into the neighbour's garbage can" might well support an action for trespass to chattels or (depending upon the location of the garbage can) trespass to land. And ditto for Rover.

¹⁰⁷ Brown, *Pure Economic Loss in Canadian Negligence Law*, note 104 at 37.

(including Thomas Aquinas¹⁰⁸ and Lords Atkin and Macmillan in *Donoghue v Stevenson*¹⁰⁹) have employed in elucidating the basis for what we now understand as private law duties: one's own bodily integrity. My bodily integrity is a resource which I own over which, as an incident of that ownership, I can assert an exclusive right of use. To injure that resource is to injure my right. In this sense, bodily integrity has a proprietary aspect inasmuch as property itself signifies a right to exclude others from things. Just as my property constitutes a resource (or set of resources) by which I make my own chosen way through life, my right to my bodily integrity imports legal protection, because it is mine.

There is a strong proprietary notion behind all of this, which notion is hardly foreign to Canadian tort law. Think of cases where courts award damages reflecting a diminished capital asset of income earning ability (as distinct from future income loss). Indeed, the proprietary quality of the resource is a critical point. Two essential attributes of all property rights is that they relate to specific things external to the rights holder, and that they are enforceable generally against the world. Similarly, while a right to one's bodily integrity is personal and is therefore different from a property right in the sense that it does not relate to something external to the rights holder, it is also generally enforceable against the world. That interest is sufficient to defeat all comers. It follows, then, that we have rights not only in our bodily integrity, but in our realty and personalty. If someone damages my automobile or destroys my home or kills my animals, I can recover because my rights in those things have been injured. Like my physical integrity, I use my property either to achieve my goals, or I value them as goals achieved. They form part of my arsenal of resources. Even the more off-the-beaten-track torts, such as defamation, appropriation

¹⁰⁸ James Gordley, "Tort Law in the Aristotelian Tradition", in David Owen, ed, *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 131 at 138.

¹⁰⁹ *Donoghue v Stevenson*, [1932] AC 562 (HL).

of personality, and infliction of nervous shock, can easily be seen as instances of resources.

Indeed, it may be difficult to account for compensation for the loss of reputation and for appropriation of personality in any other way. Why, for example, would the law compensate a person for damage to reputation if it was not something whose use he or she valued?

Interference with bodily integrity, property rights, the reputation or the personality of others can be seen as wrong, therefore, because the world is impressed with a duty to refrain from interfering with those rights.

Exclusivity, then, as a rationale for a right, embraces both the traditionally protected subjects of bodily integrity and property. This understood, Baroness Hale's justification for protecting privacy is demonstrably consistent with tort law. So long as the adjudicative question in privacy claims asks whether the plaintiff waived his or her entitlement to exclude others from knowing and telling of the information procured, privacy "fits".

VI. CONCLUSION

It is striking that the leading Commonwealth cases involve celebrities. Indeed, it may even seem paradoxical, since celebrities presumably survive on being celebrated. To that extent, it might seem that their claim to having retained privacy over any aspect of their life is slender at best. Yet, most celebrities retain exclusivity over at least a few aspects of their lives. And, celebrities are more likely targets for invaders of privacy than the rest of us are. Nobody will pay money to see photographs of me walking down the street with my children, or having dinner with my wife, or walking my niece down the aisle to be married.¹¹⁰

¹¹⁰ Even were that so, it is not obvious that courts applying tort law should ignore these sorts of cases. Although this point is not made explicitly in the cases, it might be argued that invasions of other people's privacy are not only bad for

This does not mean, however, that the tort of invasion of privacy (understood as intrusion upon seclusion) is a tort only for the rich and famous. *Jones v Tsige* serves as an example of why this tort might be applied to claims brought by persons other than the fabulous and glamorous. Old concerns about technology first expressed by Warren and Brandeis¹¹¹ loom large, even for non-celebrities. Digital technology has changed substantially the way in which we capture, store and retrieve information, and the internet has changed the way in which such information can be broadcast. As *Jones v Tsige* illustrate, and as the Ontario Court of Appeal observed,¹¹² databases store as a matter of routine our most sensitive financial information. They also store equally (if not more) sensitive information about our health, our purchases, our travels, and the nature by which we communicate with friends and family.

While, as I explained in the introduction, the question under consideration in this paper was not “*should* tort law protect privacy”, in light of the celebrity-heavy quality of the caselaw it is worth observing here that *all* of us need privacy because, like our bodily integrity and our property, it affords us the space to develop ourselves as we see fit. It allows us to develop while maintaining autonomy over one’s life.¹¹³ *Everyone* has an interest in the law maintaining the boundary between our public lives and our private lives. Civilization – that is, our *public* life – depends not only upon our being able to protect our *private* life by controlling what others know about us, but

them, but also for those of us who invade their privacy, or who read and view the resulting articles and photographs. It makes us into voyeurs, living vicariously through others, or at least leaving us more interested in the fortunes (or, more typically, the misfortunes) of others, rather than advancing our own lives. The almost universal availability of digital cameras and online social networks aggravate this phenomenon.

¹¹¹ See the text cited at note 15.

¹¹² *Jones v Tsige*, note 2 at para 67.

¹¹³ Privacy is not, therefore, the same thing as autonomy (as some of the above-listed definitions suggest – see the text cited at notes 14 and 15). Rather, our autonomy is preserved by having our privacy respected. If I am right about this, it appears (as Marmor argues, note 23) that the famous decision of the Supreme Court of the United States in *Griswold v Connecticut*, 381 US 479 (1965), which recognized a constitutional right to privacy, was incorrectly reasoned, since the main issue in *Griswold* (whether the state could ban the sale of contraceptives) went to the plaintiff’s autonomy, not privacy.

also what we know about other people. As Andrei Marmor has put it, “[w]hat we mainly lose in a Panopticon world ... is something that is essential for shaping our interactions with others; it is our social lives that would be severely compromised, not our inner or private world, so to speak.”¹¹⁴ The concern here is that, to be functional members of the *public*, people must be able to determine (so far as is consistent with living in a free and crowded society) the aspects of their life over which they retain control by excluding others. After all, were *everyone* to know *everything* about each other, we would lose the true gift of intimacy, where privilege reigns, secrets are shared, vulnerabilities are allowed, and genuine emotions are exposed.

This, I acknowledge, runs contrary to the current Western social preoccupation with “authenticity”. The authentic person, we are told, is honest and forthright about his or her most deeply held feelings. Yet, a moment’s thought should suggest that a world of utter candour would be destructive of our social fabric. Would social and familial harmony be served by our friends, parents or siblings knowing what old resentments we might harbour? How would our relationships persist if all opinions on all subjects (including each other) are shared openly? How could we operate collegially, but at arm’s length, from colleagues or from anyone else with whom we must work while sharing intimate details about our lives and opinions on all things? How would we be able to resist the scrutiny of our peers while we sort out problems with our lives, or simply experiment with something new and untried? And, quite apart from concerns for

¹¹⁴ Marmor, note 23.

social fabric, how might our personal well-being suffer from the revelation of our innermost thoughts and feelings?¹¹⁵

These are only some initial observations. This question deserves treatment that is more careful and probably more ambitious in scope, given that “privacy” implicates the essential role of lawyers and judges, whose everyday tasks might well be generalized as discerning the proper boundary between private and public life.

¹¹⁵ This is a growing and acute concern associated with the rapid expansion of social media. (A Google™ search on August 30, 2014 for “psychological effects of social media” produced 2,290,000 hits. The same search on October 8, 2014 produced 15,700,000 hits, and on October 10, 2014 produced 19,500,000 hits.)