The *Campbell* Legacy

Reflections on the Tort of Misuse of Private Information

Edited by
Thomas D. C. Bennett and
Daithí Mac Síthigh

ROUTLEDGE

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In 2004, a judgment from the highest court in the UK gave birth to a new era of privacy law. That case, brought by the supermodel Naomi Campbell against Mirror Group Newspapers, is today rightly regarded as a turning point for the protection of individuals' privacy. The case is seen as the turning point in the development of English privacy law, and has also had major implications for the law elsewhere, including in Australia, New Zealand, Ireland, and Canada. The manner in which the common law's privacy protections have developed since, and the direction in which they might develop still further, are the subject of this book. This collection, written by leading scholars in the privacy field from the UK and beyond, considers the legacy of Campbell's case. The contributors address the *Campbell* legacy from a range of legal perspectives and discuss broader themes of power, metaphor, consistency, and technological change.

This book was originally published as a special issue of the *Journal of Media Law.*

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Foreword

When I graduated in 1992, there was no such thing as "media law". The only real hint at its existence was the subject of defamation in the university tort curriculum, but – as in most textbooks – this was relegated to the final chapter or an awkward footnote (and, even then, with an unspoken assumption that it would not be assessed in the exam). In those days, defamation seemed to comprise the entirety of media law. That is not wholly accurate – breach of copyright, passing off, breach of confidence, malicious falsehood all loomed then – but being sued for defamation was the threat that publishers feared the most. Back in 1992 I don't think a single law school offered a media law course. Today, no self-respecting faculty is without one.

It is tempting to attribute the explosion of media law, and – in particular – the rise to prominence of a burgeoning privacy jurisprudence, to the incorporation of the European Convention of Human Rights into English law with the enacting of the Human Rights Act 1998. Certainly, this was a very significant event. But, as Sir Michael Tugendhat has explored in his new book, *Liberty Intact*, the notion of respect for privacy was already embedded in the common law, albeit not articulated in a unified concept.[1] As a result, its emergence in its present form is the fruit of a somewhat laboured and often murky process – aspects of which are explored in each of the essays in this collection.

Perhaps unhelpfully for the later development of a functioning law of privacy, the House of Lords in *Wainwright v Home Office* (a case that had begun in the lower courts in 1997) baldly declared that the English common law did not recognise a tort of invasion of privacy.[2] This followed an earlier example of judicial hand-wringing over the same issue in *Kaye v Robertson*.[3] One can wonder about the correctness of those decisions, particularly given that the European Court of Human Rights later found that the failure to afford a domestic remedy to the claimants in *Wainwright* for the unlawful strip search to which they were subjected amounted to a violation of Article 8 of the Convention.[4]

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[1] Michael Tugendhat, *Liberty Intact: Human Rights in English Law* (OUP 2017) ch 10
[2] [2003] UKHL 53, [2004] 2 AC 406
[3] (1991) FSR 62
[4] *Wainwright v UK* (2007) 44 EHRR 40

This supposed judicial impotence was, however, overtaken by the arrival of the Human Rights Act 1998. The refusal by successive governments, prior to the passing of the Act, to introduce specific legislation for a statutory privacy law left English law ill-equipped to deal with the privacy claims that quickly resulted. The coming into force of the Act in 2000 entailed the wholesale incorporation of Article 8 into domestic law (without further ado) and rendering the common law compatible with the articles of the European Convention on Human Rights required some fast work by the courts. The courts undertook this task by attempting to modify the equitable action for breach of confidence to fashion a remedy for some breaches of privacy.

In *Campbell v MGN*, Lord Nicholls coined the term "misuse of private information" to describe what he labelled a new tort.[5] One fears that he had to choose this nomenclature rather than the more straightforward "breach of privacy" in deference to the *Wainwright* decision (to which Lord Nicholls had not been party). But the attempt to accommodate privacy interests in the conventional breach of confidence doctrine was never destined to have a happy ending. Lord Phillips MR confessed in *Douglas v Hello!* that a degree of shoe-horning was required to squeeze privacy claims into the confidence doctrine.[6] Fundamentally, as Lord Nicholls had noted, confidentiality and privacy are different interests.

The shoe-horning project – which threatened not only to radically alter the conventional cause of action of breach of confidence but also to hamper the development of the new privacy tort – was quickly abandoned. By 2007 Lord Nicholls in *Douglas v Hello!* felt able to say, just three years after *Campbell*, that the two causes of action had seemingly become distinct from one another.[7]

In the ten years since, the courts have refined and developed the new privacy law with remarkable speed, and some aspects of it have been given welcome clarification. For instance, its emergence from the doctrine of confidence gave rise to the question as to how the doctrine ought to be classified; was it tortious or equitable (or something else entirely)? In *Douglas*, the Court of Appeal expressed the view (reluctantly and *obiter*) that, given its parentage, "misuse of private information" was not a tort but was equitable.[8] However, a retreat from this received orthodoxy, which began in *Vestergaard Frandsen A/S v Bestnet Europe Ltd*,[9] was completed in *Vidal-Hall v Google Inc*.[10] In that case, Tugendhat J determined that breach of privacy was a tort (in the context of whether a claim could be served out of the jurisdiction). His decision was upheld by the Court of Appeal, which affirmed that breach of confidence and misuse of private information were

[5] [2004] UKHL 22, [2004] 2 AC 457, [14]
[6] [2005] EWCA Civ 595, [2006] QB 125, [53]
[7] [2007] UKHL 21, [2008] 1 AC 1, [255] (Lord Nicholls)
[8] [2006] QB 125, [96], relying upon *Kitetechnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765, 777-8.
[9] [2009] EWHC 1456 (Ch), [2010] FSR 2, [19]
[10] [2014] EWHC 13 (QB), [2014] EMLR 14, [70]

separate causes of action.[11] The *Campbell* cause of action now stood on its own two feet. In less than 15 years, then, something quite remarkable has occurred: an entirely new tort has come into being.

Despite this, much else about the doctrine of misuse of private information is yet to be resolved, and the essays published in this collection highlight remaining areas of uncertainty. The development of the common law by judges on an "incremental" basis has certain inherent weaknesses. Courts can only resolve the issues that arise in an individual case. Courts are not laboratories in which different theories can be tested; they exist to resolve disputes between parties. In an adversarial court system such as ours, that has a further weakness. Parties may make concessions or not argue points (for entirely understandable reasons) that might have been helpful to test developing principles.

Another significant challenge is the vastness of the landscape that privacy rights occupy. Breach of privacy by publication is only one part of this. And even in that part, cases like *Douglas* are actually very poor examples. Certainly, no scientist would have chosen *Douglas* as an early subject for a laboratory test of the new law. It is an example at one end of the spectrum of privacy rights that borders intellectual property rights. Some people (mostly celebrities) can, if they choose, commoditise and exploit their personal privacy. The Douglases did just this. But most people either cannot do so or would not want to. At the other end of the spectrum there is the more familiar intrusion into privacy that is totally unwanted.[12] The value of the privacy right cannot, in these more obviously intrusive cases, be measured in money.

A further problem is that the development of privacy law is particularly vulnerable to a "remedy-based" approach. Put very simply, cases involving breach of privacy by publication of private information are resolved by the – now familiar – "ultimate balancing test" that seeks to balance the privacy and free speech rights of the parties.[13] This balancing act is frequently undertaken by the court in a hurry, often on the eve of the threatened publication (when the claimant seeks interim injunctive relief). Any investigation into the facts is, at this stage, necessarily limited and risks being superficial. A legitimate complaint made in Thomas Bennett's essay is that assumptions are made as to an evidential position that are never in the end tested. On this imperfect foundation, very significant decisions as to the shape of the tort have been – and continue to be – made.

At the injunction stage, the issues are not only tricky to evidence appropriately but also stark in terms of their consequences. If the court does not grant an injunction restraining publication, the claimant's action will effectively be over. In the overwhelming majority of cases, damages are simply not an adequate remedy for the breach of privacy and the claimant will simply give up. (The notable exception being Max Mosley's action against News Group Newspapers Ltd.[14])

[11] [2015] EWCA Civ 311, [2016] QB 1003
[12] Eg *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20
[13] *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593, [17]
[14] [2008] EWHC 1777 (QB), [2008] EMLR 20

Publishers complain that the reverse is also true. For if an injunction is granted, the ability to defend most privacy claims ends there. For example, even the most high-profile and hard-fought privacy case in recent years, *PJS v News Group Newspapers Ltd*, has been settled. There will now be no trial. The significant legal principles that emerge from the Supreme Court's judgment in it come from a case that has been all the way to the top of our legal system solely on the basis of an interim injunction; none of the findings of fact that would be made in a trial have had the opportunity to see the light of day.

That is not to say that some important principles have not been established in *PJS*; there is still value in the judgment. The Supreme Court endorsed the approach the lower courts had adopted in a number of cases that loss of the confidential nature of the information (eg by publication on the internet) is not necessarily deleterious to the privacy claim.[15] Relevant to Bennett's paper is the Supreme Court's emphatic endorsement of "third party interests" in the assessment of the nature and weight of the Article 8 rights in the balance, but the criticisms of this approach that he has identified remain valid.[16]

Something that is missing from the recent privacy case law is any real exploration or explanation of how the balance between the two rights (to privacy and freedom of expression) is actually to be carried out. This is something that Paul Wragg dwells on in his essay. For the question remains: how is the value of each competing right in a case to be assessed? The relatively straightforward job of setting out the nature of the task was done by the House of Lords in *Re S*; no presumptive priority was to be given to either right and an "intense focus" must be placed on the respective rights in play.[17] However, since then, the law has developed little by way of further guidance as to how this "intense focus" is actually to be carried out and what, precisely, is to be measured; only some broad principles have emerged. Information about health and sexual activities, for example, are likely (rightly) to be regarded as giving rise to weighty Article 8 (privacy) considerations. On the other side, there is a notional hierarchy of the value of speech ranging from political speech at the top, to purely commercial speech at the bottom.[18] Exposing hypocrisy or preventing the public from being misled are often regarded as weighty factors on the Article 10 (free speech) side. Conventional kiss 'n' tell stories frequently add into the mix issues involving the privacy and/or free speech rights of the person wanting to reveal the information, complicating the balancing task further.

Despite being a major, high-profile piece of litigation, little attention was actually paid to the balancing act in *PJS*. The focus of the judgment was, instead, on whether there was anything left to protect by injunction given the publication of

[15] [2016] UKSC 26, [2016] AC 1081
[16] Ibid, [72]-[73]
[17] [2004] UKHL 47, [2005] 1 AC 593, [17]
[18] [2016] UKSC 26, [2016] AC 1081, [24]

the claimant's private information that had already taken place in the UK, abroad and on the internet. That omission is no fault of the Supreme Court. It is a result of the adversarial process. For by the time the case reached the Supreme Court, the newspaper was not arguing any countervailing public interest or Article 10 right to resist the injunction. Insofar as a view was expressed, the majority of the Supreme Court observed (*obiter*):

> [I]t may be that the mere reporting of sexual encounters of someone like the claimant, however well known to the public, with a view to criticising them does not even fall within the concept of freedom of expression under article 10. But, accepting that article 10 is not only engaged but capable in principle of protecting any form of expression, these cases clearly demonstrate that this type of expression is at the bottom end of the spectrum.[19]

Setting to nought the value in Article 10 terms of revelations of sexual (mis)conduct of a public figure is a striking proposition (even if advanced tentatively). Given that there are countless decisions both of the European Court of Human Rights and of the Supreme Court itself holding there to be an intrinsic value of freedom of expression in a democratic society (embracing not only the right to publish but also the right to *receive* information), this sort of judicial ruminating carries dangers. Principally, it risks exposing courts to the charge that they are simply making a subjective value judgment as to whether the information should be published, turning the court from judicial assessor into editor. Barring instances like falsely shouting "fire" in a theatre, all speech has value. The difficulty is assessing its value when balancing it against competing rights. Not appearing to slip into the role of editor or censor is made harder by the absence of properly calibrated tools for carrying out the balance. The problem is all the more acute if the interim injunction stage effectively determines the outcome of the whole case.

I pay tribute to the scholarship that has gone into these papers. It has been a pleasure to read them and an honour to have been asked to write this foreword.

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[19] Ibid

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Introduction: The *Campbell* Legacy

Thomas D. C. Bennett and Daithí Mac Síthigh

The case of *Campbell v Mirror Group Newspapers Ltd* was decided by the House of Lords in 2004. Largely as a result of that case's introduction of novel nomenclature into the English legal lexicon – in the form of the recognition of a cause of action for 'misuse of private information' – the case quickly came to be seen as seminal for privacy rights. In the thirteen years that have now passed since the House handed down its judgments, the English law of privacy has developed considerably. This rapid period of development has thrown up a number of matters of acute controversy and it is to the study of this controversial legacy of the *Campbell* case, within and beyond England and Wales, that this collection of essays is devoted.

Prior to the *Campbell* case, privacy rights attracted only sporadic protection under the English common law. The equitable doctrine of confidence, once primarily used to protect trade secrets, had been mobilised by enterprising lawyers in the latter years of the twentieth century to protect individuals against the dissemination of their private information.[1] But as Lord Nicholls noted in *Campbell*, this state of affairs was 'not altogether comfortable'.[2] In preference to continuing down the confidence path, he preferred to speak of the law as guarding against the 'misuse of private information' ('MPI').

The emergence of MPI from the doctrine of confidence has neither been an easy nor a particularly clear-cut one. For whilst Lord Nicholls labelled it a 'tort' in *Campbell*, it was far from clear whether the other judges on the panel regarded the action as lying within the domain of equity or that of tort. In the years that immediately followed *Campbell*, this confusion persisted; counsel regularly pleaded claims in both MPI *and* breach of confidence to be doubly sure of grounding them in the appropriate legal mechanism. Courts, likewise, used the terms interchangeably for a considerable period. It was only when the High Court was forced, in *Vidal-Hall v Google Inc*, to rule on the categorisation of the MPI cause of action (for procedural reasons relating to out-of-jurisdiction service) that the judiciary finally rendered an answer. MPI is to be regarded as a tort; breach of confidence remains a parallel action in equity.

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[1] Megan Richardson, Michael Bryan, Martin Vranken and Katy Barnett, *Breach of Confidence: Social Origins and Modern Developments* (Edward Elgar Publishing Ltd 2012).
[2] [2004] UKHL 22, [2004] 2 AC 457, [14]

The fact that the lack of clarity afflicting the infancy of MPI goes so far as to call into question the very *nature* of that doctrine serves to emphasise just how controversial this area of English law has proven to be. This collection of essays highlights several discrete areas of controversy and explores the legacy that the *Campbell* case has left through detailed analysis and discussion of those controversies. There are several themes that pervade the essays in this book. Concerns about doctrinal coherence, for example, bulk large in the contributions made by Bennett and Descheemaeker, whilst the lack of clarity in judicial statements on the task of 'balancing' privacy interests against free speech are raised by both Moosavian and Wragg. Moreham and Rowbottom dwell on the rapidity of the doctrinal development in this field and the extent to which intrusive acts beyond the mere publication of private information now fall under the ambit of this tort. And, in their own ways, each author is concerned with the extent to which *Campbell*'s legacy has been to promote justice. Moreham finds the development of MPI into the realms of intrusion to be normatively appealing, whilst Rowbottom wonders whether the tort is likely to remain a useful mechanism for securing justice in the years to come. Moosavian and Wragg locate justice in the ability of courts' decisions to provide certainty for prospective litigants, whilst Bennett cautions that judges' claims to be able to promote justice by limiting the scope of judicial activism appear rather empty in the light of some unexpected doctrinal developments. At the heart of Descheemaeker's essay is the notion that justice requires some coherence of principle underpinning the tort – something he finds sorely lacking in MPI.

Nicole Moreham's essay focuses on her long-standing concern with the lack of protection in English law for intrusion-type privacy violations – an area which brings together concerns around privacy, technology, and the nature of intrusion, and has been the subject of significant developments in other jurisdictions. English law, whilst it has found ways to protect individuals from the publication of private facts (through both equitable confidence and MPI), has traditionally been 'unable, perhaps unwilling' to guard against physical or sensory intrusions into an individual's personal space or affairs.[3] Moreham scrutinises the recent judgment of the High Court in *Gulati v Mirror Group Newspapers Ltd*, which concerned a number of high-profile claims against a newspaper group for 'phone hacking'.[4] The practice of phone and voicemail hacking is found, in the judgment of Mann J, to constitute a misuse of private information. For Moreham, this has considerable significance because it indicates a willingness on the part of the Court to move MPI law beyond its traditionally narrow focus on remedying unauthorised publications of private information. By awarding damages for the activities of hacking and listening to voicemails, even where none of the information gleaned was published, the Court has moved towards recognising intrusive

[3] *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, [18]
[4] [2015] EWHC 1482 (Ch), [2016] FSR 12