

MILKY WAY AND ANDROMEDA: PRIVACY, CONFIDENTIALITY AND FREEDOM OF EXPRESSION

This article examines the extent to which the law of confidence protects private personal information. In the UK, much of the impetus for greater protection comes from the European Convention on the Protection of Human Rights and Fundamental Freedoms. How privacy and freedom of expression are to be balanced either within the law of confidence or through the development of a new tort of privacy is a question that has given rise to much discussion in the courts and elsewhere. Developments in this area are the focus of this article together with the issue as to whether similar developments might take place in Singapore.

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I. Introduction

1 In some two to three billion years, our galaxy, the Milky Way, is likely to meet its nemesis in the local galactic cluster, the Andromeda. It is thought that this galactic “mother of all collisions” will occur at a time when life may still exist on planet Earth. Whether life can survive the encounter is a matter for speculation. Some have suggested, there is so much space between the stars, that collisions between actual stars are unlikely. Even if this proves to be the case, there is no doubting the incredible gravitational tension that will arise as the two galaxies intersect and eventually merge or emerge as the case may be. It is clear that neither galaxy will look the same or feel the same after the event.¹

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1 See John Dubinski, “The Merger of the Milky Way and Andromeda Galaxies” at <<http://www.cita.utoronto.ca/~dubinski/tflops/>> (accessed 17 February 2006) and similarly at <<http://www.haydenplanetarium.org/hp/vo/ava/avapages/G0601andmilwy.html>> (accessed 17 February 2006).

2 Civilisation operates on a dynamic balance between competing rights, interests and obligations. The balance is always in a state of flux. Sometimes, small changes will suffice to restore an acceptable equilibrium. Other times, major developments in how we live, communicate, work and play will require rather larger changes. Development of modern information technology is one such example. It has called into question the copyright balance between rights of authors, copyright owners, users and the public at large. Authors and copyright owners plead that new strong rights are needed to restore the equilibrium in the light of rampant on-line copying and distribution. Users and readers cry foul: the promise that the Internet will be the information leveller will ground on the bedrock of new or strengthened rights. No, what are needed are new exceptions and qualifications to redress the imbalance. Copyleft, open source software, private use defences are what is needed: not lengthened terms of protection, obligations concerning technological measures or rights management information. The ideal is relatively easy to state (or is it?): a system that encourages and supports the creation of new works and which protects the financial investment in commercialisation and which at the same time encourages and supports access to information and use of works so that knowledge can be built on knowledge for the benefit of all. How that balance is to be achieved and whether there is any presumptive priority for some interests over others is a matter that is keenly debated between interest groups and between nations. Similarly, the long established social and legal galactic norm or right, freedom of expression, has never been a universe of its own. It has always been but one galaxy in the universe of social and legal norms and rights. One long established counterbalance is the right of an individual to protect his reputation. If defamation actions are said to carry a potential chilling effect on free speech, so too, unrestrained freedom of speech may have a chilling effect on an individual's relationship with the world at large. What has always been needed is to locate the appropriate and acceptable balance.²

2 The common law is well used to developing qualifications and exceptions to rights. It accepts that where it is necessary that rights be defined in broad open-ended terms, qualifications and exceptions become the battleground for fleshing out the right conferred. Thus, in the case of battery, the tort is defined in relatively broad and pro-liability terms: the intentional and direct application of force to the body of another person. The tort is defined in these terms because of the perceived social importance of the interest protected: the right of self-determination in the context of bodily integrity. But, even here, this is subject to the rule that contacts which are a part of the conduct of everyday life are not actionable. Life in a crowded world would be impossible if all intentional direct physical contacts were actionable. This is best seen as a qualification built into the fabric of the right protected rather than as a defence that is based on implied consent. See *Collins v Wilcock* [1984] 1 WLR 1172.

3 Of late, another right, or is it merely a value, has begun to interface much more sharply with freedom of expression. That right or value is privacy. How the social and legal tension between free speech and privacy is best resolved is the issue that has been much debated in recent times. But, unlike the future collision between the Milky Way and Andromeda galaxies, the long existing and building interface between free speech and privacy, if appropriately balanced, should do much for the quality of life in this information age. The location of this balance in England and Singapore is essentially the subject matter of this article.

II. The setting

4 The need to achieve a balance between freedom of expression and privacy is not new. In their now seminal article published in 1890, Warren and Brandeis wrote:³

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

... The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. ... The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual ...

5 The authors argued that what was needed to redress the balance was a new tort of privacy based on the “right to be left alone”.⁴ More than

3 Warren & Brandeis, “The Right to Privacy” (1890) 4 Harv L Rev 193 at 195ff. Doubtless, these sentiments would have been greatly appreciated by the American frontier man, Daniel Boone, who on seeing smoke rising from a chimney on a distant hill line, is reported to have declared that it was too crowded, prompting him to move deeper into the wilderness!

4 As suggested by *Cooley on Torts* (Callaghan and Company, 2nd Ed, 1888) at p 29. Given the inherent problems of defining privacy, it is not surprising that Warren and Brandeis concluded with a detailed list of qualifications. These set out the fence posts for the protected right. These were: (a) publication of material which was of public or general interest; (b) publication of material that would be covered as a privileged communication in defamation actions; (c) the requirement of special damage in the case of oral invasion of privacy; and (d) publication with consent. In addition, it was suggested that truth and absence of malice were irrelevant on liability issues.

a hundred years later, Lord Denning MR echoed the 1890 clarion call for a tort of privacy with his suggestion that:⁵

[A]ny unreasonable intrusion upon the plaintiff's seclusion or solitude or into his private affairs is an infringement of his right of privacy.

6 What Lord Denning was suggesting, was the development of a tort that protected privacy as a high level principle of liability: that there should be a right of privacy as opposed to mere use of privacy as a policy factor that might be taken into account in developing or explaining established causes of action such as the action for breach of confidence in respect of personal information.

7 Similarly, at the start of the new millennium in Singapore, the sentiments of Warren and Brandeis found a resounding echo in the High Court decision of *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta*.⁶ There, in the context of developing a new common law tort of harassment, Lee Seiu Kin JC explained that increasing urbanisation, the

5 Lord Denning, *What Next in the Law* (Butterworths, 1982) at p 224.

6 [2001] 4 SLR 454 ("*Malcomson*"). The defendant was employed as Assistant Vice-President of the second plaintiff in 2000. The first plaintiff was the Chief Executive Officer. The employment did not "turn out well" and the defendant resigned about three months later. Thereafter, for approximately a period of one year, the defendant made and sent numerous phone calls and e-mails to the first plaintiff. Some of these concerned requests for reinstatement. Fax messages were also sent as was a bouquet of flowers. Later, after obtaining the first plaintiff's mobile phone number, some calls were also made to that number. On another occasion, close to the anniversary of the death of the first plaintiff's infant son, the defendant sent a greeting card (celebrating births) to the first plaintiff. Various acts of trespass were also said to have been committed at the first plaintiff's home. Numerous phone calls and e-mails were also made to other employees and staff of the second plaintiff. The defendant did not file his Defence in time. Based on the statements in the first plaintiff's affidavit, the court found at [30] that:

What emerges ... is a sorry story of a person who, out of either malice or due to mental instability, had embarked on a course of conduct with such persistence that he had made life unbearable for the objects of his attention. He had used physical presence as well as telephone, mail, e-mail and SMS messages – all forms of communication available in this day and age – to wear out those people and in the process caused them much annoyance and great distress. Particularly vicious is the sending of the card with the picture of a baby rattle close to the anniversary of the death of Malcomson's son.

Viewed from a privacy perspective (right of solitude), some of the interferences complained of could be dealt with using established torts such as trespass and nuisance. However, some of the interferences were received by the first plaintiff at a place where he did not have an interest in land (or a sufficient interest in land) to support a claim in trespass or nuisance. What was needed, from the plaintiffs' point of view, was a cause of action that could take the interfering acts (phone calls, e-mails, sms messages, etc) globally, in short, a tort, which if it did not protect privacy as a high level principle of liability, covered acts of intentional harassment.

widespread availability of leisure time and new widely available communication technology had combined to create a problem which did not exist before. This was not just the increased opportunity to indulge in “fantasies” about other people – but also the greatly increased opportunity to contact and communicate with those persons by SMS, e-mail or mobile phone calls. The learned judicial commissioner concluded that:⁷

But life can be unbearable for the person who finds himself the object of attention of one who is determined to make use of these modern devices to harass. That person’s mobile phone can be ringing away at all times and in all places. He may get a flood of SMS messages, which can now be conveniently sent out by computer via e-mail. His inbox can be flooded with unwanted e-mail. These communications can be warm words of adulation or they can be chilling threats to property or personal safety. The result can range from displeasure to distress to debilitation.

...

I do not believe that it is not possible for the common law to respond to this need. In Singapore we live in one of the most densely populated countries in the world.

8 This was the setting for the acceptance by the learned judicial commissioner of a new tort of harassment in Singapore. Whilst privacy concerns clearly lay at the heart of the decision, it was accepted that any privacy right was qualified and that:⁸

There is of course the need to balance the plaintiffs’ right to privacy against Mehta’s right to free speech. However the latter right has always been subject to existing law, eg defamation, sedition ... Freedom of speech, as with any other freedom, extends to where it begins to impinge on another person’s rights.

9 The attainment of the proper balance between privacy and free speech in the context of repeated unwanted interferences resulting in

7 *Id.*, at [52] and [55].

8 *Id.*, at [56]. This article will not explore in any depth the arguments for and against a common law tort of harassment. Neither will it address the scope and limits to be woven into any such tort. Informational privacy is the main focus of this article. It should be noted that the *Malcomson* decision is based on policy considerations and might be regarded by some as tantamount to judicial legislation. This aside, it is to be stressed that the existence of a common law of harassment has not yet reached the Singapore Court of Appeal for consideration. The *Malcomson* decision was a default judgment (Defence) and thus Lee Sieu Kin JC did not have the benefit of opposing counsel’s arguments. For a discussion of *Malcomson*, see Tan Keng Feng, “Harassment and Intentional Tort of Negligence” [2002] Sing JLS 642.

emotional distress required, in the *Malcomson*'s court's view, the development of a new harassment tort.

10 If privacy is beginning to impact on the development of common law rights and obligations in Singapore, the impact in Europe has been even more dramatic.⁹ The seeds were sown shortly after the end of World War II with the coming into force of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 ("the European Convention").¹⁰ Article 8(1) sets out the European Convention right of privacy in broad terms. It covers respect for an individual's private life and family life, his home and correspondence. Article 10(1) sets out the Convention right of freedom of expression which includes

9 Aside from the *Malcomson* case (harassment), questions relating to control of spam, data collection as well as use of camera phones and voyeurism have arisen in Singapore. At present, there are proposals to introduce a US style "opt out" Anti-Spam Act in Singapore. See the Infocomm Development Authority-Attorney General's Chambers' Joint Consultation paper at <http://agcvldb4.agc.gov.sg/agc/Joint_IDA-AGC_Consultation_Paper.pdf> (accessed 17 February 2006). For a commentary, see Warren Chik, "Proposed Anti-Spam Legislation Model in Singapore: Are We Losing the War Before Even Starting the Battle?" (2005) 17 SAcLJ 747. In the case of data protection, there are no immediate plans to legislate although a self-help code of best practice is in place. It is understood that data protection is an area that will be reviewed as and when necessary. The Infocomm Development Authority in Singapore ("IDA") explains that in February 2002, the National Internet Advisory Committee ("NIAC") released a draft "Model Data Protection Code for the Private Sector" which is modelled on internationally recognised standards. The IDA and the National Trust Council ("NTC") conducted a public consultation on the code. The Model Code was then finetuned and released in December 2002 for private sector adoption. The Model Code is said to be a "generic code" that is available for adoption by the entire private sector. The Model Code applies to any private sector organisation that collects and installs personal data in electronic form, online or offline, using the Internet or any other electronic media. In the e-commerce area, the NTC has aligned its trust mark programme with the principles of the Model Code. The "Trustsg" mark is administered by the NTC and is awarded to on-line traders who meet the NTC standards for sound ecommerce standards and practices. A copy of the Model Code is available at <http://www.trustsg.org.sg/pdf/Data_Protection_Code_v1.3.pdf> (accessed 1 March 2006). For a recent article supporting data protection legislation for Singapore, see Vili Lehdonvirta, "European Union Data Protection Directive: Adequacy of Data Protection in Singapore" [2004] Sing JLS 511. In the case of voyeurism, there are no immediate plans to legislate although in some cases, existing criminal provisions may apply such as the offence concerning outraging modesty set out in s 509 Penal Code (Cap 224, 1985 Rev Ed). See also s 29 of the Films Act (Cap 107, 1998 Rev Ed) on the making and reproduction of obscene films. If the tort of harassment is confirmed, then in some cases an action for harassment may be available. The Minister for Home Affairs, Mr Wong Kan Seng, stated in Parliament on 20 July 2004 that the Government's present view is that the existing laws are adequate to deal with use of camera phones. In other cases, actions in nuisance and possibly under the rule established in *Wilkinson v Downtown* [1897] 2 QB 57 may also be relevant.

10 The European Convention entered into force in 1953.

the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”. Both rights are subject to broad qualifications that underscore important aspects of the public interest including the need to balance privacy against freedom of expression.¹¹

11 It was not, however, until the start of the new millennium that the UK passed and brought into force legislation to implement the Convention. The legislation, the Human Rights Act 1998, incorporates the values and principles of the European Convention into domestic English law.¹² Unsurprisingly, the European Convention and the Human Rights Act is proving to be a fertile ground for litigation in the UK.¹³ Many important questions have arisen including: (a) whether there is any presumptive priority for free speech over rights of privacy; (b) whether compliance with Arts 8 and 10 requires the development of a cause of action to protect privacy head on; (c) whether the Art 8 right of privacy applies not just between individuals and public authorities (vertical implementation) but also as between one individual and another individual (horizontal implementation) and (d) if the main vehicle to carry through Art 8 is the action in equity to protect confidential information, how that action is best developed or adapted so as to better incorporate the values set out in Arts 8 and 10. How the English courts

11 For privacy, see Art 8(2):

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

For freedom of expression, see Art 10(2):

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

12 The Human Rights Act 1998 (c 42) (UK) came into force in 2000.

13 These include *Campbell v MGN Ltd* [2004] 2 AC 457 and *Douglas v Hello! Ltd* [2001] QB 967; *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996 (Ch); [2006] QB 125 (CA).

appear to be dealing with these questions will be considered below.¹⁴ But, before doing so, some general points on informational privacy will be explored.

III. What is informational privacy about?

12 Privacy as a social norm is readily approachable even when couched in broad open-ended terms. But, as a factor to shape the development of legal rights and obligations and especially where privacy is advanced as a high level principle of liability, greater precision as to the scope of the right or values implicated may be necessary. This is not simply a matter of working out a range of qualifications and exceptions as these naturally beg the question: What is the right in respect of which the qualification or exception bites? Given the amorphous nature of a vague invocation of a right to be left alone in an increasingly crowded world, not surprisingly, it has been more convenient to think of privacy in terms of particular aspects of private life. Thus, in *Wainwright v Home Office*,¹⁵ Lord Hoffmann observed that whilst the US courts have been receptive to the Warren/Brandeis clarion call for a right to be left alone, it was soon apparent that “the developments could not be contained within a single principle”.¹⁶ Indeed, the US Restatement of the Law of Torts accepts that privacy encompasses four related groups of torts that deal with:

- (a) unreasonable intrusion on the seclusion of another;
- (b) the appropriation of another’s name or likeness;
- (c) unreasonable publicity given to another’s private life; and

14 Note that even before the Human Rights Act 1998, the European Convention was having an important impact in the United Kingdom. Individuals aggrieved by their failure to find a remedy in domestic UK law to protect their Art 8 rights could always launch a case at the European Court of Human Rights in Strasbourg against the UK Government. For example: *Malone v United Kingdom* [1984] 7 EHRR 14 (“*Malone*”) (telephone tapping by police in course of criminal investigation), *Halford v United Kingdom* (1997) 24 EHRR 523; [1997] IRLR 471 (telephone tapping by employers) *Earl Spencer v United Kingdom* (1998) 25 EHRR CD 105 (long lens photography), *Peck v United Kingdom* (2003) 36 EHRR 719; [2003] EMLR 15 (use of CCTV stills to publicise benefits of CCTV). In some cases, adverse findings led the UK to introduce specific legislation to deal with the issue. An example is *Malone* where as a result of a finding that Art 8 has been broken (insufficient clarity as to how the discretion to authorise tapping is exercised) the UK Government passed the Interception of Telecommunications Act 1985 (c 56) (UK).

15 [2004] 2 AC 406.

16 *Ibid*, at [16].

(d) publicity that unreasonably places the other in a false light before the public.¹⁷

13 In England and Singapore, a number of different actions may be relevant in respect of each category. In the case of intrusion into seclusion or solitude, trespass to the person (assault, battery and false imprisonment), trespass to land, nuisance, harassment (statutory or otherwise) and even the principle in *Wilkinson v Downtown*¹⁸ (intentional infliction of nervous shock) may be relevant.¹⁹ In the case of the second category, the tort of passing off and registered trade mark infringement naturally take the lead role.²⁰ In the case of the third category, the action in equity to protect confidential information is the most obvious means

17 See 4 Restatement of the Law of Torts, 2d, 1979. This classification is based on Prosser's classification. See William Prosser, *Handbook of the Law of Torts* (West Publishing Co, 4th Ed, 1971) and now *Prosser and Keeton on Torts* (West Publishing Co, 5th Ed, 1984) at p 851 that:

What has emerged is no very simple matter. As it has appeared in the cases thus far decided, it is not one tort, but a complex of four. To date the law of privacy comprises four distinct interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff "to be left alone."

18 [1897] 2 QB 57.

19 This first category might also be described loosely as "spatial privacy" or the right to be left alone in respect of quiet enjoyment of one's immediate physical surroundings.

20 Whilst there are difficulties with both passing off and registered trade mark law (goodwill, likelihood of confusion, distinctiveness and whether the use of the image or name will be seen by the public as a trade mark use: example *Elvis Presley Trade Marks* [1999] RPC 567) remedies are sometimes available even without a broad publicity right. For a successful English case under passing off, see *Irvine v Talksport Ltd* [2002] 2 All ER 414. It might be said that what is at issue here is not so much privacy as the desire to protect commercially valuable goodwill and marketing opportunities and that it is unhelpful to think of this category as an invasion of privacy. See Raymond Wacks, "The Poverty of Privacy" (1980) 96 LQR 73. But, is there any inconsistency between privacy and the desire to protect commercial interests? The reality must be that often times, information will be of a hybrid character: private information that has commercial value. The use of stringent exclusive licences to protect privacy has been recognised as legitimate and reasonable. See *Douglas v Hello! Ltd*, *supra* n 13, and especially [2006] QB 125 where Lord Phillips of Worth Matravers MR for the Court of Appeal stated at [113] that:

We can see no reason in principle why equity should not protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the nature of a trade secret.

to protect against unwanted publicity for private facts.²¹ In the fourth category, defamation and malicious or injurious falsehood are the main actions that come into play.

14 Informational privacy concerns the third category. As distinct from false light actions, informational privacy is essentially concerned with injurious revelation of true but private facts. In some cases, this may lead to consequential financial losses or nervous shock. Often times the victim will suffer mental distress, anger, humiliation and emotional hurt without any psychological injury such as nervous shock.

15 A related area concerns the fabrication of facts which whilst untrue, are not defamatory in that they do not lead to a lowering of the reputation of the victim in the minds of ordinary members of the public. This is an area which sits uncomfortably with the concept of an action to protect private facts based on the law of confidence. However much the concept of confidential information is developed to engage privacy values, privacy in the sense of informational autonomy appears to be founded on the bedrock of true but personal facts. Stretching the definition to cover invented facts which interfere with a person's private life may so greatly distort the action as to suggest that what is happening is the creation of a new tort to protect privacy *per se*, the right to be left alone, head on. Whether the law needs to go so far is a matter on which differing views will arise. But, there is likely to be agreement that even if stronger control is needed in this area, the answer is not to be found in the law of confidence however much that law is "tweaked" to incorporate

21 Wacks, *supra* n 20, asserts that the law of confidence is inadequate because of its insistence on a relationship of confidentiality. Invasions of privacy often times will take place without there being any relationship between the parties. Whilst this is clearly so, there can be no doubting that unwanted publicity for private facts is fast becoming the most important area of the privacy debate. If a new tort of privacy is undesirable, the best way forward to accommodate privacy values in this category will be to develop the action for breach of confidence. This is considered below.

privacy values.²² In his 2003 Presidential Address to the Bentham Club, Lord Phillips of Worth Matravers MR used as an example of how far privacy laws can reach, the Constitutional provisions in Germany that mandated that human dignity was “inviolable” and that “everyone has a right to the free development of his personality, insofar as he does not injure the rights of others or violate the constitutional order or the moral law”. On this basis, Lord Phillips MR noted that German law was willing to provide a remedy where a defendant published a fictitious but non-defamatory account that nevertheless encroached on the victim’s right to personality.²³

16 Given that the Prosser/US Restatement of Torts third category concerns public disclosure of embarrassing facts, what is the spirit that supports the assertion that legal liability must follow closely behind, even when the only injury is embarrassment, anger, mental distress or humiliation? As the Shakespearean tragic hero Hamlet once pondered:²⁴

To be, or not to be: that is the question:
 Whether ‘tis nobler in the mind to suffer
 The slings and arrows of outrageous fortune,
 Or to take arms against a sea of troubles,
 And by opposing end them?

- 22 Note that where actual damage is caused by the invention of untrue (but not defamatory facts), such as loss of a job or a failure to secure a job, an action for injurious falsehood may be available. The person relying on the false statement to his detriment might also have an action in deceit. It has also been suggested that in appropriate cases, an action in negligence might be available (negligent misstatement). Problems may arise, however, as to whether there is a sufficient relationship between the parties to generate a duty of care and further whether negligence is appropriate where the false statement was intentionally made with knowledge of the falsity. On the other hand, if this problem is correctly categorised as implicating privacy values, then liability should flow and a remedy should become available for false non-defamatory statements that cause mental distress or anger and humiliation. But to achieve this (assuming that it be thought desirable), a new tort of privacy will be needed.
- 23 Lord Phillips MR, “Private Life and Public Interest”, 2003 Presidential Address to the Bentham Club, University College, University of London. A copy of the address can be found posted at: <http://www.ucl.ac.uk/laws/alumni/presidents/docs/phillips_03.pdf> (accessed 17 February 2006). The German case referred to concerned publication of a fictitious interview with Princess Caroline of Monaco reported at BGH 15 November 1994, BGHZ 128,1416. How would such a case be dealt with in England or Singapore? In some cases where the false statement has the effect of depriving the victim of an opportunity to sell a story, an action for malicious falsehood might be available. See *Kaye v Robertson* [1991] FSR 62.
- 24 William Shakespeare, *Hamlet*, Act III, Scene 1, lines 56–60.

17 Stoics may reason that the slings and arrows of outrageous behaviour are part of the deal that comes with living in an ever more crowded urbanised world. Boorish behaviour, bad manners, idle curiosity and informational voyeurism are part and parcel of every day life. What is needed is thicker skin, not the taking up of legal arms against a sea of irritants and the development of mega torts that greatly expand the area of liability. Consider the related but distinct area covered by the rule established in *Wilkinson v Downtown*.²⁵ Attempts (unsuccessful) to expand liability to the intentional or reckless infliction of mental distress were met by the following counsel from Lord Hoffmann:²⁶

In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation. ... The requirement of a course of conduct [in respect of the statutory tort of harassment where mental distress damages are available] shows that Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one boorish incident. It may be that any development of the common law should show similar caution.

18 What is needed is the striking of a reasonable balance. In the area of spatial privacy (physical seclusion or solitude), the torts of trespass to land, nuisance and the rule in *Wilkinson v Downtown* have fallen short of the mark where mental distress is caused to a non-owner victim. The response has not been to carve out a blockbuster mega tort that can cover even single acts giving rise to mental distress – however boorish that behaviour might be. Instead, the balance in England is now to be found in the statutory tort of harassment with its requirement of repeated acts of interference (course of conduct) balanced off with a slate of defences including reasonableness of the conduct.

19 In Singapore, a similar judge-driven common law tort of harassment has established a tentative foothold in the legal landscape. If confirmed, close attention will be needed on the details of the action: Must the course of conduct be unreasonable and if so, is this a matter of defence or a point in establishing a case against the defendant? In England, it appears that reasonableness is structured as a defence. Some may argue with force, that the burden should fall on the victim's shoulders to prove that the conduct was not simply repetitive but also unreasonable in all the circumstances. Indeed, given the broad policy

25 *Supra* n 18.

26 *Wainwright v Home Office*, *supra* n 15, at [46].

choices that have to be made in crafting the details of the rule of liability and the range of defences, might it not be better for harassment to be developed by legislation in Singapore?

20 Similar issues arise in the area of informational privacy. Even if it is felt that the law will be more coherent and approachable with an independent tort of privacy, tricky, but familiar questions as to the role of judge-made law and Parliament arise. Who should take the lead? In their seminal article on a right to privacy, Warren and Brandeis entertained no doubts as to the suitability of this area for case law development. In tracing through the evolution of a variety of pigeon-holed actions whose common principle was said to be privacy (nuisance, defamation, trade secrets, *etc*), the authors commented that:²⁷

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition and the beautiful capacity

27 *Supra* n 3, at 195. In an attempt to forestall criticism, the authors later argued at 213 that the application of an existing principle to a new state of facts was not judicial legislation. The existing principle behind the pigeon holes was said to be privacy. But, whilst a strong case can be made for arguing that privacy is one of the *values* protected by the identified causes of action, this is not the same as stating that privacy is the governing *principle* of liability. But, Warren and Brandeis had no difficulty with this, arguing at 213 that judicial legislation was not in any case necessarily a bad thing and that:

[T]he elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever-changing society and to apply immediate relief for every recognized wrong, have been its greatest boast.

In support, the authors cited *1 Austin's Jurisprudence*, p 224 that in all countries, that part of the law made by judges has "been far better made than that part which consists of statutes". Writing almost 100 years later, Lord Denning MR would have likely agreed, given his statement that "[t]here is no obstacle in the way of the judges. It is open to them to find – as the courts of the United States have found – a new tort. English law should recognise a right of privacy": Lord Denning, *What Next in the Law*, *supra* n 5, at p 267. Similarly, whilst Sir Robert Megarry VC denied a tort of invasion of privacy in *Malone v Metropolitan Police Commissioner* [1979] Ch 344 ("the *Malone* case"), he was prepared to say at 372 that the absence of prior authority was not conclusive:

[T]here has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right.

The approach and decision of Lee Sieu Kin JC in *Malcomson*, *supra* n 6, would find support in such views. Indeed, *Donoghue v Stevenson* [1932] AC 562 and the development of negligence out of pigeon-hole categories of liability also come to mind. An analogy expressly referred to by Sedley LJ in *Douglas v Hello! Ltd* (interlocutory appeal) [2001] QB 967 at [109].

for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

21 The boundary between what might be termed “revolutionary developments” as opposed to “evolutionary changes” has never been an easy one to pin down. Few will doubt that judges and the courts must have the right or power to develop established legal principles on the time honoured “case-by-case” basis. Through the taking of small steps, by way of evolving an established action on the basis of case analogy, is how much of the common law was developed. Revolutionary developments, on the other hand, are a different matter. These tend to involve areas of broad social and economic policy and less of case-by-case analogy. Inevitably, the boundary is unclear. Case-by-case, step-by-step development generally leads to greater clarity and coherence. The establishment of new causes of action on the back of policy (as opposed to close case law analogy) by way of contrast is said to open the door to a period of uncertainty. After all, in many cases the elements of a new action will be carved out in broad terms. Exceptions may be unclear as it will take time and many cases to work out the ambit of the action and the full range of conflicting policies. In the area of privacy, there can be little doubt that the development of a new “blockbuster” tort that protects a free-standing right of privacy will be highly controversial.²⁸ Numerous interests on both sides of the divide will be implicated, leading Lindsay J to conclude that:²⁹

28 But see Sedley LJ In *Douglas v Hello! Ltd* (interlocutory appeal), *supra* n 27, to the effect that English common law had developed to the point where it would recognise a right of personal privacy.

29 *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996 at [229]. In a similar vein, see *Kaye v Roberston*, *supra* n 21, especially Glidewell LJ and Bingham LJ; and also Buxton LJ in *Wainwright v Home Office* [2002] QB 1334. On appeal to the House of Lords in the latter case, Lord Hoffmann, *supra* n 15, at [33] agreed with the observations of Megarry VC in the *Malone* case, *supra* n 27, that “this is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle”. See also Joshua Rozenberg, *Privacy and the Press* (Oxford University Press, 2004) at p 32 that the “judicial threat to legislate” in the area of privacy has been criticised by Lord Irvine of Lairg LC. Rozenberg reports that the Lord Chancellor in June 1996 stated to the House of Lords that English law did not recognise a general right of privacy and that in response to the question, should judges make one, his view was that only if “there were a clear consensus – and I am sure there is none – then I say that if judges invented a law of privacy they would seem to be taking sides”. In Singapore, Tan Keng Feng, *supra* n 8, at 646 argues against a common law of harassment stating that:

If harassment is a serious problem in Singapore, developing a new tort with its proper scope and relevant defences under the common law takes too many cases and too much time, apart from being against the scheme of the development of tort liability so far ...

So broad is the subject of privacy and such are the ramifications of any free-standing law in the area that the subject is better left to Parliament which can, of course, consult interests far more widely than can be taken into account in the course of ordinary inter partes litigation. A judge should therefore be chary of doing that which is better done by Parliament.

22 In England, the problem is compounded by the fact that successive governments and parliaments have generally been reluctant to intervene in the area of privacy. Whilst specific statutes have been passed which deal with particular aspects of privacy (such as the Protection of Harassment Act and Data Protection legislation), there is a perceived reluctance to introduce a general statutory action covering invasions of privacy.³⁰ That being so, it comes as no surprise to find that few English judges have been prepared to go so far as to support a new tort protecting privacy head on. Instead, as will be discussed later, the dominant view is that even with the Human Rights Act 1998, all that is needed is to recognise that the values of privacy and freedom of expression are to be woven into and treated as part of the fabric of established causes of action, including the action in equity to protect confidential information.³¹

23 The values protected by rights to informational privacy or informational autonomy have been described in various terms. Self-determination, dignity, esteem, respect, emotions and feelings have all been used to describe the central core of the concept. These are the values that underscore individuality and all that flows from a society that encourages individuality and creativity. Privacy, it has been said, allows the development of relationships between individuals and the fostering of trust. Beyond this, some commentators have suggested that privacy creates the conditions necessary for engagement in experiments in living. Privacy empowers the individual to develop his own character by giving him a protected area of space. It also allows the individual to edit his character and to decide to whom he is prepared to share personal

30 See Lord Phillips MR, "Private Life and Public Interest", *supra* n 23. Lord Phillips citing remarks of Lord Irvine LC and the position taken by the UK Government in *Earl Spencer v United Kingdom*, *supra* n 14, takes the position that there are clear indications that the Government was leaving it to the judges to use the tool of the Human Rights Act to build a law of privacy on the foundations of the law of confidentiality.

31 Lord Phillips MR in *Douglas v Hello! Ltd (No 3)* [2006] QB 125, however, states at [53] that he did not find the shoehorning of privacy into the law of confidence a satisfactory approach. By saying this, Lord Phillips MR appears to support the development of a new tort of privacy whether by the judges or by Parliament.

information with.³² But why should there be a right to edit true facts? Would such a law be a gateway to protecting misrepresentation, fraud and other criminal conduct? Surely not, for the most enthusiastic privacy supporter would also underscore the need for appropriate defences covering the public interest especially in areas of investigation of criminal misconduct and the like. Outside of those cases where a public interest exception applies, it is said that an individual needs a right of informational privacy so as to allow him to develop relationships with others on an individual and personal basis.

24 Viewed in this manner, informational privacy is not just a concept that interfaces with free speech. Informational privacy facilitates free speech by giving the individual the right to decide to whom and when, if ever, he wishes to speak. Informational privacy can be seen as a means of facilitating free speech. In this way, informational privacy and free speech are not galaxies on collision course – they are simply different aspects of the one and same galaxy. If this is so, constitutional provisions on free speech may provide a basis for high level recognition of privacy. This may be important for countries such as Singapore whose Constitution does not set out an express right of privacy. Even though Singapore does not have at present specific legislative provisions on privacy such as those found in the Human Rights Act 1998 (UK) and Art 8 of the European Convention, it is possible that privacy can be seen as a value that is woven into the provisions safeguarding free speech.³³ Free speech and freedom of expression are broad open-ended concepts that must be assessed by reference to qualifications and exceptions. Thus in *X Pte Ltd v CDE*,³⁴ Judith Prakash JC (as she then was) rejected an argument that the action for breach of confidence was inconsistent with the Constitutional free speech provisions set out in Art 14(1)(a) of the

32 See the excellent summary of “what privacy seeks to do” set out in N W Barber, “A Right to Privacy?” [2003] PL 602 at 604. See also the case of *Von Hannover v Germany* (No 59320/00) 24 June 2004 decision of European Court of Human Rights available at <<http://www.echr.coe.int>> (accessed 17 February 2006) and also reported at [2004] EMLR 21, where private life was said at [50] to include “a person’s physical and psychological integrity ... intended to ensure development, without outside interference, of the personality of each individual in his relations with other human beings”.

33 Singapore Constitution, Part IV sets out provisions on fundamental liberties. These deal with liberty of the person, prohibition of slavery and forced labour, prohibition of retrospective criminal laws and repeated trials, rights to equal protection, prohibition of banishment, rights of freedom of movement, freedom of speech or expression, assembly and association, freedom of religion and rights in respect of education.

34 [1992] 2 SLR 996.

Singapore Constitution.³⁵ At the time the Singapore Constitution was adopted, there was already a law in force in Singapore relating to confidence as part of the common law. That common law was not overridden by the free speech provisions.³⁶ If the vehicle for safeguarding informational privacy is the action for breach of confidence (as opposed to a new stand-alone tort), it must follow that confidentiality or privacy actions will not be inconsistent with the Singapore Constitution.³⁷ An obligation to protect confidential or private information can be seen not just as a legitimate restriction on free speech. It can be seen as a feature of free speech itself to be given the same general priority as other aspects of free speech.³⁸

35 Constitution of the Republic of Singapore (1985 Rev Ed). The current version of the Constitution is the 1999 Revised Edition.

36 This was because Art 162 of the Constitution expressly preserved all existing laws. This would include the common law in so far as it was in operation in Singapore at the time the Constitution was adopted. That being so it was not necessary for Parliament to pass a written law on breach of confidence. The point being that Art 14(2)(a) conferred on Parliament the power to derogate from the free speech provisions.

37 On this it should be noted that many of the early cases on confidential information concerned personal information of a private nature. This includes the old case of *Prince Albert v Strange* (1849) 2 De G & Sm 652; 64 ER 293 (information set out visually in etchings concerning private family scenes). Other examples are *Lennon v News Group Newspapers Ltd* [1978] FSR 573 (marital confidences), *Woodward v Hutchins* [1977] 1 WLR 760 (conduct of pop stars) and *Stephens v Avery* [1988] Ch 449 (sexual information). It would not be right to assume that with all the recent concerns over privacy and the law of confidence that the extension of confidentiality into the realm of privacy is a recent phenomenon. The fact is that the equitable action to protect confidential information has never discriminated against confidential personal information. Whilst it has been accepted that confidential information does not include trivia or “tittle tattle” it cannot be assumed that information must have a definite commercial value in order to be protected. Indeed, if unauthorised use of the information will be viewed by a person of reasonable fortitude as an affront to dignity, it is hard to see how that information could be regarded as trivia.

38 See also Eric Barendt, “Privacy as a Constitutional Right and Value, published as ch 1 in *Privacy and Loyalty* (Peter Birks ed) (Oxford University Press, 1997). Barendt argues that there is good reason to recognise privacy as a constitutional right and value even when the concept is set out in broad terms. This includes the important point that constitutionally entrenched rights and freedoms are helpful in setting out the values of a society in a way that goes beyond its use in legal disputes. Barendt also points out at p 12 that one advantage of giving Constitutional recognition to privacy is that “we do not expect constitutional freedoms to be as precisely defined as we generally do statutory rights”.

IV. Recent English developments: Turbocharging the law on confidential information

A. *Is there any presumptive priority in favour of freedom of speech?*

25 The Human Rights Act 1998 has raised a wide range of issues. Perhaps, one of the most important issues concerns whether free speech enjoys any presumptive priority over privacy. If it does, then in marginal cases where arguments are finely balanced, there will be an expectation that free speech should prevail. An assertion in favour of presumptive priority might also have an effect on where the burden of proof is to be placed: Is it for the claimant to establish that the balance requires protection on the facts for the asserted right of privacy or is it for the defendant to show that the balance (possibly assessed by reference to proportionality) requires free speech to prevail?

26 The majority, indeed close to unanimous, view of the English courts, is against reading into the European Convention or the Human Rights Act 1998 any presumptive priority. Freedom of speech and privacy are equal in importance – although on the facts of any particular case, one may well prove to be more important than the other. Thus, in *Campbell v MGN Ltd*,³⁹ Lord Nicholls of Birkenhead stated that:⁴⁰

The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been expressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual.

27 Similar remarks were made in the *Campbell* case by Lord Hoffmann,⁴¹ Lord Hope of Craighead⁴² and Baroness Hale of

39 [2004] 2 AC 457 (“the *Campbell* case”).

40 *Ibid*, at [12].

41 *Id*, at [55]:

There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is *necessary* to qualify the one right in order to protect the underlying value which is protected by the other. [emphasis in original]

42 *Id*, at [113]:

Any restriction of the right to freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life. Neither article 8 nor article 10 has any pre-eminence over the other in the conduct of this exercise.

Richmond,⁴³ and also by various judges involved in the *Douglas v Hello! Ltd* litigation.⁴⁴

28 The only English case which might give rise to some doubts is the decision of the Court of Appeal in *A v B plc*.⁴⁵ This case involved a prominent football player who was keen to restrain the unauthorised publication of sexual information arising out of brief extra-marital sexual liaisons. In an application for interlocutory relief, the court was concerned with arguments against pre-trial restraint where free speech was implicated. It will be recalled that Art 8 of the European Convention sets out a qualified right of privacy. Article 10 sets out the qualified right of freedom of expression. There is clearly nothing in these two Articles to suggest any automatic bias in favour of one over the other. The Human Rights Act requires every public authority to act consistently with the European Convention. But what of s 12 of the Act? This section applies to the grant of any relief by the court that might affect freedom of expression. In the context of pre-trial relief, s 12(3) provides “that no such relief is to be granted to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed”. Section 12(4) then states that:

The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the

43 *Id*, at [138]:

The parties agree that neither right takes precedence over the other. This is consistent with Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe, para 11:

“The Assembly reaffirms the importance of everyone’s right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.”

44 [2001] QB 967 (interlocutory appeal) *per* Sedley LJ at [136]:

Neither element is a trump card. They will be articulated by the principles of legality and proportionality which, as always, constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights. It will be remembered that in the jurisprudence of the Convention proportionality is tested by, among other things, the standard of what is necessary in a democratic society.

See also [2003] 3 All ER 996 (trial) *per* Lindsay J at [186] that:

Freedom of expression ... as a counter-force to, for example, privacy is not invariably the ace of trumps but it is a powerful card to which the court must always pay appropriate respect ...

On appeal to the Court of Appeal, [2006] QB 125, Lord Phillips MR at [82] cited the House of Lords decision in the *Campbell* case where there was agreement that “when article 8 and article 10 are both engaged, one does not start with the balance tilted in favour of article 10”.

45 [2003] QB 195.

court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –

- (a) the extent to which –
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code ...

29 Two questions arise from s 12. First, how does s 12(3) affect the standard by reference to which applications for interlocutory relief are to be determined? As is well known, the House of Lords in *American Cyanamid Co v Ethicon Ltd*,⁴⁶ in an effort to avoid costly mini-trials before the substantive hearing, held that it was no longer necessary to establish a *prima facie* case on liability before an interlocutory injunction could be granted. Instead, what the claimant had to do was to demonstrate that there was “a serious question to be tried”. Once this had been established, the court could proceed straight to factors relating to the overall balance of convenience between the parties, in particular whether damages would be adequate to safeguard the positions of the claimant and the defendant. Other factors might also be relevant including the need in some cases to preserve the status quo. In hard cases where there is no clear preference either way, the relative strengths of the parties position can be looked at – at least where one party’s case is clearly much stronger.

30 Whilst the sentiments behind the decision in *American Cyanamid* are readily appreciable, the case has given rise to some well-documented doubts. These include whether a higher threshold or a higher degree of assurance is needed where what is claimed is a mandatory interim injunction as opposed to mere prohibitory relief.⁴⁷ The reality is that the *American Cyanamid* guidelines are precisely that: guidelines which may not always have to be strictly applied. On this, there is much to be said in favour of the observation of Hoffmann J (as he then was) that there is but one fundamental principle: whether the claim is for mandatory or prohibitory relief, the court is to take the course that appears to carry the

46 [1975] AC 396 (“*American Cyanamid*”).

47 *Shepherd Homes Ltd v Sandham* [1971] Ch 340.

lower risk if it should eventually be proven wrong.⁴⁸ One area where this principle is especially pertinent is the case where the grant or refusal of the interlocutory relief is likely to dispose of the whole matter. It has long been accepted that in such cases, greater attention will have to be paid to the substantive merits of the action.⁴⁹ How then does this fit in with the requirement of s 12(3) that no pre-trial relief is to be granted to restrain publication unless the court is satisfied that the applicant is *likely* to establish that publication should not be allowed? Does this mean that a higher threshold is required – something more than a serious issue to be tried but still less than a *prima facie* case? That this might be so is not surprising given that a more detailed examination of substantive merits may already be required where the interlocutory application might prove decisive. In *Imutran Ltd v Uncaged Campaigns Ltd*,⁵⁰ Morritt VC, whilst accepting that in theory and as a matter of language a slightly higher level of probability is required under s 12(3), was of the view that in practice there will be little difference between the two. This view was described by Lord Woolf CJ in *A v B plc* as providing “useful guidance”.⁵¹

- 48 *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772 (“the *Films Rover* case”). See also Laddie J in *Series 5 Software Limited v Philip Clarke* [1996] FSR 273 that there were no fixed rules so that the relief could be kept flexible and that whilst the court should be slow to resolve complex questions of law or fact at the pre-trial stage, it might do so where it was able to form a view of the relative strengths based on credible evidence already before him. In Singapore, the approach is similar. *American Cyanamid* has been applied in many cases including *X Pte Ltd v CDE*, *supra* n 34, on breach of confidence. The observations of Hoffmann J in the *Films Rover* case were followed by the Singapore Court of Appeal in *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR 729. See also *Guardian Media Groups v Associated Newspapers Ltd* (unreported, 14 January 2000, (High Court) and 20 January 2000 (Court of Appeal)) referred to by Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford University Press, 2nd Ed, 2004) at p 1094, where it is said that the Court of Appeal acknowledged that the *American Cyanamid* guidelines had a degree of flexibility.
- 49 In England, see *Associated Newspapers Group plc v News Group Newspapers Limited* [1986] RPC 515 and *Mirage Studios v Counter-Feat Clothing Company Limited* [1991] FSR 145. In Singapore, see *Remus Innovation Forschungs-Und Abgasanlagen-Produktionsgesellschaft Mbh v Hong Boon Siong* [1995] 2 SLR 148.
- 50 [2002] FSR 2.
- 51 *Supra* n 45, at [11]. But see *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, cited by the Court of Appeal in *Douglas v Hello! Ltd (No 3)*, *supra* n 31, at [258] to the effect that in the light of s 12(3), a claimant seeking an interlocutory injunction to restrain publication had to satisfy a “particularly high threshold test”. But, on the facts of the case, Lord Phillips MR would have continued the interlocutory injunction on the basis that the claimants had a strong case that the information in the unauthorised wedding photographs was private. Aside from public curiosity, there was no public interest that justified the unauthorised publication.

31 More recently the House of Lords had an opportunity to clarify the effect of s 12(3) in *Cream Holdings Limited v Banerjee*.⁵² This case concerned an assertion of the public interest defence and an alleged misuse of confidential information by a former employee. Was there the necessary likelihood of a permanent injunction? Lloyd J, in granting the injunction, stated that whether “it was more likely than not” that a permanent injunction would be granted, the claimant had established “a real prospect of success”. After an unsuccessful appeal, the matter reached the House of Lords. There, Lord Nicholls of Birkenhead embarked on a detailed examination of s 12(3). The word “likely” was said to be capable of encompassing different degrees of likelihood ranging from “more likely than not” all the way to “may well”. That being so, it was important to set the statutory provision in its proper context. Here, Lord Nicholls stressed that s 12(3) was born out of fears that application of the *American Cyanamid* test would make it too easy to obtain interlocutory injunctions in privacy-related actions. The principal purpose of s 12(3) was, he explains:⁵³

... to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a “serious question to be tried” or a “real prospect” of success at the trial.

32 The defendant naturally asserted that this meant that “likely” had to bear the meaning of “more likely than not” or “probably” so as to raise the bar higher than the *American Cyanamid* level. The House of Lords disagreed. Lord Nicholls took the point that s 12(3) was a general provision that applied to all cases of interim prior restraint. As a general provision it was painted with a broad brush. A fixed threshold standard of “more likely than not” would not be workable in practice as it would prevent the court from granting an interim injunction in some cases where it was obvious that injunctive relief should be granted as a temporary measure.⁵⁴ For this reason, Lord Nicholls preferred a flexible or contextual meaning approach. He stated that:⁵⁵

There can be no single, rigid standard governing all applications ... Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the

52 [2005] 1 AC 253.

53 *Ibid*, at [15].

54 Lord Nicholls gives as an example a claimant who has a weak case for confidentiality but who faces extreme adverse consequences if the information is disclosed.

55 *Supra* n 52, at [22].

applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case.

33 As a starting point, Lord Nicholls suggested that the court should be "exceedingly slow" to make a prior restraint order where the applicant had not satisfied the court that he would "probably ('more likely than not') succeed at the trial". From this starting point, the court would have to consider whether there were any special circumstances that justified use of a lesser degree of likelihood such as grave adverse consequences or "where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief or any relevant appeal".⁵⁶

34 On this basis, whilst s 12(3) does set out a higher threshold for prior restraint than *American Cyanamid*, the flexible standard approach supports the view that there is no automatic priority as such for Art 10 and freedom of speech.⁵⁷ Indeed, this point was deeply underscored by the Court of Appeal in the application for an interlocutory injunction in the *Douglas v Hello! Ltd* litigation.⁵⁸ There, Sedley LJ felt that a simple "bland" application of ss 12(3) and 12(4) would result, in many cases, in the denial of the court's temporary protection – effectively giving a priority to freedom of publication over other Convention rights.⁵⁹ Sedley LJ felt that this would be inconsistent with the intention of Parliament. Section 3 of the Human Rights Act requires courts to construe all legislation in a manner that is consistent with the European Convention. This includes the Human Rights Act itself. Sedley LJ noted that:⁶⁰

The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not – and could not consistently with the Convention itself – give article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the

56 *Ibid.* Note that in England, special no prior restraint rules apply in defamation actions. These have been held to apply notwithstanding s 12 of the Human Rights Act. See *Greene v Associated Newspapers Ltd* [2005] QB 972.

57 Procedurally, of course, the assertion of a higher threshold test where Art 10 is implicated might be said to build in a bias for free speech. But, as Lord Nicholls took pains to stress, on the facts of any given application a lesser degree of likelihood of success at trial may suffice.

58 *Supra* n 27.

59 *Ibid.*, at [135].

60 *Ibid.*

United States' courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.

35 Even more clearly, Keene LJ stated that s 12(3):⁶¹

... does not seek to give a priority to one Convention right over another. It is simply dealing with the interlocutory stage of proceedings and with how the court is to approach matters at that stage in advance of any ultimate balance being struck between rights which may be in potential conflict. It requires the court to look at the merits of the case and not merely to apply the *American Cyanamid* test. Thus the court has to look ahead to the ultimate stage and to be satisfied that the scales are likely to come down in the applicant's favour. That does not conflict with the Convention, since it is merely requiring the court to apply its mind to how one right is to be balanced, on the merits against another right, without building in additional weight on one side.

36 Returning to the *A v B plc* decision, the second question under s 12 concerns the extent to which a general invocation of free speech *per se* is helpful outside of free speech to protect specific public interest matters. Here, Lord Woolf CJ set out an extensive list of guidelines to assist the courts. One important and controversial guideline relates to the direction in s 12(4) to pay particular regard to freedom of speech as well as any public interest for the material to be published. On this, Lord Woolf CJ chose to deeply underscore the importance of a free press:⁶²

Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified. ...

The fact that under section 12(4) the court is required to have particular regard to whether it would be in the public interest for the material to be published does not mean that the court is justified in interfering with the freedom of the press where there is no identifiable special public interest in any particular material being published. ... Regardless of the quality of the material which it is intended to publish *prima facie* the court should not interfere with its publication. Any interference with publication must be justified.

61 *Id.*, at [150]. Keene LJ did, however, accept that since it was necessary to pay regard to the merits, that the effect of s 12(3) was to make prior restraint more difficult. Under English law, this would not be a novel result as is demonstrated by English defamation cases.

62 *Supra* n 45, at [11].

37 Even though Lord Woolf CJ was not saying that there is presumptive priority for free speech, the heavy underscoring of the importance of the defendant being a news organisation inevitably will mean that claimants face an uphill task. Indeed, the 12th Guideline propounded by Lord Woolf CJ goes further and states that whilst even public figures are entitled to privacy (in appropriate circumstances):⁶³

The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. ... The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to state that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so legitimate interest in being told the information. ... The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.

38 These guidelines place considerable emphasis on free speech and the role of the press as the main vehicle for venting public free speech. Has the pendulum now swung too far in favour of free speech at the expense of privacy and other counterbalancing rights? Is the commercial profitability/viability of a newspaper on its own a sufficient or significant reason for allowing free speech to prevail? If so, is there a danger that effectively free speech – especially where the defendant is a news agency, has become the ace of trumps?

39 Public interest has long been established as the main defence in actions for breach of confidence. Application of the defence has always required a balancing of the public interest said to justify the unauthorised use of confidential information and the interest that the claimant has in maintaining the duty of confidence. In this context, it has been accepted that the balance is not between a *public interest* of the defendant and the *private interest* of the claimant. Instead, what the law is seeking is a

balance between two different facets of the public interest.⁶⁴ Even more significantly, Stephenson LJ took the position that there was considerable difference between information which was merely interesting to the public and information which should be made known in the interests of the public. The public interest defence was and is not a “gossiper’s charter” and the interest of media organisations in publishing what appeals to the public and in increasing circulation or viewers is not necessarily the same as the public interest.⁶⁵

40 Unsurprisingly the remarks of Lord Woolf CJ have proved controversial. Even journalists have queried whether the case had been overstated.⁶⁶ The comparison to be drawn for the purposes of the balancing exercise in the context of the public interest defence is not between some abstract concept of public interest but between the specific public interest that is said to be relevant and any specific policy reasons that might be relevant to underscoring of the claimant’s right of privacy.⁶⁷ Lord Woolf on the other hand suggests that even where there is no specific public interest reason that might justify unauthorised publication, the general claim to free speech and a free press may be sufficient, or at least a significant factor, in deciding where the balance lies. If this means no more than to say privacy claims must always be

64 *Lion Laboratories Ltd v Evans* [1985] QB 526 per Stephenson LJ.

65 See also *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 where Sir John Donaldson MR repeated Lord Wilberforce’s observation in another case that the media are apt to confuse the public interest with their own interest. The case referred to is *British Steel Corporation v Granada Television Ltd* [1981] AC 1096. See also the observations of Jacob J (as he then was) in *Hyde Park Residence Ltd v Yelland* [1999] RPC 655 that the defence was not of wide scope and would only succeed where no right thinking member of the public would quarrel with the result.

66 See Rozenberg, *supra* n 29, at p 57 that there was a fear that the balance was so far tilted in the direction of the press that the Government would come under pressure to legislate. The author is a trained lawyer and is the legal editor of the *Daily Telegraph* and an Honorary Bencher of Gray’s Inn.

67 See *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 per Lord Steyn, who after referring to the *Campbell* case, *supra* n 39, states at [17]:

What does, however, emerge ... are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.

For a description of the proportionality principle, see Rozenberg, *supra* n 29, at p 94 that “this principle derived, originally, from nineteenth century Prussian law and developed subsequently by the Human Rights Court – requires there to be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective”. Put in a different way: The end, however laudable, will not justify all means to achieve that end result.

balanced against the Convention right of free expression, then the guidelines are less controversial. To that end, it is worth pointing out that this was the interpretation taken by Lord Phillips MR in the subsequent *Campbell* litigation. Lord Phillips, after quoting the same passage, explained that when Lord Woolf stated that the public had an understandable and legitimate interest in being told information, including trivial facts about a public figure (in the name of free speech), he was not speaking of private facts which a fair-minded person would consider it offensive to disclose and that:⁶⁸

For our part we would observe that the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay.

41 That different public interest issues carry a different weightage or importance is obvious: there will always be a sliding scale. At the very high end will be information concerning serious specific criminal misconduct or acts of terrorism and the like. At the lower end may be information that a public figure has been economical with the truth as to his or her virtues. How serious that failing will be judged to be must depend on the specifics of each case, such as the nature of the public prominence (politician, trustee, community leader, judge, educator, through to pop stars and sports stars and the like), whether there has been a deliberate courting of favourable publicity, whether the claimant publicly claimed the position of role model, the nature of the failing (dishonesty, sexual misbehavior and so forth) and the nature of the relationship if any between the claimant and the defendant. At some point public interest will of course blur into information that is merely entertaining or interesting. But, then again, just because the information is “entertaining” does not mean that no public interest can exist that supports disclosure. There can be no fixed rule as to when the border, between interesting information and information which the public has a legitimate interest in receiving, is reached. It must depend on all the facts

68 *Campbell v MGN Ltd* [2003] QB 633 at [40]–[41]. But, surely this must in turn depend on the nature of the prominence, the position that the claimant holds and the reason why he has feet of clay.

of the case.⁶⁹ Similarly, from the perspective of the claimant, what is needed is a careful examination of whether there are any specific reasons as to why the claimants' right to informational self-autonomy is especially important. In a way, this was what proved determinative in the *Campbell* case at trial. There the majority of the House of Lords found that the claimant's right of confidentiality/privacy had been breached by revelations of the details of her medical treatment for a drug addiction – and especially so by the publication of a photograph showing her leaving a treatment session. That there was a public interest to correct the false impression that the claimant was not involved in drugs (and therefore a role model) was accepted. But given the importance to the claimant and the public at large that she should continue with the treatment at the clinic, publication of the details was regarded as excessive. The majority found that it would have been sufficient to meet the public interest through a revelation that the claimant had taken drugs and was being treated for an addiction.⁷⁰

42 Thus, it seems that in England, whilst the claimant is under a duty to establish a case for grant of an interlocutory injunction and whilst this will inevitably require an examination of the merits and a balancing of circumstances which underscore privacy and freedom of expression, there is no automatic priority either way. To be fair, the need to balance

69 Where the information is as much a part of the defendant's life story as the claimant's, a distinction may be drawn between long-term and transient relationships. As between husband and wife, for example, marital confidences even though shared remain protectable even if one spouse wishes to exercise her right of free speech and to tell her own life story. See *Argyll (Duchess) v Argyll (Duke)* [1967] Ch 302 and also *Lennon v News Group Newspapers Ltd*, *supra* n 37. But where the relationship is purely transitory, such as an illicit affair, the position may be different. The transient lover who has kissed and now wishes to tell asserts that an injunction will affect her right to tell her own life story. In such cases, the courts may be slower to grant interlocutory relief especially in the presence of even relatively weak but real public interest such as role model arguments. This was the result in *A v B plc*, *supra* n 45. But see *Theakston v MGN Limited* [2002] EMLR 22 where publication of a written report (detailing a sexual encounter) was allowed but not photographs of the activity. The latter was regarded as a gross invasion of the claimant's privacy. See the observations of N W Barber, *supra* n 32, at 607.

70 *Campbell v MGN Ltd*, *supra* n 39.

sliding scales on either side of the divide was recognised by Lord Woolf CJ in his guidelines.⁷¹

43 The position is likely to be similar in Singapore. Even without a provision like s 12(3) of the Human Rights Act, it has been accepted that the *American Cyanamid* guidelines incorporate a degree of flexibility so as to allow, in the name of fairness, a consideration of the merits of each side's case in appropriate circumstances. In some cases, in the name of fairness, a higher degree of assurance may be needed. However, even though the Singapore Constitution sets out an express right of freedom of expression (without mentioning a right of privacy), it does not follow that freedom of expression enjoys presumptive priority *as such*. Freedom of expression must be balanced against qualifications recognised by the laws of Singapore. This includes the action to protect confidential information. In any case, as suggested earlier, privacy may be best seen as an aspect of free speech. In which case, what is required is a balancing of different aspects of the one right. This is not so dissimilar from the observation of Stephenson LJ in *Lion Laboratories Ltd v Evans*⁷² that application of the public interest defence does not involve resolution of a conflict between a private interest and a public interest – the balance is between competing aspects of the public interest.

B. Do the Human Rights Act and the European Convention have horizontal effect?

44 A second general issue of some importance concerns whether Arts 8 and 10 have horizontal effect as between individuals in addition to

71 See *A v B plc*, *supra* n 45, at [11], on Guideline (vii) that “the weaker the claim for privacy” the more likely it will be outweighed by the claim based on freedom of expression. But of course the relative strength of the claim for freedom of expression needs to be factored in. On this, note that whilst the Court of Appeal had discharged the interlocutory injunction in the *Douglas* case (essentially on an adequacy of damages point), *supra* n 58, a different Court of Appeal in the substantive appeal felt that the injunction should have been continued. The information was clearly private as well as having a commercial value. Lord Phillips MR accepted that even where there is a strong case for privacy that there may be good reason to discharge the interlocutory injunction. But this was not such a case. There was no specific public interest to justify publication of the unauthorised wedding pictures. The fact that the pictures might satisfy public curiosity was not enough – especially as authorised wedding pictures were to be shortly published. Damages would not be adequate to compensate for the invasion of privacy and the consequential mental distress. See *supra* n 31, at [251]–[259].

72 *Supra* n 64.

vertical effect as between public authorities and individuals.⁷³ Naturally, this was an issue of fundamental importance in both the *Douglas* and *Campbell* litigation. In *Campbell v MGN Ltd*, the House of Lords, without deciding the question as to whether the European Convention had direct horizontal effect, had no doubt that the values enshrined in Arts 8 and 10 were now part of the cause of action for breach of confidence. Further, these values were said to be as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper, as they were in disputes between an individual and a public authority. The question of direct horizontal effect in a way is also related to whether there is an obligation to carve out a new tort specifically to cater for the concerns of Arts 8 and 10. The House of Lords in the *Campbell* case did not think this was necessary as the values underscored by both Articles could be recognised by incorporation into the action for breach of confidence, an action that is of course applicable whether the defendant is an individual, a non-governmental organisation or some public authority.⁷⁴

45 More recently, the European Court of Human Rights has come down firmly in favour of giving effect to Art 8 in relationships between individuals. In *Von Hannover v Germany*, a case concerning publication of unauthorised photographs of Princess Caroline of Monaco, the European Human Rights Court held that:⁷⁵

[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves ...

46 The English courts will, of course, have to take the European Court of Human Rights jurisprudence into account – a fact not lost on the Court of Appeal in the recent substantive appeal in the *Douglas*

73 See Gavin Phillipson, “Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act” (2003) 66 MLR 726; William Wade & Christopher Forsyth, *Administrative Law*, (Oxford University Press, 8th Ed, 2000) and Jonathan Morgan, “Privacy, Confidence and Horizontal Effect: ‘Hello’ Trouble” [2003] CLJ 444.

74 See *Campbell v MGN Ltd*, *supra* n 39, especially Lord Nicholls at [15]–[19]; Lord Hoffmann at [49]–[52] and Baroness Hale at [134]. Similar remarks were made in *A v B plc*, *supra* n 45, by Lord Woolf CJ.

75 Case of *Von Hannover v Germany*, *supra* n 32, at [57].

litigation. There, Lord Phillips MR accepted that the European Human Rights Court recognises an obligation on member states to protect one individual from an unjustified invasion of private life by another individual and an obligation on the courts of a member state to interpret legislation in a way to achieve that result.⁷⁶ This did not mean, however, that English law is now bound to give “full direct horizontal effect” since the values protected by the Articles might be shoehorned into the action to protect confidential information.⁷⁷ The question that remains, is how this is best accomplished. Can common law and equity act as the fairy godmother to Cinderella (privacy) and adapt the action so as to better safeguard privacy and free speech through the law of confidential information? Can the action be given new clothes to wear? As Lord Nicholls put it in the *Campbell* litigation:⁷⁸

Articles 8 and 10 call for a more explicit analysis of competing considerations than the three traditional requirements of the cause of action for breach of confidence identified in *Coco v A N Clark (Engineers) Ltd* ...

C. *Turbocharging the action for breach of confidence*

47 Whilst much of the case law developing the action protecting confidential information concerns commercial confidences and trade secrets, English common law and equity has never in fact limited the action to information that has commercial value and which is intended to be used for commercial purposes. A century before the European Convention, English common law and equity had already started developing a law on confidential information that did not draw sharp distinctions between types of information. What was important was whether the information was confidential. If so, it did not matter whether the information was commercial or personal in nature. Indeed, it will be recalled that some of the very earliest English cases in this area concerned

76 *Douglas v Hello! Ltd (No 3)*, *supra* n 31, at [49].

77 *Id.*, at [53] *per* Lord Phillips MR:

We conclude that, in so far as private information is concerned, we are required to adopt, as the vehicle for performing such duty as falls on the courts in relation to Convention rights, the cause of action formerly described as breach of confidence. As to the nature of that duty ... [t]he court should, in so far as it can, develop the action ... in such a manner as will give effect to both article 8 and article 10 rights. In considering the nature of those rights, account should be taken of the Strasbourg jurisprudence. In particular, when considering what information should be protected as private pursuant to article 8, it is right to have regard to the decisions of the European Court of Human Rights.

78 *Supra* n 39, at [19]. *Coco v A N Clark (Engineers) Ltd* is reported at [1969] RPC 41.

actions in connection with confidential information whose importance lay solely in their impact on human dignity and feelings.⁷⁹ Nevertheless, it is fair comment that the vast majority of cases developing the action have been concerned with commercial confidences. The question now is how the action is best adapted to better safeguard rights of privacy.

48 The seminal English case often said to lie at the heart of the modern law on confidential information is the decision of Megarry J in *Coco v A N Clark (Engineers) Ltd.*⁸⁰ Three key elements were identified: the information had to possess the necessary quality of confidence; the information had to be imparted in circumstances importing an obligation of confidentiality; and finally, there had to be unauthorised use of the information to the detriment of the confider. Each of these three elements has been considered in great detail in a large number of cases. Some of the areas that might prove especially problematic in the context of privacy values are summarised below.

79 *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171. This case is often cited as laying down the foundations for the development of English law on confidential information. The case concerned a threatened unauthorised use of visual information set out in etchings of family scenes. Whilst a variety of theories were advanced to support the grant of an injunction, Sir Knight Bruce VC in the lower court, *supra* n 37, at 698; 313 also noted that the defendant had not just unlawfully invaded the plaintiff's rights, he had also been guilty of "an unbecoming and unseemly intrusion ... in breach of conventional rules" and "offensive to that inbred sense of propriety natural to every man". The defendant's conduct was described as "a sordid spying into the privacy of domestic life". See also *Wyatt v Wilson*, cited in *Prince Albert v Strange* (1820) 1 H & Tw 1 at 25; 47 ER 1302 at 1311. In *Wyatt v Wilson*, Lord Eldon had said "If one of the late king's physicians had kept a diary of what he had heard and seen, this Court would not in the king's lifetime, have permitted him to print or publish it." Lord Denning, writing extrajudicially, notes, "That observation is significant. It is the first instance I know of a right of privacy as distinct from a right of confidence": see Lord Denning, *What Next in the Law*, *supra* n 5, at p 222. An important side question that arises is whether an action for breach of confidence/privacy can be maintained or brought after death of the claimant. In defamation cases, it is established that the dead cannot be defamed. See Margaret Brazier & John Murphy, *Street on Torts* (Butterworths, 11th Ed, 2003) at 484. Given the intensely personal nature of privacy interests, it may be that a similar rule will apply in the case of the use of the law of confidential information to protect personally sensitive (private) information. But, query the dividing line between business trade secrets/confidential information and confidential personal information. Even the most personal private details of a celebrity may possess considerable commercial value whose use has been "sold" or licensed to some third party commercial organisation.

80 [1969] RPC 41 ("*Coco v Clark*"). Megarry J based his decision on an earlier Court of Appeal case: *Saltman Engineering Coy Ltd, Ferotec Ld and Monarch Engineering Coy (Mitcham), Ld v Campbell Engineering Coy, Ld* (1948) 65 RPC 203 ("*Saltman Engineering v Campbell Engineering*").

(1) *Quality of confidentiality*

49 By and large this is said to require proof that the information is not in the public domain in that the information is relatively secret in the sense that it is not readily accessible to the public.⁸¹ Whilst this is primarily a question of fact, numerous guidelines have been developed. These include:

(a) Information as a whole can be confidential even if component parts are accessible from the public domain.⁸²

(b) The information alleged to be confidential must be sufficiently well developed. Whilst the provenance of this requirement is not exactly clear, it is suggested that the requirement is as much to do with the need to enable the defendant to meet the claimant's case as with substantive principles. Factors relevant to whether the information is sufficiently well developed include whether the information (if said to embody a new idea) is realisable in actuality and whether it has been developed to the point where it acquires some commercial attractiveness. Ultimately, it is suggested that what is needed is proof that the information said to be confidential can be defined with sufficient objective certainty such that the defendant can understand the case being put to him.⁸³

(c) A good test as to whether information is confidential is whether it is a product of brain labour and effort (bearing in

81 *Coco v Clark*, *supra* n 80. See also in New Zealand, *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* (1985) 5 IPR 353 *per* Prichard J at 379 that:

[I]t is a question of public accessibility, a question of degree – for the extent of the publicity and the difficulty of acquisition are both matters of degree. If, for example, the information can be obtained by a member of the public by a process of reverse engineering or analysis of the plaintiff's product this does not mean that the information is readily available to the public ... The fact that there has been publication in an evanescent form ... on a limited scale ... is not, in itself, sufficient to destroy the quality of confidentiality.

82 *Coco v Clark*, *supra* n 80, *Saltman Engineering v Campbell Engineering*, *supra* n 80, *De Maudsley v Palumbo* [1996] FSR 447 and *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289. Note that whilst the cases establish that information as a whole may be confidential even though some or all of the component parts are in the public domain, it does not inevitably follow that the combination of public domain components will always produce something that is confidential as a whole. Sometimes, 1+1 = 1+1 and not even 2!

83 *Talbot v General Television Corporation Pty Ltd* [1981] RPC 1 and *Fraser v Thames Television Ltd* [1984] QB 44. In Singapore, see also *Chiarapurk Jack v Haw Par Brothers International Ltd* [1993] 3 SLR 285.

mind that inventiveness is not required). The more brain effort that is expended on producing the information, the greater the probability that the information is inaccessible to the public by reference to that effort.

(d) Simplicity is no bar and there is no requirement as such for the information to be reduced to writing or some other material form.⁸⁴

(e) Trivial information or tittle-tattle is not protected.⁸⁵

(f) Whether the claimant believed that the release of the information would be injurious to him or harmful to others and the reasonableness of the belief are important indicators of the confidentiality of the information.⁸⁶

50 How well do these points fit a case where the claim is asserted in respect of personally sensitive information? If the action is to be successfully developed to better recognise the value of human autonomy and dignity that is said to underline the desire to protect informational privacy, a number of points come to mind. First, whilst brain labour and effort of creating information may be relevant in commercial cases, this factor should not come into play where personally sensitive information is concerned.⁸⁷ If the effort of the claimant is relevant at all in the context of personally sensitive information, it is more likely that this will only be so in terms of the effort that he has taken to protect the privacy of the information. The greater the steps taken, the more likely that the courts will be moved to hold that the circumstances were confidential or private and the less the likelihood that the court might find some form of implied consent flowing from the conduct of the claimant.

51 Second, the requirement that the information must be sufficiently well developed also needs to be re-examined at least where the claim is directed to personally sensitive information. Tests based on whether the information has been developed to the point where the idea can be actualised or possesses some commercial attractiveness are clearly inappropriate. Instead, it is suggested that the enquiry should focus

84 *Talbot v GTV*, *supra* n 83 and *Fraser v Thames TV*, *supra* n 83.

85 *Coco v Clark*, *supra* n 80, *Stephens v Avery*, *supra* n 37, and *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (“AG v Guardian Newspapers”).

86 *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227.

87 This was recognised by Lord Phillips MR in *Douglas v Hello! Ltd (No 3)*, *supra* n 31, at [55].

sharply on whether the claimant is able to identify the personal information that he wishes to protect with reasonable objective certainty. If successful claims are advanced based on some vague open-ended description of the information that is said to be “confidential” or “private”, the chilling implications for freedom of expression will be clear.

52 Third, there is the problematic exclusion of protection for trivia and tittle-tattle. Whether this exception is based on a lack of quality of confidentiality or a denial of equitable relief on the basis that equity does not act in vain, there appear to be few cases where the exclusion has applied. Will it play a more significant role in cases where the action in equity concerns personally sensitive information? The fact that personal information may have no or little immediate commercial value is clearly irrelevant. As Lord Hoffmann has eloquently put it, human rights law has identified private information as something worth protecting as an aspect of human autonomy and dignity – the right to the esteem and respect of other people.⁸⁸ But, does this mean that *any* personal information or personally sensitive information can be protected irrespective of its nature and the circumstances in which protection is claimed? These are not easy questions to resolve. In England, there appears to be a building consensus that the description of information about an individual’s private life as confidential is “not altogether comfortable” and that “[t]he essence of the tort is better encapsulated now as misuse of private information”.⁸⁹ The shift from “confidential” to “private” information is not simply a matter of changing labels; it appears to herald a real shift in scope – not surprising given the objective to underscore the values underpinned by Art 8 of the European Convention. As Lord Hoffmann has said:⁹⁰

These changes have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and

88 *Campbell v MGN Ltd*, *supra* n 39, at [50] and [51].

89 Lord Nicholls, *id*, at [14]. See also Lord Carswell at [165] and Lord Hope at [92]:

The underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the information that was disclosed was private and not public. There must be some interest of a private nature that the claimant wishes to protect ...

Similarly, see Lord Phillips MR in *Douglas v Hello! Ltd (No 3)*, *supra* n 31, at [83] that for the adjective “confidential” one can substitute the word “private”. But see also Lindsay J at first instance in the *Douglas* case who felt that the matter could be resolved by applying established principles of the law of confidence, [2003] 3 All ER 996.

90 *Supra* n 39, at [52].

form of publication which attracts a remedy and the circumstances in which publication can be justified.

Of even greater significance, is the view of Lord Phillips MR that private information “must include information that is personal to the person who possesses it and that he does not intend shall be imparted to the general public”.⁹¹ This of course leads to the question: When does an individual possess personal information such as to generate a right of control? Is it enough that the information be personal or must there be some reasonable expectation of control? Whilst the English position on what amounts to “private” information is still very much a work in progress, the following points appear to have emerged.

53 Firstly, an exhaustive definition of private information in the sense of a list of types of information that can be regarded as personal or private is clearly not possible or desirable.⁹²

54 Secondly, the torch-light that illuminates what might be encompassed, is the value that is said to be underscored by a claim to privacy: dignity and human autonomy.⁹³ Privacy is therefore more than a desire to control the use of personal information.⁹⁴ However privacy is defined as a general concept, it will stretch beyond the misuse of personal information. The action in equity to protect confidential information,

91 *Douglas v Hello! Ltd (No 3)*, *supra* n 31, at [83].

92 Such a list would include but not be limited to information on health, sexual preferences or conduct, religion and beliefs and hobbies.

93 See especially the views of the European Court on Human Rights. *Peck v United Kingdom*, *supra* n 14, at [57].

Private life is a broad term not susceptible to exhaustive definition. The court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Art 8. The Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life” ...

See also *Von Hannover v Germany*, *supra* n 32, at [50]:

The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person’s name ... or a person’s picture ...

Furthermore, private life, in the Court’s view, includes a person’s physical and psychological integrity; the guarantee afforded by Art 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings ...

94 Lord Nicholls gives as an example of this, strip-searches. *Campbell v MGN Ltd*, *supra* n 39, at [15]. See also *Wainwright v Home Office*, *supra* n 15, where the House of Lords refused to recognise a general tort of invasion of privacy where the claimant had been strip-searched in breach of prison rules.

even when expanded to cover private information, will not be relevant where the complaint does not relate to misuse of *information*.

55 Thirdly, whilst an important indicator of privacy is that the personal information is not already readily available to the public at large, the concept of private information may be more resilient and resistant to public exposure than in the case of confidential commercial information.⁹⁵

56 Fourthly, a particularly strict view (in favour of privacy) appears to apply in cases involving photographs, especially where the images are of an intimate nature. Even if the intimate scene has been described verbally or in writing to the public, the photograph may still be regarded as retaining a degree of privacy.⁹⁶ But just how far this can be taken is unclear. Where a person is photographed in a public place, this in itself will not ordinarily be seen as an invasion of privacy.⁹⁷ Of greater significance is any use made of the photograph. Unforeseeably broad exposure of the images might well implicate an Art 8 right of privacy,

95 *Douglas v Hello! Ltd (No 3)*, *supra* n 31, at [105] *per* Lord Phillips MR that:

In general, however, once information is in the public domain, it will no longer be confidential or entitled to the protection of the law of confidence, though this may not always be true ... The same may generally be true of private information of a personal nature. Once intimate personal information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication.

96 *Theakston v MGN Limited*, *supra* n 69 (English High Court), *D v L* [2004] EMLR 1 (English Court of Appeal), *Von Hannover v Germany*, *supra* n 32 (European Court of Human Rights) and especially Lord Phillips MR in *Douglas v Hello! Ltd (No 3)*, *supra* n 31, at [105] that:

In so far as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion on privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it. To take an example, if a film star were photographed, with the aid of a telephoto lens, lying naked by her private swimming pool, we question whether widespread publication of the photograph ... would provide a defence to a legal challenge to repeated publication on the ground that the information was in the public domain. There is thus a further important potential distinction between the law relating to private information and that relating to other types of confidential information.

97 *Campbell v MGN Ltd*, *supra* n 39, at [73] *per* Lord Hoffmann citing the Australian case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 where Gleeson CJ stated at [41] that “[p]art of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people”.

even if the taking of the photograph *per se* is unobjectionable. This is especially so if the images are of a highly sensitive nature.⁹⁸

57 Fifthly, even where there is nothing intrinsically embarrassing about an image recorded of the claimant in some public setting or the context in which the photograph is used, privacy may still be implicated although here the current legal position is far from clear. Will the image still be regarded as private? English views have tended to be skeptical on this. In Canada, much may depend on whether the image of the claimant was only incidentally included in the photograph or whether he or she was in fact intended to be the main subject.⁹⁹ In Europe, the recent decision of the European Court of Human Rights in *Von Hannover v Germany*,¹⁰⁰ however, represents a significant enlargement of the area of privacy. There, it was held that the publication of photographs of Princess Caroline of Monaco infringed her Art 8 right of privacy even though the photographs were taken of her in public places. These showed the Princess engaged in a variety of private or personal daily activities such as shopping and horse riding. The photographs did not show her carrying out any official duties and in this sense showed her taking part in activities of a private nature. What was important was not whether the place where the activity occurred were public or private premises, but whether the activity could properly be regarded as private.¹⁰¹ It remains to be seen how the English courts will interpret and apply the *Von Hannover v Germany* ruling on this point.

98 See *Peck v United Kingdom*, *supra* n 14, where the European Court of Human Rights found Art 8 engaged where CCTV images of the claimant carrying a knife (attempted suicide) in a public place was widely broadcast without the claimant's consent and without adequate masking of his face. See also *Campbell v MGN Ltd*, *supra* n 39, at [75] *per* Lord Hoffmann that "the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information". Note that Lord Hoffmann was also prepared to accept at [75] that the publication of a photograph taken by intrusion into a private place might in itself be an infringement even if there was nothing embarrassing about the picture itself.

99 See *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591.

100 *Supra* n 32.

101 Once the activity is found to be private, liability for unauthorised publication would follow subject to any justification based on the public interest. Here, the European Human Rights Court stressed at [65] that the publication of photographs and articles simply "to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public". Note that according to the list of pending cases (ECHR website) before the Grand Chamber of the European Court of Human Rights (as at 15 August 2005), it does not appear that the *Von Hannover v Germany* has been taken on a referral to the Grand Chamber.

58 Sixthly, it is unclear whether the issue as to whether personal information is private is to be resolved solely on the basis of whether the claimant intended to keep the information out of public view. Whilst there is some support for this, there is the alternative view that an objective test must come into play.¹⁰² In the *Campbell* case, Lord Nicholls explained that the “touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy”.¹⁰³ In most cases, the answer will be obvious. In marginal cases, there is uncertainty as to whether a further test based on whether the misuse is offensive (or highly offensive) in the eyes of a reasonable person is permissible or helpful. Courts in New Zealand and Australia appear receptive to this.¹⁰⁴ English case law is far more ambivalent. Starting with the *Campbell* litigation, different views have been expressed. Lord Nicholls felt that a test based on whether the misuse was highly offensive suggested a stricter standard than a mere reasonable expectation of privacy. The danger was that such a test might bring into play issues more relevant to the question of proportionality, such as the degree of intrusion into private life and whether the publication was a matter of proper public concern. This, it is submitted, is a critical point. Given the need to balance privacy against freedom of expression, where is the fulcrum for the balancing exercise to be found? Free expression and free press advocates will naturally support dovetailing the balancing exercise into the initial threshold question as to whether there is any information that can properly be regarded as private. Locating the fulcrum at this early stage places the duty on the claimant to demonstrate that as a whole (bearing in mind public interest concerns) the information can properly be regarded as private. On the other hand, a test that simply asks whether the information is personal and within the private sphere, postpones the key balancing exercise to the later stage when the defendant must find

102 Cases that support a broad interpretation based on a heavy underscoring of the claimant’s right to develop his personality include *Von Hannover v Germany*, *supra* n 32 and *Douglas v Hello! Ltd (No 3)*, *supra* n 31.

103 *Supra* n 39, at [21].

104 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, *supra* n 97, per Gleeson CJ that the requirement that the disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many cases a useful practical test of what is private. See also *Grosse v Purvis* [2003] QDC 151 where the Queensland District Court found that a tort of privacy had developed in Australia capable of covering intrusions which would be considered highly offensive to a reasonable person of ordinary sensibilities. In New Zealand, see *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 and also *Hosking v Runting* [2003] 3 NZLR 385 (HC) and [2005] 1 NZLR 1 (CA). See also the US Restatement of the Law of Torts (1977) that the tort of unreasonable intrusion on the seclusion of another is founded on intrusions which are highly offensive to a reasonable person.

some public interest that might justify the unauthorised use. Lord Hope was more accommodating. His Lordship, whilst stating that the test is not needed where the information is obviously private (presumably based on the views and expectations of a reasonable person), went on to state that the trial judge could nevertheless ask himself as a check whether the information would satisfy the highly offensive test!¹⁰⁵ Baroness Hale, on the other hand, stated that an objective reasonable expectations test was simpler and clearer than “the highly offensive test” that appeared to have found favour in Australia. Baroness Hale’s position also supports the view that the fulcrum for the key balancing exercise between a reasonable expectation of privacy and free expression comes after there is a finding that the information is private. It is here that the Baroness explains that the countervailing rights of the recipient will often prevail.¹⁰⁶

59 In the *Douglas* litigation, numerous different views were also expressed on this issue. At trial, Lindsay J doubted that it was permissible to ask whether the information was private in the sense that its disclosure would be significantly harmful. In any case, on the facts, it was not necessary to examine whether a reasonable person would have found the unauthorised publication to be highly offensive.¹⁰⁷ On appeal, Lord Phillips MR, after citing the various views set out in the *Campbell* case, concluded with the general statement already referred to earlier: private information is personal information which a person possesses and which he does not intend to impart to the public.¹⁰⁸ Doubtless, more is yet to come on the applicability of the offensiveness test to the threshold question of whether the information is to be regarded as private. Lindsay J suggests that such an approach would not be consistent with *Coco v Clark*.¹⁰⁹ He states that:¹¹⁰

The law at that first stage of the *Coco* test does not ... in a trade secret case, raise what would be corresponding issues such as whether the trade secret in question is truly such as might be turned to great commercial advantage or with whether its disclosure would be thoroughly damaging to the claimant’s trade.

105 *Campbell v MGN Ltd*, *supra* n 39, at [96].

106 *Id.*, at [137]. Lord Carswell did not think it necessary in any event to apply the offensiveness test since the information in question was private information. Lord Hoffmann did not expressly address this point.

107 *Douglas v Hello! Ltd (No 3)*, *supra* n 29, at [189]–[192].

108 *Supra* n 31, at [83].

109 *Supra* n 80.

110 *Douglas v Hello! Ltd (No 3)*, *supra* n 29, at [189].

60 But this ignores the subsequent decision of Megarry VC in *Thomas Marshall (Exports) Ltd v Guinle*.¹¹¹ There, Megarry VC stated that a relevant factor in deciding whether information is confidential is whether the claimant has a reasonable belief that the release of the information will be injurious to him or of advantage to others. Clearly this factor looks to the reasonableness of the belief that the threatened misuse will cause real harm. This, it is submitted, is not so far removed from a test for private information based on whether the reasonable person would find the threatened misuse offensive or highly offensive. However, notwithstanding this, there is much to be said for the point that in the majority of cases, the question as to whether information is private can be resolved by asking whether a reasonable person in the position of the parties would regard the information as private. Private or personal in what sense – in the sense that it can reasonably be regarded as implicating the claimant’s right to dignity, autonomy and personality development. A common-sense view should prevail. A system of law that chooses to expand rights of privacy may be slower to incorporate a stricter test at this threshold stage. But countries where free speech issues loom very large, such as the US, may be far more willing to develop a law on privacy by reference to stricter criteria of highly offensive behaviour. Which way should other countries go? An overly powerful privacy right or an over-extended law of confidence is not perhaps the best way to deal with the problem of public curiosity and hunger for interesting stories. Internal self-regulation, better social education and a thicker skin may be preferable to a flood of litigation before the courts. A balance is needed. If it is felt necessary to expand the action for breach of confidence to better cover privacy, what is wrong with setting the balance in hard cases at behaviour which a reasonable person would find to be highly offensive?

(2) *Relationship and obligation of confidentiality*

61 In *Coco v Clark*,¹¹² the parties dealt with each other in the course of pre-contractual negotiations. In this context, Megarry J stipulated that aside from proof that the information possesses the quality of confidence, it was also necessary to show that the information was “imparted in circumstances importing an obligation of confidence”.¹¹³ Megarry J was there dealing with a confider and a confidant in the context of consensual negotiations. The standard of conscionability was once again that of the

111 *Supra* n 86.

112 *Supra* n 80.

113 *Ibid*, at 47.

reasonable person: Would a reasonable person in the shoes of the recipient have realised on reasonable grounds that the information was being handed over in confidence?¹¹⁴

62 Much has been written on the nature of the relationship that generates the duty of confidence in equity. Is the test entirely objective? Can regard be had to the subjective beliefs of the parties? Is a degree of recklessness required where the defendant is an indirect recipient of confidential information? What degree of knowledge or notice is needed to affect the conscience of remoter recipients? Can a duty be imposed where the information though confidential was unsolicited? What if the defendant was a mistaken recipient? Whilst these are important questions, irrespective of the nature of the confidential information (commercial or private), there is one question that will likely be of critical relevance in the area of private personally sensitive information. This concerns the position of a defendant who acquires the information in the absence of any prior relationship with the claimant. An invasion of informational privacy will often occur without the claimant being in any prior relationship with the defendant. The defendant will be a deliberate taker as opposed to a mere “recipient” of information. In some cases, illegal means may have been used to acquire the information; in other cases the defendant may not have used means overtly illegal in themselves as where a long lens is used from far off to photograph the claimant walking in her own garden. An insistence that there be a giving and a receipt of the information would clearly have greatly limited the scope of the action in equity. But here, the law has moved on. In the area of industrial/commercial espionage, equity may be able to intervene proactively, so to speak, and to impose a duty of confidence in the absence of any prior relationship. Different theories might explain such an intervention: from property-based theories to liability based on reprehensible, improper or in some cases the use of illegal means to acquire the information.¹¹⁵ Indeed, English cases have for some time suggested that a duty or obligation of confidence can arise by law, whenever a person receives or acquires information which he knows or

114 *Id.*, at 48. Note that Megarry J also considered a test based on the officious bystander of contract law – not surprising given that the parties were in a near contract situation. But on balance, it appears that the reasonable man approach dominated his approach.

115 George Wei, “Surreptitious Takings of Confidential Information” (1992) 12 LS 302; Megan Richardson, “Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law” (1994) 19 MULR 673. In the US, there is strong support for liability where reprehensible means are used: *E I duPont deNemours & Co v Christopher* 431 F 2d 1012 (1970).

ought fairly to know is confidential.¹¹⁶ This has led Lord Nicholls in the *Campbell* case to observe that “[t]his cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship”.¹¹⁷ In the context of confidential private information, the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy. If so, then if the defendant knew or ought to have known of the reasonable expectation of privacy, a duty of confidentiality/privacy will arise.¹¹⁸

63 From this it can be seen that in respect of both the first and second elements of the action to protect confidential personal information, the most important question is whether the claimant had a reasonable expectation in the actual circumstances that the privacy of the facts would be respected. Once this is found in his favour, the information will be regarded as having the quality of privacy and so long as the defendant knew or ought to have known of this, he will be under a duty of confidentiality/privacy. This development of dispensing with the need to establish some prior relationship, which in fact pre-dates the Human Rights Act 1998, more so than any other change, has opened the door to a more aggressive application of the law of confidence to protect privacy interests.

(3) *Unauthorised use and detriment*

64 In the vast majority of cases, whether there has been an unauthorised use is largely a question of fact although nice issues of law have arisen in the past concerning the position of subconscious use and whether the use must result in the taking of an unfair advantage. In the

116 Lord Goff in *AG v Guardian Newspapers*, *supra* n 85, at 281.

117 *Supra* n 39, at [14].

118 See also Lord Hoffmann, *id*, at [48], that the view that there is no need any more for a prior confidential relationship has been accepted as representing current English law by the European Court of Human Rights in *Earl Spencer v United Kingdom*, *supra* n 14 and also the Court of Appeal in *A v B plc*, *supra* n 45. Similarly, Lord Hope in the *Campbell* case was of the view, at [85], that the need for a duty of confidence does not give rise to any problem as a duty will arise “whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected”. Similar views were expressed by the other House of Lords judges in the *Campbell* case. Likewise in *Douglas v Hello! Ltd (No 3)*, *supra* n 29, Lindsay J, whilst prepared to apply *Coco v Clark*, *supra* n 80, to the facts before him, stated at [186] that if there was an intrusion in a situation in which a person could reasonably expect his privacy to be respected, then that intrusion would give rise to a duty of confidence. A duty of confidence in personal confidence cases will have to be inferred from the facts. On appeal, Lord Phillips MR likewise adopted a similar approach, *supra* n 31.

context of private personal information, what adjustments if any might be needed to adapt the action to the demands of Art 8? A few points come to mind. To begin with, in the vast majority of cases where private personal information is involved, the defendant is likely to be a taker of the information. In such cases, any use will be unauthorised. Thus, once there has been a finding that the claimant did have a legitimate expectation of privacy in respect of the facts, the question as to whether any use is unauthorised is unlikely to cause any further difficulties. In cases where the defendant is given confidential information by a defaulting intermediary, the use of an opportunity revealed by the information to further spy on the claimant, such as by taking a photograph of the claimant, may in itself amount to an unauthorised use.¹¹⁹ In other cases, the mere taking of the photograph might not amount to misuse, but any publication of the images might result in liability.¹²⁰ Whether a defendant who merely photographs a person in a private place for use of the image for his or her own private gratification will be liable is also now open for consideration. Will the claimant have a reasonable expectation of privacy against “private use” by the defendant? If the Australian/New Zealand/US approach of “highly offensive” behaviour is the litmus test, will a reasonable person find such private but limited use highly offensive? Whilst much will depend on the facts, it will not be surprising if an affirmative answer is forthcoming in some cases.¹²¹

65 There is lingering uncertainty over whether detriment is needed to constitute an action for breach of confidence. At one level, the debate is whether the claim is actionable *per se* or one that is only actionable on proof of special damage. At another level, there is the important question as to whether detriment includes non-economic losses such as grief, vexation and mental distress. Further, what if the detriment is suffered by a third party? This, perhaps, was the main concern of Megarry J in *Coco v Clark*. In that case, Megarry J commented that:¹²²

119 *Earl Spencer v United Kingdom*, *supra* n 14. Information about the claimant’s medical condition was disclosed by a confidant to the defendant. The defendant would likely have been subjected to a duty of confidence and the use of a long lens to photograph the claimant in the grounds of the clinic was an unauthorised use of the information.

120 *Peck v United Kingdom*, *supra* n 14, and see *supra* n 98.

121 See also *R v Department of Health, ex p Source Informatics Ltd* [2001] FSR 74 *per* Simon Brown LJ at 85 that the central concern of the law in protecting information of a personal nature is protecting privacy and that where a defendant is caught by a duty of good faith, “the touchstone by which to judge the scope of his duty and whether or not it has been fulfilled or breached is his own conscience, no more and no less. One asks ... [whether] on the facts ... a reasonable pharmacist’s conscience [would] be troubled by the proposed use to be made of patients’ prescriptions”.

122 *Supra* n 80, at 48.

At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect.

66 On the other hand, in *Seager v Copydex Ltd*,¹²³ Lord Denning MR had less doubts, holding that the duty imposed is a duty not to take an “unfair advantage” of the confidential information by using it to the “prejudice” of the person who gave the information without obtaining his consent.

67 At a theoretical plane, there might be something to be said for the *Seager* approach. A holding that a claim for breach of confidence is actionable *per se*, whilst consistent with a property theory, is arguably inconsistent with the view that liability is rooted in equitable notions of good faith and conscience. Further, given that the case law has already confirmed the broad range of material that can be protected and that liability for misuse can flow from subconscious misuse, the removal of a detriment requirement appears to argue for a more proprietary basis for intervention. And yet the cases do not support a property approach. Alternatively, might it be said that the reality is that the two approaches can be squared through a broad flexible approach to the meaning of detriment? This is especially important in the area of personal confidential information given the role that the action has acquired in safeguarding privacy interests. Once again, the developments here predate the Human Rights Act 1998. Thus, in *AG v Guardian Newspapers*, Lord Keith of Kinkel, after commenting that in commercial cases consequential detriment is usually present, proffered the view that:¹²⁴

[I]n other cases there may be no financial detriment to the confider, since the breach of confidence involves no more than an invasion of personal privacy. ... The right to personal privacy is clearly one which the law should in this field seek to protect. ... [I]t is in the public

123 [1967] 1 WLR 923 (“*Seager*”) at 931.

124 *Supra* n 84, at 255–256. See also John Hull, *Commercial Secrecy: Law and Practice* (Sweet & Maxwell, 1998) at para 3.01 who quotes from *Attorney-General v Newspaper Publishing Plc* [1988] Ch 333 at 358 (*per* Sir John Donaldson MR) that:

Confidential information is like an ice cube. Give it to the party who undertakes to keep it in his refrigerator and you still have an ice cube by the time the matter comes to trial. ... Give it to the party who has no refrigerator or will not agree to keep it in one, and by the time of the trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.

interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself. ... So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know it, even though the disclosure would not be harmful to him in any positive way.

68 Similarly, in the earlier case of *X v Y*¹²⁵ which involved the identity of certain doctors suffering from AIDS, Rose J held that *Seager* was not authority for the proposition that detriment in the use of the information was a necessary precondition to injunctive relief. It is clear now that in the case of personal confidences, where privacy values have come to the fore, it is only right that detriment in use should not be a precondition to the award of injunctive relief. Alternatively, it might be said that the privacy value underlying the action in these cases demands that the very loss of confidentiality be regarded as sufficient to found the action.

69 Turning to the issue of monetary compensation for mental distress, this has always been difficult in English law. The starting point is the oft-stated view that disappointment, frustration, grief, anger and anxiety are part and parcel of everyday life. Bringing these within the fold of compensable harm might greatly increase the volume of litigation in a way that may not be in the interests of society as a whole. This type of harm is also said to be hard to prove, hard to assess and highly subjective in nature. But even within common law, there are exceptions where mental distress damages have been awarded. Take contract law, for example. Whilst damages are not ordinarily awardable for mental distress, they can be awarded where the consideration for the contract is enjoyment and peace of mind. In such cases, a breach of contract causing mental distress that directly undermines the consideration must be compensable, for the breach affects the very consideration for the entry into the agreement. Cases in point include *Jarvis v Swan Tours Ltd* (holiday contract gone wrong),¹²⁶ *Heywood v Wellers* (solicitor fails to prevent harassment)¹²⁷ and *Diesen v Samson* (photographer fails to turn up at the wedding).¹²⁸ Further, Prof Beatson points out that whilst these are decisions where the sole object of the contract was to provide enjoyment or peace of mind or to prevent distress, a more recent English

125 [1988] 2 All ER 648.

126 [1973] QB 233.

127 [1976] QB 446.

128 1971 SLT (Sh Ct) 49.

case applied the exception where disappointment avoidance was merely an important object of the contract.¹²⁹

70 In this context, the first instance *dictum* in *W v Egdell*¹³⁰ that mental distress damages were not awardable in an action for breach of confidence is surprising. Not only is the connection between the breach of a duty of confidentiality and the mental distress likely to be strong, the equitable duty of confidentiality, especially in the case of personal confidences, is directly concerned with peace of mind and security for the confider.¹³¹ If privacy interests are to be adequately shoehorned into the law of confidence, damages for mental distress should be made available where the information is of a personal nature. That this is now the position can be seen from the decisions in *Cornelius v De Taranto*¹³² and *Douglas v Hello! Ltd*¹³³ where mental distress damages were awarded. Indeed, in appropriate cases, aggravated damages for mental distress (on the basis of flagrant conduct) and exemplary damages (on the basis of outrage) might also be available.¹³⁴

(4) *Public interest defence*

71 If the touchstone of informational privacy concerns facts in respect of which there is a reasonable expectation of privacy, a touchstone of free speech has long been disclosure or use of information in the name of the public interest. Indeed, free speech in the context of a specific public interest is perhaps the most important area where freedom of expression operates. Whilst public interest as a defence to an action for breach of confidence has long been established, the European Convention and the Human Rights Act 1998 have raised a number of significant issues. Some of these have been examined already.

72 To begin with, there is the question touched on earlier as to where the fulcrum for the balance between privacy and freedom of expression is best placed. Procedurally, the earliest point of balance will

129 J Beatson, *Anson's Law of Contract* (Oxford University Press, 28th Ed, 2002) at p 594. The case referred to is *Farley v Skinner* [2002] 2 AC 190.

130 [1990] Ch 359.

131 See also *Cadbury Schweppes Inc v FBI Foods Ltd* [2000] FSR 491. Binnie J recognised that Canadian law supported a broad approach to detriment that would encompass emotional and psychological distress arising from the disclosure of intimate information.

132 [2001] EMLR 12.

133 *Douglas v Hello! Ltd (No 3)*, *supra* n 29 (Lindsay J) and *supra* n 31 (CA).

134 *Douglas v Hello! Ltd (No 3)*, *supra* n 29, at [272] and [275].

be in respect of an application for an interlocutory injunction. Fears that application of *American Cyanamid* principles might over-protect privacy at the expense of freedom of expression have led some to call for a no-prior-restraint rule. Whilst this has not been accepted, the UK Parliament has in s 12 of the Human Rights Act 1998 raised the threshold bar from “a serious issue to be tried” to the somewhat higher standard that “the court is satisfied that the applicant is likely to establish that publication should not be allowed”.

73 Interlocutory relief aside, there remains the question as to whether the balance between privacy and freedom of expression is an issue that relates more to proportionality and the public interest defence or whether it can affect the substantive requirement that the information be confidential or private. The *Campbell* case well demonstrates how tricky this question can be and how easy it is to conflate the question, is there private information and the question as to whether the public interest exception is applicable. This was the reason why Lord Nicholls was skeptical about the value of incorporating a test for private information based on some standard that the misuse would be highly offensive. Such a formulation might bring into play considerations more relevant to proportionality and the public interest exception.¹³⁵ The *Campbell* case concerned information said to fall into five categories: (1) the fact of the claimant’s drug addiction, (2) the fact the claimant was receiving treatment, (3) the fact that the claimant was receiving treatment at Narcotics Anonymous, (4) details of the treatment (how long she had been undergoing treatment, how often she attended treatment sessions *etc*) and (5) the visual portrayal (the covert photograph) of her leaving a specific meeting.

74 In so far as the first two categories were concerned, the claimant accepted that her false public statements that she did not take drugs meant that she was precluded from claiming protection. What this meant, according to Lord Nicholls, was that:¹³⁶

By repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private. Public disclosure that, contrary to her assertions, she did in fact take drugs and had a serious drug problem for which she was being treated was not disclosure of private information. As the Court of

135 *Supra* n 39, at [22]. Outside of actions by the State, public interest is normally seen as a defence on which the defendant bears the burden of proof. See *Lion Laboratories Ltd v Evans*, *supra* n 64.

136 *Supra* n 39, at [24].

Appeal noted, where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight ...

75 The analysis of Lord Nicholls is important as he seems to treat the public interest issue of “setting the record straight” as a matter which went to the question as to whether categories (1) and (2) retained their private (confidential) character. Indeed, similar issues arose with the other categories. Given that the claimant could not prevent disclosure of the first two categories, could it still be said that she had a reasonable expectation of privacy in respect of the other categories that provided more detail? Does this imply that the burden falls on the claimant to show that there is no public interest which justifies the breach in question? Much may now depend on how confidential information of a personal nature is to be characterised in England given underlying privacy values. Is the requirement of confidentiality or privacy nothing more than proof that the information is “relatively inaccessible to the public”, or does the touchstone of a “reasonable *expectation* of privacy” inevitably mean that matters relevant to proportionality and the public interest come into play even at this early stage? In other words, even if the “highly offensive” test is rejected, the application of a test based on reasonable expectations of privacy might in any case open the door to broader considerations on which the claimant will now bear the burden of proof. The point is unclear since in relation to categories (3) and (4) Lord Nicholls went on to say that he did not want to conclude the matter solely on the point that the information had lost its private character. He held that even if the information had retained its “private character”, the claim was bound to fail. The publication of the information was said to represent (in the circumstances) a comparatively minor intrusion. This had to be balanced against the fact that:¹³⁷

[N]on-publication of this information would have robbed a legitimate and sympathetic newspaper story of attendant detail which added colour and conviction. This information was published in order to demonstrate Miss Campbell’s commitment to tackling her drug problem. The balance [between privacy and freedom of expression] ought not to be held at a point which would preclude, in this case, a degree of journalistic latitude in respect of information published for this purpose.

76 Another question that has arisen concerns the scope of the public interest. Has s 12(4) of the Human Rights Act widened the defence to one

137 *Id.*, at [28].

where freedom of expression or freedom of the press *per se* becomes determinative? Whilst some remarks of Lord Woolf CJ in *A v B plc*¹³⁸ might support such a position, the better view is that this is not in fact the position that Lord Woolf was taking.¹³⁹ The court was simply setting out general guidelines on the grant of interlocutory relief. The general comments of Lord Woolf on the importance of a free press were more by way of an explanation of why s 12(4) was needed and *American Cyanamid* inappropriate than an assertion that freedom of press is a trump card.

77 Then, there is the question of the degree of latitude a defendant is to be allowed in determining the scope of the information to be published to meet a proven public interest concern. This was the core of the matter in the *Campbell* litigation.¹⁴⁰ Given that the claimant accepted there was a real public interest to correct the false impression that had been created (no involvement in drug consumption), did the public interest defence justify revelation of the place where the claimant was being treated, the details of the treatment and the visual information contained in the photograph? Two approaches could be taken. The first might be best described as the “pound of flesh” approach. This argues that as a defence that justifies what would otherwise be an interference with the claimant’s rights, the defendant should limit himself to information that is strictly necessary to meet the public interest concern. The second might be termed the “reasonable penumbra” approach: the defendant should be given some latitude to determine the range of facts to be disclosed. Public interest issues usually arise in circumstances of some urgency and at a time when the full picture may be unclear. So long as the revealed facts are reasonably within the shadow of the public interest that is asserted, the defence should prevail. The first view stresses the importance of the right of privacy. The second tends to stress the importance of freedom of expression. The reality is that a balanced approach is what is needed. As discussed already, public interest issues must be examined by reference to the actual facts and circumstances and balanced against any specific arguments that the claimant may have to underscore the claim to privacy. In some cases, the balance may require a stricter view of what is to be revealed. In other cases, the public interest

138 *Supra* n 45.

139 See para 40 of the main text above.

140 This is distinct from the point that in some cases the proven public interest can be adequately protected by a more limited disclosure to relevant authorities such as the police rather than to the world at large. See *Francome v Mirror Group*, *supra* n 65, and *X Pte Ltd v CDE*, *supra* n 34.

may be so important that the defendant must be given more latitude to decide what facts should be revealed. In some cases, this might include information that lends credibility to statements made by the defendant. In the *Campbell* case, the minority felt that the public interest supported disclosure of all five heads of information.¹⁴¹ The majority, on the other hand, felt that given that the information was of a medical nature and given the public interest in encouraging individuals to seek and continue with treatment, disclosure of categories (3), (4) and especially (5) was unjustified.¹⁴² Does this mean that the majority and minority were applying some different legal principles? This seems unlikely. The difference is simply a difference in views as to where the appropriate balance lay on the facts of the case. In some cases, the defendant may only be able to establish a relatively weak public interest issue, such as an assertion that a famous football star is perhaps not a good role model

141 For example, Lord Hoffmann in *Campbell v MGN Ltd*, *supra* n 39, at [62] said that:

The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure.

And at [68]:

To answer that question one must assess the disclosures said to be objectionable in the light of the disclosures conceded to be legitimate. One must then ask whether the journalists exceeded the latitude which should be allowed to them in presenting their story.

Also at [77]:

We value the freedom of the press but the press is a commercial enterprise and can flourish only by selling newspapers. From a journalistic point of view, photographs are an essential part of the story.

142 For example, Lord Hope in *Campbell v MGN Ltd*, *id*, at [113] said:

But decisions about publication of material that is private to the individual raise issues that are not simply about presentation and editing. ... The tests which the court must apply are the familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. ... Any restriction of the right to freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life.

See also Baroness Hale at [152] that whilst the public interest justified publication of the fact “that, contrary to her previous statements, Miss Campbell had been involved with illegal drugs[,] [i]t also justified publication of the fact that she was trying to do something about it by seeking treatment. It was not necessary for those purposes to publish any further information, especially if this might jeopardise the continued success of that treatment.” Also Lord Carswell’s view at [165] that “it tended to deter her from continuing the treatment which was in her interest and also to inhibit other persons attending the course from staying with it, when they might be concerned that their participation might become public knowledge”.

because of addiction to alcohol.¹⁴³ In other cases, the public interest may be far more weighty and urgent, such as information concerning a possible act of terrorism. All this has to be balanced against any specific points that might support or heighten the public interest in protecting the claimant's assertion of privacy.

(5) *The effect of an exclusive licence*

78 It must not be thought that categorisation of information as “private” or “commercial” is watertight. Overlaps can easily arise and in this day and age of celebrities, endorsement rights and merchandising, private information can easily possess real commercial value. In this sense, information will often be hybrid in nature. Privacy exists to protect an individual's right of informational autonomy: his feelings and emotions and right to control the development of his personality. The assertion of control does not detract from a claim to privacy even where the method chosen to assert control is to license limited uses of private information. Thus in the *Douglas v Hello! Ltd (No 3)*,¹⁴⁴ Lindsay J found that an assertion of control through the grant of an exclusive licence was not inconsistent with the desire to protect the confidentiality of the wedding party. On appeal, Lord Phillips MR agreed, stating that:¹⁴⁵

Recognition of the right of a celebrity to make money out of publicising private information about himself, including his photographs on a private occasion, breaks new ground. ... [But] [d]espite the comment of Joshua Rozenberg in *Privacy and the Press* (2004), at p 228, we do not see this as any reason to draw back. We see no reason in principle why

143 The question as to whether the fact that a person is a celebrity is in itself enough to support a public interest in private facts is always controversial and difficult. Where a public personality has been a party to misrepresentations on his private life such as to create a false role model impression, public interest is easy to argue (although problems of scope may still arise). Even where the claimant has not sought the position of a role model, if he has courted publicity, this might open the door to a public interest defence. But where a person has not courted publicity but acquires fame because he is highly successful in his private work (for example a famous trial lawyer), the public interest defence needs to be examined especially carefully. This is not to say that the defence cannot arise – much will depend on the nature of the information and whether there is a real public need to know. See generally *A v B plc*, *supra* n 45. Note that in the *Douglas* litigation, no public interest defence was asserted. The mere fact that the claimants were very well known and popular did not mean that there was a public interest in making available unauthorised pictures of the wedding party. This was especially so given that authorised pictures were soon to be released.

144 *Supra* n 29.

145 *Supra* n 31, at [113]. Similarly under copyright law, an author may well enjoy certain moral rights designed to protect his personality in respect of the work. These rights exist alongside the usual commercial rights (reproduction, public performance, *etc*).

equity should not protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the nature of a trade secret.

79 That being so, what was the effect of the exclusive licence to publish authorised photographs that had been granted by the Douglases to OK! (the publisher of “OK!” magazine)? Whilst this important issue goes beyond the scope of the present article, the following points arise. First, an exclusive licence at the minimum protects the licensee from a claim for infringement by the licensor. If OK! did not have a licence to publish, it would in turn have been liable to the Douglases for breach of confidence or privacy. Viewed this way, a licence, exclusive or not, is a defence to any claim for infringement. Second, an exclusive licence does not mean that the licensee is acquiring any positive rights to assert in respect of the assigned material. An exclusive licence means that the licensor will not grant the same licence over the same material to any third party. If the Douglases had subsequently granted a licence to Hello! Ltd, this would clearly have amounted to a very serious breach of the licence terms. Whether or not an individual has a right of suit must depend initially on whether he is the owner or co-owner of the information.¹⁴⁶ Where an employee makes an invention in the course of employment, the rights conferred by the law of confidence may well belong to the employer.¹⁴⁷ In other cases, the rights may have been acquired by an assignment. Where the assignment is express, no problems arise. But where the agreement is silent, the usual problems of interpretation arise.¹⁴⁸ An assignment of the right to sue would not have been necessary to give business efficacy to the exclusive licensing contract in the *Douglas* case. Indeed, the express terms required the Douglases to initiate proceedings against any unlicensed third party who used any photograph in connection with the wedding. No mention was made at all

146 Although as a co-owner it may be necessary to join in all the owners. That would not have been a problem in the *Douglas* litigation. Note also that in the Court of Appeal, *supra* n 31, Lord Phillips MR at [126] refused to accept that confidential information is protected on a property basis. Ownership is used loosely here as a term indicating a person who has sufficient standing or right to sue.

147 See, for example *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293.

148 Lindsay J at the trial of the action found that it is common enough for trade secrets to be bought and sold and that in commercial confidence cases the benefit of the confidentiality is often shared with others. “The confidentiality of a trade secret, for example, may be shared between, and be enforceable by, the inventor and the manufacturer to whom he had granted licence for the secret to be turned to account.” *Supra* n 29, at [187]. The Court of Appeal found that prior cases relied on could be distinguished. In particular, in *O Mustad & Son v Dosen* [1964] 1 WLR 109, the plaintiff was a purchaser and not a mere licensee.

of any right of OK! to bring an action.¹⁴⁹ On this basis, what claims could the Douglasses have mounted against the defendant for the breach of privacy? No problem arises with the mental distress that was consequential to the unauthorised publication. Equally, there was no difficulty with the claim for the consequential economic loss that arose in connection with reasonable efforts of mitigation.¹⁵⁰ But, what of the huge economic losses sustained by OK! calculated on a lost sales method of assessment? These were not the losses of the Douglasses. The latter presumably had already been paid the £1m licence fee.¹⁵¹

80 In any event, is there a case for saying that notwithstanding the commercial relationship between the Douglasses and OK!, the duty of confidentiality owed by Hello! Ltd to the Douglasses was inherently so personal in nature as to render the right unassignable? Thus, one commentator takes the view that the assignability of rights must depend on the nature of the information itself. Rights in the nature of trade secrets or business information are very different from personal secrets where human dignity comes to the fore.¹⁵²

V. Conclusion: The road ahead for Singapore and informational privacy

81 Even without developing a new tort to protect privacy on the basis of some high level principle of liability, it is clear that recent years have seen considerable expansion of the range of actions in England that

149 Note that actions brought by OK! outside of the law of confidence using the economic torts failed because of the finding that the defendant did not have the intent to injure OK! as opposed to benefiting themselves.

150 These concerned the extra expenses incurred by the Douglasses in expediting the selection of authorised photographs to compete with the unauthorised publication.

151 Note that cll 14 and 15 of the licence agreement provided for a sharing between OK! and the Douglasses of any sum over £1m received by OK! from all sources from the exploitation of the authorised article. If the Douglasses could prove that the activities of Hello! Ltd had affected this right, then, subject to applicable rules of causation and remoteness, a further claim could have succeeded.

152 Hull, *Commercial Secrecy: Law and Practice*, supra n 124, at para 4.60 citing the view of the Law Commission, *Breach of Confidence* (Report No 110, Cmnd 8388, 1981) at para 6.86 that:

There will ... be other cases of information protected by an obligation of confidence where, because of the personal nature of the information, the obligation ... cannot be regarded as transferable property – for example, clearly a patient should not be able to transfer the benefit of an obligation of confidence owed to him by his doctor. Similar points arise in copyright law where the highly personal nature of moral rights means that where these are conferred on the author, they are unlikely to be made assignable.

offer protection for different aspects of privacy. These include improvements in respect of protection for spatial privacy through the enactment of harassment laws,¹⁵³ improvement of rights of data subjects in respect of use of personally identifiable information in databases¹⁵⁴ and improved rights against spam.¹⁵⁵ Central to the privacy framework in the UK is of course the Human Rights Act 1998 which has played such a key role in opening up the action in equity to protect confidential information so as to better safeguard informational privacy interests. At the same time, freedom of expression and the public interest, especially in the area of counter-terrorism activity, naturally demand and require proper attention and balance.¹⁵⁶

82 Singapore is not of course bound by the European Convention. Neither does she have legislation on privacy similar to the Human Rights Act 1998. But this does not mean that privacy issues will not have an impact on the development of right – either by the courts or even more so by Parliament. Thus far, we have already seen the use in Singapore of broad privacy-driven policy arguments to carve out a tentative common law tort of harassment. Even if it is ultimately held that this is an area that is better dealt with by Parliament, the question of providing better control of harassment is unlikely to soon disappear.

83 Indeed in an increasingly crowded world, “protection” of individual space (real or virtual) is arguably more rather than less important. Long gone are the days when an individual wanting privacy (spatial or informational) could simply march off into the wilderness. In the physical world, the range of self-help options is limited. Even in cyberspace, whilst spam filters, anti-spyware programs abound, a lot of spam still gets through. As most Internet users know, new spyware programs force users to engage in endless bouts of updating.

153 Protection from Harassment Act 1997 (c 40) (UK).

154 See now the Data Protection Act 1998 (c 29) (UK).

155 UK Privacy and Electronic Communications (EC Directive) Regulations (2003) SI 2003/2426.

156 See Ian J Lloyd, *Information Technology Law* (Oxford University Press, 4th Ed, 2004) at para 3.46 that the EC Directive on Privacy and Electronic Communications (2002/58/EC) as originally drafted provided individuals with extensive guarantees of privacy in respect of data pertaining to electronic communications. But, following the events of September 11, an amendment was allowed permitting retention of data for limited periods on grounds, inter alia, national security, defence, public security, detection of crime *etc*. Lloyd notes that even prior to the entry into force of the Directive, this power has been extensively used in the UK.

84 But this in turn does not mean that a new unitary cause of action to protect all aspects of an individual's right to be left alone is necessary or desirable. Such a blockbuster cause of action will have to be couched in broad open-ended terms that may cause many more problems than it solves. A pigeon-hole approach may be the best way forward rather than the creation of a single blockbuster sledgehammer. If the problem concerns spam, then legislation specifically targeting spam, with appropriate checks and balances, can be considered. If the issue is control of spyware, rather than use of the spyware issue to ground a new tort of privacy, it may be better if specific legislation to deal with computer misuse and unauthorised access was considered (or adapted). If the issue is control of databases, especially electronic databases, then likewise, if self-regulation is not working, Parliament can consider, in the light of the experiences in other countries, the appropriate legislative framework.¹⁵⁷ If the issue concerns use of information acquired by closed-circuit television, this can first be considered under the existing laws, including the law of confidential information, and if the latter is found inadequate, then legislative intervention considered.¹⁵⁸

85 What then of the law of confidence? Will or should there be a turbocharging of the equitable tort so as to better protect private information? The fact that the Singapore Constitution does not expressly refer to a *right* of privacy does not mean that the *value* of privacy is irrelevant as a policy factor, the *Malcomson* decision in Singapore being a case in point.¹⁵⁹ If spatial and informational privacy, and its underlying value of solitude, is seen as providing the foundation for human individuality, the development of individual personality, the fostering of self-improvement, the encouragement of a "daring to be different" personality, then privacy is an essential part of human development. In this sense, the value of privacy is already part of many of the fundamental freedoms provided for in the Constitutions of many countries. From one point of view, freedom of speech, freedom of expression, freedom of assembly, protection of liberty can all be regarded as founded on a state

157 See also *supra* n 9.

158 See *Wainwright v Home Office*, *supra* n 15, at [33] where Lord Hoffmann rejects the argument that cases such as *Peck v United Kingdom*, *supra* n 14, demonstrate a need for a general tort of invasion of privacy. Lord Hoffmann felt that at best, *Peck's* case demonstrates the need for a system of control for use of CCTV film that shows greater sensitivity to the feelings of people who happen to be caught on camera.

159 *Supra* n 6.

of privacy.¹⁶⁰ At this level, the twin galaxies of privacy and freedom of expression are not on a collision course. They are part of the same team. If the defendant asserts a right to freedom of expression, the plaintiff's assertion of a right of privacy can be seen as part of the latter's claim to his own freedom of expression. Of course, no freedom or right can be absolute: as between individuals (including individuals and the State as in the case of criminal investigation), conflicts will occur and a balance will need to be found.

86 Beyond this, it is clear that from its very inception, the law of confidential information has not been limited to commercial confidences. It has been seen that many of the earliest cases in England were precisely concerned with confidential private information. In fact, in Singapore, one of the first reported cases on breach of confidence concerned, in part, the unauthorised use of personally sensitive information.¹⁶¹ The requirement that information should possess the necessary quality of confidence may be easily satisfied in many cases where the information is of a personal nature. Even if the courts in Singapore do not adopt a test based on whether a reasonable person would regard the information as private, many items of personal information will be confidential simply because they can be identified with sufficient precision and because the information is not in fact readily accessible to the public. More difficult is the question of personal information that has already been given public exposure. In England, a reasonable person might, in some cases, still regard such information as being private. As discussed above, private information may prove far more resilient and resistant to publicity which might otherwise be said to have an effect of placing the information into the public domain. In England, the movement towards this new test is informed by the duty to comply with Art 8 of the European Convention. Singapore is not under such a duty and the question as to whether she should do so is bound to give rise to many differing views. If Singapore does decide to move in this area, then she will also be free to consider developing a law on informational privacy along the lines of what has happened or appears to be happening in the US, Australia and Canada. Here, the litmus test is founded on a finding that the claimant enjoys a reasonable expectation of privacy and that the intrusion or misuse will be

160 But see the views of Wacks, *The Poverty of Privacy*, *supra* n 20. Wacks argues that privacy is too muddled and confused to be elevated into a general principle or basis for liability. He argues that privacy is often confused with other rights such as freedom of expression and freedom of association. Wacks, however, accepts that privacy is concerned with personality and may have relevance as an underlying value.

161 *X Pte Ltd v CDE*, *supra* n 34.

considered to be highly offensive to a reasonable person. Perhaps this is an area that is best left to Parliament. In the meantime, the settled law of confidence should be applied to determine whether any item of personal information is in fact confidential information.

87 On the question of an obligation of confidence, the key question is whether there is any retained requirement of a pre-existing relationship between the parties to generate a duty of confidentiality. Retention of such a requirement would severely limit the role of the law of confidence in the area of invasion of informational privacy. Whilst the matter is not free of all doubt, there appears no reason why the Singapore courts could not take the view that equity has developed the action such that a duty of confidence is imposed whenever the defendant receives or takes confidential information which he knows or ought to know is confidential. At the very least, equity should be able to intervene where improper or reprehensible means have been used by the defendant.

88 On the question of detriment, even without the European Convention, a good case can be made in support of a power to award damages for mental distress – at least where the confidential information is of a personal nature. If these are available in appropriate cases in contract law, it will be strange, to say the least, to hold that mental distress damages are not available in actions concerning confidential personal information. Legislation should not be necessary to achieve this as it is well within the capacity of the common law and equity to develop principles on an incremental case-by-case basis.

89 Finally, on the public interest defence, the recent English cases demonstrate that this is the main battleground for resolving the competition between privacy and freedom of expression. The point has already been made that the need to balance public interest factors in favour of the unauthorised use against public interest factors in maintaining confidentiality is of course not new. The defence of public interest has long ceased to be tied down to specific areas such as serious criminal misconduct or to some limited iniquity rule. There is of course no question of the Singapore courts having to give presumptive priority to either privacy or freedom of expression. Instead, what is already permitted is a free ranging enquiry on the facts of each case.¹⁶² What is more important is whether there needs to be a shift in the focal point for

162 See *Woodward v Hutchins*, *supra* n 37, for an early English case (Lord Denning MR) recognising a public interest to correct false impressions created by pop stars.

the enquiry. Should there be a toughening up of the procedural rules relating to the granting of interlocutory injunctions so that a higher degree of assurance is required where the defendant raises a public interest defence? Is there, as seems probable, sufficient flexibility already in the *American Cyanamid* rules to achieve this on a case-by-case basis? Should there be a factoring of issues of proportionality (reasonable expectations or offensiveness) into the question as to whether the information retains its quality of confidentiality or privacy? Much will depend on whether the action in equity is to be expanded to include private information that goes beyond confidential information (information that is not readily accessible to the public). If the action to protect confidential information remains limited to information that is confidential in the normal way, then it is perhaps best to leave the balancing of public interest to the established defence of public interest. These are the questions that doubtless will arise for consideration in the near future.
