

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT**

**CIVIL LIABILITY FOR INVASION OF PRIVACY**

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**December 2004**

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## REPORT

### CIVIL LIABILITY FOR INVASION OF PRIVACY

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# Preface

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1. On 11 October 1989, under powers granted by the Governor-in-Council on 15 January 1980, the Attorney General and the Chief Justice referred to the Law Reform Commission for consideration the subject of “privacy”.<sup>1</sup> The Commission appointed a sub-committee to examine the current state of law and to make recommendations. The members of the sub-committee are as follows:

**Dr John Bacon-Shone (Chairman)**

Director, Social Sciences Research Centre, The University of Hong Kong

**Mr Don Brech**

Principal Consultant, Records Management International Limited  
(Former Director, Government Records Service)

**Professor Johannes M M Chan** (from November 2001)

Honorary Senior Counsel,  
Professor (Reader) and Dean, Faculty of Law, The University of Hong Kong

**Mrs Patricia Chu, BBS, JP** (till April 2001)

Former Deputy Director of Social Welfare (Services), Social Welfare  
Department

**Mr A F M Conway**

Chairman, Great River Corporation Limited

**Mr Edwin Lau**

Chairman, Hooray Holdings Limited  
(Former Assistant General Manager & Head of Strategic Implementation  
Asia Pacific, HSBC)

**Mr Robin McLeish** (from February 2000)

Barrister-at-law  
(Former Deputy Privacy Commissioner for Personal Data)

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<sup>1</sup> The Commission’s terms of reference are as follows: “To examine existing Hong Kong laws affecting privacy and to report on whether legislative or other measures are required to provide protection against, and to provide remedies in respect of, undue interference with the privacy of the individual with particular reference to the following matters: (a) the acquisition, collection, recording and storage of information and opinions pertaining to individuals by any persons or bodies, including Government departments, public bodies, persons or corporations; (b) the disclosure or communication of the information or opinions referred to in paragraph (a) to any person or body including any Government department, public body, person or corporation in or out of Hong Kong; (c) intrusion (by electronic or other means) into private premises; and (d) the interception of communications, whether oral or recorded; but excluding inquiries on matters falling within the Terms of Reference of the Law Reform Commission on either Arrest or Breach of Confidence.”

**Mr Barry Mortimer, GBS**

Non-Permanent Judge, Court of Final Appeal  
(Former Vice-President, Court of Appeal)  
(Chairman of sub-committee from 1990 till August 1999)

**Mr James O'Neil**

Deputy Solicitor General (Constitutional), Department of Justice

**Mrs Kathy NG Ma Kam-han** (from April 2001 to April 2003)

Assistant Director (Elderly), Social Welfare Department

**Mr Peter So Lai-yin** (till November 2001)

Former General Manager, Hong Kong Note Printing Limited

**Professor Raymond Wacks**

Emeritus Professor of Law and Legal Theory, The University of Hong Kong  
(Chairman of sub-committee from August 1999 to December 2001)

**Mr Wong Kwok-wah**

Editor, Asia Times-On-Line (Chinese version)

2. The secretary of the Sub-committee is Mr Godfrey K F Kan, Senior Government Counsel.

3. The first task of the Privacy Sub-committee was to study the collection, recording, storage and disclosure of personal data. This resulted in the Commission report on *Reform of the Law Relating to the Protection of Personal Data* published in August 1994. Thereafter, the Sub-committee issued a consultation paper on the regulation of surveillance and the interception of communications. This was followed by the Commission report on *Privacy: Regulating the Interception of Communications* published in December 1996. In relation to the regulation of surveillance, the Sub-committee decided that the civil aspects of invasion of privacy should be looked into first before it finalised its recommendations on surveillance. The Sub-committee therefore published a consultation paper on *Civil Liability for Invasion of Privacy* in August 1999. That consultation paper covered the civil aspects of surveillance as well as other forms of invasion of privacy, and was published together with the consultation paper on *The Regulation of Media Intrusion*. The criminal aspects of surveillance will be dealt with in the Commission report on criminal sanctions for unlawful surveillance to be issued later.

4. The Privacy Sub-committee recommended in the Consultation Paper on *Civil Liability for Invasion of Privacy* ("the Consultation Paper") that a person should be liable in tort if he, without justification, (a) intrudes upon the solitude or seclusion of another or into his private affairs, or (b) gives publicity to a matter concerning the private life of another. The Sub-committee received 21 submissions on the Consultation Paper. The list of respondents is at the Annex. We are grateful to all those who have contributed to the discussion of this topic. The Sub-committee held ten meetings to finalise the Consultation Paper and

another 14 meetings to complete its report to the Law Reform Commission. The Commission considered the Sub-committee report at the end of 2001 and reviewed their conclusions in early 2004 after they had finalised the *Privacy and Media Intrusion Report*. We express our appreciation to the members of the Sub-committee for the time and effort they have devoted to this project.

## Overview of responses to the Consultation Paper

5. The **Bar Association** supported the idea of creating, by statute, one or more specific torts of invasion of privacy which clearly define the act or conduct which unjustifiably frustrates the reasonable expectation of privacy of an individual. **The Law Society** supported, in principle, the proposal to provide a civil remedy for invasion of privacy by statute. However, **The HK section of the International Commission of Jurists (JUSTICE)** objected to the creation of privacy torts. They preferred to adopt an incremental approach and wait for judicial development of the common law to protect individual privacy.

6. The **Hong Kong Democratic Foundation** agreed with the proposal that civil remedies be provided to victims of invasion of privacy. They believed that in formulating the new torts, the right balance between privacy and freedom of expression had been struck. **The HK Federation of Women** supported the creation, by statute, of one or more specific torts of invasion of privacy so as to provide adequate remedies to victims of invasion of privacy. They emphasised that the statutory provisions must be set out in clear, concrete and precise terms to avoid confusion.

7. The **HK and Kowloon Trades Union Council** was concerned that video surveillance of the workplace was becoming more widespread. **The HK Women Professionals and Entrepreneurs Association** welcomed the proposal to regulate workplace surveillance and the use of personal data in advertising materials by way of codes of practice to be issued by the Privacy Commissioner and the Broadcasting Authority. However, the **Broadcasting Authority** did not believe that there was a need to introduce privacy provisions in its advertising codes.

8. The **Department of Health** and the **Legal Aid Department** commented that the right to privacy had to be balanced against freedom of expression. **The Hospital Authority** supported the proposals of the Sub-committee to the extent that the new torts would be created by statute and would assist and would not impair the Authority in pursuing the objective of providing efficient health care to the public.

9. The **Privacy Commissioner for Personal Data** agreed that the existing law was insufficient to provide legal redress for infringement of privacy of the types described in the Consultation Paper. He considered it necessary for the law to develop to cope with the needs of society. **Security Bureau** noted that certain privacy-invasive acts were not regulated by existing law. They commented that there appeared to be a need to create the proposed torts to deal with these acts. **The Child Protection Unit of the HK Police Force**

agreed that the identities of victims of crime should be protected in criminal proceedings.

10. **Television Broadcasts Limited** commented that the electronic media in Hong Kong was very well regulated by the Codes of Practice issued by the Broadcasting Authority. The **HK Journalists Association** argued that the Consultation Paper failed to explain that the new torts are aimed at meeting a pressing social need. They did not accept the proposal to create the new torts. They argued that such a move was “a potentially dangerous experiment with harmful repercussions for the media and investigative journalism”. **Tim Hamlett**, Associate Professor of the Department of Journalism at the HK Baptist University, commented that the Sub-committee seemed to have lost contact with the fundamental importance of freedom of expression in a free society. The comments made by **The Society of Publishers in Asia** were directed at the proposals made by the Sub-committee in the Consultation Paper on Media Intrusion.

11. **Paula Scully** and **Andrew Bruce SC** agreed that the identities of victims of crime should be protected by giving the Court a power to issue an anonymity order. **Darryl Saw SC** commented that the role of law enforcement agencies to investigate both actual and prospective offences could not be inhibited. **John Walden** submitted that the proposals did not provide either deterrence or redress against the mounting of “unlawful defamatory operations” by the Government against its critics.

## **Structure of the report**

12. We shall explain in Chapter 1 the elements and functions of privacy. The jurisprudence on what the right of privacy comprises will also be introduced. Chapter 2 then examines the extent to which privacy is protected at common law and under the Personal Data (Privacy) Ordinance. It will be seen that the protection of privacy under existing laws is patchy and inadequate. Since affording protection to the right of privacy by creating a tort of unwarranted publicity concerning an individual’s private life may conflict with the exercise of the right to freedom of expression, we shall examine in Chapter 3 the relationship between these two rights; in particular, whether or not the protection of privacy is inconsistent with the values of free speech. The proper approach to balancing the two rights under the International Covenant on Civil and Political Rights and the European Convention on Human Rights will also be discussed.

13. After we have introduced the law of privacy in other jurisdictions in Chapter 4, we discuss in Chapter 5 whether there is a need to introduce a tort of invasion of privacy in Hong Kong. The discussion includes a debate as to whether such a tort should be created by the judiciary or by statute. After satisfying ourselves that there is a need to create one or more specific torts of invasion of privacy by statute, we recommend in Chapters 6 and 7 that two new torts be created to protect individuals from unreasonable invasion of privacy,

namely, unwarranted intrusion upon the solitude or seclusion of another, and unwarranted publicity concerning an individual's private life.

14. The recommendations affecting the privacy of ex-offenders and victims of crime are made in Chapters 8 and 9 respectively. Whether appropriation of a person's name or likeness should be actionable as a privacy tort or a distinct tort is discussed in Chapter 10. Since some jurisdictions treat publicity placing someone in a false light as a privacy tort, we examine in Chapter 11 whether there are compelling arguments for treating such publicity as an invasion of privacy. The need to create a right to correct factual errors reported in the press is also examined in that chapter. The remedies for the two torts proposed in Chapters 6 and 7 are discussed in Chapter 12. We believe that our proposals could provide a civil remedy for "arbitrary or unlawful" interference with an individual's privacy without unduly infringing other legitimate rights and freedoms, in particular, the freedom of speech and of the press.

# Chapter 1

## The right of privacy

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### The notion of “privacy”

1.1 **Right of privacy at common law** – Privacy may be defined as “*an outcome of a person’s wish to withhold from others certain knowledge as to his past and present experience and action and his intentions for the future.*”<sup>1</sup> Although the right of privacy is not legally enforceable at common law, English judges have acknowledged its importance on occasion. In one case, Lord Denning said: “*While freedom of expression is a fundamental human right, so also is the right of privacy.*”<sup>2</sup> In another case, Lord Scarman described the right to privacy as “fundamental”.<sup>3</sup> Lord Keith has also observed that “*the right to personal privacy is clearly one which the law [of confidence] should ... seek to protect.*”<sup>4</sup>

1.2 **Three concentric circles of privacy** – Étienne Picard, a French academic, suggests that privacy may be depicted by three concentric circles, the common centre of which is the subject himself.<sup>5</sup> The first circle comprises what the subject possesses as the most intimate parts of his person, namely his thoughts, his beliefs and his values. The second circle extends from the external characteristics of his person to that of his intimate social life, which involves his family and friends. According to Picard, this is privacy as such which deserves the strictest protection. As for the third circle, it encompasses relationships which are necessary for the subject to lead his private life of the first and second circles. Hence, the exercise of the right to privacy may prompt him to appear in a public place. Nonetheless, privacy in this circle does not disappear. In the view of Picard, elements of private life carried out in public also deserve some protection of privacy. Whereas the second circle should be tightly closed to third parties unless they are admitted to it, information about the third circle should not be divulged to a wider public unless the subject consents.

1.3 **An affront to human dignity** – In the view of Edward Bloustein, invasion of privacy constitutes an affront to human dignity. He believes that an intrusion on an individual’s private life “would destroy individual dignity and

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<sup>1</sup> S M Jourard, “Some Psychological Aspects of Privacy” (1966) LCP 307.

<sup>2</sup> *Schering Chemicals v Falkman* [1982] QB 1 at 21.

<sup>3</sup> *Morris v Beardmore* [1981] AC 446, 464. He described the right as “fundamental” because of the importance attached by the common law to the privacy of the home and the fact that the right enjoys the protection of the European Convention on Human Rights.

<sup>4</sup> *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 255.

<sup>5</sup> Étienne Picard, “The Right to Privacy in French Law” in B S Markesinis (ed), *Protecting Privacy – The Clifford Chance Lectures Volume Four* (OUP, 1999), pp 60-61.

integrity and emasculate individual freedom and independence”.<sup>6</sup> He says:

*“The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.”<sup>7</sup>*

1.4 We consider that it is not sufficient to describe invasion of privacy as an affront to human dignity. Tim Frazer points out that although invasions of privacy violate human dignity, an individual’s dignity may be offended without his privacy being invaded:

*“This approach to privacy, which attempts a single succinct description, does not sufficiently take account of the multifaceted nature of privacy. Though all aspects of privacy may be traced to human dignity, individuality or autonomy, so may the rationale underlying laws covering crimes of violence, sexual offences, marital breakdown, the detention of mental patients, etc. The right ‘to be let alone’ is relevant in all these contexts.”<sup>8</sup>*

1.5 **The right to be let alone** – Privacy is commonly referred to as the “right to be let alone”. This phrase is simple and easy to understand, but Ruth Gavison says that such a simple definition cannot be used in a meaningful way:

*“This description gives an appearance of differentiation while covering almost any conceivable complaint anyone could ever make. [Footnote: This is not true of only explicit privacy cases, however. Actions for assault, tort recovery, or challenges to business regulation can all be considered assertions of the ‘right to be let alone’.] A great many instances of ‘not letting people alone’ cannot readily be described as invasions of privacy. Requiring that people pay their taxes or go into the army, or punishing them for murder, are just a few of the obvious examples.”<sup>9</sup>*

1.6 **The control an individual has over information about himself** – Other philosophers define privacy as the measure of control an individual has over a realm of his private life. According to this view, privacy

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<sup>6</sup> E J Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 NYULR 962, 971.

<sup>7</sup> E J Bloustein, above, at 1003.

<sup>8</sup> T Frazer, “Appropriation of Personality - A New Tort?” (1983) 99 LQR 281, 296.

<sup>9</sup> R Gavison, “Privacy and the Limits of Law” (1980) 89 Yale LJ 421, at 437.

functions by giving individuals autonomy over certain aspects of their private life. Privacy therefore consists of the individual's control over access to and information about himself.<sup>10</sup> An individual who chooses to disclose certain aspects of his private life does not experience a loss of privacy on the ground that others gain access to him. On the contrary, he experiences privacy by choosing to allow himself or his personal information to go public. If he chooses not to allow others gaining access to himself or his personal information, an intrusion into his private affairs or a disclosure of his personal information would violate his right of privacy.

1.7 **Basic states of privacy** – Alan Westin, a renowned expert on privacy, stresses that in a free society and subject to the extraordinary exceptions in the interests of society, the choice to decide when and on what terms personal information should be revealed to the general public ought to be left to the individual concerned.<sup>11</sup> He defines privacy as *“the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”*:

*“Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.”<sup>12</sup>*

1.8 Westin therefore suggests that there are four basic states of individual privacy, namely, solitude, intimacy, anonymity and reserve.<sup>13</sup>

- (a) Solitude – The individual is separated from the group and freed from the observation of other persons.
- (b) Intimacy – The individual is acting as part of a small unit that claims to exercise corporate seclusion so that it may achieve a close and frank relationship between two or more individuals.<sup>14</sup>
- (c) Anonymity – This state of privacy occurs when the individual is in public places but still finds freedom from identification and surveillance. Although he knows that he is being observed on the streets, he does not expect to be personally identified and systematically observed by others.
- (d) Reserve – This occurs when the individual's need to limit communication about himself is protected by the willing discretion of those who have an interpersonal relationship with him. The

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<sup>10</sup> J Rachels, “Why Privacy is Lost” (1975) 4 Philosophy and Public Affairs 323, at 326.

<sup>11</sup> A F Westin, *Privacy and Freedom* (New York: Atheneum, 1968), at 42.

<sup>12</sup> A F Westin, above, at 7.

<sup>13</sup> A F Westin, above, at 31-32.

<sup>14</sup> Examples of units of intimacy are husband and wife, the family and the work clique.

creation of “mental distance” between individuals gives the parties a choice to withhold or disclose information.

1.9 **Elements of privacy** – In the opinion of Ruth Gavison, there is a loss of privacy when others obtain information about an individual, pay attention to him, or gain access to him. She suggests that the concept of privacy is a complex of three elements which are independent of but related to each other.<sup>15</sup>

- (a) Secrecy (the extent to which an individual is known) – A person can be said to have lost privacy if he is unable to control the release or use of information about himself which is not available in the public domain. In general, the more people know about the information, the greater the loss of privacy suffered by the individual to whom the information relates.
- (b) Anonymity (the extent to which an individual is the subject of attention) – An individual loses privacy when he becomes the subject of attention. Attention alone will cause a loss of privacy even if no new information about him becomes known.<sup>16</sup>
- (c) Solitude (the extent to which others have physical access to an individual) – An individual loses privacy when another gains physical access to him; not only because physical access enables another to acquire information about an individual, but also because it diminishes the “spatial aloneness” of an individual.<sup>17</sup>

1.10 **Access to a person or information about him** – The focus of Gavison is therefore on access to a person or his personal information. She defines privacy as: “*The extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others’ attention.*”<sup>18</sup> This approach has been criticised on the ground that if a loss of privacy occurs whenever any information about an individual becomes known, the concept of privacy loses its intuitive meaning. Such a proposition would lead to the result that any loss of solitude by or information about an individual has to be counted as a loss of privacy.<sup>19</sup> Raymond Wacks therefore suggests that a limiting or controlling factor is required. He points out that although focusing attention upon an individual or intruding upon his solitude is objectionable in its own right, our concern for the individual’s “privacy” in these circumstances is strongest when he is engaged in activities which we would normally consider “private”. He suggests that the protection afforded by the law of privacy should be limited to information “*which relate[s] to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict its*

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<sup>15</sup> R Gavison (1980), at 428.

<sup>16</sup> R Gavison (1980), at 432.

<sup>17</sup> R Gavison (1980), at 433.

<sup>18</sup> R Gavison in F D Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge: Cambridge University Press, 1984), at 379.

<sup>19</sup> R Wacks, *Personal Information - Privacy and the Law* (Oxford: Clarendon Press, 1993), at 15 - 18.

*collection, use, or circulation.*<sup>20</sup> Philosophers who hold this view contend that access to personal information is a necessary but not sufficient condition for it being within the scope of privacy. What is further required is that the information must be of an intimate and sensitive nature, such as information about the sexual proclivities of a person.

1.11 However, there can in theory, perhaps, be an invasion of privacy without any loss of intimate or sensitive information about an individual. A person who peeps into a private dining room which is not occupied by anyone may acquire no information other than the fact that the occupants of the house are not using the dining room at that time. Yet it is a clear case of privacy intrusion. Where an employer secretly opens the personal locker of his employee and discovers that it is empty, all the employer finds out about the employee is that the latter does not use the locker for storage. Nevertheless, no one would dispute that the employer has intruded upon the privacy of the employee. Another example is the persistent following of another on the streets. Most people would agree that it constitutes an interference with private life even though no new information about the victim is acquired as a result. Likewise, listening to a telephone conversation which reveals no intimate or sensitive information about the parties to the conversation is a serious invasion of privacy. These examples illustrate that a loss of intimate or sensitive information is not a necessary condition for invasion of privacy.

1.12 **Council of Europe** – In 1970, the Parliamentary Assembly of the Council of Europe adopted a resolution containing a Declaration on Mass Communication Media and Human Rights, which states:<sup>21</sup>

*“The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially... .”*

1.13 In another resolution adopted in 1998, the Assembly stated that the right to privacy under Article 8 of the European Convention on Human Rights should include “the right to control one’s own data”.<sup>22</sup> It reiterated the view stated in its 1970 Declaration that the right to privacy afforded by the Convention should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.<sup>23</sup>

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<sup>20</sup> R Wacks (1993), at 26.

<sup>21</sup> Resolution 428 (1970).

<sup>22</sup> Council of Europe Parliamentary Assembly, Resolution 1165 (1998), paras 4 & 5.

<sup>23</sup> Council of Europe Parliamentary Assembly, Resolution 1165 (1998), para 12 and Resolution 428 (1970) para C7.

1.14 **European Convention on Human Rights (ECHR) – Article 8(1)** of the Convention provides that “everyone has the right to respect for his private and family life, his home and his correspondence.” The guarantee afforded by Article 8 is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.<sup>24</sup> The European Court of Human Rights does not consider it possible or necessary to give an exhaustive definition of the notion of “private life”, but its decisions suggest that the right to respect for private life covers the following areas:

- (a) the right to lead one’s life without any external interference;
- (b) gender identification and name;
- (c) sexual orientation and sexual life;
- (d) the physical and moral (or psychological) integrity of the person;
- (e) the right to secrecy;
- (f) the recording, release and storage of information relating to a person’s private life;
- (g) the right to identity and personal development; and
- (h) the right to establish and develop relationships with other human beings and the outside world.

1.15 The European Court has held that mental health is a crucial part of private life associated with the aspect of moral integrity, and the preservation of mental stability is an indispensable precondition to effective enjoyment of the right to respect for private life.<sup>25</sup> The European Commission of Human Rights observed that:

*“For numerous Anglo-Saxon and French authors the right to respect for ‘private life’ is the right to privacy, the right to live, as far as one wishes, protected from publicity ... . In the opinion of the Commission, however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one’s own personality.”<sup>26</sup>*

The European Court in *Niemietz v Germany* elaborated that:<sup>27</sup>

*“it would be too restrictive to limit the notion [of private life] to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding*

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<sup>24</sup> *Botta v Italy*, No 21439/93, 24.2.1998, para 32.

<sup>25</sup> *Bensaid v UK* (2001) 11 BHRC 297, para 47.

<sup>26</sup> *X v Iceland*, 5 DR 86, at 87. See also *Bruggeman and Scheuten v Germany*, No. 6959/75, 10 DR 100, para 50.

<sup>27</sup> Series A, No 251-B, para 29 (1992).

*of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that ... it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not."*

1.16 As explained by Harris and others, the European Court in that case endorsed a long practice of the European Commission in which it had sought to extend the concept of private life beyond the narrower confines of the Anglo-American idea of privacy, with its emphasis on the secrecy of personal information and seclusion.<sup>28</sup> The Irish Law Reform Commission argues that the case represents a move from a static conception of "privacy" to a more active and rounded conception of a "private life", illustrating that people require more than islands of protected calm in which to choose their own ends but also some personal space in which to pursue those ends and express themselves in common purpose with others.<sup>29</sup> Françoise Tulkens, a judge of the European Court, also agrees that the right "is not only the right to remain in one's home and exclude others; it is also the right to go out of one's home and meet others".<sup>30</sup>

1.17 **Nordic Conference on Privacy** – In an attempt to provide a workable definition for the term "privacy", the Nordic Conference of Jurists on the Right to Respect for Privacy organised by the International Commission of Jurists (JUSTICE) elaborates on what the right to privacy is about. Paragraphs 2 and 3 of its declaration state:

*"2. The right of privacy is the right to be let alone to live one's own life with the minimum degree of interference. In expanded form, this means:*

*The right of the individual to lead his own life protected against:*

- (a) interference with his private, family and home life;*
- (b) interference with his physical or mental integrity or his moral and intellectual freedom;*
- (c) attacks on his honour and reputation;*
- (d) being placed in a false light;*
- (e) the disclosure of irrelevant embarrassing facts relating to his private life;*

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<sup>28</sup> D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), 305. In *McFeeley v UK*, No 8317/78, 20 DR 44 at 91 (1980), the European Commission established that freedom to associate with another is an aspect of private life. The European Court also used a purposive approach to interpret "private life" as encompassing the "physical and moral integrity of the person" in *X and Y v The Netherlands* (1985) 8 EHRR 235 and *Costello Roberts v UK* (1995) 19 EHRR 112.

<sup>29</sup> Law Reform Commission of Ireland, *Report on Privacy* (1998), Annex I, para 1.22.

<sup>30</sup> F Tulkens, "Freedom of expression and information in a democratic society and the right to privacy under the European Convention on Human Rights: a comparative look at Articles 8 and 10 of the Convention in the case-law of the European Court of Human Rights" in *Conference on freedom of expression and the right to privacy – Conference Reports* (Strasbourg, 2000), 31-32.

- (f) *the use of his name, identity or likeness;*
- (g) *spying, prying, watching and besetting;*
- (h) *interference with his correspondence;*
- (i) *misuse of his private communications, written or oral;*
- (j) *disclosure of information given or received by him in circumstances of professional confidence. ...*

3. For practical purposes, the above definition is intended to cover (among other matters) the following:

- (i) *search of the person;*
- (ii) *entry on and search of premises and other property;*
- (iii) *medical examinations, psychological and physical tests;*
- (iv) *untrue or irrelevant embarrassing statements about a person;*
- (v) *interception of correspondence;*
- (vi) *wire or telephone tapping;*
- (vii) *use of electronic surveillance or other ‘bugging’ devices;*
- (viii) *recording, photographing or filming;*
- (ix) *importuning by the Press or by agents of other mass media;*
- (x) *public disclosures of private facts;*
- (xi) *disclosure of information given to, or received from, professional advisers or to public authorities bound to observe secrecy;*
- (xii) *harassing a person (e.g. watching and besetting him or subjecting him to nuisance calls on the telephone).<sup>31</sup>*

1.18 The conference also declared that there was a need for a civil right to guard against intrusion, surreptitious recording, photographs or eavesdropping, and the use of material obtained by unlawful intrusion or which exploits a person’s identity, places him in a false light or reveals embarrassing private facts.

1.19 **Younger Committee** – Instead of giving a general definition of privacy, the Younger Committee on Privacy in the UK identified the principal privacy interests involved, namely:

- (a) the “freedom from intrusion upon oneself, one’s home, family and relationships”; and
- (b) “the right to determine for oneself how and to what extent information about oneself is communicated to others.”<sup>32</sup>

1.20 **Calcutt Committee** – The Calcutt Committee on Privacy and Related Matters in the UK defined privacy as “*the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family,*

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<sup>31</sup> Stockholm, May 1967; reproduced in JUSTICE, *Privacy and the Law* (London: Stevens and Sons, 1970), Appendix B.

<sup>32</sup> *Report of the Committee on Privacy* (“Younger Report”) (London: HMSO, Cmnd 5012, 1972), para 38.

by direct physical means or by publication of information.”<sup>33</sup> It suggested that the right to privacy could include protection from:

- (a) physical intrusion;
- (b) publication of hurtful or embarrassing personal material (whether true or false);
- (c) publication of inaccurate or misleading personal material; and
- (d) publication of photographs or recordings of the individual taken without consent.<sup>34</sup>

1.21 **United States** – William Prosser adopted a descriptive approach. After examining the decisions of the American courts which recognised the existence of a right to privacy, he concluded that the law of privacy “*comprises four distinct kinds of invasion of four different 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 let alone’.*”<sup>35</sup> He described these four torts as:

- (a) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs;
- (b) public disclosure of embarrassing private facts about the plaintiff;
- (c) publicity which places the plaintiff in a false light in the public eye; and
- (d) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

1.22 **Law Reform Commission of Australia** – The Commission has identified four categories of privacy interests requiring legal protection, namely:

- (a) the interest in controlling entry to the “personal place” (“territorial privacy”);
- (b) the interest in freedom from interference with one’s person and “personal space” (“privacy of the person”);
- (c) the interest of the person in controlling the information held by others about him (“information privacy”); and
- (d) the interest in freedom from surveillance and from interception of one’s communications (“communications and surveillance privacy”).<sup>36</sup>

## Psychological aspects of privacy

1.23 In his article on the psychological aspects of privacy,<sup>37</sup> Sidney Jourard explains that an adult person is taught appropriate ways to behave,

<sup>33</sup> *Report of the Committee on Privacy and Related Matters* (“the Calcutt Report”) (London: HMSO, Cmnd 1102, 1990), para 3.7.

<sup>34</sup> Above, para 3.8.

<sup>35</sup> W L Prosser, “Privacy” (1960) 48:3 California Law Review 383 at 389.

<sup>36</sup> Law Reform Commission of Australia, *Privacy* (Report No 22, 1983), vol 1, para 46. See also S I Benn, “The Protection and Limitation of Privacy” (1978) 52 ALJ 601 and 686.

<sup>37</sup> S M Jourard, “Some Psychological Aspects of Privacy” (1966) LCP 307.

depending upon his age, sex, family position, occupation, and social class. Sanctions will be directed against him if he does not conform to extant role-definitions. But continual conformity may result in physical sickness and “mental disease” (meaning the refusal or inability to continue to fulfill roles in the expected ways). If a person conceals his distress and discontent and impersonates a contented, conforming citizen, he may have a “breakdown” or become a socially invalidated mental patient. As society becomes fully urbanised and institutionalised, there are fewer and fewer such private places where a person can simply *be* rather than *be respectable*:

*“Avoiding observation by others by whom one does not wish to be seen can become a desperate, futile, and costly quest in contemporary society. This state of affairs can make a prison or a dormitory out of one’s daily living arrangement, producing the feeling that one has been condemned to his usual roles. This experience is most inimical to personal growth, the maintenance of physical and psychological health, and orderly nonviolent changes in the social structure.”<sup>38</sup>*

1.24 After pointing out that a person experiences considerable growth in self-understanding and understanding of others in group therapy if the social context is created for risk-free disclosure, Jourard states that society might well provide private places where people can go to practice voluntary, limited disclosure, to engage in meditation or cathartic release, and to divest themselves temporarily of their usual roles in order ultimately to re-enter them refreshed and possibly with creative, socially integrative innovations in the way they fulfill them:

*“The experience of psychotherapists and of students of personality growth has shown that people maintain themselves in physical health and in psychological and spiritual well-being when they have a ‘private place’, some locus that is inviolable by others except at the person’s express invitation. This ‘private place’ may be a physical location, such as a room, a cabin, a ‘pad,’ or a monastic cell. It may be a place for solitude, or it may be an ambience peopled by individuals who share the values and ideals held by the person in question. There, he can do or be as he likes and feels. He can utter, express, and act in ways that disclose his being-for-himself, and he does not need to fear external sanctions. Nor does he feel guilt for the discrepancy between the way he appears in public and the way he is in private.”<sup>39</sup>*

1.25 Jourard concludes that without privacy and its concomitant, freedom, the cost to be paid for the ends achieved - in terms of lost health, weak commitment to the society, and social stagnation - may be too great.

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<sup>38</sup> S M Jourard, above, at 314.  
<sup>39</sup> S M Jourard, above, at 310.

## Functions of privacy

1.26 According to Alan Westin, privacy serves the following functions for individuals and groups in democratic nations:<sup>40</sup>

- (a) **Personal autonomy** – Privacy satisfies the human desire to avoid being manipulated or dominated by others. An invasion of privacy threatens this personal autonomy. By penetrating into an individual's "inner zone" and learning about his secrets, the intruder could expose that individual to ridicule and shame and exert domination over him. Furthermore, every individual lives behind a mask. The consequence can be serious if the mask is torn off. In extreme cases, the individual would commit suicide or experience nervous breakdown.

Achieving personal autonomy is also essential to the development and maintenance of individuality. It would relieve the pressure to live up to the expectations of others. Giving protection to individual privacy would facilitate sheltered experimentation and testing of ideas without fear of ridicule or penalty, and would provide an opportunity to alter opinions before they are made public.<sup>41</sup>

- (b) **Emotional release** – There are at least five aspects of emotional release through privacy:<sup>42</sup>
- Every individual plays a series of roles in daily life. This could generate tensions for many. Besides, individuals can sustain conflicting roles for reasonable periods of time only. To maintain physical and psychological health, there have to be periods of privacy which give individuals "a chance to lay their masks for rest. To be always 'on' would destroy the human organism."
  - Privacy also allows individuals to deviate temporarily from social etiquette when alone or among friends and acquaintances, as by swearing or putting feet on the desk.
  - Privacy serves the "safety-valve" function by allowing individuals to vent their anger at those who exercise authority over them without fear of reprisal. In the absence of such release, people would experience serious emotional pressure.
  - Privacy is essential for bodily functions and sexual relations.
  - Individuals in sorrow, such as victims of crime or accidents, require privacy to recover. Those who are in public life who have suffered defeats or loss of face also need to retire from public view to recuperate.

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<sup>40</sup> A F Westin, above, at 32-39.

<sup>41</sup> A F Westin, above, at 33-34. See also R Gavison, "Privacy and the Limits of Law" (1980) 89 Yale LJ 421, at 448 and 449-450.

<sup>42</sup> A F Westin, above, at 35-36.

- (c) **Self-evaluation** – Individuals need privacy to evaluate the data that they receive for various purposes and to integrate them into meaningful information. Reflective solitude and even day-dreaming during moments of reserve are conducive to creative ideas.<sup>43</sup>
- (d) **Limited and protected communication** – Privacy provides individuals with the opportunities to share confidences with their intimates and other professional advisers such as doctors, lawyers and ministers.<sup>44</sup>

1.27 Ruth Gavison has also given a detailed exposition of the positive functions that privacy has in our lives. She says that privacy is central to the attainment of individual goals such as autonomy, creativity, growth and mental health. By limiting access to individuals we could create an environment which facilitates the development of a liberal and pluralistic society. Individuals would be able to relax and develop intimate relations. Restricting access also protects individuals from distraction. Freedom from distraction is essential for activities that require concentration, such as learning, writing, and all forms of creativity. Even casual observation has an inhibitive effect on individuals that makes them more formal and uneasy.<sup>45</sup>

1.28 Gavison further points out that privacy enables individuals to deliberate and establish opinions without fear of any unpleasant or hostile reaction from others. It enables individuals to continue relationships without denying one's inner thoughts that the other party does not approve. Privacy therefore enhances the capacity of individuals to create and maintain human relations. Exposing an individual to the public eye would subject him to pressure to conform to society's expectation. This would lead to inhibition, repression and even mental illness in serious cases.<sup>46</sup>

1.29 Apart from serving the individual interest in the attainment of individual goals, privacy also serves the public interest in the development of democracy. Privacy is essential to democratic government, not only because it contributes to the autonomy of the citizen, but also because it promotes liberty of political action:

*“This liberty requires privacy, for individuals must have the right to keep private their votes, their political discussions, and their associations if they are to be able to exercise their liberty to the fullest extent. Privacy is crucial to democracy in providing the opportunity for parties to work out their political positions, and to*

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<sup>43</sup> A F Westin, above, at 36-37.

<sup>44</sup> A F Westin, above, at 38.

<sup>45</sup> R Gavison (1980) 89 Yale LJ 421, at 446 - 447. Charles Fried argues that privacy is necessary for the development of love, friendship and trust by giving an individual control over the amount of personal information he would like to share with his friends and loved ones. Love and friendship are inconceivable without the intimacy of shared personal information. C Fried, “Privacy” (1968) 77 Yale LJ 475, 484; C Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge: Harvard University Press, 1970).

<sup>46</sup> S Jourard, above, 307.

*compromise with opposing factions, before subjecting their positions to public scrutiny. Denying the privacy necessary for these interactions would undermine the democratic process.*<sup>47</sup>

1.30 Although, at present, the Chief Executive is not directly elected and only a part of the Legislative Council of Hong Kong is directly elected, the Basic Law has promised that the ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with the democratic procedures<sup>48</sup> and the election of all members of the Legislative Council by universal suffrage.<sup>49</sup> Since privacy encourages public participation in political decisions by enabling citizens to form judgments and express preferences on social issues, affording adequate protection to privacy will provide a congenial environment for Hong Kong to move towards greater democracy. Furthermore, to the extent that public service means loss of expectation of privacy, a society which respects and protects privacy would reduce the costs of running for public office. Privacy therefore helps society attract talented individuals to serve the community.<sup>50</sup>

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<sup>47</sup> R Gavison (1980), above, at 456.

<sup>48</sup> The Basic Law of the HKSAR, Article 45, para 2.

<sup>49</sup> The Basic Law of the HKSAR, Article 68, para 2.

<sup>50</sup> R Gavison (1980), above, at 456.

## Chapter 2

# Protection of privacy under existing laws

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### Basic Law of the Hong Kong SAR

2.1 Although the Basic Law does not explicitly mention the right to privacy, Article 28 provides, *inter alia*, that “Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited.” Article 29 supplements Article 28 by extending the protection against arbitrary or unlawful search from search of the body to search of or intrusion into the “home and other premises” of a resident.<sup>1</sup> The freedom and privacy of communication is also protected under Article 30. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.

### Common law

2.2 There is no common law tort of invasion of privacy.<sup>2</sup> A person whose privacy has been intruded upon has to show that the conduct of the intruder amounts to the commission of a well-recognised tort for which the victim has a cause of action. The protection of individual privacy is therefore incidental to the granting of relief for recognised torts. If the privacy-invasive act inflicting the injury is otherwise lawful, it does not give rise to an action for damages even though the act is inflicted maliciously and has caused embarrassment or emotional distress. Another difficulty is that the common

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<sup>1</sup> These provisions are reminiscent of the Fourth Amendment to the US Constitution, which provides that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”. The function of the Fourth Amendment is to protect individual privacy and dignity against unwarranted intrusion by the state. It was originally applied to afford protection to tangible items as represented by persons, houses, papers and effects. But in recent years, the courts have construed it to mean that an individual has a reasonable expectation of privacy to be free from intrusion of electronic surveillance. It is open to the Hong Kong courts to adopt a liberal interpretation to construe Articles 28 and 29 of the Basic Law as providing Hong Kong residents with a right to be protected against unwarranted invasion of privacy by private persons and the Government.

<sup>2</sup> *Malone v MPC* [1979] Ch 344; *Kaye v Robertson* [1991] FSR 62 (CA); *Khorasandjian v Bush* [1993] QB 727, 744 (CA); *Home Office v Wainwright* [2002] QB 1334 (CA); *Wainwright v Home Office* [2003] UKHL 53, [2003] All ER (D) 279 (Oct). The House of Lords in the last case pointed out at para 31 that there was a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. In *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996, Lindsay J said at para 229: “It is notorious that, as our law was before the Human Rights Act [1998], there was no effective law of privacy; there was nothing to fill such gaps as might exist when neither the law of confidence nor any other law protected a claimant.”

law does not recognise any principle upon which compensation can be granted for mere injury to feelings. The plaintiff cannot maintain an action in tort unless the breach has caused him physical harm or psychiatric illness. We examine below to what extent privacy interests are protected by the recognised heads of tortious liability at common law.

### ***Trespass to land***

2.3 The plaintiff has a cause of action in the tort of trespass to land when, without justification, the defendant enters on the plaintiff's land, remains on such land or places any object upon it. This tort can be used to protect the owner of premises from unjustified invasion of privacy if the invasion involves physical encroachment upon premises. This will be the case when the defendant installs a listening device inside the private premises of the plaintiff,<sup>3</sup> or when the defendant enters upon the plaintiff's premises to collect information without the plaintiff's consent. Hence entry onto premises by a television crew with cameras rolling will constitute trespass unless they have express or implied licence to enter. In *Lincoln Hunt Australia Pty Ltd v Willesee*, the court held that the implied licence for the public to visit commercial premises was:

*“limited to members of the public bona fide seeking information or business with it or to clients of the firm, but not to people, for instance, who wished to enter to hold up the premises and rob them or even to people whose motives were to go onto the premises with video cameras and associated equipment or a reporter to harass the inhabitants by asking questions which would be televised throughout the State.”<sup>4</sup>*

Yet even if the plaintiff could obtain an injunction against trespass, he may not be able to obtain an injunction against publication of photographs or films obtained during the course of the trespass.<sup>5</sup>

2.4 The law of trespass protects a person's property and his enjoyment of it. It does not exist to protect his privacy as such. A person commits no trespass when he takes a sketch, photograph or videotape of someone else's property by standing on a public street or on adjoining property: a person does not commit a tort merely by looking.<sup>6</sup> Further, a court will not grant an injunction to prevent a landowner from opening windows which

<sup>3</sup> *Sheen v Clegg*, (1967) *Daily Telegraph*, 22 June; *Greig v Greig* [1966] VR 376.

<sup>4</sup> (1986) 4 NSWLR 457, at 460.

<sup>5</sup> *Kaye v Robertson* [1991] FSR 62. In *R v Central Independent Television plc* [1994] 3 WLR 20, the defendant obtained some footage of an arrest of an alleged paedophile which took place on private property. Although the issue of trespass was not before the Court, Neill LJ suggested at p 29 that the defendant was “entitled to publish the programme in full, and ... there was no legal bar to prevent them from including pictures of the place of arrest”. Cf *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qld R 169. The Court in that case granted an injunction on the grounds that the audio-visual material obtained by the defendants were obtained in flagrant disregard of the plaintiff's property rights and at a time when the defendants were trespassing.

<sup>6</sup> *Hickman v Maisey* [1900] 1 QB 752; *Re Penny* (1867) 7 E & B 660. In *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 494, Latham CJ held that the defendant did no wrong to the plaintiff by describing to as wide an audience as he could obtain, what took place on the plaintiff's ground

enables him to observe the activities of his neighbours.<sup>7</sup> Nor does a person have a right to prevent another taking a photograph of him even within his own premises. In *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co Ltd*, the court refused to prevent the defendant publishing photographs taken at a dog show by an independent photographer. Horridge J held that:

*"no one possesses a right of preventing another person photographing him any more than he has a right of preventing another person giving a description of him, provided the description is not libellous or otherwise wrongful."*<sup>8</sup>

2.5 In *Bernstein v Skyviews*,<sup>9</sup> the defendant took aerial photographs of the plaintiff's house without the latter's consent and then offered the photographs for sale. The court did not grant an injunction restraining the defendant from entering the plaintiff's airspace. It held that a flight several hundred feet above the plaintiff's property did not interfere with his enjoyment of land, nor was the mere taking of a photograph without committing trespass on his land unlawful.<sup>10</sup>

2.6 The law of trespass is helpless where the surveillance is carried out from a distance. It does not protect individuals from eavesdropping with the aid of parabolic microphone where no wire-tapping or other physical intrusion upon plaintiff's property takes place. Likewise, it is not a trespass to listen in to another's telephone conversation as long as this does not involve physical encroachment upon the plaintiff's land.<sup>11</sup>

2.7 A further difficulty is that the law of trespass only protects plaintiffs who have a proprietary interest in land. A person who does not have any interest in land has no right to sue. The cause of action is therefore of no avail to guests, lodgers and hospital patients. The owner of the premises will have an action in trespass but he may be unwilling to bring it. Indeed, he may actually be the one who has placed a hidden surveillance device in the premises. Lastly, there can be no protection if the victim is in a public place.

## **Nuisance**

2.8 The essence of the tort of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. The interference must continue for a prolonged period of time. An occupier may have a cause of action in private nuisance if he is harassed by telephone calls which cause him inconvenience and annoyance, thereby interfering with the ordinary and

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<sup>7</sup> *Turner v Spooner* (1861) 30 L.J.Ch 801. The Court in *Tapling v Jones* (1865) 11 HLC 290 at 305 held that "invasion of privacy by opening windows" was not a wrong for which the law would give a remedy.

<sup>8</sup> [1916] 2 KB 880; affirmed by the Court of Appeal in [1917] 2 KB 125. The landowner may prohibit the taking of photos in his premises by making it a condition of entry.

<sup>9</sup> [1978] QB 479.

<sup>10</sup> Section 8(1) of the Civil Aviation Ordinance (Cap 448) provides that no action shall lie in respect of trespass or nuisance by reason only of the flight of an "aircraft" over any property at a reasonable height above the ground.

<sup>11</sup> *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] 2 All ER 620 at 642-644.

reasonable use of the property.<sup>12</sup> Likewise, watching and besetting premises may constitute a private nuisance.<sup>13</sup> However, the plaintiff could not maintain an action if there is only one isolated incident, or the property suffers no physical injury or the beneficial use of the property was not interfered with. A person who has taken a photograph of another cannot be liable in nuisance.

2.9 Subject to the exception that a person who is in exclusive possession of land could sue even though he could not prove title to it, a person who has no interest in the land could not sue in private nuisance. Thus a mere licensee on the land such as a lodger or member of the householder's family who has no right to exclusive possession does not have a right of action. An attempt to extend the protection afforded by this action to mere licensees was made in *Khorasandjian v Bush*.<sup>14</sup> There, the Court of Appeal held that harassment by unwanted telephone calls amounting to interference with the ordinary and reasonable enjoyment of property which the recipient of the calls had a right to occupy was actionable as a private nuisance, even though the recipient had no proprietary interest in the property. However, that decision was overruled by the House of Lords in *Hunter v Canary Wharf Ltd*.<sup>15</sup> Lord Hoffmann, now also a Non-Permanent Judge of the HK Court of Final Appeal, pointed out that the development of the common law should be rational and coherent: "*It should not distort its principles and create anomalies merely as an expedient to fill a gap.*"<sup>16</sup> He said:

*"If a plaintiff, such as the daughter of the householder in Khorasandjian v Bush, is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much an abuse, or indeed an invasion of her privacy, whether she is pestered in this way in her mother's or her husband's house, or she is staying with a friend, or is at her place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home. I myself do not consider that this is a satisfactory manner in which to develop the law, especially when ... the step so taken was inconsistent with another decision of the Court of Appeal ... ."*<sup>17</sup>

2.10 The action in private nuisance is developed to protect private property or rights of property in relation to the use or enjoyment of land, rather than the privacy of the occupants and visitors. Although diminution of amenity value of the land will suffice, it is only if the victim's discomfort is caused by some act which adversely affects the value of some interest in the land to which

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<sup>12</sup> *Khorasandjian v Bush* [1993] QB 727.

<sup>13</sup> *Hubbard v Pitt* [1976] 1 QB 142.

<sup>14</sup> [1993] 3 All ER 669, [1993] 3 WLR 476 (CA).

<sup>15</sup> [1997] 2 All ER 426.

<sup>16</sup> Above, at 452g.

<sup>17</sup> Above, at 438c.

he is entitled that the action can succeed.<sup>18</sup> This cause of action is also of limited use in protecting individuals against surveillance activities. A spy does not seek to interfere with the activities of his target; on the contrary he hopes that the activities will continue unchanged, so that he may observe or record them unnoticed. There can be no interference with the use of property if the occupier is not aware of the intrusion. In any event, the action affords no protection if the victim is in a public place.

### **Breach of confidence**

2.11 Three elements appear to be necessary to succeed in an action for breach of confidence: (a) the information must have the necessary quality of confidence about it; (b) the information must have been imparted in circumstances importing an obligation of confidence; and (c) there must be an unauthorised use of that information to the detriment of the party communicating it.<sup>19</sup> A duty may arise if a person accepts the information on the basis that it will be kept secret or where a third party receives information from a person who is under a duty of confidence in respect of it and the third party knows that it has been disclosed to him in breach of confidence. Although most cases arise in a commercial or industrial context, revelation of marital confidences or sexual conduct of an individual may be restrained through the remedy of breach of confidence.

2.12 It is worth noting that the law of breach of confidence in England and Wales has been developed in the light of obligations falling upon the Court under the UK Human Rights Act 1998. The following are some of the principles derived from recent cases:<sup>20</sup>

- (a) If there is an intrusion in a situation in which a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to liability in an action for breach of confidence unless the intrusion can be justified.<sup>21</sup> The bugging of someone's home or the use of other surveillance techniques, such as a telephoto lens, are examples of such an intrusion.<sup>22</sup>
- (b) It is unnecessary to show a pre-existing relationship of confidence where private information is involved. A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected. The existence of a relationship such as may create a duty of confidence may, and in personal

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<sup>18</sup> *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426; affirmed in *Ng Hoi Sze v Yuen Sha Sha* [1999] 3 HKLRD 890, 895 - 896.

<sup>19</sup> *Koo Chih Ling (Linda) v Lam Tai Hing* [1994] 1 HKLR 329; *Li Yau-wai, Eric v Genesis Films Ltd* [1987] HKLR 711.

<sup>20</sup> See generally *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996, para 186.

<sup>21</sup> *A v B plc* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA), para 11(x); *Venables v Newsgroup Newspapers Ltd* [2001] 1038, para 81.

<sup>22</sup> *Theakston v MGN Ltd* [2002] EWHC 137 (QB), paras 77-80.

confidence cases commonly will, have to be inferred from the facts.<sup>23</sup>

- (c) An injunction may be granted to restrain the publication of photographs taken surreptitiously in circumstances such that the photographer is to be taken to have known that the occasion was a private one and that the taking of photographs by outsiders was not permitted.<sup>24</sup>
- (d) Equity may intervene to prevent the publication of photographic images taken in breach of confidence. If, on some private occasion, the prospective claimant makes it clear, expressly or impliedly, that no photographic images are to be taken of him, then all those who are present will be bound by the obligation of confidence created by their knowledge (or imputed knowledge) of that restriction.<sup>25</sup>

2.13 Nonetheless, the action for breach of confidence aims at preserving confidentiality and the trust which the plaintiff has reposed in the confidant; it does not aim at protecting individuals from emotional distress and embarrassment caused by an infringement of his privacy. There are difficulties relying on this action to afford a remedy for unwarranted infringement of privacy:

- (a) The courts have not laid down any criteria for determining what kinds of personal information would have the necessary quality of confidence about them, other than the negative requirement that the information must not be in the public domain.
- (b) The law would not impose an obligation of confidence merely because the information relates to the private or sexual life of a person. For example, details of the treatment for drug addiction received by the applicant in *Campbell v MGN*<sup>26</sup> have been found to be too insignificant (compared with the fact that she was a drug addict) to warrant the court's intervention even though such information fell within the definition of "sensitive personal data" under the UK Data Protection Act.
- (c) The concept of a relationship of confidentiality may well be inapplicable to transitory or commercial sexual relationships even though information relating to sexuality engages an intimate aspect of private life requiring special protection. Thus, where the parties are not married and one of them informs the media about their sexual relationship without the consent of the other party, the fact that the confidence was a shared confidence which only one of the

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<sup>23</sup> *A v B plc* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA), para 11(ix); *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281.

<sup>24</sup> *Douglas v Hello! Ltd* [2001] 2 WLR 992 (CA), paras 68-69; citing *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444 and *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134.

<sup>25</sup> *Douglas v Hello! Ltd* [2001] 2 WLR 992 (CA), para 71.

<sup>26</sup> [2002] EWCA Civ 1373, paras 56-58 .

parties wishes to preserve would undermine the other party's right to have the confidence respected. Extra-marital sexual relations would therefore lie "at the outer limits of relationships which require the protection of the law".<sup>27</sup> This is all the more so when the relationship is one between a prostitute in a brothel and her customer. The fact that they participate in sexual activity does not by itself constitute a sufficient basis for the attribution to the relationship of confidentiality. Details of the sexual activity between a prostitute and her customer have therefore been held to be not confidential, even though the latter would wish to keep them secret.<sup>28</sup> Thus, although the courts seem to have done away with the requirement of a pre-existing relationship to found an obligation of confidentiality, the fact that only one party would wish to keep the information private and confidential has deprived the claimants in *A v B plc* and *Theakston v MGN Ltd* of the protection under the law of confidence. The requirement of an agreement to keep the information confidential therefore renders actions for breach of confidence inadequate for the purposes of protecting an individual against invasion of privacy by unwarranted publicity.<sup>29</sup>

- (d) Some private information is in the public domain but should nonetheless be protected from further disclosure from the privacy point of view. Images of a private individual in a public place taken without his knowledge and consent may relate to and impact on his private life, particularly when accompanied by a story revealing details of his private life.
- (e) In *Peck v UK*,<sup>30</sup> the applicant was filmed by a local authority CCTV in a public street, brandishing a knife with which he had attempted to commit suicide. The authority later disclosed the footage and still images taken from the footage to the media, resulting in the applicant's images being published and broadcast. The UK Government suggested that the applicant would have been entitled to bring an action for breach of confidence if he had been filmed "in circumstances giving rise to an expectation of privacy on his part". But the European Court of Human Rights held that the applicant did not have an actionable remedy in breach of confidence and had no effective remedy before a UK court in relation to the disclosures by the local authority. The Court was not persuaded by the Government's argument that a finding that the applicant had an "expectation of privacy" would mean that the elements of the breach of confidence action were established. It was unlikely that the UK courts would have accepted that the images had the "necessary

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<sup>27</sup> *A v B plc* [2002] EWCA Civ 337, [2002] 2 All ER 545, paras 11(xi), 43(iii) and 47.

<sup>28</sup> *Theakston v MGN Ltd* [2002] EWHC 137 (QB), paras 57-64 and 72-76; endorsed by the Court of Appeal in *A v B plc*, above.

<sup>29</sup> G Phillipson, "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" (2003) 66 MLR 726, 744-748 and 757-758.

<sup>30</sup> No 44647/98, date of judgment: 28.4.2003 (ECtHR).

quality of confidence” about them, or that the information was “imparted in circumstances importing an obligation of confidence”.<sup>31</sup>

- (f) The fact that the information is obtained as a result of unlawful activities does not mean that its publication should necessarily be restrained by injunction on the grounds of breach of confidence, though this could well be a compelling factor when it comes to exercising discretion.<sup>32</sup>
- (g) A person who acquires personal information in relation to another without notice of its confidential character (as when the information is not confidential by its nature) may disclose the information even though there is an agreement to keep it secret between the confider and the confidant.
- (h) The requirement that the information must have been imparted in circumstances importing an obligation of confidence is problematic if the information was disclosed by a newspaper. The plaintiff would have to show that the newspaper had been put on notice prior to publication that the disclosure amounted to a breach of confidence owed by the source to the subject of the information. Accordingly, the plaintiff would have to show that the newspaper had the requisite notice both of the source’s duty of confidence and of the source’s breach of that duty. Such a duty will not exist in the majority of cases of media intrusion. Even if a duty of confidence exists in the particular case, it is difficult to prove because of the protection afforded to the media regarding their sources and the fact that information will often be provided to the media anonymously.
- (i) There is no jurisdiction to grant an injunction as regards personal information already published. Once the information in question is in the public domain, its re-publication is not actionable as a breach of confidence. The obligation of confidence is discharged once the subject matter of the obligation has been destroyed, even though the destruction was the result of a wrongful act committed by the person under the obligation.<sup>33</sup> But private facts or photographs of an individual which have already been published in breach of his privacy may, on re-publication, cause him further distress, embarrassment and frustration.
- (j) The law of breach of confidence is solely concerned with unauthorised disclosures. It offers no relief when the infringement does not involve, or result in, a disclosure. An intrusion into private premises or surveillance using an aural or visual device is not actionable as a breach of confidence.

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<sup>31</sup> No 44647/98, date of judgment: 28.4.2003 (ECtHR), paras 95, 110-111.

<sup>32</sup> *A v B plc* [2002] EWCA Civ 337, [2002] 2 All ER 545, para 11(x); citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.

<sup>33</sup> See J Morgan, “Privacy, Confidence and Horizontal Effect: ‘Hello’ Trouble” [2003] CLJ 444, 452-3; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 265, 286-287.

### ***Infringement of copyright***

2.14 There is an infringement of copyright if a person copies or publishes a private letter or family photograph the copyright of which is owned by another.<sup>34</sup> There are, however, limitations to protecting privacy under the law of copyright. An action for infringement of copyright is only actionable at the suit of the owner of the copyright, such as a photographer, the author of an article, or a television or newspaper company. A person whose photograph has been taken by another person cannot normally bring an action if the photograph is reproduced or published by that other person without his authority. An exception is if the person whose privacy has been invaded is also the person who has commissioned the photograph and he is entitled to the copyright under the terms of the agreement. A person who has commissioned a work may restrain any exploitation of the commissioned work for any purpose against which he could reasonably take objection.<sup>35</sup> But in situations where the publication of a photograph in a newspaper amounts to an invasion of privacy, the copyright of the photograph is usually owned by the newspaper company. There is also no copyright in a person's name, likeness or image; nor is there any copyright in information as such. A person may read a private letter and then reproduce the information contained in the letter in his own words without infringing the copyright of the author. Dissemination of information disclosed in an article would not constitute an infringement if there is no direct quotation. As for the tort of passing off, it exists to protect business goodwill, not privacy or personality as such.

### ***Breach of contract***

2.15 A contract may expressly or impliedly restrict the use or disclosure of personal information furnished by a party to the contract. In *Pollard v Photographic Company*,<sup>36</sup> a photographer was restrained from using the plaintiff's photograph for advertising purposes. The court held that it was an implied term of the contract that prints taken from the negative of photographs taken at the defendant's shop were not to be used for an unauthorised purpose. It is open to the person who has been surreptitiously photographed by hotel staff when staying at a room in a hotel to argue that it is an implied term of the contract with the hotel that the room is free from surveillance by his staff.

### ***Intentional infliction of emotional distress causing physical harm***

2.16 A person who has wilfully done an act calculated to cause physical harm to another person without justification, and has in fact thereby

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<sup>34</sup> An author also has two "moral rights" under the Copyright Ordinance (Cap 528), namely, the right to be identified as the author (s 89) and the right to object to derogatory treatment of his work (s 92).

<sup>35</sup> Copyright Ordinance (Cap 528), s 15.

<sup>36</sup> (1889) 40 Ch D 345.

caused physical harm to that person, is liable in tort under the principle laid down in *Wilkinson v Downton*.<sup>37</sup> False words and threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing, physical harm to the person to whom they are uttered, are actionable.<sup>38</sup> The tort requires that the defendant intended the physical harm to be the consequence of the emotional distress suffered by the plaintiff, or was reckless as to whether this would be the consequence. Mental suffering or emotional distress by itself, although reasonably foreseeable, if unaccompanied by physical injury or recognisable psychiatric illness, is not a basis for a claim for damages,<sup>39</sup> nor would the defendant be liable if he did not have knowledge that the conduct in question was likely to cause physical harm.<sup>40</sup>

2.17 The action would not assist the individual aggrieved by an invasion of privacy in the majority of cases. Although the surreptitious use of a recording device in a person's premises and the publication of the details of his private life may cause him embarrassment or annoyance, it is only in extreme cases that physical or mental harm would ensue. Another difficulty is that a victim of invasion of privacy is rarely able to prove that the wrongful act was calculated to cause him physical harm or psychiatric illness; he is normally able to show that it is negligent at most.<sup>41</sup>

### ***Trespass to the person***

2.18 Trespass to the person consists of battery and assault. Battery is physical interference with the person of an individual. Touching an individual without his consent would be actionable. The taking of a photograph or the flashing of a light is not a battery, although it may well be the case if a bright light is deliberately shone into another person's eyes and injures his sight or damages him in some other way.<sup>42</sup> An assault is an overt action, by word or by deed, indicating an immediate intention to commit a battery and with the capacity to carry the threat into action.

2.19 In *Home Office v Wainwright*,<sup>43</sup> a man, M, and a woman, F, had been strip-searched, without real consent, by prison officers before they were allowed to visit a relative in prison. During the search, one officer examined M's naked body, lifted up his penis and pulled back the foreskin. F did not allege that she had been touched by the officers, but the room had an uncurtained window through which someone across the street could have seen her. At one point she was naked apart from her knickers around her ankles and a vest held above her breasts. As a result, M suffered from post-traumatic stress disorder

<sup>37</sup> *Wilkinson v Downton* [1897] 2 QB 57, 59.

<sup>38</sup> *Janvier v Sweeney* [1919] 2 KB 316, 322; *Wong Kwai Fun v Li Fung* [1994] 1 HKC 549.

<sup>39</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Khorasandjian v Bush* [1993] 3 WLR 476, 482H-483A; *Wainwright v Home Office* [2003] UKHL 53, para 47.

<sup>40</sup> *Home Office v Wainwright* [2001] EWCA Civ 2081, [2002] QB 1334.

<sup>41</sup> *Hosking v Runting* [2003] 3 NZLR 385, para 173 ("In many cases, particularly those involving the media, it is quite unlikely that a media organisation intends to harm a plaintiff when it publishes private information about that person. It is much more likely ... that the intention would be to impart information to the public and to maintain circulation.")

<sup>42</sup> *Kaye v Robertson and Sport Newspaper Ltd* [1991] FSR 62.

<sup>43</sup> [2001] EWCA Civ 2081, [2002] QB 1334.

and F's existing depression was exacerbated. The trial judge held that the tort of trespass to the person consisted of wilfully causing a person to do something to himself which infringed his right to privacy. However, Buxton LJ found that it was not a case of battery, but of causing the claimants to do something to themselves that led to humiliation and illness. He said extending the tort of trespass into the areas covered by *Wilkinson v Downton* and privacy was "unsupported by authority, entirely unprincipled, and if adopted would severely undermine the policy reasons for limiting the ambit of trespass".<sup>44</sup>

## **Defamation**

2.20 Defamation consists in the publication of a false statement which tends to damage the reputation of another without lawful justification. It might, for example, be defamatory if the defendant took a photograph of a person who wished to be let alone and published a photograph of him in fancy costume.<sup>45</sup> There are, however, differences between defamation and invasion of privacy. Whereas defamation protects the commercial interests of a natural or legal person, the law of privacy protects the personal right attached to a living individual. The basis of a defamation action is injury to a person's public reputation or status, not injury to an individual's emotions and mental suffering as in privacy cases. Since the primary damage in a complaint of unwanted publicity is the mental distress resulting from private facts having been exposed to public view, the published matter need not be defamatory in a privacy case. Another distinction between defamation and privacy is that truth is a complete defence to a defamation action. Defamation cannot afford a remedy where the offending statement is true. Since the primary object of privacy law is not to prevent inaccurate portrayal of private life, but to prevent its being depicted at all, defamation law is only marginally relevant to the protection of individuals from unwanted publicity; *a fortiori* when the invasion of privacy in question is unwarranted surveillance which does not involve any publication at all.

## **Malicious falsehood**

2.21 The tort of malicious falsehood consists in the defendant maliciously publishing statements about the plaintiff which are false, and the plaintiff suffering special damage as a result. The Younger Report gave the example of the malicious publication in a newspaper to the effect that a famous pop-singer had commenced his novitiate with a closed order of monks. The publication would not lower him in the esteem of right-thinking people, but would lose him engagements and therefore income, and therefore be

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<sup>44</sup> [2001] EWCA Civ 2081, [2002] QB 1334, para 72.

<sup>45</sup> *Monckton v Ralph Dunn* [1907] *The Times*, 30 January. The plaintiff in the following cases was found to have a cause of action in defamation: a dental advertisement showing a picture of a young actress as if she had no teeth: *Funston v Pearson* [1915] *The Times*, 12 March; a photograph in a newspaper of a person on a hot day, with a caption implying that his feet would smell so badly at the end of the day that they would need to be soaked in the defendant's disinfectant: *Plumb v Jeyes Sanitary Compounds Co Ltd* [1937] *The Times*, 15 April; an advertisement showing the face of the plaintiff, who did not seek publicity, mounted upon the body of a man dressed in a foppish manner, carrying a cane and eye-glass: *Dunlop Rubber Co Ltd v Dunlop* [1921] AC 347.

actionable at his suit.<sup>46</sup> The tort has been developed to protect commercial interests.<sup>47</sup> An action for malicious falsehood would not avail the person whose personal information is accurately published in the newspaper.

### ***Kaye v Robertson***

2.22 One of the best cases to illustrate the failure of the common law to protect individual privacy is *Kaye v Robertson*.<sup>48</sup> The plaintiff was a well-known actor. He suffered severe injuries to his brain and was hospitalised in a private room which had a notice asking visitors to see a member of the staff before visiting. The defendant journalists ignored the notice and entered the room. Although the plaintiff apparently agreed to talk to them and did not object to them taking photographs inside the room, it was confirmed at the trial that he was in no fit condition to be interviewed or to give any informed consent to be interviewed.

2.23 The court held that there was no right to privacy in English law and accordingly there was no right of action for breach of a person's privacy. Invasion of a person's privacy, however gross, did not of itself entitle him to relief. The plaintiff therefore relied on the following causes of action: trespass to the person, passing off, libel, and malicious falsehood. The court agreed to grant an injunction for malicious falsehood: what was written in the article was false and the plaintiff's right to sell the story of the accident and his recovery would be seriously diminished if the defendants were able to publish their article.

2.24 The injunction granted on the basis of malicious falsehood afforded only limited protection. If the defendant had intended to publish the photographs alongside the story telling their readers the truth, namely that their photographer had entered the plaintiff's hospital room uninvited and the photographs had been taken without the plaintiff's consent, then no injunction could have been granted for malicious falsehood. As to the suggestion that the action could have successfully been based on a breach of confidence, Lord Bingham CJ was of the view that such a claim could not have successfully been made "without doing impermissible violence to the principles upon which that cause of action is founded."<sup>49</sup> As he pointed out, the complaint was not that information obtained or imparted in confidence was about to be misused, but that the plaintiff's privacy had been the subject of a monstrous invasion but for which the interview would never have been obtained at all.

## **Hong Kong Bill of Rights Ordinance**

2.25 The HK Bill of Rights Ordinance (Cap 383) incorporates into the

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<sup>46</sup> Younger Report, Annex I, para 8.

<sup>47</sup> Examples are actions for "slander of title" and "slander of goods".

<sup>48</sup> [1991] FSR 62; B S Markesinis, "Our Patchy Law of Privacy - Time to do Something about it" (1990) 53 MLR 802; P Prescott, "Kaye v Robertson - a reply" (1991) 54 MLR 451.

<sup>49</sup> Lord Bingham of Cornhill, "Opinion: Should There Be a Law to Protect Rights of Personal Privacy?" [1996] 5 EHRLR 450, 457.

law of Hong Kong the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong. As far as the right to privacy is concerned, Article 14 of the HK Bill of Rights states that no person shall be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence”, and that everyone has the right to the protection of the law against such interference.<sup>50</sup> The Ordinance makes no attempt to elaborate on the right to privacy under that Article.

2.26 Insofar as a court may grant remedy or relief in an action for breach of the HK Bill of Rights Ordinance,<sup>51</sup> it is arguable that the Ordinance has created a general right of privacy protecting an individual from arbitrary or unlawful interference with his privacy. However, the Ordinance binds only the Government and public authorities.<sup>52</sup> The right to privacy under the Ordinance cannot be enforced against private persons. The Article affords no protection to an individual whose right to privacy has been infringed by a private person.

## **Personal Data (Privacy) Ordinance<sup>53</sup>**

### ***The Data Protection Principles***

2.27 Data Protection Principle (DPP) 1(1) provides that personal data must not be collected unless: (a) they are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data; (b) the collection is necessary for or directly related to that purpose; and (c) the data are adequate but not excessive in relation to that purpose. DPP 1(2) requires that personal data shall be collected only by means which are both lawful and fair in the circumstances of the case. This means that a person is prohibited from collecting personal data by means that are unfair in the circumstances of the case, even if the means are lawful. For example, where personal data are collected by the use of deception, such a means of collection is likely to be treated as unfair if no public interest is at stake and hence contrary to DPP 1(2), even if the deception concerned is not unlawful. The Privacy Commissioner has advised that collection by means unknown to the individuals concerned (eg, photo-taking in public places using long-range lens or hidden cameras) is generally not considered to be a fair means of collection.<sup>54</sup> Other examples given by the Privacy Commissioner include the taking of photographs of individuals in private premises from outside without their consent, and the taking of photographs of individuals in public where they have made it clear that they do not wish to be photographed.<sup>55</sup> These means might nonetheless be

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<sup>50</sup> Hong Kong Bill of Rights Ordinance (Cap 383), Part II. On Article 14 generally, see *X v The Commissioner of the Independent Commission Against Corruption*, HCCM 49/2003, paras 14 - 20.

<sup>51</sup> Cap 383, section 6.

<sup>52</sup> Cap 383, section 7.

<sup>53</sup> See generally M Berthold and R Wacks, *Hong Kong Data Privacy Law – Territorial Regulation in a Borderless World* (Sweet & Maxwell Asia, 2<sup>nd</sup> edn, 2003).

<sup>54</sup> Minutes of the Meeting of the Panel on Information Policy of the Provisional Legislative Council held on 26.9.97, para 27.

<sup>55</sup> Above.

considered fair if there is an over-riding public interest in the collection of personal data.<sup>56</sup>

2.28 Where personal data are collected from the individual who is the subject of the data (as may occur, for example, where a journalist records information given by an individual about himself during an interview), the provisions of DPP 1(3) require that all practicable steps shall be taken to inform the individual concerned of certain matters. In particular, the individual must be explicitly informed of the purpose for which the data are to be used.

2.29 The judgment of the Court of Appeal in *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*<sup>57</sup> has, however, limited the application of the various requirements of DPP 1 reviewed above to the collection of data relating to individuals whose identities are known to the collecting party or data of individuals the collecting party intends to identify (see below). Accordingly, where a person, say, photographs or films an individual whose identity is unknown and whom the photographer or film-maker does not intend to identify, the photographing or filming of the individual is not subject to the provisions of DPP 1, even though the subsequent use of the photograph or film may result in the individual being recognised and identified by his acquaintances.

2.30 DPP 2(1) requires that all practicable steps shall be taken to ensure that personal data are accurate having regard to the purpose for which the data are, or are to be, used. Given their time-sensitive nature, it will often be the case that there will be inaccuracies in personal data contained in news reports. However, so long as all practicable steps have been taken to check the accuracy of the personal data concerned, having regard to the fact that the purpose for which the data are to be used is news reporting, the requirements of DPP 2(1) will have been complied with.

2.31 DPP 2(1) also provides that where there are reasonable grounds for believing that personal data are inaccurate having regard to the purpose for which the data are, or are to be, used, the data concerned should either not be used for that purpose until those grounds cease to apply, or be deleted. Accordingly, a person who includes personal data in a document knowing that the data are inaccurate would be in breach of DPP 2(1). Further, where it is practicable in all the circumstances of the case to know that personal data disclosed to a third party were and are materially inaccurate having regard to the purpose for which the personal data are, or are to be, used by the third party, DPP 2(1) provides that all practicable steps shall be taken to inform the third party that the data are inaccurate and to provide the third party with such particulars as would enable the rectification of the data.

2.32 At first sight, it might appear that these requirements of DPP 2(1) would require a media organisation to publish or broadcast (as the case may be) corrections of reports that contained inaccurate personal data. Indeed, in our

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<sup>56</sup>

Above.

<sup>57</sup>

[2000] 1 HKC 692.

*Report on Reform of the Law Relating to the Protection of Personal Data*,<sup>58</sup> we recommended that the media be required to take all practicable steps to disseminate a correction where inaccurate data have been published.<sup>59</sup> On closer examination, however, it is doubtful whether DPP 2(1)'s requirement that recipients of inaccurate personal data be informed of corrections to that data are applicable to inaccurate personal data that have been broadcast or published to a general audience. This is because the relevant requirements of DPP 2(1) presuppose that the party that disclosed the personal data knows the purpose for which the data are, or are to be, used by each of the parties to whom the data have been disclosed. Such a presupposition does not seem to hold good for a publisher to a general audience, such as a newspaper publisher or broadcaster.<sup>60</sup> We are also not aware that anyone has sought to require that this be done in reliance on the provisions of DPP 2(1).

2.33 In *Kam Sea Hang Osmaan v Privacy Commissioner for Personal Data*<sup>61</sup>, the Administrative Appeals Board was asked to consider a case in which an individual alleged that a magazine had published fabrications about him. The Board found, however, that a lie or fabrication about an individual falls outside the definition of personal data and, hence, that the provisions of the PD(P)O, including the provisions of DPP 2, did not apply at all in the case before it. Specifically, the Board said that:

*“The wordings of the definition [of personal data in section 2(1) of the PD(P)O] are clear enough to exclude any fabrication or lies told about a person by another person. ... A lie or fabrication always remains a lie or fabrication and can never convert into ‘personal data’.”*

2.34 With respect to the Board, there is no basis in the wording of the definition of personal data in section 2(1) of the PD(P)O for the contention that it excludes lies or fabrications. We also note that the Board's view would mean that the requirements of DPP 2, and the PD(P)O generally, apply where personal data are inaccurate as a result of inadvertence but not where the inaccuracy is deliberate. We cannot find any justification for such a distinction in the Ordinance. It is also at odds with our recommendation in our *Report on Reform of the Law Relating to Personal Data* (on which the PD(P)O was based) that all data relating to an individual that facilitate directly or indirectly the identification of the individual to whom they relate should be regulated by law “whether true or not”.<sup>62</sup> A lie or fabrication is just as much an untruth as an inadvertent mistake. Accordingly, we respectfully consider that the views expressed by the Board on this matter are incorrect and hence that the

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<sup>58</sup> August 1994.

<sup>59</sup> Above, para 18.50.

<sup>60</sup> Similar arguments apply with respect to the provisions of s 23(1) of the PD(P)O, which require that corrections of personal data made pursuant to a data correction request be notified to third parties to whom the data had been disclosed within the previous 12 months unless there is reason to believe they have ceased to use the data for the purpose for which the data were disclosed. These arguments are set out in Ch 11.

<sup>61</sup> Administrative Appeal No 29 of 2001, unreported decision of the Administrative Appeals Board dated 28.2.02.

<sup>62</sup> August 1994, para 8.17.

application of DPP 2, and the PD(P)O generally, is not limited in the manner contended for by the Board in its decision referred to above.

2.35 DPP 3 provides that personal data must not, without the express consent of the data subject, be used for any purpose other than the purpose for which the data were to be used at the time of the collection of the data or a directly related purpose. As a general rule, compliance with the requirements of DPP 3 should pose little difficulty for journalists and media organisations because the personal data they publish or broadcast will usually have been collected for journalistic purposes. On the other hand, DPP 3 does pose potential problems for persons who wish to disclose personal data to journalists or media organisations. If such data were not collected by such persons for use for journalistic purposes or purposes directly related thereto, which will often be the case, then such disclosure would be contrary to the requirements of DPP 3 unless the express consent of the subject is obtained. To address this restriction, an exemption is provided for in the PD(P)O to permit the disclosure of personal data to journalists and media organisations where this is in the public interest. Specifically, in accordance with section 61(2) of the PD(P)O, journalistic sources are permitted to disclose personal data to a journalist or media organisation for publication or broadcasting if they have reasonable grounds to believe, and reasonably believe, that publication or broadcasting of the personal data concerned is in the public interest, even though such disclosure would otherwise contravene the requirements of DPP 3.

2.36 DPP 4 and DPP 5 provide respectively for various requirements with respect to the security of personal data and openness about the personal data policies and practices of persons who collect, hold, process or use personal data, and other matters. Like any other body, to the extent that a media organisation collects, holds, processes or uses personal data, it is subject to these requirements.

2.37 In *Apple Daily v Privacy Commissioner*,<sup>63</sup> the Administrative Appeals Board overturned a ruling by the Privacy Commissioner that the publisher of *Apple Daily* had breached DPP 4 by publishing the name of the street to which victims of an attack had moved out of fear of a further assault by their assailant. The basis for the Privacy Commissioner's decision was that the publication of the address in *Apple Daily* had put the individuals concerned at risk because their assailant might learn of their new location from the article and attack them again. The Privacy Commissioner concluded that this was a breach of DPP 4 because DPP 4 provides for a requirement to take all practicable steps to ensure that personal data are protected against unauthorised or accidental access having particular regard to the harm that could result from such access. The Privacy Commissioner ruled that *Apple Daily* had failed to meet this requirement by publishing the street name in the article.

2.38 The Administrative Appeals Board disagreed. It found that DPP 4 was intended to ensure that personal data are *held* in a secure manner. In publishing the personal data concerned, *Apple Daily* was using the data in such

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<sup>63</sup> Administrative Appeal No 5 of 1999, unreported decision of the Administrative Appeals Board dated 30.11.99, discussed in R Wacks, "Privacy and Process" (1999) 29 HKLJ 176.

a way that the public would inevitably gain access to it and no question of “unauthorised or accidental” access arose. The Board concluded that: “Access is gained by reason of the publication and is not accidental in nature.”

2.39 DPP 6 makes general provision for an individual to have the right to access and correct personal data of which he is the subject. These general provisions are elaborated upon in Part V of the PD(P)O, which contains detailed provisions on compliance with such data access and correction requests.<sup>64</sup> Potentially, the exercise of these rights by individuals who are the subjects of personal data collected by journalists or media organisations for journalistic purposes prior to publication or broadcasting of the personal data concerned could have an inhibiting effect on the journalistic process. To avoid this consequence, section 61(1) of the PD(P)O provides that personal data held by a person, whose business consists, in whole or in part, of a journalistic activity,<sup>65</sup> solely for the purpose of that activity, or a directly related activity, are exempt from the requirement to comply with data access requests unless and until the data are published or broadcast. The net effect of this exemption is that under the PD(P)O individuals have no right of access to, and correction of, their personal data held by journalists or media organisations for a journalistic purpose before the data concerned are published or broadcast.

### ***Rights of redress***

2.40 An individual who believes that a person has breached any of the provisions of the PD(P)O, including the provisions of the DPPs, in relation to personal data of which he is the subject may make a complaint to the Privacy Commissioner.<sup>66</sup> However, in accordance with section 61(1) of the PD(P)O, where the data are held for the purpose of a journalistic activity, the Privacy Commissioner may not carry out an investigation of the complaint unless and until the personal data concerned have been published or broadcast. Further, in accordance with the same section, the Privacy Commissioner may not carry out an investigation of a suspected breach of the PD(P)O on his own initiative (ie in the absence of a complaint from the data subject or a person duly authorised on his behalf to make a complaint),<sup>67</sup> in relation to personal data held by a journalist or media organisation for the purpose of a journalistic activity, whether or not such data have been published or broadcast.<sup>68</sup>

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<sup>64</sup> To the extent, if any, that there is an inconsistency between the provisions of DPP 6 and Part V of the PD(P)O, the latter prevail by virtue of s 4 of the PD(P)O.

<sup>65</sup> By virtue of the definition of “news activity” in s 61(3) of the PD(P)O all journalistic activities, including the gathering of news and various other news related activities are covered by the relevant provisions.

<sup>66</sup> Pursuant to s 37 of the PD(P)O.

<sup>67</sup> Pursuant to s 37(1) of the PD(P)O, a “relevant person” may make a complaint to the Commissioner about a possible contravention of the Ordinance on behalf of the individual who is the subject of the personal data concerned; a “relevant person” is defined in s 2(1) of the Ordinance.

<sup>68</sup> In addition, if the Commissioner wishes to require a media organisation to reveal the source of personal data that are the subject of an investigation and are held for a news activity, pursuant to s 44(2) of the PD(P)O he must first obtain an order to this effect from the Court of First Instance.

2.41 If, having carried out an investigation of a complaint, the Privacy Commissioner concludes that the person concerned is contravening a requirement of the PD(P)O, including a requirement of the DPPs, or has contravened the PD(P)O and is likely to continue or repeat the contravention, he may serve an enforcement notice on that person.<sup>69</sup> Such a notice may direct the person on whom it is served to take such steps as are specified therein to remedy the contravention found by the Privacy Commissioner. For example, in a suitable case such a notice could require a person not to engage in a specified means of collecting personal data that the Privacy Commissioner has concluded is unfair in all the circumstances of the case. While a breach of a DPP is not by itself an offence,<sup>70</sup> a contravention of an enforcement notice is an offence,<sup>71</sup> as is a breach of any of the requirements of the main body of the PD(P)O.<sup>72</sup>

2.42 Where a data subject suffers damage, including injury to feelings, by reason of a contravention of the PD(P)O in relation to personal data of which he is the subject, he has a right to compensation for that damage.<sup>73</sup> To enforce this right the data subject must initiate legal proceedings. As far as is known, only one action involving a claim for compensation under the PD(P)O has been brought to trial.<sup>74</sup>

### ***Protection of freedom of the press***

2.43 The PD(P)O contains a number of provisions to prevent its being used to interfere unduly with journalistic activities. By virtue of section 61(1) of the PD(P)O, the Privacy Commissioner may not carry out inspections of personal data systems used by media organisations. As already noted, by virtue of the same section he also cannot undertake an investigation on his own initiative into a possible breach of the Ordinance in relation to personal data held for the purpose of a journalistic activity, whether or not the data have been published or broadcast. Even where the Privacy Commissioner receives a complaint of such a contravention, he cannot investigate it unless and until the personal data concerned have been published or broadcast. In addition, where the Privacy Commissioner does exercise his investigatory powers within the aforementioned limits, journalists' sources are protected from disclosure by the provisions of section 44(2) of the PD(P)O. According to this section, a journalist cannot be compelled to disclose his source of information unless a judge of the Court of First Instance, on an application made by the Privacy Commissioner, directs the journalist to furnish the Commissioner with such information. Lastly, as also noted above, exemptions are provided for in the PD(P)O from: (a) the use limitation provisions of DPP 3 to enable the disclosure of personal data to journalists and media organisations where it is in the public

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<sup>69</sup> Section 50 of the PD(P)O.

<sup>70</sup> Section 64(10) of the PD(P)O.

<sup>71</sup> Section 64(7) of the PD(P)O, the maximum penalty on conviction is a fine at level 5 and imprisonment for 2 years.

<sup>72</sup> Section 64(10) of the PD(P)O, the maximum penalty on conviction is a fine at level 3.

<sup>73</sup> Section 66 of the PD(P)O.

<sup>74</sup> *Kwan Chi-shan v Yeung Yin-fang* DCCJ 7812 of 1997 (Unreported judgment of Judge CB Chan) (4.12.97).

interest for the data to be published or broadcast; and (b) the data subject's right of access to his personal data where the data are held for the purpose of journalistic activities unless and until the data are published or broadcast.<sup>75</sup>

### **Limitations of the PD(P)O**

**2.44 Protection of privacy in relation to personal data** – The object of the PD(P)O is to protect the privacy of individuals *in relation to personal data* by regulating the collection, holding, processing and use of personal data. It does not aim at protecting individuals from unwarranted privacy intrusion as such.<sup>76</sup> “Personal data” is defined as meaning any data:

- “(a) relating directly or indirectly to a living individual;*
- (b) from whom it is practicable for the identity of the individual to be directly or indirectly ascertained; and*
- (c) in a form in which access to or processing of the data is [reasonably] practicable”.*<sup>77</sup>

“Data” is in turn defined as meaning “any representation of information (including an expression of opinion) in any document”, and “document” is defined as including documents in writing and discs, films, tapes or other devices in which data are embodied and are capable of being reproduced.

**2.45 Personal data relating to a living individual** – Since the PD(P)O defines “personal data” as data relating to a living individual, bereaved relatives and friends have no right to complain under the Ordinance if personal data about their deceased relative or friend have been collected or used in a manner that would be a breach of the DPPs if the deceased were alive.

**2.46 Information must be in a recorded form** – By virtue of the definitions of personal data, data and document (see above), the PD(P)O does not apply to information relating to an individual that is not recorded. If the personal information disclosed by someone does not involve the disclosure of a record of the information or of information inferred from a record of the information, the disclosure does not constitute a disclosure of personal data within the meaning of the PD(P)O.<sup>78</sup> Likewise, if the personal information collected by someone is not subsequently put into a recorded form, the collection does not constitute a collection of personal data within the meaning of the Ordinance. Accordingly, information concerning an individual that is communicated orally is not subject to the provisions of the Ordinance so long as it has not been inferred from a written record. On the other hand, if such information is subsequently put into a recorded form (for example, written down or inputted into a computer file), it becomes personal data at that point and hence subject to the provisions of the PD(P)O provided it is practicable to

<sup>75</sup> Section 61(1) of the PD(P)O refers.

<sup>76</sup> See the long title and the remarks of Ribeiro JA (as he then was) at 704I to 705E of *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 1 HKC 692.

<sup>77</sup> Section 2(1) of the PD(P)O.

<sup>78</sup> Under s 2(1) of the PD(P)O, disclosing in relation to personal data includes disclosing information inferred from the data.

identify the individual who is the subject of the information and the information is in a form in which access or processing is practicable.

2.47 By the same token, the PD(P)O does not operate to control visual or aural surveillance by an individual using only his own senses unless and until the information obtained by these means has been recorded and even then only if the resulting data meet all the other parts of the definition of personal data. Likewise, an individual who carries out a body search or who searches the premises of another without authority could not have any liability under the Ordinance.

2.48 **Practicable to ascertain the identity of data subject** – On its face, the requirement of the definition of personal data that it must be practicable to ascertain the identity of the individual to whom the data relate is a purely objective test to be applied by reference solely to the data concerned and without reference to any other information known by the party holding or receiving the data concerned. On this basis, a published article about an individual that does not directly identify him, and from which it is not practicable to identify him indirectly from the article alone, would not constitute personal data and hence would not be subject to the requirements of the Ordinance. This would be so even though the relatives or other acquaintances of the individual concerned are able to identify him indirectly through a combination of what is said in the article about him and their own knowledge of him. One example of this in this context is the publication of a photograph of an individual without otherwise identifying him in the related article. The individual's relatives and other acquaintances are able to identify him because they recognise him in the photograph but no one else is.

2.49 However, given that this part of the definition of personal data is given such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the PD(P)O,<sup>79</sup> the better view appears to be that account should be taken of other information that may be in the possession of the party holding or receiving the data concerned. On this basis, the photograph and accompanying article in the example given above (insofar as they relate to the individual concerned) would be considered personal data as far as the individual's relatives and other acquaintances are concerned. The Legal Director of the Privacy Commissioner's Office has expressed his personal view that where data about an individual are made available to third parties "generally" (as opposed to a specific party), it is "usually impossible" to give individual consideration to the question of whether a party who has thus acquired the data happens to possess other information which would render it practicable for him to ascertain the identity of the individual to whom the data relate.<sup>80</sup> While this is undoubtedly the case, it is reasonable to expect publishers to have general regard to the fact that their publications may be seen by persons, such as relatives or other acquaintances of the subjects of their articles, who have knowledge that would enable them to identify the

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<sup>79</sup> In accordance with s 19 of the Interpretation and General Clauses Ordinance (Cap 1).

<sup>80</sup> E Pun, "Meaning of 'personal data' and 'collection' in the PD(P)O", collected in *E-Privacy in the New Economy – Conference Presentations* (Hong Kong: Office of the Privacy Commissioner for Personal Data, 2001), <[www.pco.org.hk/english/infocentre/speech\\_20010326.html](http://www.pco.org.hk/english/infocentre/speech_20010326.html)>, p 102.

subjects concerned, even though the articles do not directly identify them. Indeed, the reason why the facial features of individuals in photographs or film clips are commonly obscured in media reports is presumably to prevent their identification by persons whom the media organisation concerned reasonably believes may otherwise identify them.

**2.50 The *Eastweek* case** – In *Eastweek Publisher v Privacy Commissioner for Personal Data*,<sup>81</sup> the plaintiff’s photographer took a photograph of the complainant in a public street. The photograph was later used to illustrate an article about women’s fashion in Hong Kong, in which the complainant’s dress sense was criticised. After a hearing as part of his investigation into the complaint, the Privacy Commissioner found *inter alia* that the photograph had been taken using a long-range lens without the complainant’s knowledge or consent, and that after it appeared in the magazine concerned, the complainant’s colleagues and others made fun of her and made her too embarrassed to wear the same clothing (which was new) again. As a result of his investigation into the complaint, the Privacy Commissioner concluded that there had been a breach of the requirement of DPP 1 to collect personal data by means that are fair in the circumstances of the case (ie that the taking of the photograph had been a collection of personal data by means that were unfair in the circumstances of the case).<sup>82</sup> The Court of First Instance upheld the Privacy Commissioner’s finding on an application for judicial review.<sup>83</sup> However, a majority of the Court of Appeal held otherwise.<sup>84</sup>

**2.51 Requirement to identify or intend to identify the data subject** – DPP 1(2) provides *inter alia* that personal data shall be collected by means that are lawful and fair in the circumstances of the case. The Court of Appeal in the *Eastweek* case held that a contravention of DPP 1(2) requires two elements to be present: (a) an act of personal data collection; and (b) doing this by means which are unlawful or unfair in the circumstances. With respect to (a), a majority of the Court was of the view, as noted above, that it is of the essence of the required act of personal data collection that the data user must thereby be compiling information about “an identified person” or about “a person whom the data user intends or seeks to identify”.<sup>85</sup> That this requirement is not expressly provided for in the Ordinance was explicitly recognised by one of the judges in the majority, Godfrey VP, thus: “*I know this is not expressly spelled out in the legislation but I am satisfied from the way in which that legislation is framed that that is its underlying purpose ...*”.<sup>86</sup> The majority further pointed out that if the identity of the person to whom the information relates is not known to the data user, then the latter could not comply with a data access or correction request under the Ordinance.<sup>87</sup>

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<sup>81</sup> [2000] 1 HKC 692. Cf *Aubry v Éditions Vice-Versa Inc*, 157 DLR(4th) 577.

<sup>82</sup> Above, *per* Ribeiro JA (as he then was) at 696C.

<sup>83</sup> *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*, HCAL 98 of 1998 (Unreported judgment of Keith JA, sitting as an additional judge of the Court of First Instance) (24.9.99).

<sup>84</sup> [2000] 1 HKC 692; Godfrey VP and Ribeiro JA (as he then was) in the majority, Wong JA dissenting.

<sup>85</sup> Above, *per* Ribeiro JA (as he then was) at 700A-B and *per* Godfrey VP at 711D.

<sup>86</sup> Above, at 711D-F.

<sup>87</sup> Above, *per* Ribeiro JA (as he then was) at 702D-703H.

2.52 The Court found that the photographer, the reporter and *Eastweek* remained completely indifferent to, and ignorant of, the complainant's identity right up to and after publication of the offending issue of the magazine. The Court therefore held (Wong JA dissenting) that taking her photograph did not constitute an act of personal data collection relating to the complainant. The fact that the photograph, when published, was capable of conveying the identity of the subject to a reader who happens to be acquainted with that person did not make the act of taking the photograph an act of data collection if the photographer and his principals were acting without knowing or being at all interested in ascertaining the identity of the person being photographed.<sup>88</sup>

2.53 **Personal privacy vs information privacy** – In the view of Ribeiro JA, as he then was, the complainant in the *Eastweek* case would be entirely justified in regarding the article and the photograph as an unfair and impertinent intrusion into her sphere of personal privacy.<sup>89</sup> Indeed, the Court of First Instance observed that the complainant's real complaint related to the invasion of her privacy, which the publication of her photograph in the magazine represented, rather than the unfair collection of data about her.<sup>90</sup> But as Ribeiro JA pointed out, the PD(P)O does not purport to protect "personal privacy" as opposed to "information privacy". The Ordinance is not intended to establish general privacy rights against all possible forms of intrusion into an individual's private sphere.<sup>91</sup> The complainant was therefore left without a remedy under the PD(P)O and the consequence of the principles laid down in *Eastweek* is that any individual whose privacy is intruded upon by a publication has no redress under the PD(P)O if the publisher has not identified and does not intend to identify the individual concerned.

2.54 **Use Limitation Principle (DPP 3)** – As far as the use and disclosure of personal data are concerned, DPP 3 provides that personal data may only be used for "the purpose for which the data were to be used at the time of the collection" unless the data subject consents otherwise. DPP 3 only limits the purpose of a disclosure or use of personal data; it does not aim at protecting the private life of individuals from unwarranted publicity as such. In particular, it offers limited protection to people whose personal data are revealed in consequence of a crime, accident or tragedy. Personal data collected by journalists from public figures, victims and their friends and relatives are invariably for journalistic purposes. Journalists may argue that including these data in a newspaper or broadcast programme is consistent with the purpose for which the data were to be used at the time of the collection of the data. Hence individuals whose right of privacy has been infringed by the media publicising their data in connection with a "newsworthy" event may not have a remedy under PD(P)O if it was a journalist who had collected the data and the collection was lawful and fair. As long as the data are collected lawfully and fairly and the publication is for the purpose for which the data were to be

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<sup>88</sup> Above, *per* Ribeiro JA (as he then was) at 702B-D.

<sup>89</sup> Above, at 705H-I.

<sup>90</sup> *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*, above, at 17E-H.

<sup>91</sup> [2000] 1 HKC 692 at 704I to 705B.

used at the time of the collection, the Ordinance will not restrain the publication even though it amounts to an unwarranted invasion of privacy.

2.55 **Security Safeguards Principle (DPP 4)** – As noted above, in *Apple Daily v Privacy Commissioner*,<sup>92</sup> the Administrative Appeals Board ruled that DPP 4 is not applicable to personal data when the data are used for publication. On the basis of this ruling, DPP 4 provides no protection for an individual the publication of whose personal data creates a risk that he may suffer harm from someone who “accesses” the data as a result of the publication.

2.56 **Enforcement notices** – The Privacy Commissioner does not have a power to award compensation to a person who suffers damage because of a contravention of a DPP, nor does he have the power to undertake proceedings on behalf of such a person. However, as noted above, a person who believes that there may have been a contravention of the PD(P)O with respect to his personal data may make a complaint to the Privacy Commissioner. As already noted in this context, however, the Privacy Commissioner’s powers of investigation in relation to complaints against a media organisation are restricted to those concerning personal data that have been published or broadcast.<sup>93</sup> Where, following such an investigation, the Privacy Commissioner is satisfied that the person complained against is contravening the PD(P)O or has contravened it “in circumstances that make it likely that the contravention will continue or be repeated”, he may serve on the person concerned an enforcement notice directing the person concerned “to take such steps as are specified in the notice to remedy the contravention” within the specified period.<sup>94</sup> However, other than his power to publish a report of the result of his investigation and make such recommendations or other comments as he thinks fit,<sup>95</sup> the Privacy Commissioner has no power to take further action against the party complained against where there is no likelihood of a further or continued contravention of the Ordinance.

2.57 **Conclusion** – The PD(P)O does not, and was not intended to, provide a comprehensive system of protection and redress for potential and actual victims of unwarranted privacy intrusion. The main reason for this is that the provisions of the PD(P)O are concerned only with privacy in relation to personal data, not privacy rights in general. Intrusive behaviour that does not involve the recording of information relating to identifiable individuals simply does not engage the Ordinance. The PD(P)O also has no application to data relating to deceased individuals.

2.58 Further, if a person collects data about an individual whose identity is unknown and there is no intention by that person to identify him, the collection of the data does not engage the provisions of the PD(P)O governing the collection of personal data. In addition, some provisions of the PD(P)O are

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<sup>92</sup> Administrative Appeal No 5 of 1999.

<sup>93</sup> Section 61(1) of the PD(P)O.

<sup>94</sup> Section 50 of the PD(P)O.

<sup>95</sup> Section 48 of the PD(P)O.

not easily applied to personal data that are published generally or broadcast.<sup>96</sup> As noted above, the Administrative Appeals Board has pointed out the inapplicability of the security provisions of the Ordinance to personal data when they are so used. Generally published or broadcast personal data also do not appear to be susceptible to the application of the PD(P)O's provisions on the dissemination of corrections of inaccurate personal data.

**2.59 Privacy Commissioner's views** – The Consultation Paper concluded that the PD(P)O could not always provide satisfactory relief to victims of invasion of privacy. The Privacy Commissioner agreed that existing legislation and common law were not sufficient to provide adequate protection against privacy intrusion and unwanted publicity. In handling complaints under the PD(P)O, they sometimes encountered situations where there appeared to be no legal remedy for infringement of privacy. The Privacy Commissioner further agreed that although the two proposed torts would cover some situations already covered by the PD(P)O, the creation of a new cause of action should not be ruled out simply because it overlaps partly with an existing cause of action. In their opinion, what matters is how effective the new causes of action are likely to be in filling the existing gap in the law, and what other outcome (if any) their creation may lead to.

**2.60** The Privacy Commissioner advised in his submission that there had been only one civil claim under section 66 of the PD(P)O, which had been dismissed as lacking in merits. This figure contrasts sharply with the number of complaints received by the Privacy Commissioner. The Commissioner offered the following reasons to explain why section 66 had been invoked so rarely:

- (a) Most citizens are more inclined to lodge a complaint with an informal tribunal than to bring a lawsuit in view of the trouble and expense of the latter.
- (b) There is not much to gain in bringing a civil action under section 66 because infringement of privacy rarely involves serious loss or damage.<sup>97</sup>
- (c) In the absence of any successful claim under section 66, aggrieved individuals do not have any idea as to how the compensation would be assessed.

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<sup>96</sup> The concept of 'fair use or disclosure' (as opposed to 'fair collection') is lacking in DPP 3 (which implements the Purpose Limitation Principle in the OECD Privacy Guidelines 1980). Cf Article 6(a) of the EU Data Protection Directive 1995, which requires that personal data must be 'processed' (a term defined as including 'use, disclosure by transmission, dissemination or otherwise making available') not only lawfully but also 'fairly'; and Article 7 which sets out the principles relating to the reasons for making 'processing' legitimate.

<sup>97</sup> Although the amount of damages for injury to feelings may be small in the past, three plaintiffs, who sought redress for unlawful discrimination under the Disability Discrimination Ordinance, obtained substantial damages for injury to feelings recently. In *K, Y and W v Secretary for Justice* (DCEO Nos 3, 4, 7 of 1999), K and Y were each awarded \$100,000 under that head while W was awarded \$150,000. Similarly, the plaintiff in *Yuen Sha Sha v Tse Chi Pan* (DCEO No 1 of 1998) obtained \$80,000 for sexual harassment under the Sex Discrimination Ordinance. It appears that the view that there is not much to gain in bringing a civil action under s 66 of the PDPO should be adjusted.

- (d) Since the meaning of the Data Protection Principles is rather loose, a DPP is subject to a wide range of interpretation. The courts are not bound by the decisions and observations made by the Privacy Commissioner. It is hard to predict the outcome of a claim and an aggrieved individual cannot be sure that he has a good case.

2.61 Contrary to the position of the Equal Opportunities Commission under the Sex Discrimination Ordinance (Cap 480) and the Disability Discrimination Ordinance (Cap 487), the Privacy Commissioner does not have the power and resources to provide assistance to aggrieved individuals in respect of proceedings under section 66. Victims who have suffered damage by reason of a contravention of a DPP have to bear all the legal costs unless they are entitled to legal aid. We believe this is another reason why there have not been many cases under section 66.

2.62 A person who institutes proceedings under the Sex Discrimination Ordinance or the Disability Discrimination Ordinance may apply to the Equal Opportunities Commission for assistance in respect of these proceedings.<sup>98</sup> Such assistance may include (a) giving advice; (b) arranging for the giving of advice or assistance by a solicitor or counsel; (c) arranging for representation by a solicitor or counsel; and (d) any other form of assistance which the Commission may consider appropriate. We consider that similar provisions should be added to the PDPO in order that the Privacy Commissioner can provide assistance to data subjects who have suffered damage by reason of a contravention of a DPP.

#### **Recommendation 1**

**We recommend that the Personal Data (Privacy) Ordinance (Cap 486) should be amended to enable the Privacy Commissioner for Personal Data to provide legal assistance to persons who intend to institute proceedings under section 66 of the Personal Data (Privacy) Ordinance, along the lines of section 85 of the Sex Discrimination Ordinance (Cap 480) and section 81 of the Disability Discrimination Ordinance (Cap 487).**

### **Concluding remarks**

2.63 Although the HK Bill of Rights Ordinance has created a cause of action for breach of privacy against the Government or a public authority, the Hong Kong courts have thus far not recognised a legally enforceable right of privacy at common law. Where the HK Bill of Rights Ordinance is inapplicable, the interests in privacy have been protected only if another interest recognised

<sup>98</sup> Cap 480, s 85 & Cap 487, s 81. There were 11 District Court cases under the two Ordinances in 1999. About half of them were assisted by the EOC.

by the courts has also been violated. Although some of the existing causes of action may incidentally afford some protection of privacy interests, their primary focus has been the protection of an individual's interest in his person or property. As privacy interests are wider in scope than the interests recognised by the existing torts, the protection of privacy by common law is "patchy and inadequate".<sup>99</sup> We consider that the protection of privacy interests should not be confined to "parasitic damages" arising out of defamation and injury to contractual or proprietary rights.<sup>100</sup> In its report on privacy, the British section of JUSTICE concluded:

*"English law does ... provide a remedy for some kinds of intrusion into privacy, but it is certainly not adequate to meet the activities of a society which is perfecting more and more sophisticated techniques for intrusion. The present law in the field of privacy is unco-ordinated and unsatisfactory, and a strong case in our view exists for the creation by means of statutory provision of comprehensive protection for the right of privacy."*<sup>101</sup>

2.64 Basil Markesinis says:

*"English law, on the whole, compares unfavourably with German law. True, many aspects of the human personality and privacy are protected by a multitude of existing torts, but this means fitting the facts of each case in the pigeon-hole of an existing tort and this process may not only involve strained constructions; often it may also leave a deserving plaintiff without a remedy".*<sup>102</sup>

2.65 Leggatt LJ made the following observation in *Kaye v Robertson* after referring to the law of privacy in the US:

*"We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature. Especially since there is available in the United States a wealth of experience of the enforcement of this right both at common law and also under statute, it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed."*<sup>103</sup>

2.66 Apart from the US, the laws of many jurisdictions recognise the right of privacy in one way or another. But since the US is the first common law jurisdiction to treat invasion of privacy as a tort, more American authorities are cited in the remaining part of the report than those from other jurisdictions.

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<sup>99</sup> Lord Bingham of Cornhill, "The Way We Live Now: Human Rights in the New Millennium" [1998] 1 Web JCLI.

<sup>100</sup> G Dworkin, "Privacy and the Press" (1961) 24 MLR 185, 187.

<sup>101</sup> JUSTICE, *Privacy and the Law* (London, Stevens and Sons, 1970), para 85.

<sup>102</sup> B S Markesinis, *A Comparative Introduction to the German Law of Torts* (Oxford: Clarendon Press, 3<sup>rd</sup> edn, 1994), 416.

<sup>103</sup> *Kaye v Robertson*, at 71.

However, although American authorities are instructive as to the ingredients of a tort of invasion of privacy, the impact of the First Amendment on the US Constitution has resulted in an approach which cannot be directly transplanted to Hong Kong. American authorities must be used with caution in developing the principles governing the law of privacy in Hong Kong.<sup>104</sup>

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<sup>104</sup> See *Godfrey v Demon Internet Ltd* [2000] 3 WLR 1020, 1022 (observing that care has to be taken before American cases are applied in English defamation cases).

## Chapter 3

### Freedom of expression and the right to privacy

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3.1 Since privacy is not absolute and has to be balanced against other rights and freedoms, a law protecting an individual's privacy must not unduly violate other legitimate interests. In particular, claims that privacy has been invaded by unwanted publicity have the potential to stifle free speech. Any law protecting individuals from unwanted publicity must resolve this tension satisfactorily. The common interest of Hong Kong is best served by an ample flow of information to the public concerning matters of public interest to the community. To the extent that the press have a duty to impart information on matters of public interest to the community, the press must be protected from any threat of civil liability that would stifle public interest speech. Our object is therefore to protect individuals from invasion of privacy without impinging on the right to freedom of expression.

3.2 We examine in this chapter the functions of the right to freedom of expression and how that right interacts with the right to privacy. It will be seen that while the protection of privacy may impinge on freedom of expression, the exercise or abuse of freedom of expression may infringe the right to privacy. The International Covenant on Civil and Political Rights recognises this conflict. It protects privacy only from "arbitrary or unlawful" interference, while the exercise of the right to freedom of expression carries with it "special duties and responsibilities" and may be subject to legal restrictions permissible under the Covenant.

#### Right of privacy and free speech values<sup>1</sup>

3.3 The free speech principle serves four main functions: (a) ascertainment and publication of the truth; (b) individual self-development and fulfilment; (c) participation in a democracy; and (d) a safety-valve function.

3.4 **Ascertainment and publication of the truth** – The basis of this argument is that open discussion with no restraint will lead to the discovery of the truth. However, not all speech is protected by the free speech principle. Even the most liberal democracies ban speech which incites violence, interferes with the administration of justice, or discloses state secrets or

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<sup>1</sup> See generally, R Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995) and Zhang Xinbao, "Freedom of Expression, of the Press and of Publication and the Protection of the Right to Privacy", *Fa Hsueh Yen Chiu* (法學研究) vol 18, 1 Nov 1996, p 32.

confidential commercial information.<sup>2</sup> Likewise, the requirement of decency and the need to protect children require that hard-core pornography should be prohibited. Whereas articles about the private lives of public officials and public figures are protected if they contain information relevant to the public's assessment of their suitability for office or general worth as public figures, articles about the private lives of ordinary individuals are not so protected if the publication cannot be justified on any of the grounds supporting free speech.<sup>3</sup> Although everyone should, in principle, have the liberty to express and publish true facts, this liberty does not extend to truth which causes private individuals annoyance or embarrassment without any corresponding benefit to the public. The publication of private facts which interferes with a person's private realm and is of no legitimate concern to the general public should be restrained even though the facts are true.

3.5 Frederick Schauer argues that it is not always the case that knowing the truth is better than living under a misconception. Even if we are to accept that it is always better to know the truth than to be deceived by a false belief, knowing the truth does not necessarily put one in a better position than one who has no belief at all. The gain in knowledge may simply be an addition rather than the substitution of the true for the false.<sup>4</sup> It does not follow that an increase in knowledge by a person is good in itself, either for that person or for society. Knowledge that an identifiable individual is a gay, an alcoholic or a welfare recipient has no intrinsic value if the individual concerned is merely an ordinary citizen. An increase of knowledge about such private facts might harm the interests of the individuals concerned without any corresponding benefit to society.

3.6 In addition, giving undue emphasis to attainment of truth would render investigative journalism and academic research using human subjects difficult. As observed by Paton-Simpson, many journalists and researchers obtain information from their subjects by guaranteeing their anonymity in the eventual publication or by agreeing that what is said will be "off the record". The truth on social issues and matters of lifestyle and human behaviour will more likely be discovered by protecting privacy than by violating it.<sup>5</sup>

3.7 **Individual self-development and fulfilment** – Freedom of expression is essential to the realisation of a person's character and potentialities as a human being. Restraining a person from expressing himself would not only inhibit the growth of his personality but would also affront his dignity. It is only through public discussion that individuals could formulate their own beliefs and develop intellectually and spiritually. But as pointed out in Chapter 1, privacy also contributes to the development and maintenance of

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<sup>2</sup> E Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987) pp 11 and 190 (concluding that "the case for applying for a free speech principle to invalidate actions for privacy is very weak, even where the disclosures are accurate.").

<sup>3</sup> E Barendt, above, p 189. See also M B Nimmer, "The Right to Speak from *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56 Cal L Rev 935.

<sup>4</sup> F Schauer, "Reflections on the Value of Truth" (1991) 41 Case Western Reserve L Rev 699, 707-711.

<sup>5</sup> E Paton-Simpson, "Human Interests: Privacy and Free Speech in the Balance" (1995) 16 New Zealand Universities L R 225, 237.

individuality. Freedom of speech and privacy complement each other in working toward the same goal of individual self-fulfilment.

3.8 **Participation in a democracy** – The free speech principle may also be viewed as a means by which citizens participate in social and political decision-making. Public discussion and debate of social and political issues assist citizens in understanding such issues and forming their own opinion on matters affecting their lives. This would in turn enable them to check government misconduct and to participate effectively in the operation of a democratic government. Freedom of speech is therefore essential to representative self-government.

3.9 However, free speech is not the only means to facilitate citizen participation in social and political decision-making. One of the basic requirements of democracy is the moral autonomy of citizens. To the extent that privacy fosters and encourages autonomy, privacy is also important to democratic government.<sup>6</sup> Allowing free discussion in private would contribute to a pluralistic society and protect those who question mainstream thoughts and values. Protecting individuals from unwarranted publicity therefore facilitates public discussion and effective participation in a democratic government. The freedom to express ideas and opinions would be undermined if individual privacy is not protected against intrusion.

3.10 Another benefit of privacy protection is that talented individuals can be attracted to serve the community by assuring that they would not be exposed to unwarranted publicity merely because they enter public life.<sup>7</sup> Respect for privacy should be all the stricter at a time when the public demand more transparency in public affairs. An absolute claim to free speech would discourage people from participating in public affairs:

*“Because it is probably possible to unearth some embarrassing facts about anyone, many individuals may decide to avoid becoming public figures. Therefore, a pattern of investigation and disclosure may seriously limit the life plans of worthy individuals and cost society its more explorative and inventive potential leaders. The leaders are then likely to be individuals who have never tried anything nonconformist or extraordinary, who never challenged accepted norms, and who never made mistakes.”<sup>8</sup>*

3.11 Hence, as far as individual self-fulfilment and citizen participation are concerned, the interests in privacy are consistent with those in freedom of speech. Privacy and free speech serve the same values and are complementary to each other:

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<sup>6</sup> R Gavison, “Privacy and the Limits of Law” (1980) 89 Yale LJ 421, 455.

<sup>7</sup> R Gavison, “Privacy and the Limits of Law” (1980) 89 Yale LJ 421, 456.

<sup>8</sup> R Gavison, “Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech” (1992) 43 S Carolina L Rev 437 at 469.

*“In many cases where privacy and free speech conflict at a superficial level, they are at a deeper level merely two different modes of giving effect to the same underlying concerns. It is possible that in at least some of these cases, free speech values will be better served by protection of privacy than by permitting publication.”*<sup>9</sup>

3.12 **Safety-valve function** – According to Thomas Emerson,<sup>10</sup> freedom of expression provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. Open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision making process. Conversely, suppression of discussion would make a rational judgment impossible and conceal the real problems confronting a society. Yet privacy also affords a safety-valve function. As observed by Westin, most persons need to give vent to their anger at those who exercise authority over them, and to do this in the privacy of intimate circles, or in private correspondence, without fear of being held responsible for these comments. Without such an avenue of release, most people would experience serious emotional stress.<sup>11</sup>

## Freedom of the press

3.13 Article 27 of the Basic Law protects freedom of the press, in addition to freedom of speech and of publication. Press freedom is important because the press is a medium for publishing information and ideas, and journalism is the primary and principal manifestation of freedom of expression. The HK Court of Final Appeal has this to say about freedom of expression:

*“Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials.”*<sup>12</sup>

3.14 The press is singled out for protection in many constitutions because it is particularly vulnerable to Government control. Unless checked by the constitution, the Government can impose restrictions on the press directly or indirectly, such as through the imposition of heavy taxation on publishing companies, requirements for large bonds to start a newspaper, and injunctions against future issues.<sup>13</sup>

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<sup>9</sup> E Paton-Simpson, above, p 234.

<sup>10</sup> T I Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), 6-7.

<sup>11</sup> A F Westin, *Privacy and Freedom* (New York: Atheneum, 1968), pp 35 – 36.

<sup>12</sup> *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 920, per Li CJ.

<sup>13</sup> Z Chafee Jr, *Government and Mass Communications* (1947) at 34-35; cited in David Lange, “The Speech and Press Clauses” (1975) 23 UCLA Law Rev 77, fn 4.

3.15 The press can play the role of professional critics by acquiring enough information to pass judgment on the actions of the Government, and disseminating such information and judgments to the general public.<sup>14</sup> As observed by the European Court of Human Rights:

*“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”*<sup>15</sup>

3.16 By and large, the local press has been free to play the role of professional critic. Over the years, local newspapers have been used as a medium to criticise the Qing dynasty, warlords, the Chiang administration, Japanese militarism, colonialism and Communism. Since the Government decided to introduce democracy in the late 1980s, many councillors, political groups and columnists have also criticised the Government through the press.<sup>16</sup> Indeed, a recent study found that 58% of local journalists consider that the most important function of newspapers is to monitor the Government.<sup>17</sup>

3.17 Some may therefore argue that Article 27 of the Basic Law should be construed as creating a fourth institution outside the Government as an additional check on the executive, legislature and judiciary. Under the Basic Law, the Government is accountable to the legislature, and all legislators will ultimately be elected by universal suffrage. In an age of transparency and accountability, the public’s right to know extends to matters concerning the workings of the Government and what is being done in their name by their representatives in the legislature. If democracy is to function effectively, it is essential that the public is adequately informed as to the actions of Government officials and members of the legislature.<sup>18</sup>

3.18 Apart from the important role played by the press in scrutinising the activities of the Government, press freedom also serves to protect the public from the improper or wrongful conduct of private individuals who are involved in public affairs, particularly those who are powerful and influential in society. Matters relating to the public life of the community and those who take part in it are plainly matters of public interest. The expression “public life” includes not only activities such as the conduct of Government and political life, elections and public administration, but also matters such as the governance of public bodies, institutions and companies which give rise to a public interest in

<sup>14</sup> V Blasi, “The Checking Value in First Amendment Theory”, American Bar Foundation Research Journal (1977), No 3, p 521.

<sup>15</sup> *Castells v Spain* (1992) 14 EHRR 445 at 476.

<sup>16</sup> 李谷城, “香港報業百年滄桑”, (Hong Kong: Ming Pao, 2000), ch 8.

<sup>17</sup> Justice & Peace Commission and Amnesty International (Hong Kong Branch), 新聞工作者人權意識研究 (A Study on the Human Rights Consciousness of Journalists), Oct 2002, para 5.1.3.

<sup>18</sup> Such an interpretation of Article 27 is consistent with that adopted by the Basic Law Consultative Committee: *Final Report on Freedom of the Press* (1987), para 3.

disclosure.<sup>19</sup> Those who engage in public life must expect that their public conduct will be the subject of scrutiny and criticism. The freedom of the press in exposing unlawful or improper conduct should not be undermined.

3.19 However, the constitutional right of free speech in Article 27 is not absolute.<sup>20</sup> Although freedom of the press is important for democracy and the public, it does not give a special right to media organisations to unjustifiably exploit other people's private lives for commercial gain. It is essential to distinguish between the public's interest in information and the interest of a democratic system in having a free press on the one hand, and the commercial interests of media organisations on the other. When weighing the commercial interests of media organisations against the interest of an individual to enjoy a protected private life, one has to look at what is being put onto the scales of press freedom: forced commercialisation of others or important information for the public.<sup>21</sup>

3.20 We must, however, stress that any interference with the press has to be justified. Such interference 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 must be justified.<sup>22</sup> Lord Nicholls said:

*"To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration and the means employed must be proportionate to the end sought to be achieved. ... It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."*<sup>23</sup>

3.21 The need to justify any interference with press freedom has also been stressed by the Supreme Court of South Africa:

*"The press played a critical role in the free exchange of ideas, an essential part of freedom of speech. It was the role of the press to ferret out and expose corruption and maladministration, to contribute to the exchange of ideas and to act as watchdog of the governed. ... In order for a law to qualify as a reasonable and*

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<sup>19</sup> *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862, 909 (CA). "Public life" does not include matters that are personal and private, in which there is no public interest in disclosure.

<sup>20</sup> *Wong Yeung Ng v SJ* [1999] 3 HKC 143, 147B (decision of Appeal Committee of the CFA).

<sup>21</sup> M Prinz, "Remedies against an infringement of privacy", in *Conference on freedom of expression and the right to privacy - Conference Reports* (Strasbourg: Directorate General of Human Rights, Media Division, 2000), at <[www.humanrights.coe.int/media/](http://www.humanrights.coe.int/media/)>, 67 at 69-70.

<sup>22</sup> *A v B plc* [2002] EWCA Civ 337, para 11(iv).

<sup>23</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 200 (HL).

*justifiable limit on a right or freedom it had to be shown that the law pursued a sufficiently important objective, was rationally connected to that objective, impaired the right no more than was necessary to accomplish such objective and did not have a disproportionately severe effect on the person to whom it applied.*<sup>24</sup>

3.22 Our *Report on Reform of the Law Relating to the Protection of Personal Data* published in 1994 approached the relationship between personal data protection and media freedom “starting from a position that free speech is pre-eminent, but that certain exceptions protecting the individual may prove to be necessary.”<sup>25</sup> In its submission, the HK section of JUSTICE queried whether the proposals in the Consultation Paper had deviated from this stance. We maintain the view that the correct starting position is that free speech is pre-eminent, particularly when freedom of speech and of the press is now guaranteed by the Basic Law of the Hong Kong SAR. Nonetheless, certain privacy interests are also protected by the Basic Law, including privacy of the person (Article 28), territorial privacy (Article 29) and communications privacy (Article 30). There are no provisions in the Basic Law suggesting that the rights and freedoms in Articles 27, 28, 29 and 30 are in any hierarchical order.

3.23 In addition to the protection of press freedom under Article 27 and the protection of privacy under Articles 28 to 30, the Basic Law also affords protection to these two human rights through Article 19 (freedom of expression) and Article 17 (privacy) of the International Covenant on Civil and Political Rights (“ICCPR”). Article 39 of the Basic Law provides that the provisions of the ICCPR shall be implemented through the laws of Hong Kong, and any restrictions on the rights and freedoms enjoyed by Hong Kong residents must not contravene these provisions. Hence, although restrictions may be imposed on the right to privacy or the right to free speech, they must be provided by law and be compatible with the ICCPR.<sup>26</sup> We examine below how free speech and privacy are reconciled under the Covenant.

## **International Covenant on Civil and Political Rights**

3.24 In addition to the Basic Law, freedom of speech and of the press is protected under the HK Bill of Rights Ordinance (Cap 383) and the ICCPR.<sup>27</sup> Article 19 of the ICCPR provides, *inter alia*:

*“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either*

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<sup>24</sup> *Government of the Republic of South Africa v The Sunday Times Newspaper* [1995] 1 Law Reports of the Commonwealth 168. See also the decision of the Supreme Court of India in *Indian Express Newspapers (Bombay) Private Ltd v Union of India* (1985) SCR (2) 287, 342.

<sup>25</sup> (1994), para 18.17.

<sup>26</sup> Basic Law, Article 39. *Secretary for Justice v Oriental Press Group*, HCMP 407/1998, at 59.

<sup>27</sup> See generally, K Boyle, “Freedom of Opinion and Freedom of Expression” in J Chan & Y Ghai (ed), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths, 1993), ch 13.

*orally, in writing or in print, in the form of art, or through any other media of his choice.*

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.”*

3.25 The exercise of freedom of expression may violate the rights of others, including privacy. Contrary to the position in the US where press responsibility is not mandated by the First Amendment to its Constitution,<sup>28</sup> Article 19 of the ICCPR expressly requires that the exercise of the right to freedom of expression carries with it “special duties and responsibilities”. The reference to “special duties and responsibilities” was adopted in order to offer States Parties an express tool to counter abuse of power by the modern mass media. States which supported these proposals were of the opinion that freedom of expression was a “dangerous instrument” as well as a precious heritage. They maintained that, in view of the powerful influence the modern media exerted upon the minds of man and upon national and international affairs, the “duties and responsibilities” in the exercise of the right to freedom of expression should be especially emphasised.<sup>29</sup>

3.26 The UN Human Rights Committee has not commented on the nature of these duties and responsibilities except that it is “the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.”<sup>30</sup> But the expression is generally presumed to include the duty to present information and news truthfully, accurately and impartially.<sup>31</sup> It has also been suggested that it obliges speakers not to abuse their power at the expense of others.<sup>32</sup> In determining the nature of the “duties and responsibilities”, it is necessary to ascertain the status of the person in question, the content of the information expressed, and the medium chosen for such expression. It is arguable that a person who chooses to publish in a newspaper private information about children, victims of crime, or other vulnerable persons, is under a special responsibility not to harm the individual concerned.

3.27 Pursuant to Article 19(3) of the ICCPR, the exercise of freedom of expression may legitimately be restricted by lawful measures that are “necessary for respect of the rights or reputations of others”, including the right to privacy under Article 17, which provides:

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<sup>28</sup> *Miami Herald Publishing Co v Tornillo*, 418 US 241, 256.

<sup>29</sup> M J Bossuyt, *Guide to the “Travaux Préparatoires” of the ICCPR* (Martinus Nijhoff Publishers, 1987), p 386.

<sup>30</sup> General Comment 10/19 of 27 July 1983, para 2.

<sup>31</sup> K J Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in L Henkin (ed), *The International Bill of Rights - The ICCPR* (1981), p 210.

<sup>32</sup> M Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* (Strasbourg: N P Engel, 1993), at 349.

*“1. No one shall be subjected to arbitrary or unlawful interference with the privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”*

3.28 As regards the protection of “public morals” under Article 19(3), it may imply safeguarding the moral ethos or moral standards of a society as a whole, but may also cover protection of the moral interests and welfare of certain individuals or classes of individuals who are in need of special protection because of lack of maturity, mental disability or state of dependence.<sup>33</sup> As far as the protection of individuals is concerned, the expression protects the psychological as well as the physical well-being of individuals.<sup>34</sup>

3.29 Having regard to the fundamental role of journalistic freedom of expression, we consider that any interference with the practice of journalism must: (a) be foreseen in the complete and exhaustive list of restrictions set out in Article 19(3) of the ICCPR; (b) be necessary in a democratic society and respond to a pressing social need;<sup>35</sup> (c) be laid down by law and formulated in clear and precise terms; (d) be narrowly interpreted; and (e) be proportional to the aim pursued.<sup>36</sup>

3.30 We acknowledge that the purpose of protecting the right to privacy is not, of itself, a sufficient reason to restrict expression. Any restriction on freedom of expression imposed by any privacy legislation must be necessary to protect the right to privacy. Since the requirement of necessity implies an element of proportionality, the scope of the restriction must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value.<sup>37</sup>

3.31 Also relevant is Article 5(1) of the ICCPR, which aims at preventing the abuse of any one of the rights and freedoms declared in the Covenant for the purpose of prejudicing one or more of the others. The rights capable of being abused include the freedom of expression. For present purposes, there are two aspects to Article 5(1). First, any limitation on exercise of the right to free expression or the right to privacy must not be greater than is provided for in the Covenant. Secondly, the exercise of the right to free expression cannot aim at the destruction of the right of privacy under Article 17. Conversely, the protection of the right to privacy cannot aim at the destruction of the right to free expression under Article 19.

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<sup>33</sup> *Dudgeon v UK* (1981) 4 EHRR 149, para 47.

<sup>34</sup> *X v Sweden*, CD, vol 7, p 18.

<sup>35</sup> Note, however, that the Privy Council in *Ming Pao Newspaper v AG of HK* [1996] 3 WLR 272 held at 279 that “necessary” in Article 16 of the HK Bill of Rights (which corresponds to Article 19 of the ICCPR) should be used in its “normal meaning” and needed not be replaced with a phrase such as “pressing social need”. See also *HKSAR v Ng Kung Siu* [2000] 1 HKC 117, 140.

<sup>36</sup> 4th European Ministerial Conference on Mass Media Policy (Journalistic Freedoms and Human Rights) (1994), DH-MM (98) 4, Resolution No 2, Principle 6; *Ming Pao Newspapers Ltd v AG of HK* [1996] 3 WLR 272, 277.

<sup>37</sup> *Faurisson v France* (1997) 2 BHRC 1 at 17 (individual opinion of E Evatt & D Kretzmer, co-signed by E Klein (concurring)).

3.32 Article 19 of the ICCPR provides that freedom of expression includes “freedom to seek, receive and impart information and ideas of all kinds”. A motion to replace the word “seek” with “gather”, thus excluding the right of active inquiry, was defeated in the UN General Assembly. The States voting against the motion stated that active steps to procure and study information should be protected and that any abuse on the part of journalists could be sufficiently prevented under the limitations clause in paragraph 3.<sup>38</sup>

3.33 The right of the press to acquire information is justified on the grounds that it is desirable to have an informed public which is able to assess the wisdom of governmental decisions.<sup>39</sup> No citizen can obtain for himself all the information needed for the intelligent discharge of his political and social responsibilities. Much of the fact-finding has to be conducted vicariously by the press. The dissemination of information by the press is often the means by which the public first discovers that an issue is a matter of public importance.

3.34 However, the argument that it is a function of the press to keep the public informed on social issues can only justify a right to impart or receive information without undue interference. It does not give the press a privilege to compel others to disclose information which they are unwilling to impart, nor does it entitle the press to use intrusive means to acquire personal information which others wish to keep private. The freedom to seek and receive information under Article 19 does not provide a person with a right to extract information from an unwilling speaker.<sup>40</sup>

## American Convention on Human Rights

3.35 The American Convention on Human Rights (“ACHR”) is open for ratification by the member States of the Organisation of American States. About 25 States are parties to the Convention. Canada and the US are members of the Organisation but neither have ratified the Convention. The right to privacy in Article 11 of the ACHR is similar to that in Article 17 of the ICCPR, but the right to freedom of expression in Article 13 of the Convention is more elaborate than that in Article 19 of the Covenant.

3.36 After declaring that the exercise of the right to freedom of expression is not subject to prior censorship but is subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure respect for the rights or reputations of others, or the protection of national security, public order, or public health or morals, Article 13(3) of the Convention provides that:

*“the right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls*

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<sup>38</sup> M Nowak, above, 343.

<sup>39</sup> *AG v Times Newspapers* [1974] AC 273, 315. See also *Re Compulsory Membership of Journalists' Association* (1985) 8 EHRR 165, 184 -185.

<sup>40</sup> See E Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987), ch III.5.

*over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”*

3.37 In contrast to the ICCPR, the right of reply is expressly guaranteed by the American Convention:

*“1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish. 2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred. ...”*

3.38 The Inter-American Court of Human Rights hears cases submitted to it by the State Parties or the Inter-American Commission on Human Rights after the latter has examined the matter and expressed its opinion. At the request of a member State of the OAS, the Court may also provide a State with opinions regarding the compatibility of any of its domestic laws with the ACHR. In the *Licensing of Journalism case*,<sup>41</sup> the Court expressed the opinion that compulsory licensing of journalists is incompatible with Article 13 of the Convention if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information. In the *Right of Reply case*,<sup>42</sup> the Court advised that Article 14(1) of the Convention recognises an internationally enforceable right to reply or to make a correction, and that when the right is not enforceable under domestic law, the State concerned has the obligation to adopt legislative or other measures to give effect to this right.

## **European Convention on Human Rights**

3.39 Freedom of expression in Europe is also protected by Article 10 of the European Convention on Human Rights. The European Court of Human Rights has expressed the view that freedom of expression constitutes “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.<sup>43</sup> Subject to such restrictions as are permissible under paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the community.<sup>44</sup>

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<sup>41</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-Am Ct HR (Series A) No 5 (1985), para 85.

<sup>42</sup> *Enforceability of the Right to Reply or Correction*, Advisory Opinion OC-7/86, Inter-Am Ct HR (Ser A) No 7 (1986), para 35.

<sup>43</sup> *Lingens v Austria* (1986) 8 EHRR 407, 418.

<sup>44</sup> *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, 21; *Fressoz v France*, No 29183/95 (21.1.99), para 45.

3.40 In enunciating the principles underlining the freedom of expression, the Strasbourg authorities have put a high value on informed discussion of matters of public concern. The European Court of Human Rights has therefore ascribed a hierarchy of value, first to political expression, then to artistic expression and finally to commercial expression.<sup>45</sup> The Court is mindful of the fact that journalistic freedom also covers “possible recourse to a degree of exaggeration, or even provocation”.<sup>46</sup> Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless “to impart - in a way consistent with its duties and responsibilities - information and ideas on all matters of public interest.”<sup>47</sup> Not only does the press have the task of imparting information and ideas on matters of public interest; the public also has a right to receive them. The role of the press has therefore been described as “purveyor of information and public watchdog”.

3.41 Under the European Convention, the exercise of freedom of expression may be subject to such restrictions as are “necessary” in a democratic society for the protection of the reputation or rights of others, or for preventing the disclosure of information received in confidence. The adjective “necessary” has been construed by the European Court as implying the existence of a “pressing social need”. In addition, the interference must be “proportionate to the legitimate aim pursued” and the reasons given to justify it must be “relevant and sufficient”.<sup>48</sup> The proportionality test implies that the pursuit of the countervailing interests mentioned in Article 10 of the Convention has to be weighed against the value of open discussion of topics of public concern. When striking a fair balance between the countervailing interests and the right to freedom of expression, the court should ensure that members of the public would not be discouraged from voicing their opinions on issues of public concern for fear of criminal or other sanctions.<sup>49</sup>

3.42 Although the European Court in *Sunday Times v UK* held that it was “faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted”,<sup>50</sup> jurisdictions in Europe tend to treat the rights of privacy and free expression as fundamental human rights having equal status. Both the right to freedom of expression and the right to privacy under the European Convention are subject to limitations necessary for the protection of the rights of others.<sup>51</sup> In a resolution on the right to privacy, the Parliamentary Assembly of the Council of Europe<sup>52</sup> declared that the two rights “are neither absolute nor in any hierarchical order, since they are of equal

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<sup>45</sup> D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), at 414.

<sup>46</sup> *Prager and Obershlick v Austria* (1995) 21 EHRR 1, at 21.

<sup>47</sup> *Bladet Tromsø v Norway* (1999) 6 BHRC 599, at 624.

<sup>48</sup> *Barthold v Germany* (1985) 7 EHRR 383, para 55.

<sup>49</sup> *Barfod v Denmark* (1989) 13 EHRR 493, at 499.

<sup>50</sup> *Sunday Times v UK* (1979) 2 EHRR 245, para 65.

<sup>51</sup> European Convention on Human Rights, Articles 8(2) and 10(2).

<sup>52</sup> The members of the Parliamentary Assembly are elected or appointed by national parliaments of the Member States of the Council of Europe from among their own members. The European Convention on Human Rights was promoted by the Council of Europe.

value”.<sup>53</sup> It is therefore necessary to find a way of balancing the exercise of two fundamental rights. Where a question arises of interference with private life through publication in the mass media, the State must find a proper balance between the two Convention rights.<sup>54</sup> We note that neither English common law nor most constitutional bills of rights treat the right to freedom of speech as a primary right which always takes precedence over other rights or interests.<sup>55</sup>

3.43 The courts in the UK seem to agree with the Council of Europe that the two rights are of equal value. In *Douglas v Hello! Ltd*, Sedley LJ held that neither the right to publish under Article 10(1) nor any of the other rights referred to in Article 10(2) is a trump card under the UK Human Rights Act 1998. He said:

*“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 United States’ courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.”*<sup>56</sup>

And in *Cream Holdings Ltd v Banerjee*, Simon Brown LJ said:

*“It is one thing to say ... that the media’s right to freedom of expression, particularly in the field of political discussion ‘is of a higher order’ than ‘the right of an individual to his good reputation’; it is, however, another thing to rank it higher than competing basic rights.”*<sup>57</sup>

3.44 The English courts have also endorsed the approach recommended by the Council of Europe resolution on the right to privacy. In *A v B plc*, the English Court of Appeal considered that the resolution provided “useful guidance” on the difficult issue of finding the right balance.<sup>58</sup> This approach was subsequently followed by the English courts.<sup>59</sup> However,

<sup>53</sup> Resolution 1165 (1998), para 11, followed in *A v B plc* [2002] EWCA Civ 337, para 11(xii); *Naomi Campbell v Vanessa Frisbee* [2002] EWHC 328 (Ch), para 24; and *Naomi Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB), para 48 & 98. See also J Craig & N Nolte, “Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort” [1998] 2 EHRLR 162, 163-165.

<sup>54</sup> *N v Sweden* (1986) 50 DR 173 at 175.

<sup>55</sup> Sydney Kentridge, “Freedom of speech: Is it the primary right?” (1996) 45 ICLQ 253 (arguing that to take the right to freedom of speech to extremes is likely to damage rather than further the purposes for which it exists and may reduce rather than increase society’s commitment to freedom of speech).

<sup>56</sup> *Douglas v Hello! Ltd* [2001] 2 WLR 992 at para 135. Sedley LJ said at para 136 that the qualifications set out in Article 10(2) are as relevant as the right set out in Article 10(1), meaning that, for example, the reputations and rights of others are as material as the defendant’s right of free expression. See also para 150, *per* Keene LJ.

<sup>57</sup> [2003] 2 All ER 318, para 54.

<sup>58</sup> *A v B plc* [2002] EWCA Civ 337, para 11(xii).

<sup>59</sup> *Campbell v Frisbee* [2002] EWHC 328 (Ch), paras 24 & 29 (holding that the right to privacy and to freedom of expression are of equal value and section 12(4) of the Human Rights Act 1998 does not give the right to free expression a presumptive priority over other rights); *Campbell v*

although the right to freedom of expression is not in every case the ace of trumps, “it is a powerful card to which the courts of this country must always pay appropriate respect.”<sup>60</sup> Any impediment to freedom of expression must be on cogent grounds recognised by law.<sup>61</sup>

3.45 In the 1986 case of *Winer v UK*,<sup>62</sup> the European Commission of Human Rights declared inadmissible a complaint that English law lacked adequate remedies apart from defamation against invasion of privacy. However, the Commission in that case did not decide that there is no positive obligation on the part of a State Party to protect individuals from unwanted publicity in a case where the law of defamation cannot provide a remedy for invasion of privacy. Such a situation would arise when the published facts are true, making it impossible for the aggrieved individual to bring an action for defamation. Nor did the Commission address the situation where the invasion takes the form of an intrusion (eg by surveillance or interception of communications), in which case a restriction on freedom of expression would not be directly involved.<sup>63</sup>

3.46 In *Markt Intern v Germany*,<sup>64</sup> a case decided in 1987, the European Commission agreed that, in general, the restriction of true statements requires the application of a stricter test of necessity than the restriction of false or misleading allegations. However, it also recognised that the truth of information cannot be the only criterion for being allowed to publish it. True statements can interfere with legitimate interests which deserve a degree of protection equal to that given to freedom of expression. The European Court affirmed this view in this case, holding that:

*“even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples.”*<sup>65</sup>

3.47 In 1998, the European Court went so far as ruling that Article 10 of the Convention “does not ... guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern”.<sup>66</sup> It pointed out that:

*“By reason of the ‘duties and responsibilities’ inherent in the exercise of the freedom of expression, the safeguard afforded by*

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*Mirror Group Newspapers* [2002] EWHC 499 (QB), paras 43 to 48 & 98 (holding that neither Article 10 nor Article 8 of the European Convention has pre-eminence, the one over the other); *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786 (Ch), para 186(iii)-(v); *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, para 40 (CA); and *Campbell v MGN Ltd* [2004] UKHL 22, [2004] All ER (D) 67 (May), para 113 (HL).

<sup>60</sup> *Douglas v Hello! Ltd* [2001] 2 WLR 992, para 49.

<sup>61</sup> *Douglas v Hello! Ltd* [2001] 2 WLR 992, para 137.

<sup>62</sup> No 10871/84, 48 DR 154.

<sup>63</sup> D J Harris, M O’Boyle & C Warbrick, above, at 326.

<sup>64</sup> (1987) 11 EHRR 212 at 234 (European Commission decision).

<sup>65</sup> (1989) 12 EHRR 161 at 175 (European Court decision).

<sup>66</sup> *Bladet Tromsø v Norway* (1999) 29 EHRR 125, para 65.

*Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.*<sup>67</sup>

The requirement that the exercise of freedom of expression carries with it “duties and responsibilities” also applies to the press. People exercising freedom of expression, including journalists, undertake “duties and responsibilities” the scope of which depends on their situation and the technical means they use.<sup>68</sup> The “duties and responsibilities” are liable to assume significance when what is at issue is an attack on the reputation of private individuals and an undermining of the “rights of others”.<sup>69</sup>

3.48 Most recently, the applicant in *Peck v UK*<sup>70</sup> complained about the disclosure to the media of closed circuit television footage recorded in a public street, which resulted in his image being published and broadcast widely. The applicant also argued that there was no effective domestic remedy in relation to the violation of his right to privacy under Article 8. The European Court found in favour of the applicant, noting that breach of confidence did not provide him with an actionable remedy on the facts of his case. The Court did not accept as relevant the UK Government’s argument that any acknowledgement of the need to have a remedy would undermine the important conflicting rights of the press guaranteed by Article 10 of the Convention.<sup>71</sup>

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<sup>67</sup> Above.

<sup>68</sup> *Fressoz v France*, No 29183/95 (21.1.99), para 52.

<sup>69</sup> Above.

<sup>70</sup> No 44647/98, date of judgment: 28.1.03 (ECtHR). See also *Spencer v UK* (1998) 25 EHRR CD 105, 112.

<sup>71</sup> Above, para 113 (noting that the public authority concerned and the media could have achieved their objectives by properly masking, or taking appropriate steps to ensure such masking of, the applicant’s identity).

## Chapter 4

### The law of privacy in other jurisdictions

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4.1 We have reviewed the law of privacy in Australia, Austria, Brazil, Canada, Mainland China, Denmark, England, Estonia, France, Germany, Hungary, Ireland, India, Italy, Lithuania, Macao, The Netherlands, New Zealand, Norway, The Philippines, Russia, South Africa, South Korea, Spain, Taiwan, Thailand and the United States. Their experience is instructive and has shaped some of our proposals in this Report.

#### Australia

4.2 It has long been considered that the 1937 High Court decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*<sup>1</sup> was authority for the proposition that there was no common law right to privacy in Australia which could be enforced by the courts. Latham CJ stated that “*however desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists.*”<sup>2</sup> This case has stalled the development of any tort of infringement of privacy by the Australian courts. Australian common law has therefore protected privacy as part of its protection of other interests. A person seeking relief for infringement of privacy must fit within established forms of action that were not designed to protect privacy. This has resulted in the distortion of common law principles in areas such as defamation and breach of confidence.<sup>3</sup> Although the protection of personal data under the Privacy Act 1988 (Commonwealth) has recently been extended to the private sector, the Act does not cover the journalistic activities of the media and other privacy interests which do not fall within the Act’s ambit.

4.3 However, in 2001, the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*<sup>4</sup> queried whether the decision in *Victoria Park* was authority for the proposition that there was no tort of invasion of privacy in Australia. Although Gleeson CJ was cautious about “declaring a new tort of the kind for which the respondent contends”, he stated that “*The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.*”<sup>5</sup> The Court referred to US law and considered that the development by the courts in other common law jurisdictions of a common law action for invasion of privacy was useful in

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<sup>1</sup> (1937) 58 CLR 479.

<sup>2</sup> (1937) 58 CLR 479, at 495-6.

<sup>3</sup> D Lindsay, “Freedom of Expression, Privacy and the Media in Australia” in M Colvin (ed), *Developing Key Privacy Rights* (Hart Publishing, 2002), at 197; G Taylor, “Why is there no Common Law Right of Privacy?” (2000) 26(2) *Monash University Law Rev* 236.

<sup>4</sup> [2001] HCA 63.

<sup>5</sup> [2001] HCA 63, paras 40-41.

developing Australian privacy law. Individual members of the Court have also elucidated certain matters that would constitute an unwarranted invasion of privacy:

*“Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.”*<sup>6</sup>

*“The remaining categories, the disclosure of private facts and unreasonable intrusion upon seclusion, perhaps come closest to reflecting a concern for privacy ‘as a legal principle drawn from the fundamental value of personal autonomy’, the words of Sedley LJ in Douglas v Hello! Ltd.”*<sup>7</sup>

4.4 Relying on the observations made by the Justices in *Lenah’s* case, the District Court of Queensland in *Grosse v Purvis*<sup>8</sup> held that there could be a right of action for damages based on an individual’s right to privacy. For the purposes of the case before him, the judge expressed the view that the essential elements of the cause of action would be:

- “(a) a willed act by the defendant,*
- (b) which intrudes upon the privacy or seclusion of the plaintiff,*
- (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,*
- (d) and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.”*<sup>9</sup>

4.5 The Australian Law Reform Commission produced in 1979 a report on unfair publication which covered defamation and privacy.<sup>10</sup> The Commission was not persuaded that it was appropriate to create a general tort of invasion of privacy, but they found the idea of creating a specific and closely circumscribed tort of invasion of privacy attractive. They concluded that legislation should specify the area in which there is an undoubted claim for privacy protection.<sup>11</sup> In their opinion, only “serious, deliberate exposures of a person’s home life, personal and family relationship, health and private behaviour” should be made unlawful by legislation. The recommendations

<sup>6</sup> [2001] HCA 63, para 42, per Gleeson CJ.

<sup>7</sup> [2001] HCA 63, para 125, per Gummow and Hayne JJ, Gaudron J concurring.

<sup>8</sup> [2003] QDC 151, para 442.

<sup>9</sup> [2003] QDC 151, paras 444 – 446; adding that a defence of public interest should be available.

<sup>10</sup> *Unfair Publication: Defamation and Privacy* (Report No 11, 1979); see Part III.

<sup>11</sup> Above, para 234.

have not been implemented, in the absence of a consensus on a uniform defamation law.<sup>12</sup>

4.6 In 1995, the Australian Privacy Charter Council launched a charter of privacy rights for Australians which declares that *“People have a right to the privacy of their own body, private space, privacy of communications, information privacy (rights concerning information about a person), and freedom from surveillance.”*

## **Austria**<sup>13</sup>

4.7 Pictures of individuals are protected from public disclosure under section 78(1) of the Copyright Act 1936, which provides that:

*“Images of persons shall neither be exhibited publicly, nor disseminated in any other way in which they are made accessible to the public, where the legitimate interests of the person in question or, in the event that they have died without having authorised or ordered publication, of a close relative would be injured.”*

The accompanying text would be taken into account in determining whether the publication of a person’s picture violated his “legitimate interests”.

4.8 Section 7 of the 1981 Media Act<sup>14</sup> further prohibits disclosures about a person’s intimate sphere (sexual life, health, family relations) when they imply an undesired exposure to the public in the absence of a strong public interest defence. The identities of victims of crime and persons suspected of having committed, or have been convicted of, an offence are specifically protected by section 7a:

*“(1) Where publication is made, through any medium, of a name, image or other particulars which are likely to lead to the disclosure to a larger not directly informed circle of people of the identity of a person who*

*1. has been the victim of an offence punishable by the courts, or*  
*2. is suspected of having committed, or has been convicted of, a punishable offence,*

*and where the legitimate interests of that person are thereby injured and there is no predominant public interest in the*

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<sup>12</sup> The issue of creating a general tort of invasion of privacy was also discussed in the report on personal information and privacy published by the Australian Law Reform Commission in 1983. *Privacy* (Report No 22, 1983), vol. 2, paras 1075 - 1081.

<sup>13</sup> C J Hamelink, *Preserving media independence: regulatory frameworks* (UNESCO: Communication and Development Series, 1999), at 37; *News Verlags GmbH & CoKG v Austria*, No 31457/96, date of judgment: 11.1.2000 (ECtHR).

<sup>14</sup> Federal Act on the Press and Other Journalistic Media, *Federal Gazette*, No 314/1981, Article I, Section 3, paras 7 and 7a.

*publication of such details on account of the person's position in society, of some other connection with public life, or of other reasons, the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered. ....”*

The legitimate interests of the victim shall in any event be injured if the publication, in the case of subsection (1)1, is such as to give rise to an interference with the victim's strictly private life or to his exposure; or, in the case of subsection (1)2, relates to a juvenile or to a minor offence or may substantially prejudice the victim's advancement.

4.9 A proposal to introduce into the Austrian Civil Code a new claim for damages caused by unlawful privacy intrusions was drafted by the Department of Justice in 2002. Individuals would also have a right to claim a minimum of EUR1,000 for pain and suffering or other immaterial loss under the proposal. The draft legislation has already been introduced in Parliament but will have to be reintroduced after the new elections.<sup>15</sup>

## **Brazil**

4.10 Article 5 of the 1988 Constitution of Brazil provides that “*the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured.*” The Brazilian Civil Code, effective from January 2003, provides further protection by declaring that “the private life of an individual is natural and inviolable”. The Court, at the request of an individual, must adopt measures to protect against any actions to the contrary.<sup>16</sup>

## **Canada<sup>17</sup>**

4.11 **Charter of Rights and Freedoms** – Neither the Constitution nor the Charter of Rights and Freedoms contains any express provisions relating to privacy. However, in interpreting section 8 of the Charter which grants the right to be secure against unreasonable search or seizure, the courts have recognised an individual's right to a reasonable expectation of privacy.

4.12 **Common law** – Invasion of privacy *per se* is not a tort recognised by the courts in Canada. To maintain an action for acts which constitute an invasion of privacy, the plaintiff has to show that the defendant has committed some well-established tort such as trespass, nuisance, defamation and deceit. However, there are indications that the courts are prepared to stretch the scope

<sup>15</sup> Electronic Privacy Information Center & Privacy International, *Privacy & Human Rights 2003*, at <[www.privacyinternational.org/survey/phr2003/index.htm](http://www.privacyinternational.org/survey/phr2003/index.htm)>, “Republic of Austria”.

<sup>16</sup> *Privacy & Human Rights 2003*, above, “Federative Republic of Brazil”.

<sup>17</sup> I Lawson & B Jeffery, *Privacy and Free Enterprise - The Legal Protection of Personal Information in the Private Sector* (Ottawa: The Public Interest Advocacy Centre, 2<sup>nd</sup> edn, 1997); J D R Craig, “Invasion of Privacy and Charter Values: The Common-Law Tort Awakens” (1997) 42 McGill LJ 355.

of a particular tort so as to bring within the ambit of such tort acts which would otherwise be legitimate, on the ground that such acts amount to an invasion of privacy.

4.13 In *Motherwell v Motherwell*,<sup>18</sup> the Alberta Court of Appeal held that the constant making of telephone calls to harass the plaintiff's family was an actionable nuisance. It stated that even persons who did not have any legal or equitable interest in the land where the nuisance was suffered would be entitled to relief on the ground that what had occurred was an invasion of privacy. Similarly, in *Poole v Ragen and Toronto Harbour Commissioners*,<sup>19</sup> the defendant was held liable for watching and besetting the plaintiff's boats. Although the technical ground of liability was nuisance, the underlying reason for liability was that persistent and unwarranted surveillance constituted "an affront to the dignity of any man or woman". The Court of Appeal of Prince Edward Island also commented that "the courts in Canada are not far from recognising a common law right of privacy, if they have not already done so".<sup>20</sup> Indeed, a few plaintiffs in Ontario have been awarded damages in actions for invasion of privacy.<sup>21</sup> Nevertheless, Canadian appellate courts have yet to make a conclusive determination and the status of the common law tort of invasion of privacy remains unclear.<sup>22</sup> This is, perhaps, the reason why four common law provinces have enacted legislation to create such a tort.

4.14 Although the tort of invasion of privacy has not been firmly established in Canada, the courts there have ruled that there is a tort of "appropriation of personality" at common law. This tort is actionable where the defendant has appropriated some feature of the plaintiff's life or personality (such as his face or name) without permission for economic gain.<sup>23</sup>

4.15 **Privacy legislation** – Five provinces in Canada have legislated to create a tort of invasion of privacy. Four of these - British Columbia, Manitoba, Newfoundland and Saskatchewan - are common law provinces.<sup>24</sup> These provinces create the tort of "violation of privacy" which is actionable without proof of damage. They aim at correcting the failure of the common law to develop a general tort remedy for invasion of privacy. In British Columbia, Saskatchewan and Newfoundland, it is only where a person "wilfully and without a claim of right" violates the privacy of another that he commits the tort. In Manitoba, the expression is "substantially, unreasonably and without claim of right". Further, while the Manitoba, Newfoundland and Saskatchewan statutes create a general tort of invasion of privacy which covers appropriation of personality, the British Columbia legislation creates two separate torts, namely, invasion of privacy and appropriation of personality. Not many cases have been reported on these Privacy Acts and there has been very little judicial

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<sup>18</sup> (1976) 73 DLR (3d) 62.

<sup>19</sup> (1958) OWRN 77.

<sup>20</sup> *Dyne Holdings v Royal Insurance Co of Canada* (1996) 138 Nfld & PEI R 318.

<sup>21</sup> These actions related to unauthorised recording and publication of a telephone conversation; and conduct involving harassment, trespass and interference with enjoyment of property. Discussed in I Lawson & B Jeffery, above, pp 212 – 221.

<sup>22</sup> See "Annotation" (1981) 19 CCLT 37, referred to in I Lawson & B Jeffery, above, p 219.

<sup>23</sup> G H L Fridman, 194.

<sup>24</sup> British Columbia Privacy Act 1996, c 373; Manitoba Privacy Act 1987, c P125; Newfoundland Privacy Act 1990, c P-22; and Saskatchewan Privacy Act 1979, c P-24.

comment on their meaning and scope. One of the reasons is that the jurisdiction over this cause of action is restricted to the superior courts. Another reason might be that Canada has not yet experienced the phenomenon of the tabloid press or paparazzi to the same extent as the US and many Western European countries.<sup>25</sup>

4.16 **Quebec** – The fifth province which has a statutory tort of invasion of privacy is Quebec, where the remedy originally evolved through interpretation of general provisions of civil liability in the former Civil Code, but has now been expressly included in the new Civil Code of Quebec. Section 35 of the amending Act provides that every person has a right to the respect of his reputation and privacy, and that no one may invade the privacy of another person except with the consent of the person or his heirs or unless it is authorised by law. Section 36 then identifies the following acts as particular instances of invasion of privacy:

- entering a person’s dwelling or taking anything therein;
- intentionally intercepting or using private communications;
- appropriating or using a person’s voice or image while the person is in private premises;
- observing a person in his private life by any means;
- using a person’s name, image, likeness or voice for a purpose other than the legitimate information of the public; and
- using a person’s correspondence, manuscripts or other personal documents.<sup>26</sup>

4.17 Section 5 of the Quebec Charter of Human Rights and Freedoms also provides that every person has a right to respect for his private life. This provision is directly enforceable between citizens. In *Gazette v Valiquette*, Michaud CJQ, speaking for a unanimous panel of the Quebec Court of Appeal, held that the right comprises “a right to anonymity and privacy, a right to autonomy in structuring one’s personal and family life, and a right to secrecy and confidentiality”.<sup>27</sup> This view was subsequently endorsed by the Supreme Court of Canada, which held that section 5 of the Charter protects, among other things, a narrow sphere of personal autonomy within which decisions relating to choices that are of a fundamentally private or inherently personal nature are made.<sup>28</sup> It is on this basis that the Supreme Court further held that the right to privacy guaranteed by the Charter must include the ability to control the use made of one’s image, since the right to one’s image is based on the idea of individual autonomy, that is, on the control each person has over his identity.<sup>29</sup>

4.18 **New Brunswick** – The Minister of Justice introduced Bill 23, a proposed Privacy Act, to the Legislative Assembly in December 2000. The Bill has been referred to the Law Amendments Committee for review before final decisions in relation to its enactment are taken. The Bill is similar to the existing

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<sup>25</sup> J Craig & N Nolte, “Privacy and Free Speech: Germany and Canada: Lessons for an English Privacy Tort” [1998] EHRLR 162 at 167.

<sup>26</sup> I Lawson & B Jeffery, above, p 93.

<sup>27</sup> [1997] RJQ 30 at 36.

<sup>28</sup> *City of Longueuil v Godbout* (1997) 152 DLR(4<sup>th</sup>) 577, paras 97-98.

<sup>29</sup> *Aubry v Éditions Vice-Versa Inc* (1998) 157 DLR (4<sup>th</sup>), para 52.

four Privacy Acts in Canada.<sup>30</sup> After declaring in section 1 that an invasion of an individual's privacy is a tort, section 2 provides that an act is an invasion of privacy if "(a) it unduly intrudes into the personal affairs of an individual or into his or her activities, whether in a public or a private place, or (b) it gives undue publicity to information concerning an individual".<sup>31</sup> Sections 3 and 4 of the Bill then provide, respectively, examples of conduct that may amount to an invasion of privacy<sup>32</sup> and a list of the situations in which conduct will not be an invasion of privacy.

**4.19 Uniform Privacy Act** – In 1994, the Uniform Law Conference of Canada adopted the Uniform Privacy Act. The Act draws upon and improves the existing provincial statutes. The key elements of the Act are as follows:

- (i) an open-ended statement that violation of the privacy of an individual is a tort that is actionable without proof of damage; the Act does not contain a general description or definition of what a violation of privacy is;
- (ii) a list of specific activities that will "in the absence of evidence to the contrary" be considered to be a violation of privacy, including:
  - (a) auditory or visual surveillance of the individual or the individual's residence or vehicle by any means, including eavesdropping, watching, spying, besetting and following, whether the surveillance is accomplished by trespass or not;
  - (b) listening to or recording a conversation in which the individual participates, or listening to or recording a message to or from the individual that passes by means of telecommunications, by a person who is not a lawful party to the conversation or message;
  - (c) publication of letters, diaries or other personal documents of the individual;
  - (d) dissemination of information concerning the individual that has been gathered for commercial or governmental purposes if (i) the dissemination is contrary to a statute or regulation, or (ii) the information was provided by the individual in confidence, and the dissemination is made for

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<sup>30</sup> See New Brunswick Department of Justice, *A Commentary on the Privacy Act* (Dec 2000), at <[inter.gov.nb.ca/legis/index-e.htm](http://inter.gov.nb.ca/legis/index-e.htm)>.

<sup>31</sup> The Department of Justice explains that the words "undue" and "unduly" are used to make clear that there is a question of degree involved in determining whether an invasion of privacy has occurred. It acknowledges that some degree of intrusion or publicity may often have to be accepted as part of the give-and-take of living in society. When that degree becomes excessive, or "undue", it may amount to an invasion of privacy.

<sup>32</sup> Examples given in s 3 are: "(a) watching or following an individual; (b) disturbing an individual in his or her home or any other private place; (c) listening to or intercepting private communications; or (d) disclosing information of a personal nature about an individual."

a purpose other than the purpose for which the information was provided.

- (iii) a list of defences, including (a) the plaintiff consented to the activity; (b) the defendant acted in lawful defence of person or property; (c) the activity was authorised or required by law; (d) the defendant was lawfully investigating an offence; (e) the defendant's action was reasonable, having regard to any relationship, domestic or otherwise, between the parties; (f) the defendant neither knew nor reasonably should have known that his act would violate the privacy of any individual; (g) there were reasonable grounds for believing that the publication was in the public interest; and (h) the publication was privileged under the law relating to defamation;
- (iv) a provision specifying that a court may do one or more of the following: (a) award damages; (b) grant an injunction; (c) order the defendant to account for any profits arising out of the violation; (d) order the defendant to deliver up to the plaintiff all articles or documents that have come into the defendant's possession as a result of the violation; or (e) grant any other relief to the plaintiff that the court considers necessary in the circumstances.

## Mainland China

4.20 The Constitution of the People's Republic of China stipulates that the "personal dignity" and "residences" of citizens are inviolable and that citizens' "freedom and privacy of correspondence" are protected by law.<sup>33</sup> Article 101 of the General Principles of Civil Law further provides: "*Citizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited.*"

4.21 In the opinion of the Supreme People's Court, a person who uses such means as giving publicity to the private facts of another in writing or in spoken words, or publicly subjecting the personality of another to ridicule by the fabrication of facts, or using insults or defamatory statements to damage the reputation of another, should be liable for infringement of the right to reputation if his conduct has caused special damage.<sup>34</sup> A person who publishes the private facts of an individual or gives publicity to the same in writing or in spoken words without the permission of that individual so that his reputation has been damaged may be tried for infringement of the right to reputation.<sup>35</sup>

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<sup>33</sup> Articles 38 - 40.

<sup>34</sup> "Supreme People's Court's Tentative Opinion on the Enforcement of the PRC General Principles of Civil Law", 26 January 1988, para 140.

<sup>35</sup> "Supreme People's Court's Answers to Questions about the Trial of Reputation Cases", 7 August 1993, Question 7.

4.22 The Standing Committee of the National People's Congress is now studying the Draft Civil Code tabled on 23 December 2002.<sup>36</sup> The right of privacy is expressly recognised in Part 4 of the Draft Code as one of the rights falling within the ambit of the right to personality. It encompasses personal information, private activities and private space. In particular, the Code protects an individual from invasion of privacy by visual surveillance, aural surveillance, spying, intrusion into a person's home, interception of communications, disclosure, and unauthorised collection, storage and publication of private information.

## Denmark

4.23 The Danish Criminal Code guarantees the right to privacy by making it an offence: (a) to trespass into private homes and other private places; (b) to obtain access to private papers; (c) to use mechanical devices to eavesdrop on private conversations or meetings; (d) to take photographs of people when on any private property; (e) to spy on people on any private property with telescopes, binoculars, etc; (f) to communicate to another person any information or picture about another which concerns his private life; (g) to violate the peace of another by intruding on him, persistently communicating with him, or otherwise inconveniencing him, after having been warned by the police to leave him alone. It is also an offence to make use of information obtained in most of these ways. For these purposes, private property is defined as a place where the public is not admitted.<sup>37</sup>

## England and Wales

4.24 There is no common law remedy for breach of privacy as such in England and Wales, whether before or after the enactment of the Human Rights Act 1998.<sup>38</sup> Actions for infringement of privacy have to be founded on recognised heads of tortious liability.

4.25 The following is an outline of the legislative proposals made in the UK for the better protection of individual privacy.

1961 Lord Mancroft presented a Right of Privacy Bill in the House of Lords in February 1961. The object of the Bill was to protect a person from unjustifiable publication relating to his private affairs. It was given a Second Reading but withdrawn at the end of the debate to go into Committee.

1969 Brian Walden presented a Privacy Bill in November 1969. It was

<sup>36</sup> Part 4 of the Draft Code is at <<http://law-thinker.com/>>.

<sup>37</sup> Calcutt Report, below, paras 5.23-5.24.

<sup>38</sup> *Kaye v Robertson* [1991] FSR 62 (CA); *Khorasandjian v Bush* [1993] QB 727, 744 (CA); *R v Khan* [1997] AC 558, 581G and 582G-583A (HL); *Earl Spencer v UK* (1998) 25 EHRR CD 105; *Home Office v Wainwright* [2002] QB 1334 (CA), paras 20, 57-59, 87-112; *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996, para 229; *Wainwright v Home Office* [2003] UKHL 53, [2003] All ER (D) 279 (Oct), paras 15-35.

withdrawn after Second Reading debate upon the Government undertaking to carry out a detailed examination of the subject of privacy. The Bill was identical to that produced by the British section of the International Commission of Jurists (JUSTICE) in 1970.

- 1970 The Committee on Privacy of the British section of JUSTICE published a report on *Privacy and the Law* in January 1970.<sup>39</sup> They concluded that legislation ought to create a general right of privacy applicable to all situations. The report included a draft Right of Privacy Bill.
- 1972 The National Council for Civil Liberties submitted a draft Right of Privacy Bill to the Privacy Committee chaired by Kenneth Younger. The Younger Report concluded that, on balance, there was then no need for a general law of privacy.<sup>40</sup> However, it recommended that surveillance by means of a technical device should be actionable in tort. It also suggested that it should be a tort to disclose or use information which the discloser knows or ought to know was obtained by illegal means.<sup>41</sup>
- 1989 John Browne introduced the Protection of Privacy Bill. It sought to confer remedies for the unauthorised public use or public disclosure of private information. Although it passed Committee stage, it was withdrawn at Report stage when the Government announced that it was appointing a committee, to be chaired by David Calcutt QC, to consider what measures were needed to give further protection to individual privacy from the activities of the press.
- 1990 The Calcutt Committee published a report in 1990.<sup>42</sup> It concluded that an overwhelming case for then introducing a statutory tort of infringement of privacy had not been made out.
- 1993 Sir David Calcutt QC concluded in his *Review of Press Self-Regulation* published in January 1993 that press self-regulation under the Press Complaints Commission had not been effective.<sup>43</sup> He recommended that the Government should give further consideration to the introduction of a new tort of infringement of privacy.
- 1993 The National Heritage Committee of the House of Commons published a report on *Privacy and Media Intrusion* in March 1993.<sup>44</sup> The Committee was dissatisfied with the way the Press Complaints Commission had dealt with the complaints and recommended a Protection of Privacy Bill with both civil and criminal provisions. The

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<sup>39</sup> JUSTICE, *Privacy and the Law* (London, Stevens and Sons, 1970).

<sup>40</sup> *Report of the Committee on Privacy* ("Younger Report"), (London: HMSO, Cmnd 5012, 1972).

<sup>41</sup> Above, paras 563 – 565 and 629 – 633.

<sup>42</sup> *Report of the Committee on Privacy and Related Matters* ("Calcutt Report"), (London, Cm 1102, 1990).

<sup>43</sup> D Calcutt, *Review of Press-Regulation* (London, Cm 2135, 1993).

<sup>44</sup> National Heritage Committee, *Privacy and Media Intrusion* (London: HMSO, 294-I, 1993).

first part of the Bill listed various civil offences leading to a tort of infringement of privacy.

- 1993 In July 1993, the Lord Chancellor's Department and the Scottish Office issued a consultation paper on *Infringement of Privacy* ("the UK Consultation Paper").<sup>45</sup> The paper dealt with the question of whether there should be a general tort of infringement of privacy.
- 1995 The UK Government's response to the National Heritage Committee Report and the 1993 Consultation Paper was contained in a paper entitled *Privacy and Media Intrusion* published in July 1995.<sup>46</sup> The Government concluded that statutory intervention in this area would be a significant development of the law and the Government then was not convinced that the case had been made out for it.
- 1998 The UK Government introduced the Human Rights Act 1998 which incorporates the European Convention on Human Rights into United Kingdom law.
- 2003 In its report on *Privacy and Media Intrusion*, the House of Commons Culture, Media and Sport Committee "firmly recommended" that the UK Government should bring forward legislative proposals to clarify the protection that individuals could expect from unwarranted intrusion into their private lives.<sup>47</sup> The Government responded in October 2003 by saying that specific privacy legislation was "not only unnecessary but undesirable" on the following grounds:<sup>48</sup>
- (a) various aspects of privacy are already protected by legislation (eg, the Data Protection Act);
  - (b) there is the over-arching impact of the 1998 Human Rights Act's provisions on the right to respect for private life;
  - (c) the weighing of competing rights in individual cases is the quintessential task of the courts, not of Government, or Parliament;
  - (d) the mere fact of seeking a remedy in the courts can, of itself, lead to a further loss of privacy for those not normally in the public eye;
  - (e) the focus should be on ensuring that the press are meeting their responsibilities under the industry's Code of Practice.

4.26 The Human Rights Act 1998 imposes a duty on "public authorities" to act compatibly with the rights of the European Convention. A person who claims that a public authority has acted in a way which is

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<sup>45</sup> Lord Chancellor's Department & the Scottish Office, *Infringement of Privacy - Consultation Paper* (1993).

<sup>46</sup> Department of National Heritage, *Privacy and Media Intrusion - The Government's Response* (London, Cm 2918, 1995).

<sup>47</sup> *Privacy and Media Intrusion*, Fifth Report of Session 2002-03, Vol 1, HC 458-1.

<sup>48</sup> Department for Culture, Media and Sport, *Privacy and Media Intrusion - The Government's Response to the Fifth Report of the Culture, Media and Sport Select Committee on 'Privacy and Media Intrusion' (HC 458-1) Session 2002-2003* (Cm 5985, 2003), paras 2.3-2.6.

incompatible with a Convention right may bring proceedings against the authority if he is a victim of that act. The Court may grant such relief or remedy as it considers just and appropriate if the public authority has acted unlawfully. The Act does not apply to the relations between private individuals. Most relevant to our discussion is section 12:

*“(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. ...*

*(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*

*(4) 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 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. ...”<sup>49</sup>*

4.27 In *Douglas v Hello! Ltd*, Brooke LJ held that the existence of section 12, coupled with clause 3 of the Code of Practice ratified by the Press Complaints Commission,<sup>50</sup> meant that in any case where the court is concerned with issues of freedom of expression in a journalistic, literary or artistic context, it is bound to pay particular regard to any breach of the rules set out in clause 3 of the code, especially where none of the public interest claims set out in the preamble to the code is asserted. He said:

*“A newspaper which flouts Section 3 of the code is likely in those circumstances to have its claim to an entitlement to freedom of expression trumped by Article 10(2) considerations of privacy. Unlike the court in Kaye v Robertson, Parliament recognised that it had to acknowledge the importance of the Article 8(1) respect for private life, and it was able to do so untrammelled by any concerns that the law of confidence might not stretch to protect every aspect of private life.”<sup>51</sup>*

<sup>49</sup> An amendment providing that a court should “normally” give precedence to Article 10 over Article 8 was rejected.

<sup>50</sup> Clause 3 of the Code declares: “(i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual’s private life without consent. (ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable. Note: Private places are public or private property where there is a reasonable expectation of privacy.”

<sup>51</sup> [2001] 2 WLR 992 para 94 (Sedley LJ concurring, at para 136).

4.28 In regard to the application of the test set out in section 12(3), Sedley LJ had this to say:<sup>52</sup>

*“It will be necessary for the court ... to bear in mind that by virtue of s. 12(1) and (4) the qualifications set out in Article 10(2) are as relevant as the right set out in Article 10(1). This means that, for example, the reputations and rights of others - not only but not least their Convention rights - are as material as the defendant's right of free expression. So is the prohibition on the use of one party's Convention rights to injure the Convention rights of others. Any other approach to s.12 would in my judgment violate s.3 of the Act. Correspondingly, ... ‘likely’ in s. 12(3) cannot be read as requiring simply an evaluation of the relative strengths of the parties' evidence. If at trial, ... a minor but real risk to life, or a wholly unjustifiable invasion of privacy, is entitled to no less regard, by virtue of Article 10(2), than is accorded to the right to publish by Article 10(1), the consequent likelihood becomes material under s. 12(3). 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.”*

4.29 Although the court has a duty to act compatibly with Convention rights in adjudicating upon existing common law causes of action, it cannot hear free-standing applications based directly on Article 8 where the common law or statute law is deficient.<sup>53</sup>

## Estonia

4.30 Article 29 of the Constitution and Article 24 of the Civil Code guarantee the right to the protection of privacy. Gathering information on a person's private life is a breach of the right to privacy under the Code if it takes place without lawful grounds or against the person's wishes.<sup>54</sup>

## France

4.31 The right to privacy is not explicitly protected in the French Constitution. But the Constitutional Council in 1995 extended the protection of “individual freedom” under Article 66 of the Constitution to the right to privacy by including the latter within the former, thereby elevating the right to privacy to the status of a constitutional right.<sup>55</sup> In general, the right of expression must not be used to infringe the right of privacy in the absence of a legitimate public interest to be informed.

<sup>52</sup> Above, para 136. See also *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908, paras 40 and 51; *Campbell v Frisbee* [2002] EWHC 328 (Ch), para 29.

<sup>53</sup> *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908, paras 27 and 111; *Mills v News Group Newspapers Ltd* [2001] EMLR 41, para 21.

<sup>54</sup> C J Hamelink, above, at 63.

<sup>55</sup> Étienne Picard, above, at 51.

4.32 Article 1382 of the Civil Code provides that any person who by his fault causes damage to another is under an obligation to repair that damage. The claimant is required to show that the victim has suffered harm. This has been taken to include non-pecuniary harm such as injury to feelings. The courts have characterised as “fault” the publication of confidential letters, the dissemination of facts about a person’s private life, and the unauthorised use of a person’s name.<sup>56</sup>

4.33 In 1970, a right of privacy was specifically created by virtue of Article 9 of the Civil Code. The Article provides:

*“Everyone has the right to respect for his private life. Judges may, without prejudice to a right to compensation for the damage sustained, order any measures, such as seizure, attachment and others, that may prevent or cause to cease an interference with the intimate side of private life; in the event of urgency such measures may be ordered on an interlocutory application.”<sup>57</sup>*

4.34 The statute does not provide a definition of “private life” but the notion of “the intimate side of private life” was generally taken as being more restrictive than “private life”. The concept of “private life” has been held to include the identity of a person (covering such matters as his name, date of birth, religion, address and telephone number) and information about a person’s health, matrimonial situation, family composition, affectionate or sexual relationships, sexual orientation, and his way of life in general (such as the person’s home, the goods he uses, the places where he goes and stays, the people he meets or his debts).<sup>58</sup> It seems that the definition of private life extends to any fact which the plaintiff does not wish to have revealed. However, before emergency measures may be ordered, the court have required that the breach of private life be of an “unbearable degree” or constitute an “unbearable interference” with private life.<sup>59</sup>

4.35 It is also a criminal offence to intrude upon a private place by taking a photograph or by making a recording, if the act is intentional and has intruded into the “intimacy of privacy”. Keeping and using a photograph or recording so obtained constitutes a further offence. For these purposes, a private place is defined as a place where the public is not admitted, including a hotel room. Victims of these offences are entitled to seek civil remedies.<sup>60</sup>

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<sup>56</sup> K Zweigert & H Kotz, *Introduction to Comparative Law*, (Oxford: Clarendon Press, 2nd rev edn, 1987) vol. II, p 387.

<sup>57</sup> Quoted in C Dupré, “The Protection of Private Life versus Freedom of Expression in French Law” in M Colvin (ed), *Developing Key Privacy Rights* (Hart Publishing, 2002), at 52. A court may also order the publication of a “rectifying communiqué” drawn up by the plaintiff.

<sup>58</sup> Étienne Picard, above, pp 83-89.

<sup>59</sup> C Dupré, above, at 69-70.

<sup>60</sup> Calcutt Report, above, para 5.14.

## Germany

4.36 The right of personality is a fundamental right guaranteed by the Basic Law of Germany. Article 1 of the Constitution imposes on all state authorities a duty to respect and protect “the dignity of man”. Article 2(1) provides that “Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.” These two articles jointly create the general right to one’s own personality; and the right to respect for one’s own private sphere of life is an emanation of this personality right. The Federal Constitutional Court held:

*“The right to the free development of one’s personality and human dignity safeguard for everyone the sphere of autonomy in which to shape his private life by developing and protecting his individuality. This includes the right ‘to remain alone’, ‘to be oneself’ within this sphere, to exclude the intrusion of or the inspection by others. This includes the right to one’s likeness and to one’s utterances and even more to the right to dispose of pictures of oneself. Everyone has the right in principle to determine himself alone whether and to what extent others may represent in public an account of his life or of certain incidents thereof.”<sup>61</sup>*

4.37 Privacy is also protected in the civil courts as an aspect of the right of personality under the Civil Code. Article 823(1) of the Civil Code provides that “a person who wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom.” Since the Federal Supreme Court has held that a person’s right to his personality is an “other right” under the paragraph, the general constitutional right to personality enjoys the protection of Article 823(1). This enables the courts to apply the law of tort against conduct injurious to human dignity such as the unauthorised publication of the intimate details of a person’s private life. Other interests protected under the right to personality include: the right not to communicate medical reports without the patient’s consent; the right not to record a conversation without the speaker’s knowledge and consent; the right not to have private mail opened whether or not it is read; the right not to be photographed without consent; the right to a fair description of one’s life; and the right not to have personal information misused by the press.<sup>62</sup> The courts have also held it actionable to use the name of a famous artiste in an advertisement without his consent, to publish a fictitious interview with a well-known figure, to publish a picture which gave the impression that the person portrayed was a murderer, or to make an inaccurate or incomplete

<sup>61</sup> 35 BVerfGE 202, reproduced in B S Markesinis, *A Comparative Introduction to the German Law of Torts* (Oxford: Clarendon Press, 3<sup>rd</sup> edn, 1994), 390 at 392; translated by F H Lawson & B S Markesinis.

<sup>62</sup> See R English, “Protection of Privacy and Freedom of Speech in Germany” in M Colvin (ed) *Developing Key Privacy Rights* (Hart Publishing, 2002), at 81. For a brief introduction to privacy in Germany, see G Taylor, “Why is there no Common Law Right of Privacy?” (2000) 26(2) *Monash University Law Rev* 236, 247-256.

report in a newspaper.<sup>63</sup> The plaintiff may recover damages or obtain injunctive relief to restrain publication. The press laws of most German states also provide for a right of reply. This right applies to facts, but not opinion. It applies whether the allegation is flattering or derogatory.

4.38 The Federal Constitutional Court has held that both the right of personality and the right of freedom of expression are constitutional concerns essential to the liberal democratic order, with the result that neither can claim precedence in principle over the other.<sup>64</sup> In resolving a conflict between the two rights, the courts would take into account the “sphere of personality” involved in a particular case. As summarised by John Craig and Nicol Nolte, the German courts recognise three spheres of personality, namely, the “intimate”, the “private” and the “individual” spheres.<sup>65</sup>

- (a) The “intimate sphere” covers the “inner world of thoughts and feelings” and their expression through media such as confidential private letters or personal diaries. This sphere also protects matters which have a secret character, such as detailed health reports and sexual behaviour.<sup>66</sup> Because of the especially private nature of the matters involved, information falling within the intimate sphere enjoys absolute protection. Publication is prohibited unless the subject consents.<sup>67</sup>
- (b) The “private sphere” offers an intermediate level of legal protection to personal matters which are not by their very nature of public interest, but cannot be characterised as intimate or secret. Information concerning one’s family and home life, including telephone communications, would be considered “private”. An infringement of the private sphere would be justified if disclosure is of special interest to the public.
- (c) The “individual sphere” relates to the public, economic and professional life of the individual. It protects the occupational and social relations of a person. Information falling within this sphere is the least protected, particularly where the information relates to matters of political and public life.<sup>68</sup>

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<sup>63</sup> K Zweigert & H Kotz, above, at 384.

<sup>64</sup> The *Lebach* case, 35 BVerfGE 202, reproduced in B S Markesinis, *A Comparative Introduction to the German Law of Torts* (Oxford: Clarendon Press, 3<sup>rd</sup> edn, 1994), at 390.

<sup>65</sup> J Craig & N Nolte, above, at 174. See also B Markesinis *et al*, “Concerns and Ideas about our Developing Law of Privacy” (Institute of Global Law, University College London, 2003), pp 69-74 (identifying five levels of protection, namely, the public sphere, the social sphere, the private sphere, the confidential sphere and the intimate sphere).

<sup>66</sup> The human body between death and burial is likely to be within this sphere: G J Thwaite & W Brehm, “German Privacy and Defamation Law: The Right to Publish in the Shadows of the Right to Human Dignity”, 8 EIPR 336, 342 (1994).

<sup>67</sup> It has been held that the publication of a photograph of a German woman topless on a Spanish beach without her consent was a violation of her intimate sphere: G J Thwaite & W Brehm, above, at 342.

<sup>68</sup> Hence, the activities of an “absolute public person” can generally be reported and his picture can be published. As for “relative public persons”, their names and pictures might be published for a reasonable period. For example, the name and even picture of an accused may be published. However, there must be some proceedings in place before he can be publicly identified. Such a person may recover his privacy after a lapse of time. A “private person” receives the widest

4.39 Craig and Nolte state that balancing is required only in cases implicating the private and social spheres. The publication of information falling within the intimate sphere will not be tolerated. Where non-intimate yet otherwise private matters are at stake, the courts will look to a variety of factors in assessing whether a privacy invasion can be justified on the basis of public interest. These factors include: (a) the value of the information published;<sup>69</sup> (b) the motivation underlying publication;<sup>70</sup> (c) the status of the subject of the publication;<sup>71</sup> (d) the place where the invasion of privacy takes place;<sup>72</sup> and (e) alternatives available which could have reduced the impact of the publication on the privacy of the individual concerned.<sup>73</sup> Due to the weight given to freedom of expression, the careful appraisal of the circumstances in each individual case and the application of the proportionality test, Articles 1 and 2 of the Basic Law have not proved to be a significant threat to free speech interests or press freedom.<sup>74</sup>

## Hungary

4.40 The Civil Code affords protection to the right of privacy in sections 81 (secrecy of correspondence and business secrets); 82 (private homes and premises) and 83 (computerised data processing). Section 79 also provides a remedy for spreading false facts about a person or putting true facts in a false light.<sup>75</sup>

## India

4.41 There are two aspects to the right to privacy in India, which is implicit in the right to life and liberty guaranteed by Article 21 of the Constitution:<sup>76</sup> (a) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy; and (b) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect is violated where, for example, a person's name or likeness is used, without his consent,

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protection. His name, picture or likeness cannot be attributed to a commercial product; his image cannot be seriously distorted by a play; and his photographs cannot be published without his informed consent. See G J Thwaite & W Brehm, above, at 341.

<sup>69</sup> The smaller the value of the information, the greater the protection of privacy.

<sup>70</sup> Whereas personal information that is of genuine public interest may be published, publications that are published merely to satisfy the craving of readers for sensational and superficial entertainment and motivated solely to further the economic interests of the publisher, are generally precluded if they infringe upon the right of personality.

<sup>71</sup> That is, whether the complainant is a public or private figure.

<sup>72</sup> For example, the fact that a long-range camera is used to photograph a person will not render publication in breach of the right of personality, unless the person being photographed was in his home or other private premises.

<sup>73</sup> J Craig & N Nolte, above, at 177.

<sup>74</sup> R English, "Protection of Privacy and Freedom of Speech in Germany" in M Colvin (ed), *Developing Key Privacy Rights* (Hart Publishing, 2002), at 95.

<sup>75</sup> C J Hamelink, above, at 77.

<sup>76</sup> Article 21 of the Constitution states: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

for advertising or non-advertising purposes or, for that matter, his life story is written whether laudatory or otherwise and published without his consent.<sup>77</sup>

4.42 The Supreme Court of India has ruled that a citizen has a right to safeguard the privacy of his own person, his family, marriage, procreation, motherhood, child-bearing and education. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. The position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy, or the publication is based upon public records, including court records, subject to an exception for victims of sexual assault, kidnapping, abduction or similar offences, who should not further be subjected to the indignity of their names and the circumstances of the incidents being publicised in the press.<sup>78</sup>

## Ireland<sup>79</sup>

4.43 Irish courts do not explicitly recognise a general right to privacy at common law. Privacy interests are protected by a wide range of torts such as trespass, nuisance and breach of confidence. However, the courts have developed a constitutional right to privacy on the basis of Article 40.3.1 of the Constitution under which the State guarantees to respect, defend and vindicate the personal rights of the citizen. The Supreme Court in *McGee v The Attorney General* held that privacy was among the personal rights which the State guarantees in the Article.<sup>80</sup> Although two of the three judges in the majority specifically limited their treatment of privacy to the field of marital relations, subsequent cases have indicated that the Article affords some protection against threats to privacy posed by interception of communications and surveillance.<sup>81</sup>

4.44 Recently, the Irish Law Reform Commission has recommended in its report on surveillance and interception of communications the enactment of three torts to protect privacy, namely:

- (a) a tort of privacy-invasive surveillance which protects a reasonable expectation of privacy;
- (b) a tort of harassment modelled on the definition of harassment provided under section 10 of the Non-Fatal Offences against the Person Act 1997; and
- (c) a tort of unjustified disclosure or publication of any information,

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<sup>77</sup> *Rajagopal v State of Tamil Nadu* [1994] SCC (6) 632, 639. See also *Kharak Singh v State of UP* [1964] 1 SCR 332.

<sup>78</sup> Above, at 649-650.

<sup>79</sup> B M E McMahon & W Binchy, *Irish Law of Torts*, (Dublin: Butterworths (Ireland), 2nd edn, 1990), ch 37; Law Reform Commission of Ireland, *Consultation Paper on Privacy: Surveillance and the Interception of Communications* (1996), chapters 3 & 4.

<sup>80</sup> [1974] IR 284.

<sup>81</sup> Law Reform Commission of Ireland (1996), paras 3.5 - 3.8. Eg, *Kennedy v Ireland* [1987] IR 587 (holding that "the nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society"); *Re Ansbacher (Cayman) Ltd* [2002] IEHC 27, para 22.

material or images obtained by or as a result of privacy-invasive surveillance or harassment.<sup>82</sup>

4.45 The Irish Law Reform Commission recommends that no liability should attach to disclosure that would otherwise be unlawful under its proposals if the defendant can show that the disclosure was justified by “overriding considerations of the public interest”. Where it cannot be shown to have been so justified, the defendant would still have a good defence if he can show that he had reasonable grounds to believe and did *bona fide* believe that such disclosure was justified by overriding considerations of the public interest.<sup>83</sup> The Commission further recommends that in deciding whether the defence has been established, the court should have regard to all the relevant circumstances, including whether such disclosure was justified in the interests of (a) the detection or prevention of serious crime; (b) the exposure of serious illegality or other serious wrongdoing; (c) the need to inform the public on a matter of public importance; or (d) preventing the public from being misled by public conduct (including statements) of a person having or seeking a public office or function.<sup>84</sup>

## Italy

4.46 The Italian Constitution protects the right to privacy as a component of the personality of an individual. Hence, a breach of privacy can lead to a claim under the Civil Code, which states that anyone who does an intentional or negligent act that causes unjust damage to another is liable to compensate the latter. Damage is not unjust if it is caused by the fair exercise of a right recognised by the law, such as the right to information. The Civil Code also provides that the publication of the picture of a person may be restrained if it causes prejudice to his dignity or reputation. Further, a person may apply for an injunction if the use of his name by another person causes prejudice to him.<sup>85</sup>

4.47 The Court of Cassation, which is the highest court in Italy, elaborated on the right to privacy in a case involving Princess Soraya. In that case, a popular news weekly acquired photographs which had been taken with a telephoto lens. The photographs showed Princess Soraya behaving affectionately with an actor inside her Roman villa. As summarised by Guido Alpa, the Court observed that the right to privacy bears three different meanings: (a) domestic privacy, which is linked to the protection of the home; (b) the realm of individual and family life, and certain forms of illicit, interpersonal intimacy in relationships, including outside the home and in correspondence; and (c) the right to require other people’s discretion about one’s private life. The Court held that the first definition was too restrictive, the second more

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<sup>82</sup> Law Reform Commission of Ireland, *Report on Privacy: Surveillance and the Interception of Communications* (1998).

<sup>83</sup> Law Reform Commission of Ireland (1998), p 129, Head 3(1)(iv).

<sup>84</sup> Law Reform Commission of Ireland (1998), p 129, Head 3(3).

<sup>85</sup> Civil Code, Articles 7, 10 & 2043. See Gustaf von Dewall, *Press Ethics: Regulation and Editorial Practice* (The European Institute for the Media, EIM Media Monograph 21, 1997), pp 102 – 104.

reasonable, and the third too wide and general. It therefore proposed that the right be defined as “a right of protection for those situations and events that are strictly personal and relating to the family and which, even if they take place outside the domestic residence, do not have an appreciable public or social interest for third parties.” As for famous persons, the Court stressed that the public interest in information about a famous person is not to be confused with the public’s morbid curiosity about facts relating to that person’s private life, and that there need only be an exception if there is “a real social interest or an overriding public interest”.<sup>86</sup>

## Lithuania

4.48 The civil laws in Lithuania provide for compensation for moral damage caused by the dissemination of unlawful or false information demeaning the honour and dignity of a person in the mass media.<sup>87</sup> Article 5 of the Law on the Provision of Information to the Public also protects an individual’s health secrets and the right of an individual to his private life.<sup>88</sup>

## Macao, China

4.49 Apart from explicitly protecting “the freedom of the person”, “the homes and other premises” and “the freedom and privacy of communication” of Macao residents,<sup>89</sup> the Basic Law of the Macao Special Administrative Region contains a specific provision on the right to personality and the right to “the intimacy of private and family life”. Such a provision is absent from the Basic Law of the Hong Kong SAR. Article 30 of the Macao Basic Law provides:

*“The human dignity of Macao residents shall be inviolable. Humiliation, slander and false accusation against residents in any form shall be prohibited.*

*Macao residents shall enjoy the right to personal reputation and the intimacy of their private and family lives.”*

4.50 Apart from the Basic Law, the Civil Code of Macao affords comprehensive protection to the right of personality. The section on the right of personality contains provisions in the following areas:<sup>90</sup> (a) the right to the general protection of personality; (b) the right to personality of the deceased; (c) the right to the integrity of the body and mind; (d) the right to honour; (e) the right to the protection of the intimacy of private life; (f) protection of confidential correspondence; (g) protection of notes by relatives and other confidential documents; (h) protection of non-confidential correspondence; (i) the right to

<sup>86</sup> Guido Alpa, “The Protection of Privacy in Italian Law” in B S Markesinis (ed), *Protecting Privacy – The Clifford Chance Lectures Volume Four* (OUP, 1999), pp 121-124.

<sup>87</sup> *Privacy & Human Rights 2003*, above, “Republic of Lithuania”.

<sup>88</sup> C J Hamelink, above, at 82.

<sup>89</sup> Articles 28, 31 & 32 of the Macao SAR Basic Law, at <[www.umac.mo/basiclaw/english](http://www.umac.mo/basiclaw/english)>.

<sup>90</sup> Articles 67 to 82. See 趙秉志總編，〈澳門民法典〉，中國人民大學出版社，1999年，頁29-34。

the secrecy of personal history; (j) protection of personal data; (k) the right to portrait; (l) the right to accuracy in personal information; and (m) the right to name and other personal identifier. Article 5 of the Publication Law also provides, *inter alia*, that the right to access the source of information shall cease if it involves the protection of any facts or documents about the intimacy of private and family life.

## The Netherlands

4.51 The right to privacy is guaranteed by Article 10 of the Constitution. Although the Dutch Supreme Court has held that the right to freedom of speech does not justify an infringement of privacy, the right to privacy is not absolute in the Netherlands. The Court would take all circumstances into account in a privacy action, and a journalist may show that the publication was reasonable. Privacy is also protected by Article 1401 of the Civil Code, which creates general liability for causing wrongful harm to others. This provision has been construed to cover harming people by publishing damaging private information about them in the absence of a good reason, even though the information was true.<sup>91</sup> Invasion of individual privacy by the media may also be dealt with under the Civil Code.<sup>92</sup>

4.52 It is a criminal offence to trespass into another person's home, to eavesdrop on private conversations, or to take photographs of people without their consent when they are on any private property. It is also an offence to publish a photograph so obtained. Since a civil action lies for harming another person by committing a criminal offence, the victims may pursue civil remedies against the offenders concerned.<sup>93</sup>

## New Zealand

4.53 **Common law** – At common law, privacy interests were protected only if the plaintiff had a cause of action in other heads of tortious liability. However, there is a trend on the part of the courts towards recognising a right to privacy in New Zealand. In *Tucker v News Media Ownership Ltd*,<sup>94</sup> Jeffries J granted an interim injunction against a publisher prohibiting publication of any report which referred to the plaintiff's previous convictions. He reasoned that a person who lives an ordinary private life has a right to be left alone and to live the private aspects of his life without being subjected to unwarranted, or undesired, publicity or public disclosure. In his view, the right to privacy might provide the plaintiff a valid cause of action in New Zealand, observing that it seemed a natural progression of the tort of intentional infliction of emotional distress and in accordance with the renowned ability of the common law to provide a remedy for a wrong. The Court of Appeal did not reject the views of

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<sup>91</sup> Francine van Lenthe & Ineke Boerefijn, "Press Law in the Netherlands" in ARTICLE 19, *Press Law and Practice* (1993), ch 6; Calcutt Report, above, para 5.27.

<sup>92</sup> Article 6:162 on tort: C J Hamelink, above, at 88.

<sup>93</sup> Calcutt Report, above, paras 5.25 and 5.28.

<sup>94</sup> [1986] 2 NZLR 716, at 733.

Jeffries J.<sup>95</sup> When the defendant applied to discharge the interim injunction, McGechan J stated that he supported the introduction into the New Zealand common law of a tort covering invasion of personal privacy at least by public disclosure of private facts. He did not think it beyond the common law to adapt the *Wilkinson v Downton* principles to significantly develop the same field and meet the same needs.<sup>96</sup>

4.54 In *P v D*,<sup>97</sup> Nicholson J reviewed the New Zealand authorities and concluded that the tort of breach of privacy in New Zealand encompassed public disclosure of private facts. He held that a breach in that regard should be determined by consideration of four factors:

- “(a) That the disclosure of the private facts must be a public disclosure and not a private one.*
- (b) Facts disclosed to the public must be private facts and not public ones.*
- (c) The matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.*
- (d) The nature and extent of legitimate public interest in having the information disclosed”.*<sup>98</sup>

4.55 In *Hosking v Runting*,<sup>99</sup> the defendants had taken photographs of the plaintiffs' children in the street, being pushed in their stroller by their mother. Subsequently, the second defendant informed the plaintiffs of the defendants' intention to publish the photographs. The plaintiffs commenced proceedings and pleaded that the photographing of their children and the publication of the photographs without their consent amounted to a breach of their children's privacy. The High Court held that New Zealand law did not recognise a cause of action in privacy based on the public disclosure of photographs taken in a public place. The Court of Appeal dismissed the plaintiffs' appeal but held, by three to two, that the case for a right of action for “breach of privacy by giving publicity to private and personal information” was made out. They took that view because:<sup>100</sup>

- (a) It was essentially the position reached in the United Kingdom under the breach of confidence cause of action.
- (b) It was consistent with New Zealand's obligations under the ICCPR and the UN Convention on the Rights of the Child.
- (c) It was a development recognised as open by the NZ Law Commission.
- (d) It was workable, as demonstrated by the experience of the NZ Broadcasting Standards Authority and similar British tribunals.
- (e) It enabled competing values to be reconciled.

<sup>95</sup> The judgments of Jeffries J and the Court of Appeal were quoted in [1986] 2 NZLR 716, 731-732.

<sup>96</sup> [1986] 2 NZLR 716, 733.

<sup>97</sup> [2000] 2 NZLR 591.

<sup>98</sup> *P v D* [2000] 2 NZLR 591, paras 33-34; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, 423. See generally R Tobin, “Invasion of privacy” [2000] NZLJ 216.

<sup>99</sup> CA101/03 (date of judgment: 25.3.04).

<sup>100</sup> *Per* Gault P and Blanchard J, at para 148; Tipping J concurring, at para 223.

- (f) It could accommodate interests at different levels so as to take account of the position of children.
- (g) It avoided distortion of the elements of the action for breach of confidence.
- (h) It enabled New Zealand to draw upon extensive United States experience.
- (i) It would allow the law to develop with a direct focus on the legitimate protection of privacy, without the need to be related to issues of trust and confidence.

Gault P and Blanchard J were of the view that there were two fundamental requirements for a successful claim for interference with privacy in New Zealand: (a) the existence of facts in respect of which there was a reasonable expectation of privacy; and (b) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.<sup>101</sup>

4.56           **Legislation** – By virtue of the Privacy Act 1993, any person may make a complaint to the Privacy Commissioner alleging that any action is or appears to be “an interference with the privacy of an individual”. An action will be “an interference with the privacy of an individual” if the action breaches an information privacy principle in the Act and has caused or might cause some loss or other form of harm to the individual concerned. As far as the manner of collection is concerned, Information Privacy Principle 4 provides, *inter alia*, that personal information shall not be collected by an agency by means that are “unfair” or “intrude to an unreasonable extent upon the personal affairs of the individual concerned”. If the Privacy Commissioner considers that a complaint has substance, he may refer it to the Proceedings Commissioner appointed under the Human Rights Act 1993, who may in turn bring proceedings in the Complaints Review Tribunal. The Tribunal may make an order prohibiting a repetition of the action complained of or requiring the interference to be put right. It can also require damages to be paid.

4.57           It may be noted in passing that section 4(1)(c) of the Broadcasting Act 1989 in New Zealand imposes a duty on broadcasters to maintain standards which are consistent with the privacy of the individual. The Broadcasting Standards Authority applies seven privacy principles when determining complaints under that provision. In these principles, the Authority expresses the view that the protection of privacy includes protection against:

- (a) the intentional interference (in the nature of prying) with an individual’s interest in solitude or seclusion, provided that the intrusion is offensive to the ordinary person;
- (b) the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities;
- (c) the public disclosure of “public facts” concerning events (such as criminal behaviour) which have, in effect, become private again, for example, through the passage of time provided that the public

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<sup>101</sup> Para 117. See also para 259.

- disclosure is highly offensive to a reasonable person;
- (d) the disclosure of private facts to abuse, denigrate or ridicule personally an identifiable person; and
  - (e) the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable person unless the details are public information or are disclosed in the course of current affairs reporting.<sup>102</sup>

## Norway

4.58 Although there is no provision in the Constitution dealing specifically with the protection of privacy, the Norwegian Supreme Court has held that Norwegian law recognises legal protection of personality, which embraces a right to privacy. The right to privacy is also protected by the Penal Code, which provides that anyone who unlawfully violates the right to privacy by publishing information relating to the “personal or domestic affairs” of another is liable to a fine or three months’ imprisonment.<sup>103</sup>

## The Philippines

4.59 Article 26 of the Civil Code provides:

*“Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts ... shall produce a cause of action for damages, prevention and other relief: (1) Prying into the privacy of another’s residence; (2) Meddling with or disturbing the private life or family relations of another; (3) Intriguing to cause another to be alienated from his friends; (4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.”<sup>104</sup>*

Any individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs the privacy of communication and correspondence of another shall be liable to that other for damages.<sup>105</sup>

## Russia

4.60 The Constitution provides in Article 23 that *“Everyone shall have the right to privacy, personal and family secrets, and protection of his honour and good name.”* Article 24 provides that *“It shall be forbidden to gather, store,*

<sup>102</sup> New Zealand Broadcasting Standards Authority, “Privacy Principles”, at <[http://www.bsa.govt.nz/\\_priv\\_princ.htm](http://www.bsa.govt.nz/_priv_princ.htm)>. Discussing the matter in the “public interest” is a defence to a claim for invasion of privacy.

<sup>103</sup> *Privacy & Human Rights 2003*, above, “Kingdom of Norway”.

<sup>104</sup> At <<http://www.chanrobles.com/civilcodeofthephilippines1.htm>>.

<sup>105</sup> Civil Code, Article 32(11).

use and disseminate information on the private life of any person without his consent.” Privacy is also a personal right under Article 150(2) of the Civil Code. Attached to this right are rights to personal dignity, honour and good name, business name, personal secrets and family secret. A court can order the defendant to provide financial compensation if the plaintiff suffers physical or moral damage by violation of his personal rights.<sup>106</sup>

## South Africa<sup>107</sup>

4.61 The right of privacy in South Africa is protected by both common law and the Constitution. Section 14 of the South African Constitution of 1996 states that “*Everyone has the right to privacy, which includes the right not to have - (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.*” To establish a violation of the constitutional right to privacy, the plaintiff has to show that he had a subjective reasonable expectation of privacy which was objectively reasonable. Any person whose right of privacy under the Constitution has been infringed or threatened may apply to the court for “appropriate relief”, including a declaration of rights.

4.62 An unlawful and intentional interference with the right to privacy is also actionable at South African common law within the concept of *dignitas*.<sup>108</sup> Invasions of privacy have been broadly divided into two categories:

- (a) Intrusions into (including acquisition of information) or interferences with private life – A violation of privacy by means of an act of intrusion takes place where an outsider himself acquires knowledge of private and personal facts relating to the plaintiff, contrary to the plaintiff’s determination and wishes.
- (b) Disclosures or revelations of private information – A violation of privacy through an act of disclosure arises where, contrary to the determination and will of the plaintiff, an outsider reveals to third parties personal facts regarding the plaintiff, which, although known to the outsider, nonetheless remain private. The legal protection of private facts is extended only to ordinary or reasonable sensibilities and not to hyper-sensitiveness. This type of violation covers:
  - (i) the disclosure of private facts which have been obtained by an unlawful act of intrusion into privacy;
  - (ii) the disclosure of private facts in breach of a confidential relationship;
  - (iii) the mass publication of private facts; and
  - (iv) the disclosure of false or misleading private facts.

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<sup>106</sup> *Privacy & Human Rights 2003*, above, “Russian Federation”.

<sup>107</sup> See South African Law Reform Commission, *Privacy and Data Protection – Issue Paper 24* (2003), Chapter 3 and the cases and materials cited therein.

<sup>108</sup> *Dignitas* consists of all those rights relating to dignity.

4.63 The common law defences to a violation of the right to privacy include consent, necessity, private defence, impossibility, public interest and performance in a statutory or official capacity.

## South Korea

4.64 Article 17 of the Constitution of the Republic of Korea declares that “The privacy of no citizen may be infringed.” Invasion of privacy is actionable in tort and compensatory damages are recoverable for “injured feelings”. A Seoul court found that five female university students were entitled to damages when a *Newsweek* photographer published without their permission a photograph of them at school, in conjunction with an unfavorable accompanying article.<sup>109</sup>

## Spain

4.65 The Constitution recognises a basic right to privacy. It is also a civil offence to infringe the right to privacy under the Organic Law of 1982 on Civil Protection of Honour, Personal and Family Privacy and One’s Image of Oneself. Section 9(3) of the Law provides:

*“The protection afforded by the courts will include the taking of all necessary measures to end the unlawful intrusion and to re-establish the victim in full possession of his rights, and preventing or impeding further intrusions. These measures may include an injunction for the prompt termination of the unlawful intrusion, the admission of the right to reply, the discussion of the sentence, and the order to pay damages.”*<sup>110</sup>

The constitutional court held that the courts must balance the right to privacy and the right to freedom of expression.<sup>111</sup> Unwanted publicity and unauthorised collection of personal information may also be an offence under the Criminal Code.<sup>112</sup>

## Taiwan, China

4.66 The Civil Code in Taiwan protects the right of personality.<sup>113</sup> This

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<sup>109</sup> *Sun-Jeong Kwon, Hyun-Ju Kim and Yun-Hwa Kim v Newsweek Inc*, Seoul Civil Dist Ct, 92 Gadan 57989 July 8, 1993; cited in *Privacy & Human Rights 2003*, above, “Republic of Korea”.

<sup>110</sup> C J Hamelink, above, at 118.

<sup>111</sup> STC 104/86, 17 July 1986.

<sup>112</sup> Organic Act 10/1995, section 197. A person may be criminally liable for “*The unauthorised appropriation, use or modification to the detriment of others, of confidential information of a personal or family nature pertaining to another, contained in computerised, electronic or telematic files or supports or in any other type of public or private file or record, as well as unauthorised access thereto by any means, and its alteration or use to the detriment of the owner of the information or any other person.*” Quoted in C J Hamelink, above, at 118.

<sup>113</sup> Articles 18, 184 & 195.

right seeks to protect the intrinsic value and dignity of man and to maintain the integrity and inviolability of his personality. It includes the right to physical body, health, freedom, reputation, name, privacy, likeness, secrecy and honour. Anyone whose right of personality has been infringed by another may apply to the court for relief.

## United States

4.67           **Constitutional privacy** – Although both the Constitution and the law of tort in the US protect an individual's right to privacy, privacy as guaranteed by the Constitution is different in nature from privacy as protected by the law of tort. While constitutional privacy rights protect against acts by the Government, tort law privacy rights primarily protect against acts by private parties. The common law right operates as a control on private behaviour, while the constitutional right operates as a control on Government.<sup>114</sup> Constitutional privacy affords protection against the following types of intrusion:<sup>115</sup>

- (a) Government intrusion into a person's mind and thought processes and the related right to control information about oneself.
- (b) Government intrusion into a person's zone of private seclusion. For example, the Government is precluded from unreasonable search and seizure within that zone of seclusion.
- (c) Government intrusion into a person's right to make certain personal decisions in relation to marriage, procreation, contraception, family relationships and child rearing and education.

4.68           **Tort law privacy rights** – Judicial development of the law of privacy in the US was influenced by the seminal article written by Warren and Brandeis in 1890. Drawing upon English cases of defamation, property, breach of copyright, and breach of confidence, they argued that the common law implicitly recognised the right to privacy. They concluded that "*the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone*", and that "*the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.*"<sup>116</sup> The ideas propounded in the article were subsequently taken up and developed by the courts in most jurisdictions in the US.

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<sup>114</sup> J T McCarthy, *The Rights of Publicity and Privacy* (Clark Boardman Callaghan, 1994), § 5.7[B].

<sup>115</sup> J T McCarthy, above, § 5.7[C]. See also E H Schopler, "Supreme Court's Views as to the Federal Legal Aspects of the Right of Privacy" 43 L Ed 2d 871.

<sup>116</sup> S D Warren and L D Brandeis, "The Right to Privacy", 4 Harv L Rev 193, at 205 - 206.

4.69 The law of privacy as developed by the American courts comprises four distinct kinds of invasions of four different interests of the individual:

- (a) **Invasion of privacy by intrusion upon the plaintiff's solitude or seclusion** – This tort consists of intrusion (physical or otherwise) upon the solitude or seclusion of another or his private affairs or concerns which is highly offensive to a reasonable person. It requires proof of an unauthorised intrusion or prying into the plaintiff's seclusion as to a matter which the plaintiff has a right to keep private, where the conduct would be highly offensive to a reasonable person.
- (b) **Invasion of privacy based on public disclosure of private facts** – The “disclosure” type of tort of invasion of privacy consists of publicity of a highly objectionable kind, given to private information about the plaintiff, even though it is true and no action would lie for defamation. It is triggered by the public disclosure of private facts, where the disclosure is highly offensive to a reasonable person.
- (c) **Invasion of privacy by appropriation of name or likeness** – The appropriation form of invasion of privacy consists of appropriation of the plaintiff's name or likeness for the defendant's benefit or advantages. It usually involves the unauthorised commercial use of a person's identity, which causes injury to dignity and self-esteem with resulting mental distress damages. The plaintiff may seek a remedy under this head if his name or picture, or other likeness, has been used without his consent to advertise the defendant's product, or for any other business purposes.
- (d) **False light in the public eye** – This tort consists of publicity which places the plaintiff in a false light in the public eye. Examples of this form of invasion include publicity attributing to the plaintiff some opinion, such as spurious books or articles; and the use of the plaintiff's picture to illustrate an article with which he has no reasonable connection, with the implication that such a connection exists.<sup>117</sup>

4.70 As at 1995, the courts in at least 28 states have explicitly or implicitly accepted each of the four torts delineated above. Several other states have adopted the privacy torts of intrusion, public disclosure of private facts, and appropriation of an individual's name or likeness, but not the tort of placing someone in a false light. Virtually all states have recognised a cause of action for invasion of privacy in some form.<sup>118</sup>

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<sup>117</sup> W P Keeton (ed), *Prosser and Keeton on Torts* (Minn, St Paul, West Publishing Co, 5th edn, 1984), p 863 *et seq.*

<sup>118</sup> A J McClurg, “Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places” (1995) 73 North Carolina L Rev 989, 998-999.

4.71 The future of the “public disclosure” tort in the US has been thrown into doubt by the US Supreme Court’s decision in *Florida Star v B.J.F.*<sup>119</sup> In that case, a reporter lawfully obtained the name of a rape victim from an erroneously released police report. The name was subsequently included in a newspaper article. The victim alleged that the newspaper had violated a Florida statute that made it unlawful to publish in any instrument of mass communication the name of the victim of a sexual offence. She argued that a rule punishing publication furthers three closely related interests, namely, the privacy interest of victims of sexual offences; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims to report these offences without fear of exposure. The Court held that the imposition of civil damages on the newspaper, pursuant to the Florida statute, violated the First Amendment: “*where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order*”.<sup>120</sup> Although the Court also stated that it did not hold that truthful publication is automatically constitutionally protected, the context of the decision indicates that rarely will privacy be considered a “state interest of the highest order”. In a dissent joined by Rehnquist CJ and O’Conner J, White J stated: “*By holding that only ‘a state interest of the highest order’ permits the State to penalise the publication of truthful information, and by holding that protecting a rape victim’s right to privacy is not among those state interests of the highest order, the Court accepts appellant’s invitation to obliterate one of the most noteworthy legal inventions of the 20<sup>th</sup> century: the tort of the publication of private facts.*”<sup>121</sup>

## Other jurisdictions

4.72 **Thailand** – Section 34 of the Constitution of the Kingdom of Thailand states:

*“A person’s family rights, dignity, reputation or the right of privacy shall be protected. The assertion or circulation of a statement or picture in any manner whatsoever to the public, which violates or affects a person’s family rights, dignity, reputation or the right of privacy, shall not be made except for the case which is beneficial to the public.”*

4.73 **Singapore and Malaysia** – Neither the Constitution of Singapore nor that of Malaysia specifically recognises the right of privacy. There is also no data protection or privacy law in these two countries. However, the Singaporean High Court has held that personal information may be protected from disclosure under a duty of confidence.<sup>122</sup>

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<sup>119</sup> 491 US 524 (1989).

<sup>120</sup> 491 US 524 at 541 (1989).

<sup>121</sup> Above, at 550.

<sup>122</sup> *X v CDE* [1992] 2 SLR 996, cited in *Privacy & Human Rights 2003*, above.

4.74 **Latin America** – The privacy laws in most Latin American countries are contained in the criminal law under which the media may be criminally liable for invading someone’s privacy. The privacy offences include divulging private facts to the public, publishing private communications, and interfering with a person’s intimate life. It has been suggested that the public largely supports these measures.<sup>123</sup>

## Conclusion

4.75 It is safe to conclude that outside the realm of personal data privacy which is specifically protected by data protection legislation, the overwhelming majority of the jurisdictions covered by our comparative study provide for a right to the legal protection of individual privacy in one way or another. These jurisdictions are Austria, British Columbia, Manitoba, Newfoundland, Saskatchewan, Quebec, Mainland China, Macao, Taiwan, Denmark, Estonia, France, Germany, Hungary, Ireland, India, Italy, Lithuania, The Netherlands, New Zealand, Norway, The Philippines, Russia, South Africa, South Korea, Spain, Thailand, the United States and most of the Latin American countries, including Brazil. There is no legislation protecting general privacy rights in New Brunswick but a Privacy Bill was introduced to the Legislative Assembly in December 2000.

4.76 Jurisdictions which do not recognise a right of action for breach of privacy are Australia, England and Wales, Malaysia and Singapore.

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<sup>123</sup> See generally J E Lanao, *Freedom of the press and the law – Laws that affect journalism in the Americas* (Miami, FL: Inter American Press Association, 1999).

## Chapter 5

# Providing civil remedies to victims of unwarranted invasion of privacy

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### Need for civil protection against invasion of privacy

5.1 Privacy is an important value which should be protected by law as a right in itself and not merely incidentally to the protection of other rights. It is a fundamental human right recognised in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and many other international and regional treaties. Nearly every country in the world recognises privacy as a fundamental human right in their constitution, either explicitly or implicitly.<sup>1</sup>

5.2 **International Covenant on Civil and Political Rights** – The ICCPR imposes on the Hong Kong SAR Government a positive duty to protect the right of privacy under Article 17, which provides, *inter alia*, that no one shall be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence”, and that everyone has the right to the protection of the law against such interference. This obligation is derived from the undertakings in Article 2 of the Covenant, including the undertaking “to respect and to ensure” to all individuals within Hong Kong the rights recognised in the Covenant; where not already provided for by existing legislative or other measures, “to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights”; and to ensure that any person whose rights or freedoms are violated shall have “an effective remedy”.

5.3 Hence, Article 17 necessitates the adoption of legislative or other measures to give effect to the prohibition against interference with the right to privacy as well as to the protection of that right. The obligation of the Government is to protect every person against all arbitrary or unlawful interferences whether they emanate from Government authorities or from natural or legal persons.<sup>2</sup> The “protection of the law” in paragraph 2 of the Article calls for measures in the area of private and administrative law as well as prohibitive norms under criminal law.<sup>3</sup>

5.4 The right of privacy under Article 17 is qualified and not absolute. It is protected only to the extent that the interference is either unlawful or arbitrary. The UN Human Rights Committee has stated that the term “unlawful”

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<sup>1</sup> Electronic Privacy Information Center & Privacy International, *Privacy & Human Rights – An International Survey of Privacy Laws and Developments*, at <[www.gilc.org/privacy/survey](http://www.gilc.org/privacy/survey)>.

<sup>2</sup> UN Human Rights Committee, General Comment 16/32 of 23 March 1988, para 1.

<sup>3</sup> M Nowak, *UN Covenant on Civil and Political Rights; CCPR Commentary* (Strasbourg: Engel, 1993), 289 - 290.

means that no interference can take place except on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. As regards the expression “arbitrary interference”, it can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.<sup>4</sup> The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.<sup>5</sup>

**5.5 Council of Europe** – By virtue of a resolution passed in 1998, the Parliamentary Assembly of the Council of Europe calls upon the governments of the member states to pass legislation containing the following guidelines, if such legislation not yet exists:<sup>6</sup>

*i. the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy;*

*ii. editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel;*

*iii. when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned;*

*iv. economic penalties should be envisaged for publishing groups which systematically invade people’s privacy;*

*v. following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited;*

*vi. a civil action (private lawsuit) by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used ‘visual or auditory enhancement devices’ to capture recordings that they otherwise could not have captured without trespassing;*

*vii. provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an*

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<sup>4</sup> General Comment 16(32).

<sup>5</sup> *Toonen v Australia* (1994) 1 IHRR 97, para 8.3.

<sup>6</sup> Resolution 1165 (1998), at <<http://stars.coe.fr/ta/ta98/ERES1165.HTM>>, para 14.

*assessment by the court as to the merits of the claim of an invasion of privacy; ...”*

**5.6 The Basic Law of the Hong Kong SAR** – The provisions of the ICCPR have acquired a constitutional status in Hong Kong by virtue of Article 39 of the Basic Law. That Article imposes an obligation on the Hong Kong SAR Government to implement the provisions of the Covenant through its laws. This would necessitate the enactment of laws to give effect to the right to privacy guaranteed by the ICCPR. Since China has undertaken the responsibility to report on the measures Hong Kong has adopted to give effect to the rights recognised in the Covenant, the implementation of the Covenant will continue to be subjected to international scrutiny. Failure to implement Article 17 through the laws of Hong Kong would not only be contrary to the Basic Law, but would also be criticised by the UN Human Rights Committee when it considers the report submitted by China. The Hong Kong Bill of Rights Ordinance (Cap 383) creates a general right of privacy but infringements by private persons are not actionable under that Ordinance. Creating a tort of invasion of privacy would therefore fulfil the Hong Kong SAR Government’s obligations under the ICCPR and the Basic Law.

**5.7 Absence of protection against interference by private parties** – Under Article 17 of the ICCPR, the Government is under an obligation to adopt measures to give effect to the prohibition against interference with one’s privacy by private persons as well as by the Government or public authorities. Although the Hong Kong Bill of Rights Ordinance enables an individual to bring an action for breach of the right to privacy under Article 14 of the HK Bill of Rights, these actions can only be brought against the Government and public authorities but not against private persons.<sup>7</sup> What is lacking is a right of action for breach of privacy against private persons. If the legislature has seen fit to provide a statutory remedy enabling private citizens to sue public authorities for breach of privacy, without providing a definition of privacy, there is no reason why a more specific tort of invasion of privacy should not be created which is actionable against private persons as well as public authorities. Denying citizens legal protection against invasion of privacy by private persons on the ground that privacy cannot be defined, or that the result is uncertain, appears indefensible. If the courts can be trusted to perform a balancing exercise in resolving privacy claims against public authorities under the HK Bill of Rights Ordinance, they should also be trusted to perform the same exercise in resolving privacy claims against private persons based on a statutory tort of invasion of privacy.

**5.8 The floodgate argument** – When the Government introduced the draft Bill of Rights into the Legislative Council in 1990, there was concern that the guarantee of the right to privacy provided in Article 14 of the Bill would create a new cause of action against private bodies which went well beyond the protection of privacy under existing Hong Kong law. This led to fears that the courts would be overwhelmed by a flood of litigation instituted by private bodies. However, the right of personality in Germany has not created an excessive

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<sup>7</sup> The Ordinance binds only the Government and public authorities: Cap 383, s 7.

caseload for the courts. For example, between 1980 and 2000, there were only some 223 privacy-related judgments by the German Courts of Appeal and the Federal Supreme Court.<sup>8</sup> Privacy claims under the Canadian Privacy Acts are also rare. After referring to the experiences in Germany and Canada, Craig and Nolte conclude that it seems rather “fanciful” to suggest that great numbers of claims will overwhelm the courts, tax the legal resources of newspapers, and place a chill on freedom of the press if the right of privacy is enforceable in the courts.<sup>9</sup> As far as we are aware, there is no evidence that a right of action for invasion of privacy has led to unwarranted claims or blackmailing actions in jurisdictions that protect privacy by law.

**5.9 Privacy as a value deserving legal protection** – Quite apart from the constitutional requirements and the international obligations undertaken by Hong Kong in respect of the right to privacy, and notwithstanding any doubts about its definition, there are strong arguments why privacy ought to receive the protection of the law. We have seen in Chapter 1 that privacy serves many important functions in society. An explicit commitment to privacy as a legal concept would modify people’s behaviour and encourage them to respect and be more sensitive to each other’s privacy needs. Imposing liability for invasion of privacy would have a deterrent effect which would make potential intruders think twice before they act. We acknowledge that it is difficult to define the parameters of the right of privacy in precise terms, but this does not preclude us from examining whether an infringement of the privacy interests embodied in the right of privacy should be made a tort. After all, the ICCPR, the HK Bill of Rights and the European Convention on Human Rights recognise the right of privacy in general terms.

**5.10 Privacy as a legal concept** – It has also been argued that the right of privacy is too elusive a concept to support a workable and enforceable definition. However, uncertainties in the law are not unusual. To decline to reform the law because of the difficulty in defining the wrong is “a doctrine of despair” which could be applied to any proposed legal reform. With regard to the argument that the law, if enacted, would be uncertain because of the difficulty of deciding in borderline cases whether the defendant’s conduct amounted to an unwarranted invasion of privacy or not, Lord Bingham CJ has this to say:

*“There are two answers to this objection. The first is that very many cases decided in the courts do involve the drawing of lines in difficult borderline cases. That is the job which judges are employed to do. If they draw the line in the wrong place, they are subject to review in the higher courts, and ultimately to the will of Parliament. In this as in other fields, a body of case law would build up over time which would give considerable guidance as to where the line lay. The second answer is that this objection has nothing at all to do with the legitimate complaints of those whose private affairs are of no significance to the general public at all.*

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<sup>8</sup> B S Markesinis, above, 414–415; B Markesinis *et al*, “Concerns and Ideas about our Developing Law of Privacy” (Institute of Global Law, University College London, 2003), 84-85.

<sup>9</sup> J Craig & N Nolte, above, at 177.

*Even if the public's right to know were given the most ample recognition, ... there would remain a residue of cases in which it could not plausibly be argued that the public had a right to know.*<sup>10</sup>

5.11 We consider it inappropriate to deny relief in egregious cases merely because certain borderline claims pose difficulties in the balancing process.<sup>11</sup> Many common law and civil law jurisdictions provide civil remedies for infringement of privacy. The lack of an exhaustive definition of privacy has not been a bar to its legal protection in these jurisdictions. Although the concept of privacy is elusive, there is a growing consensus as to what kind of acts or conduct would constitute an infringement of privacy. Insofar as the object is to provide relief for invasion of privacy, the statute may aim at defining what act or conduct would constitute an unwarranted invasion of privacy, rather than defining the substance of the right of privacy the breach of which would entitle the victim to seek redress.

5.12 **Personal Data (Privacy) Ordinance** – We are aware that the provisions of the PD(P)O provide some protection against invasion of privacy. However, the availability of remedies under the Ordinance does not of itself preclude us from considering whether it is desirable to introduce a new right of action to protect privacy. Overlap between different causes of action is not uncommon. The introduction of a new tort should not be ruled out on this ground. Moreover, it is clear from the discussion in Chapter 2 that the protection under the PD(P)O is not comprehensive enough to protect individuals from all types of unwarranted invasion of privacy. The primary concern of the Ordinance is information privacy. It is not designed to safeguard communications and surveillance privacy, territorial privacy, and privacy of the person. Even in the field of information privacy, the Collection Limitation Principle, the Use Limitation Principle and the Security Safeguards Principle in the PD(P)O have been ineffective in protecting individuals from unwarranted surveillance and publicity.

5.13 **Broadcasting Authority and the HK Press Council** – We are aware that the Hong Kong Press Council affords certain protection against press intrusion. However, as pointed out in our *Privacy and Media Intrusion Report*, the protection afforded by the Press Council is less than adequate. Although the Press Council provides victims of press intrusion an opportunity to assert and vindicate their rights against certain newspapers, it is not intended to provide any legal remedies.<sup>12</sup> Any extra-legal remedies provided by the

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<sup>10</sup> Lord Bingham of Cornhill, "Opinion: Should There Be a Law to Protect Rights of Personal Privacy?" [1996] 5 EHRLR 450, 460.

<sup>11</sup> J D R Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 McGill LJ 355, 389.

<sup>12</sup> Unsatisfied with a published apology obtained through the UK Press Complaints Commission, a disc jockey in the UK successfully sued the offending newspaper for publishing naked pictures of her and her husband honeymooning in a secluded villa on a private island. As part of the settlement agreed in the court, the newspaper and the photographic agencies agreed to destroy or delete all copies of the pictures, including electronic images, and pay damages and legal costs. R Greenslade, "Sara Cox wins privacy case", *The Guardian*, 7.6.2003, at <<http://media.guardian.co.uk/pressprivacy/story/0,7525,972604,00.html>> (20.10.2003).

Council can only be *ex post facto* in nature.<sup>13</sup> Given the voluntary nature of the Press Council, its decisions are not subject to judicial review. As regards the Broadcasting Authority, although it may warn or impose a fine on a licensed broadcaster, it does not have power to make pecuniary compensation and to prevent broadcasts that would constitute a breach of the Authority's Code of Practice.

5.14 In *Peck v UK*,<sup>14</sup> a local authority disclosed CCTV footage filmed in a public street, resulting in the publication and broadcasting of identifiable images of the applicant. The European Court of Human Rights held that the disclosure constituted an unjustified interference with the applicant's private life and a violation of Article 8 of the ECHR. The UK Government pointed out that the applicant had been able to assert and vindicate his claims before the Broadcasting Standards Commission, the Independent Television Commission and the Press Complaints Commission. However, the European Court found that the lack of legal power of these commissions to award damages to the applicant meant that they could not provide an effective remedy to him in relation to the violation of his right to privacy under Article 8. The Court considered that the Independent Television Commission's power to fine the relevant television company did not amount to an award of damages to the applicant. Furthermore, while the applicant was aware that the local authority had disclosed the footage to the media prior to the publication and broadcasting, neither the Broadcasting Standards Commission nor the Press Complaints Commission had the power to prevent those publications or broadcasts. The Court did not accept the Government's argument that the finding of a violation would constitute sufficient satisfaction in itself.<sup>15</sup>

5.15 In any event, our concern is to protect individuals from unwarranted intrusion into privacy whether the intrusion originates from the media or not. Even if the proposals in our *Privacy and Media Intrusion Report* in relation to the creation of a press privacy complaints commission were implemented in full, in the absence of a tort of breach of privacy, a victim of unwarranted intrusion would not have an effective remedy if the intrusion was effected by a private person who was not a member of the press.

5.16 **Incidence of privacy invasion** – It has been argued that complaints about invasions of privacy in Hong Kong are not substantial and that reforming the law of privacy is an excessive response to a minor problem in society. Although it may be true that such complaints are rare, it does not indicate that invasion of privacy is not prevalent in Hong Kong. Such rarity may be explained by the very fact that invasion of privacy is not actionable under

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<sup>13</sup> In *X (a woman formerly known as Mary Bell) v O'Brien* [2003] EWHC 1101 (QB), [2003] 2 FCR 686, Bell had been convicted of manslaughter for killing two children when she was 11. Although the UK Press Complaints Commission's Code of Practice stated that "the press must avoid identifying relatives or friends of persons convicted of crime without their consent", Dame Elizabeth Butler-Sloss P considered that the application of that code would be "utterly inadequate" to protect the identities of Bell and her daughter, noting that "*a single breach of the Press Code would be irreparable. The genie would be out of the bottle and, once in the public domain, it would be difficult, if not impossible, to police. Later criticism of the offending newspaper by the Press Complaints Commission would be too late.*" Above, para 57.

<sup>14</sup> No 44647/98, date of judgment: 28.1.2003 (ECtHR).

<sup>15</sup> No 44647/98, date of judgment: 28.1.2003 (ECtHR), paras 108-109, 117-120.

existing law. Moreover, many invasions of privacy are difficult to uncover. Whereas the victim often knows when he is assaulted or his property is stolen or damaged, it is unlikely that a person would notice that he is being recorded or monitored by a surveillance device. Nonetheless, we have collected in our *Privacy and Media Intrusion Report* many local cases which present a *prima facie* case of unwarranted invasion of privacy.<sup>16</sup> Yet even if it is true that invasion of privacy is not prevalent in Hong Kong, it would be unreasonable and unjust to deny privacy victims a civil remedy purely on this ground. The need to introduce civil measures to protect individuals from invasion of privacy derives from the right to privacy under Article 17 of the ICCPR in conjunction with Article 39 of the Basic Law; it does not hinge on the incidence of privacy invasions in Hong Kong.

**5.17 Effect on freedom of expression** – It has been argued that creating a tort of breach of privacy would unduly restrict freedom of expression. However, we have already explained in Chapter 3 that privacy and freedom of speech are complementary in nature. In jurisdictions where unwanted publicity is actionable in tort, the legislation or common law invariably recognises the importance of press freedom by requiring that the plaintiff’s privacy interests should be balanced against the defendant’s right to freedom of expression, or by providing for a defence of publication in the public interest. The provision of such a defence would ensure that investigative journalism would not be hampered by a privacy action. We are not aware of any evidence that free expression has been unduly restricted in jurisdictions which recognise a tort action for breach of privacy.

**5.18 Conclusion** – We consider that the protection of privacy is in the interests of both the individual and society. It is in the public interest to protect the interests of individuals against mental suffering and injury to their emotions. To treat privacy as purely an individual interest and to pit it against other public interests is misguided. Privacy should be afforded the same level of protection as other fundamental human rights as long as the law gives sufficient recognition to the legitimate interest of the press. Insofar as privacy is a fundamental social value which underpins other fundamental rights and freedoms, a civilised and liberal society like Hong Kong which is moving toward greater democracy should respect and protect an individual’s private life. We therefore conclude that individuals should have a civil remedy for invasion of privacy that is unwarranted in the circumstances.

## **Judicial development or legislation?**

**5.19** The Hong Kong section of JUSTICE commented that the Sub-committee had discounted the option of leaving Hong Kong courts to develop the common law to provide for better protection of privacy on the basis of traditional torts. They considered that the Sub-committee had been “too dismissive” of the role that the courts could play in the development of the law of privacy, pointing out that the courts in Canada, Ireland and New Zealand had

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<sup>16</sup> *Privacy and Media Intrusion Report* (2004), ch 4 and Annex 2.

been able to develop the common law to provide for better protection of privacy not only on the basis of traditional torts but also in the light of constitutional guarantees of fundamental human rights. They commented that the Sub-committee had under-estimated the ability of the Hong Kong courts to appreciate the fact that Hong Kong is a separate jurisdiction and to learn from comparative jurisprudence for the purpose of developing the common law of Hong Kong. They therefore concluded that it was preferable to leave the Hong Kong courts to develop the law of privacy incrementally on a case-by-case basis. Nevertheless, they acknowledged that the introduction of statutory torts would accord protection to those whose right to privacy has been violated and serve to inform the public of their rights and liabilities.<sup>17</sup>

5.20 We agree that traditional torts such as trespass, nuisance and breach of confidence could be developed by the courts to afford better protection to individual privacy. The developments in South Africa and the US show that the common law is capable of developing an enforceable right of privacy. There are also signs that the action for breach of confidence may be developed to afford protection to certain aspects of individual privacy. However, even though the remedy for breach of confidence could provide relief for invasion of privacy in circumstances where it is unconscionable for the defendant to disclose the information received by him, it would only afford protection against unwarranted disclosure or publicity, but not unwarranted collection of information by means such as the taking of photographs and the surreptitious use of surveillance devices. In any event, it would take a long time for the courts to establish the elements of the cause of action; the basis of liability; and the nature and scope of the defences. The legal costs involved in developing a common law tort of invasion of privacy would inhibit many victims from seeking legal remedies.<sup>18</sup> As stated in Chapter 4, several provinces in Canada have legislated to create a tort of invasion of privacy in order to correct the failure of the common law to develop a remedy for invasion of privacy. More recently, the Irish Law Reform Commission has recommended that two privacy torts be created by statute. Although the courts in South Africa, India and the US have been able to develop the common law to protect privacy, the House of Lords in *Wainwright v Home Office*<sup>19</sup> has unanimously decided that there was no common law tort of invasion of privacy in England and Wales.

5.21 Under existing laws, the practical difficulties faced by victims of invasion of privacy appear to be insurmountable. In *Malone v Metropolitan Police Commissioner*, Sir Robert Megarry V-C said: “*I can find nothing in the authorities or contentions that have been put before me to support the plaintiff’s claim based on the right of privacy.*”<sup>20</sup> The English Court of Appeal in *Kaye v Robertson* also held that there was no right of action for breach of a person’s

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<sup>17</sup> It is interesting to note that the views of the Hong Kong section of JUSTICE were different from those of the British section of JUSTICE, which concluded that legislation ought to create a general right of privacy. See JUSTICE, *Privacy and the Law* (London: Stevens and Sons, 1970).

<sup>18</sup> *Campbell v Frisbee* [2002] EWCA Civ 1374. Lord Phillips MR said at para 35: “*while this case may provide a valuable addition to the developing jurisprudence on the right to privacy if it proceeds to trial, the costs involved in the provision of that benefit are likely to be disproportionate to what is at stake in terms of damages or an account of profits.*”

<sup>19</sup> [2003] UKHL 53, [2003] All ER (D) 279 (Oct).

<sup>20</sup> [1979] Ch 344 at 375B.

privacy. Glidewell LJ remarked that the facts of that case were a “*graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provisions can be made to protect the privacy of individuals.*”<sup>21</sup> More recently, Lord Woolf CJ in *Home Office v Wainwright* said that “*the existence of [a right to privacy] at common law has never been clearly established*”.<sup>22</sup>

5.22 In the *Malone* case, Sir Robert Megarry V-C said:

*"I am not unduly troubled by the absence of English authority: there 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. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. At times judges must, and do, legislate; but as Holmes J once said, they do so only interstitially, and with molecular rather than molar motions ... . Anything beyond that must be left for legislation. No new right in the law, fully-fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right. ... Where there is some major gap in the law, no doubt a judge would be capable of framing what he considered to be a proper code to fill it; and sometimes he may be tempted. But he has to remember that his function is judicial, not legislative, and that he ought not to use his office to legislate in the guise of exercising his judicial powers."*<sup>23</sup>

*"It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed."*<sup>24</sup>

5.23 It is significant that Sir Robert's treatment of the subject in the *Malone* case received the endorsement of the House of Lords in *Wainwright v Home Office*.<sup>25</sup> In the address to the International Press Institute, Sir Nicholas Browne-Wilkinson V-C stated:<sup>26</sup>

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<sup>21</sup> [1991] FSR 62 at 66.

<sup>22</sup> [2001] EWCA Civ 2081, para 2; Mummery LJ agreed at para 39, saying “there is no tort of invasion of privacy”.

<sup>23</sup> [1979] Ch 344 at 372E to 373B.

<sup>24</sup> [1979] Ch 344 at 379.

<sup>25</sup> Above, paras 19-21, *per* Lord Hoffmann (Lord Bingham, Lord Hope, Lord Hutton and Lord Scott concurring). Lord Hoffmann and Lord Scott are also Non-Permanent Judges of the HK Court of Final Appeal.

<sup>26</sup> Address to the International Press Institute in 1988, quoted in the Calcutt Report, para 12.10.

*“The legal difficulties of defining what is privacy and what are the proper defences are too elaborate. The courts, I would have to say, are quite good at some things, but they are not famed for their delicacy of touch, and when you have matters which are a very complicated balancing of imponderables, where the essence of the matter is flexibility, not certainty, I believe, the courts may not be the ideal body to administer it.”*

5.24 Lord Bingham, then the Lord Chief Justice of England and Wales, also preferred legislation:

*“In deciding the cases coming before them, the courts have of course done their best to reflect the values of society, but they have been hampered by the absence of any standard to which reference can be made when choosing, as is often necessary, between competing values.”<sup>27</sup>*

*“Should there be law to protect rights of personal privacy? To a very large extent the law already does protect personal privacy; but to the extent that it does not, it should. ... My preference would be for legislation, which would mean that the rules which the courts applied would then carry the imprimatur of democratic approval.”<sup>28</sup>*

5.25 The difficulty of formulating the proper ambit and balance of the tort was also noted by Buxton LJ in *Home Office v Wainwright*:

*“I have no doubt that in being invited to recognise the existence of a tort of breach of privacy we are indeed being invited to make the law, and not merely to apply it. Diffidence in the face of such an invitation is not, in my view, an abdication of our responsibility, but rather a recognition that, in areas involving extremely contested and strongly conflicting social interests, the judges are extremely ill-equipped to undertake the detailed investigations necessary before the proper shape of the law can be decided. It is only by inquiry outside the narrow boundaries of a particular case that the proper ambit of such a tort can be determined. The interests of democracy demand that such inquiry should be conducted in order to inform, and the appropriate conclusions should be drawn from the inquiry by, Parliament and not the courts. It is thus for Parliament to remove, if it thinks fit, the barrier to the recognition of a tort of breach of privacy that is at present erected by Kaye v Robertson and Khorasandjian v Bush.”<sup>29</sup>*

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<sup>27</sup> Lord Bingham of Cornhill, “The Way We Live Now: Human Rights in the New Millennium” [1998] 1 Web JCLI.

<sup>28</sup> Lord Bingham of Cornhill, “Opinion: Should There Be a Law to Protect Rights of Personal Privacy?” [1996] 5 EHRLR 450 at 461-462. David Eady QC also advocates the introduction of a statutory tort of unlawfully publishing personal information: D Eady, “Opinion: A Statutory Right to Privacy” [1996] 3 EHRLR 243.

<sup>29</sup> [2001] EWCA Civ 2081, para 94. Endorsed by the New Zealand High Court in *Hosking v Runting* [2003] 3 NZLR 385, para 181.

5.26 The most recent case to pronounce on this issue is *Douglas v Hello! Ltd*, in which Lindsay J stated:

*“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. That Parliament has failed so far to grasp the nettle does not prove that it will not have to be grasped in the future. The recent judgment in Peck v United Kingdom in the ECHR, given on the 28th January 2003, shows that in circumstances where the law of confidence did not operate our domestic law has already been held to be inadequate. That inadequacy will have to be made good and if Parliament does not step in then the Courts will be obliged to. Further development by the Courts may merely be awaiting the first post-Human Rights Act case where neither the law of confidence nor any other domestic law protects an individual who deserves protection. A glance at a crystal ball of, so to speak, only a low wattage suggests that if Parliament does not act soon the less satisfactory course, of the Courts creating the law bit by bit at the expense of litigants and with inevitable delays and uncertainty, will be thrust upon the judiciary. But that will only happen when a case arises in which the existing law of confidence gives no or inadequate protection; ... .”<sup>30</sup>*

5.27 The UK House of Commons Culture, Media and Sport Committee recommended in 2003 that the Government should reconsider its position and bring forward legislative proposals to clarify the protection that individuals could expect from unwarranted intrusion into their private lives. The Committee noted that this was necessary fully to satisfy the obligations upon the UK under the ECHR.<sup>31</sup> We may add that Lord Phillips has also expressed the view that it is usually easier to apply a statute than to apply principles of common law.<sup>32</sup>

5.28 Contrary to the position adopted by the Hong Kong section of JUSTICE, the British section of JUSTICE is of the view that legislation is the only practicable answer:

*“It is true that the essence of every invasion of privacy of this particular class is the obtaining or use by one person of confidential information (in the widest sense) relating to another, and there is a fairly highly developed law of ‘confidential information’ to be found in our law reports. But, almost without*

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<sup>30</sup> [2003] EWHC 786 (Ch), [2003] All ER (D) 209 (Apr), para 229(iii).

<sup>31</sup> *Privacy and Media Intrusion – Fifth Report of Session 2002-03* (London: The Stationery Office, HC 458-I, 2003), para 111.

<sup>32</sup> Lord Phillips, “Private life and public interest – The Bentham Club, UCL, Presidential Address 2003” (University College London, 2003), at 17.

*exception, this has been developed in cases where the subject-matter has been a trade secret; it would take many cases dealing with 'private' confidential information before this aspect of the matter could achieve an equally high degree of development. And, until there is a developed law, only the boldest of lawyers will advise and the boldest or richest of plaintiffs will launch a civil action which may cost many thousands and take many years before the House of Lords finally decides that the plaintiff's case lay (for him) just the wrong side of the line. ... [I]n the absence of a large class of rich private plaintiffs who feel strongly enough about their privacy - or a large class of very poor such plaintiffs, combined with abundant legal aid and enough bold lawyers - it seems likely that very many years would be required to bring the law of privacy in England to the point which it has reached in the U.S.A. today. And that, in our view, would be far too late."*<sup>33</sup>

5.29 McGechan J, a New Zealand High Court judge, held a similar view. Referring to the actions brought in *Tucker v News Media Ownership Ltd*,<sup>34</sup> he pointed out that the courts were being forced into a position where they had to create new law as they saw appropriate. But this process, which will be "painful and expensive" to the litigants involved, might not be thought the ideal approach. He therefore considered that legislative action on some comprehensive basis determining the extent of the privacy right and the relationship of that right to freedom of speech had to be introduced "with urgency".<sup>35</sup>

5.30 The HK Journalists Association cautioned that the Law Reform Commission should avoid the temptation of seeing legislation as the solution to all problems. We should emphasise that neither the Consultation Paper nor this report asserts that legislation is the solution to all problems arising from unwarranted infringement of privacy. We agree that legislation should be introduced as a last resort. But if judicial development of the law of privacy at common law is not forthcoming or is far from satisfactory, then legal protection of individual privacy has to be founded on statutory provisions.

5.31 The HK Journalists Association also argued that the existing Legislative Council, in which members elected through direct election were in a minority, should not enact legislation affecting such a fundamental right as freedom of expression. Until the legislature is "properly elected", members who are not accountable to the general public can "twist even a well-meaning bill into an ordinance that is harmful". In this connection, we note that the Legislative Council must function within the parameters of the Basic Law and the ICCPR. Apart from guaranteeing freedom of speech and of the press, Article 39 of the Basic Law provides that any restrictions on the rights and freedoms enjoyed by Hong Kong residents must not contravene the ICCPR.

<sup>33</sup> JUSTICE, *Privacy and the Law* (London: Stevens & Sons, 1970), para 121.

<sup>34</sup> See the section on New Zealand in Chapter 4.

<sup>35</sup> *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, 737. At p 733, McGeehan J said: "If the tort is accepted as established [in New Zealand], its boundaries and exceptions will need much working out on a case by case basis so as to suit the conditions of this country. If the legislature intervenes during the process, so much the better."

Irrespective of whether it is elected by universal suffrage, the Legislative Council may not pass any legislation that contravenes the Basic Law or the ICCPR. Any legislative proposals restricting the right to freedom of speech and of the press that appear to be incompatible with the Basic Law or the Covenant would be subject to the most careful scrutiny by the legislature, the judiciary, the media and the electorate. And any provisions found to be in contravention of the Basic Law would ultimately be held by the Court to be of no legal effect.

5.32 By virtue of Article 2(3) of the ICCPR, the Hong Kong SAR Government is under an obligation to ensure that:

- (a) any person whose rights or freedoms recognised in the Covenant are violated must have an effective remedy;
- (b) any person claiming such a remedy must have his right thereto determined by “*competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy*”; and
- (c) the competent authorities must enforce such remedies when granted.

5.33 The so-called “democratic deficit” arguments should not be used as an excuse for not providing legal protection to Hong Kong people against unlawful or arbitrary interference with their privacy by private persons. Accepting these arguments would deprive victims of unwarranted privacy invasion of their right to legal protection under Article 17 of the ICCPR, and would enable the Government to derogate from its obligation under Article 39 of the Basic Law as well as Article 17 of the Covenant, to the extent that the unlawful or arbitrary interference originates from a private person – until such time as all members of the Legislative Council are elected by universal suffrage.

5.34 In our view, the right of Hong Kong people to legal protection from arbitrary or unlawful interference with their privacy by private persons under Article 17 is *not* contingent on full realisation of Article 25(b) of the Covenant, which guarantees the right to vote and be elected at genuine periodic elections by universal and equal suffrage. There are no provisions in the Covenant entitling the Government to derogate from its obligations in relation to the right to privacy under Article 17 on the ground that Article 25(b) has not yet been fully implemented. Indeed, pursuant to a reservation made upon ratification of the Covenant in 1976, Article 25(b) need not be applied to Hong Kong “*in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong.*”<sup>36</sup> It could not have been in contemplation that the right to privacy in Hong Kong under Article 17 would also therefore be elided.

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<sup>36</sup> Article 21 (right to participate in public life) of the HK Bill of Rights also does not require the establishment of an elected Executive or Legislative Council in Hong Kong: HK Bill of Rights Ordinance (Cap 383), s 13. Note, however, that para 2 of Article 68 of the Basic Law of the HKSAR provides that “The ultimate aim is the election of all the members of the Legislative Council by universal suffrage.”

5.35 There are few signs that the courts in Hong Kong would be likely to develop a tort of invasion of privacy when presented with a privacy case that does not give rise to a cause of action under the law of torts. It is possible that the courts would accept the argument that a general tort of invasion of privacy is too vague or imprecise to be acceptable, or that a more specific tort of invasion of privacy covering a specific privacy interest is too complicated to be developed by them. It is also possible that they would decide that an invasion of privacy should not give rise to any legal remedy at common law. It is true that there are English decisions suggesting that the action for breach of confidence can be developed to protect certain privacy interests, but there is no reason why the law should protect privacy only when the facts of the case can be brought within the scope of the law of confidence. Besides, there can be an invasion of privacy without disclosure of confidential personal information.

5.36 Development of the law of privacy by the courts is uncertain both as to timing and as to content. It will take a long time, particularly for a small jurisdiction like Hong Kong. Even if the lower courts were willing to recognise a tort of invasion of privacy, the tort's status and its precise scope would not be resolved definitively until considered by the Court of Final Appeal. Until then, the development would tend to be piecemeal and may not be logical. It would also be unfair to the injured parties if they have to incur extensive legal costs to assert what most would regard as a fundamental human right. We acknowledge that Hong Kong courts are capable of developing the common law by making reference to the case-law in other jurisdictions. However, legislation can save the Court starting from scratch. It can also reassure the public of an effective remedy where there has been an unwarranted invasion of privacy, while the Court would have the benefit of clear guidelines as to how the right of privacy should be balanced against the right to freedom of expression and other competing interests.

5.37 Further, the very generality of the right of privacy under Article 14 of the HK Bill of Rights is itself an argument for legislation. By reason of the abstract generality of this right, legal protection against government intrusion is uncertain and, hence, less than satisfactory. The vagueness in Article 14 of the Bill of Rights is not in the interests of those whose privacy is unjustifiably invaded by public authorities, nor is it in the interests of public authorities which, for various legitimate reasons, engage in privacy-invasive acts or activities that may be held in breach of Article 14. The legislature should clarify the law by creating one or more specific torts of invasion of privacy, indicating what the privacy concerns are and how they should be reconciled with the competing claims.

5.38 The principles for determining the types of actionable infringements of privacy and the scope of exceptions and defences are matters that should be debated and decided by the legislature. Whereas the common law is developed on the basis of arguments put forward by the litigants in the case before the court, the legislative process enables a comprehensive framework for the resolution of privacy claims to be formulated after hearing a wide range of arguments from all interested parties, including the Privacy Commissioner, the media, the news associations and other NGOs. The

experience in jurisdictions with a law of privacy shows that any difficulties of definition present no more than a minor obstacle to legislation.

5.39 When the draft HK Bill of Rights was made public, there were arguments that detailed privacy legislation was desirable but that, as the HK Law Reform Commission was looking into privacy, it was appropriate to defer the application of Article 14 to the private sector pending the enactment of detailed privacy legislation. The Government was persuaded by these arguments.<sup>37</sup> It would therefore be unfortunate if legal protection of privacy is not extended to infringements by private persons when the Law Reform Commission finally works out the ingredients of a privacy tort.

5.40 There does not appear to be any strong argument in favour of giving an individual a right of action for invasion of privacy if the invasion originated from public authorities but not if it originated from a private person. The UN Human Rights Committee has expressly stated that the obligation of a State Party under Article 17 of the ICCPR extends to preventing infringements by private persons.<sup>38</sup> By creating one or more specific torts of invasion of privacy, the legislature could, at one stroke, give substance to the right of privacy under Article 14 of the HK Bill of Rights, and extend the right to legal protection of privacy under Article 17 of the ICCPR to infringements by private persons.

5.41 In the light of these arguments, we conclude that a tort of invasion of privacy (which is enforceable against private persons as well as public authorities) should be created by statute. Legislation is necessary because judicial development is not occurring. Even if the judiciary is willing to develop the common law, the process would be lengthy and costly and the outcome uncertain. By providing a statutory remedy for invasion of privacy, the legislation could remove the uncertainty and fill a gap in the common law which is unlikely to be filled without the intervention of the legislature.

## **Legislative approach to the creation of a tort of invasion of privacy**

5.42 There are at least four approaches to the legislation of a tort of invasion of privacy. The first approach is to make the minimum adjustments to the existing common law causes of action necessary to extend their effect to the main types of privacy invasion which are at present not covered. The British section of JUSTICE rejected this approach as being somewhat artificial. It would mean that "*well-established and well-defined common law causes of action well adapted to their traditional roles would have to be extended, modified and even distorted to deal with situations of quite a different type.*"<sup>39</sup>

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<sup>37</sup> A Byrnes, "The Hong Kong Bill of Rights and Relations between Private Individuals" in J Chan & Y Ghai (ed), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths, 1993), at 85.

<sup>38</sup> General Comment 16(32), CCPR/C/21/Rev 1 (1989), paras 1, 9 & 10.

<sup>39</sup> JUSTICE, above, para 127.

5.43 The second approach is to create a general right of privacy which is applicable to all types of privacy invasions and defined in general terms to allow flexibility in a changing society. Mummery LJ said:

*"I foresee serious definitional difficulties and conceptual problems in the judicial development of a 'blockbuster' tort vaguely embracing such a potentially wide range of situations. I am not even sure that anybody - the public, Parliament, the press - really wants the creation of a new tort, which could give rise to as many problems as it is sought to solve. A more promising and well trod path is that of incremental evolution, both at common law and by statute (eg section 3 of the Protection from Harassment Act 1997), of traditional nominate torts pragmatically crafted as to conditions of liability, specific defences and appropriate remedies, and tailored to suit significantly different privacy interests and infringement situations."*<sup>40</sup>

5.44 We consider that a tort of invasion of privacy defined in general terms would introduce an element of uncertainty into the law. It would give insufficient guidance to the public and the Court. Before there were sufficient cases to enable the principles and ingredients of the new tort to be deduced, there would be considerable uncertainty as to the scope of the right of action, the types of infringements covered, and the types of defences applicable. Leaving these matters in doubt would deprive an aggrieved individual of an effective remedy.

5.45 The third approach is to give a wide definition of the right to privacy followed by examples of infringements. The four Canadian provinces which enacted a Privacy Act adopt this approach. Although none of the privacy statutes contains a definition of right of privacy, all of them give examples of violation of privacy. The Uniform Law Conference of Canada follows this approach in drafting the Uniform Privacy Act.<sup>41</sup> The UK Consultation Paper commented that the Canadian legislation had the advantage of flexibility and it would still be applicable when society's attitude to aspects of privacy changed, but it criticised this approach as not sufficiently precise and as likely to lead to uncertainty. It preferred a tighter definition which concentrated on the core of privacy and minimised the need to plead defences.<sup>42</sup>

5.46 The fourth approach is to treat the matter piecemeal by reference to particular classes of infringement. The British section of JUSTICE criticised this approach on the ground that it endeavours to confine a wide subject within limited categories, which may not, in the course of time, prove sufficient. They

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<sup>40</sup> *Home Office v Wainwright* [2002] QB 1334, para 60.

<sup>41</sup> See the section on Canada in Chapter 4.

<sup>42</sup> Lord Chancellor's Department & the Scottish Office, *Infringement of Privacy - Consultation Paper* (1993), para 5.21. The Paper proposed at para 5.22 that the new tort be drafted in the following terms: "A natural person shall have a cause of action, in tort or delict, in respect of conduct which constitutes an infringement of his privacy, causing him substantial distress, provided such distress would also have been suffered by a person of ordinary sensibilities in the circumstances of the complainant. A natural person's privacy shall be taken to include matters appertaining to his health, personal communications, and family and personal relationships, and a right to be free from harassment and molestation."

argued that the principles which ought to determine the balance of the competing interests of the intruder and the individual were the same in any privacy situation, and that if the legislature could define them for one purpose it could define them for all.<sup>43</sup>

5.47 Since a right of privacy defined in general terms would make the law uncertain and difficult to enforce, we have decided not to recommend the creation of a general tort of invasion of privacy. We consider that the proper approach is to isolate and specify the privacy concerns in which there is an undoubted claim for protection by the civil law, while, at the same time, identifying the overriding public interests to which the right of privacy must give way. Our conclusion is therefore to enact legislation creating one or more specific torts of invasion of privacy which clearly define the act, conduct and/or publication which frustrates the reasonable expectation of privacy of an individual without justification.<sup>44</sup>

5.48 We examine in the remaining parts of the report whether the following acts or conduct constitute an invasion of privacy, and if so, whether such acts or conduct ought to be actionable in tort: (a) intrusion upon the seclusion, solitude or privacy of another with or without a recording device; (b) unauthorised publicity given to facts pertaining to an individual's private life, whether the facts have been obtained by lawful or unlawful means; (c) exploitation or appropriation of a person's identity or likeness without his consent; and (d) publicity placing someone in a false light.<sup>45</sup>

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<sup>43</sup> JUSTICE, above, paras 127 & 128.

<sup>44</sup> The Court is experienced in reconciling the competing interests arising in this area. They already discharge a similar function in breach of confidence and defamation cases. The enactment of the PD(P)O has also resulted in the Court balancing personal data privacy and freedom of expression where the data in question were collected by the media. See *Eastweek Publisher v Privacy Commissioner* [2000] HKC 692.

<sup>45</sup> Cf the privacy tort proposed in: Hugh Tomlinson QC (ed), *Privacy and the Media – The Developing Law* (London: Matrix Chambers, 2002), Chapters 2 to 5.

## Chapter 6

### Intrusion upon the solitude or seclusion of another

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6.1 This chapter begins by explaining why the law should protect an individual's interests in seclusion and solitude by creating a tort of intrusion upon the seclusion or solitude of another. We shall argue that it is only when the aggrieved person is reasonably entitled to expect to be free from surveillance that he may bring an action for intrusion. The thorny issue of whether or not a person can have a reasonable expectation of privacy in a place accessible to the public or where he can be seen by others will also be discussed. Since an intrusion may be effected by modern surveillance devices, the need to protect individuals against non-physical intrusion will be emphasised. The distinction between aural intrusion and visual intrusion will be maintained throughout the chapter because these are the two major ways by which a person's privacy can be intruded upon. To discourage the bringing of trivial claims, only intrusions that are seriously offensive or objectionable to a reasonable person of ordinary sensibilities would be actionable. In order to strike a fair balance between privacy interests and the general interests of the community, a number of defences will be proposed to protect those legitimate interests which may outweigh the right of privacy.

#### Need for protection from intrusion upon privacy

6.2 **A matter of morals or good taste?** – The HK Journalists Association commented that the issue of intrusion upon solitude and seclusion is in many ways one of “morals, taste and good manners” and the law is “a blunt tool” in this area. In our view, unwarranted intrusion upon the solitude or seclusion of another is offensive and objectionable. It is not merely a matter of morals or good taste. In the case involving the surreptitious videotaping of a university student inside her hostel room over the period from October 1996 to March 1997, the Privacy Commissioner observed:

*“This incident ... raised serious concerns about the adequacy of current laws to deal with a serious invasion of privacy. The main concern being that surveillance by itself is not contrary to the law. Only if it results in the collection of personal data does it become subject to the Ordinance. However, the individual's feeling that his or her privacy has been violated by being covertly observed, is directed as much, if not more, at the act of surveillance itself as at any resulting collection of personal data.”<sup>1</sup>*

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<sup>1</sup> PCO Report No R97-1948 issued on 13.10.97, p 9. See also Chapter 2.

6.3 **An affront to human dignity** – In the privacy context, the word “intrusion” may include “prying, spying, telephone-tapping, ‘bugging’, interception of correspondence, searches, and other physical intrusions.” Bloustein contends that intrusion into private affairs is wrongful because it is an assault on human personality and a blow to human dignity:

*“The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversation may be over-heard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.”<sup>2</sup>*

6.4 **Restraint on individual liberty** – The importance of protection from intrusion upon privacy to the enjoyment of individual liberty is well expressed by Judge Cobb in the following passage:

*“Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. ... Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty.”<sup>3</sup>*

6.5 **Private space to recover, relax and develop relations with others** – One of the functions of privacy is to keep certain aspects of an individual’s life or body out of the public realm. Every individual has to retreat from time to time into his private space to work, recover or relax. An individual should be free to indulge in his personal preferences in sex, religion, reading, research, play or manner of communication in settings where he is not aurally or visually accessible to others. It is only when an individual’s private life is not exposed to the senses of others that he can freely develop his business, social and intimate relations with others. The ability to choose the circles in which we carry on such activities and to control the dissemination of personal information is important to a society that places a high value on liberal individualism.

6.6 **Safeguarding freedom of action** – An invasion of privacy is often accompanied by an increase of knowledge about the subject. This enables the possessor of that knowledge to manipulate or exercise control over

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<sup>2</sup> E J Bloustein, above, at 973-974.

<sup>3</sup> *Pavesich v New England Life Ins Co*, 122 Ga 190 at 196 (1905); quoted in E J Bloustein, 1002.

the subject: “by possessing information about B that B does not want known, A will have greater power over B and, concomitantly, B will have less power over A.”<sup>4</sup> Protecting the privacy of B will enable him to enjoy a greater degree of freedom of action.

**6.7 Chilling effect on freedom of speech** – The right to speak and publish does not carry with it the unrestrained right to gather information.<sup>5</sup> On the contrary, failure to provide adequate protection from intrusion by surreptitious surveillance has a chilling effect on freedom of communications. Richard Posner explains:

*“Prying by means of casual interrogation of acquaintances of the object of the prying must be distinguished from eavesdropping, electronically or otherwise, on a person’s conversations. A in conversation with B disparages C. If C has a right to hear this conversation, A, in choosing the words he uses to B, will have to consider the possible reactions of C. Conversation will be more costly because of the external effects, and the increased costs will result in less, and less effective, communication. After people adjust to this new world of public conversation, even the C’s of the world will cease to derive much benefit in the way of greater information from conversational publicity, for people will be more guarded in their speech. The principal effect of publicity will be to make conversation more formal and communication less effective rather than to increase the knowledge of interested third parties.”<sup>6</sup>*

**6.8 Diminution of “spatial aloneness”** – Gavison argues that an individual loses privacy when another person gains physical access to him. She points out that where A is close enough to touch or observe B through normal use of his senses, the essence of B’s complaint is not that more information about him has been acquired, nor that more attention has been drawn to him, but that his spatial aloneness has been diminished.<sup>7</sup>

**6.9 Protecting individuals from unwanted access** – The right to privacy entails the liberty of an individual to restrict physical access to his person or his private communications, and to avoid the society of others by retiring into a state of being or living alone. Where a person publicly performs an act in a closed or secluded place, only those who are admitted to that place are supposed to know of that act: third parties are not permitted to intrude into this circle. Insofar as an individual experiences privacy when he is neither looked at nor listened to against his wishes, all individuals have a reasonable expectation of privacy when in a state of solitude or seclusion.

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<sup>4</sup> F Schauer, above, at 715-6.

<sup>5</sup> *Zemel v Rusk* (1965) 381 US 1 at 17. The US Supreme Court points out that the prohibition of unauthorised entry into the White House diminishes the citizen’s opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.

<sup>6</sup> R A Posner, “The Right of Privacy” (1978) 12:3 Georgia L Rev 393, 401. This analysis can be extended to efforts to obtain letters and private papers of another.

<sup>7</sup> R Gavison, “Privacy and the Limits of Law” (1980) 89 Yale LJ 421, at 433.

6.10 **The Basic Law of the Hong Kong SAR** – Although the Basic Law does not make explicit reference to the right of privacy, Articles 28, 29 and 30 of the Basic Law provide a basic framework within which an individual’s reasonable expectation of privacy is protected at a constitutional level. Any unauthorised surveillance or interception of communications is liable to be subjected to scrutiny under these articles. Article 28 of the Basic Law provides:

*“The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. ...”*

6.11 The right of an individual to be protected from intrusion into private premises is specifically addressed in Article 29. It provides that unlawful or “arbitrary” search of, or intrusion into, a resident’s home “or other premises” shall be prohibited. Article 30 further provides that “*The freedom and privacy of communications of Hong Kong residents shall be protected by law.*” The protection from unauthorised interception of communications covers all communications of Hong Kong residents regardless of where the communications take place. It should, however, be borne in mind that a breach of Articles 28, 29 or 30 of the Basic Law does not give rise to a cause of action in the civil courts unless and until the common law or a statute provides that it is actionable in tort.

6.12 **Personal Data (Privacy) Ordinance** – It may be thought that DPP 1, which requires that personal data be collected by means which are lawful and fair in the circumstances, can protect a person from intrusion or surveillance. However, DPP 1 is not engaged if the information is not recorded. Hence a person who uses a CCTV to monitor the activities in a sleeping room, hotel room, bathroom, toilet or changing room is not in breach of the PD(P)O if the images are not recorded. Further, since the Court of Appeal in the *Eastweek* case has held that the essence of an act of personal data collection is that the data user must thereby be compiling information about *an identified person* or about a person whom the data user intends or seeks to identify, the PD(P)O is inapplicable where the person who is using a surveillance device to monitor the conversations, activities or affairs of another is ignorant of and indifferent to the identity of his targets. Such is the case even though the use of the surveillance device is not fair in the circumstances and the conversations or images have been recorded without the knowledge and consent of the targets. The PD(P)O therefore fails to afford adequate protection against unwarranted surveillance.<sup>8</sup>

6.13 **United Nations report on privacy** – Subsequent to the adoption of the ICCPR, the Secretary-General of the United Nations published a report which included several specific points for possible inclusion in draft international standards concerning respect for the privacy of the individual in

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<sup>8</sup> See also Ch 2.

the light of modern recording and other devices.<sup>9</sup> After recommending that States adopt legislation, or bring up to date existing legislation, so as to provide protection for the privacy of the individual against invasions by modern technological devices, the report specifies the “minimum steps” that States should take, including the following:

- “(e) ... [C]ivil liability should attach to either the use of an auditory or visual device in relation to a person, under circumstances which would entitle him to assume that he could not be seen or heard by unauthorised persons, or the unauthorised disclosure of information so gained;
- (f) Civil remedies shall allow a person to apply for the cessation of acts thus violating his privacy and, where the act has been completed, to recover damages, including damages for non-pecuniary injury; ... .”<sup>10</sup>

6.14 **Nordic Conference** – The Nordic Conference on the Right of Privacy identified the following acts or conduct as falling within a law of privacy:

- “(a) *Intrusion upon a person’s solitude, seclusion or privacy*

*An unreasonable intrusion upon a person’s solitude, seclusion or privacy which the intruder can foresee will cause serious annoyance ... should be actionable at civil law; and the victim should be entitled to an order restraining the intruder. In aggravated cases, criminal sanctions may also be necessary.*

- (b) *Recording, photographing and filming*

*The surreptitious recording, photographing or filming of a person in private surroundings or in embarrassing or intimate circumstances should be actionable at law. In aggravated cases, criminal sanctions may also be necessary.*

- (c) *Telephone-tapping and concealed microphones*

- (i) *The intentional listening-in to private telephone conversations between other persons without consent should be actionable at law.*

- (ii) *The use of electronic equipment or other devices - such as concealed microphones - to overhear telephone or other conversations should be actionable both in civil and criminal law.”*

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<sup>9</sup> UN Document E/CN.4/1116 (1976). The recommendations of the report are reproduced in J Michael, *Privacy and Human Rights* (Dartmouth, 1994), 21 - 23.

<sup>10</sup> Above, para 3.

6.15 **Council of Europe** – In a resolution on the right to privacy, the Parliamentary Assembly of the Council of Europe declares that:

*“v. following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited;*

*vi. a civil action ... by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used ‘visual or auditory enhancement devices’ to capture recordings that they otherwise could not have captured without trespassing”.*<sup>11</sup>

6.16 **European Convention on Human Rights** – The storing of data relating to the “private life” of an individual falls within the application of Article 8(1). The European Court of Human Rights points out in this connection that the term “private life” must not be interpreted restrictively. In particular, respect for private life comprises the right to establish and develop relationships with other human beings. It is irrelevant whether the information gathered on the individual is sensitive or not, or whether he has been inconvenienced in any way.<sup>12</sup> Further, the use of covert audio and video recording devices may amount to an interference with an individual’s right to private life.<sup>13</sup> The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual’s private life, but the recording of the data and the systematic or permanent nature of the record may give rise to such considerations.<sup>14</sup>

6.17 **Canada** – The Uniform Privacy Act provides that the following activities are presumed to be violations of privacy:

*“(a) auditory or visual surveillance of the individual or the individual’s residence or vehicle by any means, including eavesdropping, watching, spying, besetting and following, whether the surveillance is accomplished by trespass or not;*

*(b) listening to or recording a conversation in which the individual participates, or listening to or recording a message to or from the individual that passes by means of telecommunications, by a person who is not a lawful party to the conversation or message”.*

6.18 **United States** – One who intentionally intrudes upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to

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<sup>11</sup> Resolution 1165 (1998), para 14.

<sup>12</sup> *Amann v Switzerland*, No 27798/95, date of judgment: 16.2.2000, paras 65-70.

<sup>13</sup> *Khan v UK*, No 35394/97, date of judgment: 12.5.2000.

<sup>14</sup> *Perry v UK*, No 63737/00, date of judgment: 17.7.2003, para 38.

the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person.<sup>15</sup> The three elements of the tort are: (a) an intrusion by the defendant; (b) into a matter which the plaintiff has a right to keep private; (c) by the use of a method which is highly offensive to the reasonable person.<sup>16</sup>

6.19 **New Zealand** – An agency who collects personal information by means that are “unfair” or “intrude to an unreasonable extent upon the personal affairs of the individual concerned” in breach of Information Privacy Principle 4 may be held responsible for interfering with the privacy of an individual under the Privacy Act 1993. Further, the Broadcasting Standards Authority is of the view that the protection of privacy includes protection against the intentional interference (in the nature of prying) with an individual’s interest in solitude or seclusion provided that the intrusion is offensive to an ordinary person.

6.20 **South Africa** – The South African Court recognises that breach of privacy could occur by way of an unlawful intrusion upon the personal privacy of another.<sup>17</sup> Examples are entry into a private residence, the reading of private documents, listening in to private conversations and the shadowing of a person.

6.21 **Ireland** – The Irish Law Reform Commission recommended that any person who invades the privacy of another by means of “surveillance” should be liable in tort. “Surveillance” is defined to include aural and visual surveillance (irrespective of the means employed) and the interception of communications (whether such communications are effected by electronic or other means) including (a) the recording of a conversation by a party thereto without the knowledge of the other party and (b) the recording by a third party with the knowledge of a party but without the knowledge of the other party.<sup>18</sup>

6.22 **England** – The Younger Committee recommended that surveillance (whether overt or surreptitious) by means of a technical device be a tort comprising the following elements: (a) a technical device; (b) a person who is, or his possessions which are, the object of surveillance; (c) a set of circumstances in which, were it not for the use of the device, that person would be justified in believing that he had protected himself or his possessions from surveillance whether by overhearing or observation; (d) an intention by the user to render those circumstances ineffective as protection against overhearing or observation; and (e) absence of consent by the victim.<sup>19</sup> The Calcutt Committee also defines privacy as “*the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.*” In *R v Khan*, the appellant contended for a right of privacy in respect of private conversations in private houses. Lord Nicholls, now also a Non-Permanent Judge of the HK Court of Final Appeal, expressed no view on the existence of this right in England, but stated that such a right, if it existed, could only do so as part of a larger and

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<sup>15</sup> *Restatement 2d, Torts*, s 652B.

<sup>16</sup> 62A Am Jur 2d, Privacy, §§ 48 – 67.

<sup>17</sup> *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A).

<sup>18</sup> LRC of Ireland, above, Ch 8 & 10, Heads 1 & 2.

<sup>19</sup> Younger Report, above, paras 562 – 565.

wider right of privacy. He added that “the continuing, widespread concern at the apparent failure of the law to give individuals a reasonable degree of protection from unwarranted intrusion in many situations” was “well known”.<sup>20</sup>

**6.23 Easy access to surveillance devices** – In the past, simple precautions could be taken by individuals to protect themselves from being overheard or observed by others. Such precautions are no longer effective with the advances in the technology of surveillance devices. Listening and optical devices are becoming more and more sophisticated and many of them are now available at a low price either on the local market or the Internet. Surveillance technology now allows the penetration of physical barriers which, but for the use of such devices, would have been adequate for the protection of privacy against unwanted monitoring. It also renders legal protection of territorial privacy by the torts of trespass and nuisance inadequate if not irrelevant. The following illustrates the variety of technical devices that may be used for surveillance:

- A long-range camera can be used for taking photographs at night.
- An optical device can be operated by remote control in complete darkness.
- A telephone recorder can connect anywhere along the telephone line or simply be plugged in at any extension. It can record the conversation only when the telephone is in use.
- A miniature telephone transmitter can be placed along the telephone line, inside a socket or in the phone itself. It enables the user to monitor and record both sides of the conversations up to a distance of 1000 metres.
- A miniature ultra high frequency room transmitter can pick up sounds from up to 10 metres away and transmit to a receiver or scanner up to a distance of 800 metres. To record the reception, the receiver can be connected to a recorder for fully automatic recording.
- A transmitter can be hidden in a normal pen that writes as well. It can pick up the slightest whisper and transmit up to a distance of 300 metres.
- An ordinary pen can also conceal a high-resolution camera and a microphone. It can be placed in a pocket and connected to a video recorder or transmitter and receiver set.
- A transmitter hidden in an ordinary calculator can pick up sounds and transmit conversations to an ultra high frequency receiver or suitable scanner.

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<sup>20</sup> *R v Khan* [1997] AC 558 at 582H. See also Chapter 2.

- A colour video camera with a pin-hole lens can measure just 25 x 25 mm. Since the hole-size is very small, it can be concealed almost anywhere.
- A standard button can be attached to the lens of a high-resolution camera. It can be used unattended and is invisible to the naked eye. Fitting is very simple for any type of jacket or coat. The camera has audio and can be connected to a transmitter.
- Where a wireless remote controlled automatic recording system is installed, the user can operate the video recorder and standby functions up to a distance of 100 metres away. The recorder can also be set to activate only when someone is present. When no one is detected, the recorder returns to standby until an intruder is detected again.
- An ordinary looking clock radio can conceal a high-resolution camera, microphone and transmitter.
- A hidden camera can be concealed in a smoke detector; and an ordinary tie can conceal a hidden camera that connects to a transmitter.
- An ordinary mobile phone can conceal a hidden camera, microphone and transmitter. The transmitter is powered from the phone's battery and will transmit video and audio to a microwave receiver.
- A miniature microphone can measure little more than a matchstick. It can be concealed almost anywhere and when used with the miniature amplifier, will pick up the slightest whisper up to 10 metres away.
- A miniature room transmitter, powered by just one small watch type battery, can measure just 40 x 10 x 10 mm. It can pick up all conversations in a large room and transmit up to a distance of 500 metres.
- A miniature digital recorder uses no tapes and records conversations with crystal clarity. It can be concealed almost anywhere and is ideal for body-worn use.
- A microwave-beam device enables an intruder to listen through walls and other obstacles. It is capable of listening through up to 60 cm of solid concrete, doors or windows.
- A wireless camera, which incorporates a tiny video camera and a 2.4 GHz transmitter with a range of 100 metres, can be the size of a sugar cube. It can transmit sharp, clear, colour images to a

television set or a videocassette recorder, and can be turned into a web camera.

6.24 **Conclusion** – In order to protect an individual's interests in solitude and seclusion and to provide a civil remedy for unwarranted surveillance whether conducted with or without the assistance of a recording device, a tort of intrusion upon solitude or seclusion should be created by statute. This would remove the need for victims of invasion of privacy to seek relief by relying on a right of action in tort which is not primarily designed for the protection of privacy. Since the mischief is the act of intrusion, no disclosure or publication is required where the invasion of privacy consists of an intrusion upon an individual's seclusion or solitude.

### **Reasonable expectation of privacy**<sup>21</sup>

6.25 In its report on surveillance and the interception of communications, the Irish Law Reform Commission recommends that the new tort of privacy-invasive surveillance should protect a reasonable expectation of privacy. It proposes that in determining whether the privacy of a person has been invaded by means of surveillance, the Court should consider the extent to which that person was reasonably entitled to expect that he should not be subjected to such surveillance having regard to all the relevant circumstances.<sup>22</sup>

6.26 The notion of reasonable expectation of privacy is the core of an intrusion tort. The US Supreme Court held that a person has a reasonable expectation of privacy if (a) he, by his conduct, has exhibited an actual (or subjective) expectation of privacy, that is, he has shown that he seeks to preserve something as private; and (b) his subjective expectation of privacy is one that society is prepared to recognise as reasonable, that is, the expectation, viewed objectively, is justifiable under the circumstances.<sup>23</sup> An individual does not have a subjective expectation of privacy if he has been put on notice that his activities in a specified area would be watched by others for a legitimate purpose. In US tort law, factors determining the reasonableness of an expectation of privacy include: (a) whether the area is generally accessible to

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<sup>21</sup> The Privacy Act of British Columbia expressly provides that the nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others: British Columbia Privacy Act 1996, s 1(2). The Newfoundland Privacy Act contains a similar provision.

<sup>22</sup> The report further recommends that the Court shall have regard to the following factors: (a) the place where such surveillance occurred; (b) the object and occasion of such surveillance; (c) the use to which material obtained by surveillance is to be put; (d) the means of surveillance employed and in particular the nature of any device or apparatus used for such surveillance; (e) the status or function of that person; (f) the conduct of that person, whether prior to or on the occasion of the surveillance, insofar as it may have amounted to a waiver, in whole or in part, of that person's privacy in respect of the surveillance, or invited or encouraged interest in the object of that surveillance; and (g) the relationship between the person subjected to the surveillance and the person who carried it out. See LRC of Ireland, *Report on Privacy* (1998), Ch 10, Head 1(3)(i) at 121.

<sup>23</sup> *Smith v Maryland*, 442 US 735.

the public; (b) whether the individual has a property interest in the area;<sup>24</sup> (c) whether the individual has taken normal precautions to maintain his privacy; (d) how the area is used; and (e) the general understanding of society that certain areas deserve the most scrupulous protection from intrusion.<sup>25</sup>

6.27 In recognition of its importance in determining whether an intrusion has occurred, the notion of reasonable expectation of privacy should be expressly incorporated as an ingredient of the new tort. The defendant should be liable only if the plaintiff had a privacy expectation that is reasonable in the circumstances. To assist the public and the Court in assessing whether an individual's privacy expectation is reasonable or not, the legislation should provide guidelines as to what factors the Court should take into account when determining whether a plaintiff has a reasonable expectation of privacy in the circumstances of the case. In our view, the following factors are relevant for this purpose:

- (a) **the place where the intrusion occurred** (eg, whether the plaintiff is at home, in office premises or in a public place, and whether or not the place is open to public view from a place accessible to the public, or, as the case may be, whether or not the conversation is audible to passers-by);
- (b) **the object and occasion of the intrusion** (eg, whether it interferes with the intimate or private life of the plaintiff);
- (c) **the means of intrusion employed and the nature of any device used** (eg, whether the intrusion is effected by means of a high-technology sense-enhancing device, or by mere observation or natural hearing); and
- (d) **the conduct of the plaintiff prior to or at the time of the intrusion** (whether it amounts to a waiver, in whole or in part, of his privacy in respect of the intrusion, for example, by actively inviting interest in his private life or voluntarily releasing intimate information about himself, and whether the plaintiff has taken any steps to protect his privacy).

6.28 We consider that the use to which material obtained by an intrusion is to be put, though relevant for the purposes of a tort of unwarranted publicity concerning an individual's private life, is irrelevant for the purposes of determining whether a victim has a reasonable expectation of privacy when the intrusion occurred. The relationship between the plaintiff and the defendant is also excluded from the list because this is a matter that goes to the issue of consent. Further, while the status and function of the plaintiff are factors to be taken into account when determining whether he has impliedly consented to the intrusion and whether the publication of facts pertaining to his private life can be justified, they are irrelevant for the purposes of determining whether he

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<sup>24</sup> Property interest reflects society's explicit recognition of a person's authority to act as he wishes in certain areas: *Rakas v Illinois* (1978) 439 US 128 at 153.

<sup>25</sup> *Rakas v Illinois* (1978) 439 US 128, 152-153; *Oliver v US*, 466 US 170, 178-183.

has a reasonable expectation of privacy. A person should be protected from unwarranted intrusion irrespective of his status and function. He should not be deprived of protection against intrusion merely because he is an artiste, a politician, a public officer, a victim of crime, or a person involved in a tragedy. Any intrusion has to be justified on grounds allowed by the law.

## **Intrusion upon the “solitude” or “seclusion” of another**

6.29 In the US, the plaintiff in an action for invasion of privacy by intrusion has to show that there was something in the nature of prying or intrusion. Offensive manners and insulting gestures are not enough. Moreover, the thing into which there was prying or intrusion must be private. *Prosser and Keeton on the Law of Torts* states:

*“The plaintiff has no right to complain when his pretrial testimony is recorded, or when the police, acting within their powers, take his photograph, fingerprints or measurements, or when there is inspection and public disclosure of corporate records which he is required by law to keep and make available. On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see. On the other hand, when the plaintiff is confined to a hospital bed, and when he is merely in the seclusion of his home, the making of a photograph is an invasion of a private right, of which he is entitled to complain.”<sup>26</sup>*

6.30 Although the American approach has the merits of legal certainty and predictability, not every jurisdiction subscribes to the view that there can never be an intrusion in a public place or a place to which members of the public have access. Andrew McClurg argues that such an approach, which precludes the possibility of an invasion of privacy occurring in a public place, is too rigid in that it treats privacy as an all-or-nothing concept. Privacy is, in his view, a matter of degree. Although an individual surrenders much privacy when he ventures to a public place, it does not follow that he automatically forfeits all legitimate expectation of privacy.<sup>27</sup> McClurg notes that some American courts want to allow recovery in appropriate cases involving “public intrusions” but they lack a sufficient vehicle to accomplish the desired result. He therefore argues that the courts should recognise the existence of the concept of “public privacy” and afford protection of that right by allowing recovery for intrusions that occur in or from places accessible to the public.<sup>28</sup>

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<sup>26</sup> W P Keeton (ed), above, at 855-6.

<sup>27</sup> A J McClurg, above, at 1025 *et seq.*

<sup>28</sup> A J McClurg, above, at 1044-1054.

6.31 In *Huskey v National Broadcasting Co.*,<sup>29</sup> the defendant's camera crew visited a prison and filmed the plaintiff who was an inmate in the prison's exercise cage, wearing only gym shorts and exposing his distinctive tattoos. The Court rejected the contention that the plaintiff was not secluded because he could be seen by prison guards, personnel, and other inmates:

*“the mere fact a person can be seen by others does not mean that person cannot legally be ‘secluded’. ... Further, [the plaintiff’s] visibility to some people does not strip him of the right to remain secluded from others. Persons are exposed to family members and invited guests in their own homes, but that does not mean they have opened the door to television cameras.”*<sup>30</sup>

6.32 The same view has recently been endorsed by the Supreme Court of California in *Sanders v ABC* where an undercover reporter used a video camera hidden in her hat to covertly videotape her conversations with several co-workers.<sup>31</sup> The Court held that in a workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be covertly videotaped by undercover television reporters, even though their conversations and interactions may have been witnessed by co-workers.<sup>32</sup> Hence, a person who lacks a reasonable expectation of complete privacy in a conversation because it could be seen and overheard by co-workers (but not the general public) may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation. It reasoned that:

*“privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law. Although the intrusion tort is often defined in terms of ‘seclusion’ ..., the seclusion referred to need not be absolute. ‘Like “privacy”, the concept of “seclusion” is relative. The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.’”*<sup>33</sup>

6.33 In a German case involving the publication of photographs of Princess Caroline of Monaco having dinner with her boyfriend in a secluded part of a garden restaurant where a number of other patrons were also seated,

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<sup>29</sup> (N D Ill 1986) 632 F Supp 1282.

<sup>30</sup> Above, at 1287-1288.

<sup>31</sup> *Sanders v American Broadcasting Companies, Inc* (1999) 6/24/99 SC.

<sup>32</sup> Where the workplace is regularly open to entry or observation by the public, or the interaction was between proprietor (or employee) and customer, any expectation of privacy against press recording is less likely to be deemed reasonable.

<sup>33</sup> *Sanders v American Broadcasting Companies, Inc* (1999) 6/24/99 SC (quoting J T McCarthy, *The Rights of Publicity and Privacy* (1998) §5.10 [A][2], p 5-120.1). The Court added that the defendant might negate the offensiveness element of the intrusion tort by showing that the intrusion was justified by the legitimate motive of the gathering of news.

the Court of Appeal held that the photographs did not violate her private sphere on the ground that they had been taken in a restaurant which was a public place.<sup>34</sup> This judgment was reversed by the Federal Supreme Court, which rejected the argument that privacy stopped “at the doorstep”. The Court held that it was enough that the Princess had “*retreated to a place of seclusion where [she wished] to be left alone, as [could] be ascertained by objective criteria, and in a specific situation, where [she], relying on the fact of seclusion acts in a way that [she] would not have done in public. An unjustified intrusion into this area occurs where pictures of that person are published if taken secretly or by stealth*”.<sup>35</sup> By holding that the plaintiffs had transferred their private sphere of life to a place outside their home, the Court has extended the spatial zone of legal protection of privacy to public places that are secluded from the general public. Examples given by the Court included a secluded room of a hotel or restaurant, a sports centre, a telephone box, and in certain circumstances, even out in the open. The Court held:

*“Like all humans, persons of contemporary history have the right to retreat to places outside their home where they may wish to be let alone, protected [as it were] from public gaze. This may occur even in places which are open to the general public, though this presupposes that in the place in question the person somehow ‘shuts himself off’ from the public at large. This ‘seclusion’ must be ascertainable in an objective manner.”*<sup>36</sup>

6.34 In a similar vein, the Supreme Court of Iowa held that a woman dining in a restaurant who was filmed by a television reporter after having asked the reporter not to do so had stated a cause of action against the television station for intrusion upon her privacy.<sup>37</sup> The defendant argued that the plaintiff could not possibly have a cause of action because she was eating in a restaurant open to the public, where anyone could observe her. But the Court stated that it was not inconceivable that the woman was seated in the

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<sup>34</sup> BGH NJW 1996, 1128 (1.9.1995), cited and discussed in B S Markesinis & N Nolte, “Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places” in P Birks (ed) *Privacy and Loyalty* (Oxford: Clarendon Press, 1997), pp 118-122.

<sup>35</sup> Referred to by Lord Bingham of Cornhill in “The Way We Live Now: Human Rights in the New Millennium” [1998] 1 Web JCLI. In the penultimate paragraph of that article, Lord Bingham suggests that the German case may contain some clues as to the direction English law may take. He does not believe that there will be any threat to serious investigative journalism: “*It is one thing to hold that a public figure may not be photographed, against his or her wishes, when dining privately in a secluded corner of a public restaurant. It is quite another to impose any restriction on photographs or reports which may bear on the fitness of any public or responsible figure to discharge the duties to their office.*”

<sup>36</sup> Quoted in B S Markesinis & N Nolte, above, at 121. The Court further held that the photographs contain little, if anything, of value: “*mere prying sensationalism, and the public's wish to be entertained, which is to be satisfied by pictures of totally private events of the plaintiff's life, cannot be recognised as worthy of protection.*” Referred to in Lord Bingham of Cornhill, “The Way We Live Now: Human Rights in the New Millennium” [1998] 1 Web JCLI. In another German case, OLG München 1988 NJW 915, a newspaper published a photograph of the plaintiff sunbathing in the nude in the English Gardens of Munich. The plaintiff, who was not a public figure, lost his promotion in consequence of the publication. The Court of Appeal of Munich held that the defendant was liable for the plaintiff's economic loss. It rejected the defence that by sunbathing in the nude in a public place he had, implicitly, consented to the publication of his photograph in a newspaper. See B S Markesinis & N Nolte, above, at 126-127.

<sup>37</sup> *Stessman v American Black Hawk Broadcasting Co* (1987, Iowa) 416 NW2d 685 (cited in 69 ALR4th 1059 § 8).

sort of private dining room offered by many restaurants, in which the filming of a patron might conceivably be a highly offensive intrusion upon that person's seclusion.

6.35 Paragraph 18 of the Code of Fairness and Privacy produced by the Broadcasting Standards Commission in the UK suggests that secret recording is an infringement of privacy which has to be justified even though the recording occurs in a public place:

*“The use of secret recording should only be considered where it is necessary to the credibility and authenticity of the story, as the use of hidden recording techniques can be unfair to those recorded as well as infringe their privacy. In seeking to determine whether an infringement of privacy is warranted, the Commission will consider the following guiding principles: (i) Normally, broadcasters on location should operate only in public where they can be seen. Where recording does take place secretly in public places, the words or images recorded should serve an overriding public interest to justify: the decision to gather the material; the actual recording; the broadcast. ...”*

6.36 In *R v Broadcasting Standards Commission, ex parte BBC*,<sup>38</sup> a programme-maker secretly filmed transactions in Dixons Ltd's stores as part of an investigation into the selling of second-hand goods as new. The BSC upheld the complaint from Dixons Ltd that the filming had constituted an unwarranted infringement of its privacy within the meaning of section 110(1) of the Broadcasting Act 1996. One of the questions before the Court of Appeal was whether secret filming in a place to which the public had access could amount to an infringement of privacy unless what was filmed itself had a private element (which did not exist in that case). The Court of Appeal held that the BSC had been entitled to conclude that the secret filming was an infringement of Dixons Ltd's privacy. Hale LJ stated that it was open to the BSC to hold that secret filming of an individual for potential use in broadcasting was in itself an infringement of that individual's privacy (although it may well be warranted). In his view, notions of what an individual might or might want to be kept “private”, “secret” or “secluded” were subjective to that individual: the infringement consisted in depriving the person filmed of the possibility of refusing consent.<sup>39</sup>

6.37 Clause 3(ii) of the Code of Practice ratified by the UK Press Complaints Commission provides that the use of long lens photography to take pictures of people in “private places” without their consent is unacceptable unless it can be demonstrated to be in the public interest. For this purpose, “private places” is defined as “*public or private property where there is a reasonable expectation of privacy*”.<sup>40</sup>

<sup>38</sup> [2000] 3 All ER 989.

<sup>39</sup> [2000] 3 All ER 989, para 43. See also para 37 in which Lord Woolf MR noted that the filming was on Dixons' property and although the public were invited to the premises the invitation was not in relation to secret filming. The fact that the filming was secret prevented their staff from taking any action to prevent what they were doing being filmed.

<sup>40</sup> The Code of Practice is a “relevant privacy code” which the court may have regard if the proceedings relate to journalistic, literary or artistic material: Human Rights Act 1998, s 12(4).

6.38 In *R v Loveridge*,<sup>41</sup> Lord Woolf CJ, now also a Non-Permanent Judge of the HK Court of Final Appeal, noted in delivering the judgment of the English Court of Appeal that:

*“secret filming in a place to which the public has free access can amount to an infringement even where there is no private element to the events filmed. Secret filming is considered objectionable, because it is not open to those who are the subject of the filming to take any action to prevent it”*.<sup>42</sup>

6.39 Lyrissa Lidsky agrees that there are relative degrees of privacy even in public places. She suggests that in determining whether surveillance involving filming, recording or photographing in public places is intrusive or not, the courts must consider factors such as (a) whether the defendant’s use of technology enhanced his normal sensory capacities, (b) whether the plaintiff was aware he was being observed or filmed, (c) whether the plaintiff was acting in a private capacity or professional capacity, and (d) the exact location of the alleged intrusion.<sup>43</sup>

6.40 It will be recalled that the European Court of Human Rights in *Niemietz v Germany* has expanded the notion of private life to encompass the formation and development of personal relations, including activities of a professional and business nature. The Anglo-Saxon idea of private space as covering home, hospitals, hotel rooms and other private premises seems no longer adequate. In order to protect the freedom of individuals to establish and develop relationships with others, the idea of private space should no longer be confined to private places in which the individual has some exclusive rights of occupancy where secrecy or confidentiality can be maintained. The European Court has not given any guidance as to whether “private life” extends to activities in public places or semi-public places such as churches, funeral parlours and restaurants to which the public has a right of access. But in view of the expanding notion of private life set out in the *Niemietz* case, it is clear that the private or public nature of the location is not always decisive in determining whether the individual has a legitimate expectation of privacy. For instance, it is arguable that a person who takes pictures of women entering an abortion clinic or of persons entering a health centre for AIDS patients captures an intimate fact about the private lives of the persons filmed even though the pictures are taken in a public place.<sup>44</sup>

6.41 We are persuaded by the arguments put forward in the authorities cited above. Privacy is a matter of degree. It is not an all-or-nothing concept. We admit that a person’s reasonable expectation of privacy is considerably less when he is in a public place than when he is at home, and the taking of casual

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<sup>41</sup> [2001] EWCA Crim 973, [2001] 2 Cr App R 29.

<sup>42</sup> Above, at para 30, citing *R v Broadcasting Standards Commission, ex p BBC* [2001] QB 885, paras 37 and 43 (CA), as authority.

<sup>43</sup> L B Lidsky, “Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It” (1998) 73 *Tulane L Rev* 173 at 237.

<sup>44</sup> In the US, legal actions against anti-abortion protesters filming women entering abortion clinics have resulted in injunctions prohibiting the activity: A J McClurg, above, at 1033.

photographs in a public place should not normally be held to be an invasion of the privacy of a person who happens to be captured by such a photograph. However, a person does not forfeit all legitimate expectation of privacy when he ventures to a public place or a place to which the public has access. The fact that the plaintiff is in a private or public place is not conclusive in determining whether he has a reasonable expectation of privacy. Targeted photography or filming of a person inside a gymnasium, public toilet, methadone clinic, job centre, funeral parlour, church, hospital ward or waiting area of a social hygiene clinic, is intrusive if done without that person's consent – even though he is in a place accessible to the public. These places are in a sense public but where people expect a reasonable degree of seclusion. Another example is the use of an electronic listening device to spy on another person's conversation from a distance. It intrudes upon the privacy of the interlocutors whether the conversation is conducted in a public place or not.

6.42 We also agree with the observation that the mere fact that a person can be seen by others does not mean that he cannot be secluded in a legal sense. Seclusion need not be absolute. He can be visible to some people without forfeiting his right to remain secluded from others. The fact that the privacy one expects in a given setting is limited and not complete should not render the expectation unreasonable as a matter of law.

## Physical intrusion

6.43 Where a person has secluded himself in his home, an office, a guest room, a hospital room or a cubicle, he should have a right to bring an action against any one who, without proper authority, forces his way into the premises. Whether the place in which a person has secluded himself is private or public in nature is immaterial. The question of ownership is not decisive when it comes to the protection of privacy. A person is entitled to the privacy of his flat, room or cubicle in which he has lawfully secluded himself even though he has no proprietary interest in it.

6.44 In *Philippe v France Éditions*,<sup>45</sup> reporters entered the hospital room of the child of a French actor and took photographs. The publisher planned to publish the photographs alongside a story about the child's illness. The Paris Court of Appeal granted an injunction and held that the photographs and story were "an intolerable intrusion into the private life of the Philippe family". In the American case of *Barber v Time Inc.*,<sup>46</sup> the plaintiff was being treated in hospital for a rare eating disorder when journalists entered her room without permission and photographed her despite her objections. *Time* magazine published the photographs and an article entitled "Starving Glutton". The Supreme Court of Missouri held the magazine liable for invasion of privacy. Other examples of physical intrusion include the placement of a hidden transmitter inside the target premises; the attachment of a miniature microphone to the outside of a

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<sup>45</sup> Gaz Pal (1966) 1 sem Jur 38, referred to in J D R Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 McGill LJ 355, 367.

<sup>46</sup> (1942) 348 Mo 1199, 159 SW2d 291.

window; and the fixing of a telephone transmitter inside the socket or receiver or anywhere on the telephone line.

## Non-physical intrusion

6.45 Apart from physical intrusion upon a person's seclusion, non-physical intrusions such as looking onto a person's private property and eavesdropping on private conversations are also objectionable in circumstances where the person has a reasonable expectation of privacy.<sup>47</sup> A person who surreptitiously overhears or observes the private affairs of another by the use of his senses, whether with or without the aid of a surveillance device, intrudes upon the latter's solitude or seclusion even though he has not trespassed on the latter's property. If the intrusion tort is limited to physical intrusions, persons who conduct visual or aural surveillance without encroaching upon the premises in which the target is located or otherwise interfering with the target's property would be able to avoid liability. This is unjust to the persons who are subjected to surveillance. The tort should therefore cover both physical and non-physical intrusions.

6.46 Non-physical intrusion may be effected by surveillance devices which do not need to physically intrude on property or come close to the target. Examples are devices that operate by intercepting at a distance information transmitted by satellite, microwave and radio, including mobile telephone transmissions. Some devices may even intercept electromagnetic radiation emitted from electronic equipment. Electronic devices such as computers and printers emit radiation through the air or through wires. A private detective can monitor and retrieve information in any electronic device while it is being processed without the knowledge of the user. Emanation monitoring is difficult to detect because it is passive and can be done at a distance from the target. Although much of such electromagnetic radiation is not intended to transmit information, the intercepted material may be reconstructed into useful intelligence. It is now technically possible to reconstruct the contents of computer terminal screens, the contents of a computer's memory, or the contents of its mass storage devices at a distance.<sup>48</sup>

6.47 The Commission report on *Interception of Communications* recommends that the interception of telecommunications while the messages are in the course of transmission be a crime. Telecommunications presuppose the existence of a sender and a recipient. The word "telecommunications" indicates that the sender is seeking to send signals or messages to the intended recipient by electronic equipment; it does not refer to the inadvertent emission of electromagnetic radiation. Insofar as emanated transient electromagnetic pulses are not telecommunications nor would they be

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<sup>47</sup> Peeping into a bedroom with the curtains drawn or overhearing a private conversation conducted inside the bedroom may be as invasive as using a surveillance device in the bedroom.

<sup>48</sup> J McNamara, "The Complete, Unofficial TEMPEST Information Page" (1997) at <<http://www.eskimo.com/~joelm/tempest.html>>; C Seline, "Eavesdropping on the Electromagnetic Emanations of Digital Equipment: The Laws of Canada, England and the United States" (1989), at <<http://www.jya.com/tempest.htm>>.

regarded as a form of communication, the monitoring of electromagnetic emanations of electronic equipment would not be covered by the proposed interception offence. We consider that such monitoring should give rise to liability in tort.

6.48 Subsequent to the publication of our *Interception Report*, Security Branch (as it was then) published a consultation paper inviting the public to comment on a draft Interception of Communications Bill. The White Bill explicitly excluded electronic communications from the scope of the new legislation by excluding “communication[s] sent through a computer network” from the definition of “communication”.<sup>49</sup> The effect of such a provision is that the interception of telephone conversations and electronic mail would not be unlawful under the new legislation. We consider that unauthorised interception of telephone conversations and electronic mail should be subject to both criminal and civil sanctions unless the interception is made pursuant to a judicial warrant.

## Aural surveillance

6.49 Aural surveillance generally refers to the surreptitious overhearing, either directly by ear or by means of some technical device such as a wiretap, microphone or amplifier, of conversations, or the preservation of such conversations by a recording device. Eavesdropping on private conversations intrudes on the solitude and seclusion of the parties to the conversations and enables the eavesdropper to pry into another’s private affairs. It constitutes an invasion of privacy<sup>50</sup> and is, unless authorised, contrary to Article 30 of the Basic Law.<sup>51</sup> The victim should be able to maintain a civil action against the eavesdropper. Failure to impose liability on the eavesdropper would effectively deny an individual other rights and freedoms guaranteed under the Basic Law.<sup>52</sup>

6.50 Although a person who speaks loudly cannot reasonably expect his conversation not to be overheard by his neighbours, he may nevertheless expect that his conversation will not be transmitted or recorded by a technical device that is installed in his premises without his consent. Eavesdropping by an amplifying, transmitting or recording device is offensive. In *McDaniel v Atlanta*,<sup>53</sup> the defendant caused a listening device to be installed in the plaintiff’s hospital room in which personal and private conversations with her husband, nurses and friends were held. As a result, what was said and done by the plaintiff was listened to and recorded by the defendant. The Court held

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<sup>49</sup> Security Branch, *Consultation Paper on Interception of Communications Bill* (1997), Appendix A, clause 2.

<sup>50</sup> The respondents to the PCO 2000 Opinion Survey considered the interception by a supervisor of a telephone conversation with a friend during working hours as invasive of their personal privacy. The mean value was 8.76 out of 10. PCO, *2000 Opinion Survey: Attitudes and Implementation – Key Findings*, fig 2.

<sup>51</sup> *Rhodes v Graham* 238 Ky 225 (1931), quoted in 11 ALR3d 1296 at 1301; *Halford v United Kingdom* [1997] *The Times*, 13 July.

<sup>52</sup> A M Swarthout, “Eavesdropping as Violating Right of Privacy”, 11 ALR3d 1296.

<sup>53</sup> 60 Ga App 9 (1939) 2; cited in 11 ALR3d 1296 at 1303.

that the defendant's conduct was "as effectively an intrusion upon or an invasion of privacy of the plaintiff as if the agent had actually been in the room." Similarly in *Hamberger v Eastman*,<sup>54</sup> the landlord had installed an eavesdropping device in the bedroom of the plaintiffs who were a husband and wife. The plaintiffs alleged that as a result of the discovery of the device, they were "greatly distressed, humiliated, and embarrassed," and that they sustained "intense and severe mental suffering and distress, and have been rendered extremely nervous and upset." The Court held that it was highly offensive to intrude into marital bedrooms.<sup>55</sup>

6.51 An individual's right to privacy does not automatically cease when he leaves the confines of his home or other secluded premises. Intrusion by eavesdropping may occur in public places as well as private premises. The expectation to be free from visual surveillance is distinct from the expectation to be free from aural surveillance. A person can be visible to the public without forfeiting his right to the privacy of his communications. A conversation between two persons sitting on a bench in a public park with no one sitting or standing nearby should be protected even though it is conducted in a public place. Granting legal protection to that conversation is in accordance with the reasonable expectation of the interlocutors because the words spoken are not sufficiently in the public domain as to justify their being overheard by another.

6.52 In *Goldman v US*, the Court held that the use of an electronic listening device was not an unlawful search and seizure in the absence of a physical intrusion or trespass accompanying the surveillance.<sup>56</sup> This rule was expressly disapproved in *Katz v US* in which FBI agents had planted an electronic listening device on the outside of a public telephone booth to eavesdrop on the defendant's conversation.<sup>57</sup> In response to the argument that the telephone booth was constructed partly of glass, so that the defendant was as visible after he had entered it as he would have been if he had remained outside, the US Supreme Court pointed out that what the defendant sought to exclude when he entered the booth was not the intruding eye, but the uninvited ear. The Court held that an unlawful search and seizure had taken place notwithstanding the absence of a physical intrusion into any given enclosure. Stewart J stated:

*"the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. ... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."*<sup>58</sup>

6.53 Hence, although a person may take a photograph of two public figures sitting inside a private car, he may be liable for invasion of privacy if he places a hidden device inside the vehicle compartment to listen to their conversations.

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<sup>54</sup> 106 NH 107; 206 A2d 239 (1964).

<sup>55</sup> 106 NH 107 at 112; 206 A2d 239 at 242 (1964); quoting R Pound, *Jurisprudence* (1959) 58.

<sup>56</sup> 316 US 129 (1942).

<sup>57</sup> 389 US 347 (1967).

<sup>58</sup> At 351-352.

## Visual surveillance

6.54 The respondents to the 1997 Baseline Opinion Survey commissioned by the Privacy Commissioner considered the opening of their personal mail by another and the taking of pictures of them through a window by an outsider as “highly invasive”.<sup>59</sup> In the opinion survey conducted in 2000, the respondents found the following activities “quite invasive” of their individual privacy: an employer looking at the contents of an employee’s email on a company supplied computer; installing a video camera in the pantry of the working place; and monitoring the entrance of the working place by a video camera.<sup>60</sup> The survey also found that 64% of respondent organisations carried out some form of surveillance, mostly CCTV.<sup>61</sup>

6.55 Whether visual observation of a person or his personal property amounts to an intrusion upon seclusion depends mainly on whether that person has a reasonable expectation of privacy in the area in which he or his property is located. Where a picture of an individual is taken in a public place, it is unlikely that his right to privacy has been violated, even though it is taken without his consent and may annoy him.<sup>62</sup> A person does not normally have a reasonable expectation of privacy when he is in an area visible to the general public. Observing through an open window of an individual’s home constitutes no invasion of privacy because any information acquired thereby is knowingly exposed by him.<sup>63</sup>

6.56 Under this plain view doctrine, much of a vehicle’s interior is within the plain view of passers-by and is not protected from intrusion by curious onlookers.<sup>64</sup> A driver cannot complain if a journalist takes a picture of him driving the vehicle on the road. Nor can the shop-owner complain if a journalist observes him selling drugs to customers over the counter which is open to public view. Where the individual or his property is in plain view and is perceptible to the naked eye, the use of a binocular or long-lens camera to observe or record does not normally infringe the individual’s expectation of privacy. However, there is an intrusion if a technical device is used to collect data which would otherwise be shielded from observation but for the use of the device.<sup>65</sup>

6.57 Where a photograph is taken within the privacy of a person’s home or hospital room, the photographer should normally be liable for invasion

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<sup>59</sup> Office of the Privacy Commissioner for Personal Data & HKU Social Sciences Research Centre, *Baseline Opinion Survey: Public Attitudes to and Preparedness for the Personal Data (Privacy) Ordinance - Key Findings* (March 1997), Figure 4.

<sup>60</sup> The mean values of responses were 7.81, 7.28 & 6.42 respectively out of 10: HKPCO, *2000 Opinion Survey: Attitudes and Implementation – Key Findings*, fig 2.

<sup>61</sup> Above, p 4.

<sup>62</sup> This may, however, constitute an “unfair” collection of personal data in contravention of DDP 1 under the PD(P)O. See *Eastweek Publisher v Privacy Commissioner*, above.

<sup>63</sup> *US v Whaley*, 479 US 1055 (1987).

<sup>64</sup> *Maryland v Macon*, 472 US 463.

<sup>65</sup> K J Rampino, “Observation through Binoculars as Constituting Unreasonable Search” 48 ALR3d 1178; Younger Report (1972), paras 553-559.

of privacy.<sup>66</sup> But the taking of photographs of another on a “private occasion” may also be objectionable.<sup>67</sup> The Court of Appeal in *Oriental Press Group Ltd v Apple Daily Ltd* noted that “Public sentiment has turned, or seems to be turning, against those who are guilty of invasion of the privacy of public figures by taking their photographs on private occasions without their consent and then selling those photographs for large sums”.<sup>68</sup>

6.58 **Aerial surveillance** – Aerial observation does not constitute an intrusion unless the individual has a reasonable expectation of privacy in the area exposed to aerial view. The factors that are taken into consideration by the American courts in determining whether warrantless aerial surveillance constitutes a “search” for the purposes of the Fourth Amendment are: (a) the height of the aircraft; (b) the size of the objects observed; (c) the nature of the area observed, including the uses to which it is put; (d) the frequency of flights over the area; and (e) the frequency and duration of the surveillance.<sup>69</sup>

## Intrusion into the private affairs or concerns of another

6.59 Apart from “Peeping Toms” and eavesdroppers, those who, for example, without consent or lawful authority:

- open another’s private and personal mail;
- examine another’s personal belongings such as his diary, wallet or address book;
- search another’s premises, vehicle, locker, briefcase or handbag;
- conduct a body search;
- gain access to another’s bank statements or medical records;
- obtain access to data stored in another’s computer;
- intercept the communications of another;
- fix a tracking device on the vehicle or personal belongings of another;<sup>70</sup> or
- keep another under constant or systematic surveillance,

also invade the privacy of that other by intruding into his private affairs or concerns. Such conduct should be rendered tortious by holding the perpetrator liable for intrusion into another’s private affairs or concerns. Intrusions of this nature may take place in a private or public place.<sup>71</sup> Any one who overhears the conversation between two or more persons in a public place with the aid of a technical device in circumstances where the interlocutors are reasonably entitled to expect to be free from aural surveillance may be held liable under this head.

<sup>66</sup> P E Hassman, “Taking Unauthorised Photographs as Invasion of Privacy”, 86 ALR3d 374.

<sup>67</sup> Even if the press have been invited to cover a private party in a restaurant, the party would nevertheless become a “private occasion” when the press were told to leave.

<sup>68</sup> [1997] 2 HKC 525. See also *Douglas v Hello! Ltd* [2001] QB 967 (CA).

<sup>69</sup> 68 Am Jur 2d, *Searches and Seizures*, § 59.

<sup>70</sup> On the use of Radio Frequency Identification technology, see Parliamentary Office of Science and Technology, *Postnote*, “Radio Frequency Identification”, July 2004, No 225, at [www.parliament.uk/documents/upload/POSTpn225.pdf](http://www.parliament.uk/documents/upload/POSTpn225.pdf), and the articles collected in Electronic Privacy Information Center, “Radio Frequency Identification (RFID) Systems”, at [www.epic.org/privacy/rfid/](http://www.epic.org/privacy/rfid/).

<sup>71</sup> The issue of workplace surveillance is addressed below.

6.60 The European Court of Human Rights had this to say in *PG and JH v United Kingdom*:<sup>72</sup>

*“The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Article 8 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. 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’.*

*There are a number of elements relevant to a consideration of whether a person’s private life is concerned by measures effected outside a person’s home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8, even where the information has not been gathered by any intrusive or covert method. . . .*

*In the case of photographs, the [European Commission on Human Rights] previously had regard, for the purpose of delimiting the scope of protection afforded by Article 8 against arbitrary interference by public authorities, to whether the taking of the photographs amounted to an intrusion into the individual’s privacy, whether the photographs related to private matters or public incidents and whether the material obtained was envisaged for a limited use or was likely to be made available to the general public. . . .”*

6.61 The notions of solitude and seclusion are less relevant when a person leaves his private enclave and ventures into the public realm. However, a person still has some legitimate expectation of privacy even though he is in places accessible to the public or visible from places open to the public. He

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<sup>72</sup> No 44787/98, date of judgment: 25.9.2001 (ECtHR), paras 56-58 (citations omitted). See also *Perry v UK*, No 63737/00, date of judgment: 17.7.2003 (ECtHR), paras 40-43, 48.

maintains an interest in being able to move about anonymously.<sup>73</sup> As observed by Westin, when people go into stores, hotels, restaurants and other places of public accommodation, they do not expect to be under secret surveillance, especially in those times and places for which social custom has set norms of privacy, even in public situations.<sup>74</sup> If a person knows that someone is paying attention to him by following him, listening to him or observing him, he may have to modify or curtail his lawful activities on the understanding that any information revealed by his activities would be captured, recorded and even publicised against his will. By observing the public activities of a person for a long period of time, one can also find out a considerable amount of private information about him.<sup>75</sup> Yet casual observation should not attract liability in tort, nor should a celebrity have any cause to complain if a reporter or his fan pays attention to him in a public place. The mischief against which the law of privacy should provide a remedy is unwarranted surveillance, not casual observation. In our view, a person generally has a reasonable expectation not to be subjected to constant or systematic surveillance (whether overt or covert) even though he is in a public place. Keeping a person under constant or systematic surveillance in public places is a form of intrusion into the latter's private affairs or concerns.<sup>76</sup>

## Unauthorised filming by a lawful visitor

6.62 The surreptitious use of a video camera by a lawful visitor whose presence is known to the subject may constitute an invasion of the latter's privacy. Anyone in a public bathroom or changing room who uses a hidden device to take pictures of another taking a shower or changing clothes should be subject to civil sanctions. Similarly, a person who is invited into another's home or office should not be allowed to film what he could lawfully see, but which is screened from public view, while he is inside. The surreptitious use of a video camera in these circumstances is offensive and objectionable whether or not the information is eventually disclosed. The permission for a person to enter and stay at a particular place does not extend to the use of a hidden camera to collect information inside. The fact that an individual consents to being watched by another person does not necessarily mean that he also consents to that other person making a permanent record of what he sees or to his transmitting the visual images to a third party by electronic means.

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<sup>73</sup> A F Westin, above, at 69; R Gavison (1980), above, at 432; A J McClurg, above, 1033-1036.

<sup>74</sup> A F Westin, above, at 112.

<sup>75</sup> For example, who are his friends and relatives? When and how often does he meet them? Is he on good terms with his spouse? If he is married, does he have any extra-marital affair? Does he have any health problem? How and where does he spend his leisure time? What kind of books and magazines does he read? And what kind of videos does he watch?

<sup>76</sup> In the US, whether unsolicited mails, house calls or telephone calls amount to intrusion depends on a number of factors, such as (a) the number of mailings and calls received; (b) whether the sender or caller persists in total disregard of the victim's responses or distress caused; (c) whether abusive or vicious language was used; and (d) whether the intrusion occurred at unreasonable hours. 62A Am Jur 2d, § 64. The question of unsolicited mails, unwanted visits and harassing phone calls has been specifically addressed in our *Stalking Report*. We believe that these forms of intrusion would be adequately covered by the anti-stalking legislation proposed in that report.

6.63 In *Murray v UK*,<sup>77</sup> one of the applicants complained, *inter alia*, that she had been photographed without her knowledge or consent while in custody at an Army screening centre after her arrest. At the hearing before the European Court of Human Rights, the UK Government did not contest the fact that the impugned measures, including the photography, interfered with the applicants' exercise of their right to respect for their private and family life.

6.64 In *Dietemann v Time*,<sup>78</sup> two employees of a magazine posed as patients and used a hidden camera and a microphone to investigate someone who had been alleged to have been practising medicine without a licence. The US Court of Appeals held that clandestine photography of the plaintiff in his den and the recording and transmission of his conversation without his consent resulting in his emotional distress warranted recovery for invasion of privacy:

*"One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But [the plaintiff] does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living colour and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued, e.g., in the case of doctors and lawyers."*<sup>79</sup>

6.65 In *Creation Records Ltd v News Group Newspapers Ltd*, a photographer who was lawfully at the hotel was able to gain access to a restricted area to observe a scene which was not intended for publication. Lloyd J said:

*"I accept also that they were of course allowed to observe the scene and could therefore have gone away and told the world the ingredients of the picture, or even made a sketch of it from memory. But being lawfully there does not mean that they were free to take photographs, and it seems to me that to be able to record it as a photographic image is different in kind, not merely in degree, from being able to relate it verbally or even by way of a sketch."*<sup>80</sup>

6.66 Keene LJ made a similar observation in *Douglas v Hello! Ltd*:

*"It is said that those photographs in the present case did not convey any information which had the quality of confidence, because the guests were not prevented from imparting the same*

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<sup>77</sup> No 14310/88, date of judgment: 28.10.94, paras 84-86.

<sup>78</sup> 449 F2d 245 (1971, CA9 Cal).

<sup>79</sup> 449 F2d 245 at 249 (1971, CA9 Cal)

<sup>80</sup> [1997] EMLR 444 at 455; referred to by Brooke LJ in *Douglas v Hello! Ltd* [2001] 2 WLR 992 at para 69.

*information subsequently, whether in words, by drawings based on recollection or any other means. This argument is unsustainable. The photographs conveyed to the public information not otherwise truly obtainable, that is to say, what the event and its participants looked like. It is said that a picture is worth a thousand words. Were that not so, there would not be a market for magazines like Hello! and OK! The same result is not obtainable through the medium of words alone, nor by recollected drawings with their inevitable inaccuracy.*<sup>81</sup>

6.67 While the recording or transmission of communications by a party without notice to the other party might be acceptable in the aural context, the surreptitious use of a video camera by a licensee or invitee is of a different quality and raises different concerns. Whilst it may be true that the use of speaker-phones and recording machines has reduced the level of privacy expectation which an interlocutor would have when engaging in telephone conversations, the person whose appearance or property is not in public view is reasonably entitled to expect that information about him or his property would not be recorded or transmitted by another to a third party without his consent. Such is the case even though the person using the camera is lawfully present on the premises and the subject or property is within his eyesight.

6.68 There is a qualitative difference between mere casual observation unaided by technology, and the deliberate recording of an individual in a private place using a sophisticated surveillance device. Creating a permanent record by photography or filming is more intrusive than mere observation. A permanent photographic image may contain all the minute details of an individual's appearance or property which would not otherwise be captured by a fleeting glance. Whereas an audio recorder merely repeats what the other party said to the person operating the recorder, a video camera gathers more data about the other party than what the data collector saw with his own eyes. There is also a risk of disclosing data captured by a video camera to a third party or to the whole world through the Internet once a permanent record is made. The subject's image, his private behaviour or his personal belongings can be transmitted, without his knowledge, at any time in the future to an audience completely different from the one he originally expected.<sup>82</sup> Besides, an individual often tailors his behaviour to the audience. By surreptitiously recording him, it is arguable that the intruder has violated both his expectation of anonymity and his autonomy in selecting to whom he will reveal himself. We therefore find surreptitious video recording by a person who is otherwise lawfully present on the premises offensive and objectionable. There is no implied consent to surreptitious recording of visual data by a person whose presence on the premises is otherwise lawful. Such recordings should generally be permissible only if the individual concerned consents.

6.69 The Sub-committee was originally of the view that surreptitious collection of visual data with the assistance of a technical device carried by a

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<sup>81</sup> Above, at para 165.

<sup>82</sup> A J McClurg, above, at 1063, 1036-1044. L B Lidsky, "Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It" (1998) 73 Tulane L Rev 173, 236-238.

person who is lawfully present on the premises does not constitute an intrusion.<sup>83</sup> The Sub-committee therefore recommended in the Consultation Paper that the surreptitious use of a device to collect visual data about an individual which would not otherwise be open to public view should be deemed to be an intrusion for the purposes of the intrusion tort, even though the person using the device is lawfully present on the premises in which the data are located and the data are visible to his naked eye. However, the Sub-committee has since accepted that an intrusion can occur in a place accessible to the public or where the subject can be seen by others as long as the subject has a reasonable expectation of privacy in the circumstances. Such being the case, the new tort should be able to protect individuals who are reasonably entitled to expect that they would not be subjected to secret filming - whether or not the presence of the intruder is otherwise lawful. It is therefore no longer necessary to make a separate recommendation on unauthorised filming by a lawful visitor.

## Standard of liability

6.70 The UK Consultation Paper examined whether a defendant should be liable only if he intended to invade the plaintiff's privacy, or if he was reckless or negligent, or whether there should be strict liability so that the defendant would be liable even though he could not be said to be at fault. It commented that to limit liability to cases where there was clear intention would unduly restrict plaintiffs' right to a remedy, but that the balance would be tilted too much in their favour if the tort were made one of strict liability. It therefore suggested that the defendant should be liable where the infringement was caused intentionally, recklessly or negligently.<sup>84</sup>

6.71 We consider that the plaintiff should not be allowed to recover if the intrusion was accidental or the defendant was merely negligent.<sup>85</sup> *Clerk and Lindsell on Torts* suggests that recklessness, in the sense of indifference to the consequences and/or willingness to run the risk of those consequences, would generally be sufficient to establish liability for the intentional torts.<sup>86</sup> Since indifference to the consequences of an invasion of privacy is as culpable as intentionally invading another's privacy, we consider that an intrusion must be either intentional or reckless before the intruder could be held liable.<sup>87</sup>

## Offensiveness of an intrusion

6.72 Not every intrusion warrants the imposition of civil liability. Hong Kong being a densely populated city, all residents must accept that they are subject to a certain degree of scrutiny by their neighbours. To discourage the

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<sup>83</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above, paras 5.59 – 5.61.

<sup>84</sup> Above, para. 5.35.

<sup>85</sup> However, where the defendant was negligent in intruding upon the plaintiff's privacy, the latter might have a cause of action in negligence.

<sup>86</sup> *Clerk and Lindsell on Torts* (Sweet & Maxwell, 18<sup>th</sup> edn, 2000), § 1-59.

<sup>87</sup> Knowledge on the part of the defendant that exposure of the plaintiff's private matters would follow from his wrongful act would be evidence that the defendant had the intention to intrude.

bringing of trivial or frivolous claims, an objective test should be applied to determine the liability of the intruder. In our view, an intrusion should not be actionable unless the plaintiff can show that it is seriously offensive or objectionable to a reasonable person. This would ensure that the right of privacy would be determined by the norms of a person of ordinary sensibilities and not those of a hypersensitive person. As observed by *American Jurisprudence*:

*“In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable person can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant.”*<sup>88</sup>

6.73 In determining the offensiveness of an invasion of a privacy interest, the American courts consider, among other things, *“the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder’s motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.”*<sup>89</sup>

6.74 We consider that the Court should take the following factors into account in determining whether an intrusion was seriously offensive or objectionable to a reasonable person:<sup>90</sup>

- (a) **The magnitude of the intrusion, including the duration and extent of intrusion** – The greater the magnitude of the intrusion, the more likely that the act will be considered seriously offensive to a reasonable person.
- (b) **The means of intrusion** – Whether the defendant used a technical device to record the plaintiff is another factor that the Court should take into account. The type of recording device used is also relevant. The use of a wireless remote-controlled automatic video recorder with a pin-hole lens is more offensive and objectionable than using an ordinary camera.
- (c) **The type of information obtained or sought to be obtained by means of the intrusion** – ie whether the information is sensitive or intimate.
- (d) **Whether the plaintiff could reasonably expect to be free from such conduct under the customs of the location where the intrusion occurred** – Not all places that are accessible to the public are equally “public” in terms of a person’s privacy expectations. Although persons in crowded settings must accept that their images may be captured by a camera, they have a reasonable expectation

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<sup>88</sup> 62A Am Jur 2d, Privacy, § 40.

<sup>89</sup> *Miller v National Broadcasting Co*, 187 Cal App 3d at pp 1483-1484.

<sup>90</sup> See Andrew J McClurg, “Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places” (1995) 73 North Carolina L Rev 989, 1057-1085.

not to be subjected to extensive videotaping or photography. Where a person seeks solitude in an isolated setting such as an empty beach or in a remote part of a country park, he may reasonably expect greater privacy than on the streets of a city centre. This is the case even though the location is technically accessible to the public. While he is aware of the possibility of encountering others, he reasonably expects that those encountered will, by virtue of the surroundings, exercise greater respect for his privacy than would occur in more populated areas.<sup>91</sup>

- (e) **Whether the defendant sought the plaintiff's consent to the intrusive conduct**
- (f) **Whether the plaintiff has taken any actions which would manifest to a reasonable person the plaintiff's desire that the defendant not engage in the intrusive conduct** – Such actions may be either explicit or implicit. A person may indicate that he wishes to be let alone by taking measures to protect his privacy or requesting the defendant not to videotape him. Less clear-cut are situations where a person chooses to appear in a publicly accessible place where he could nevertheless reasonably expect some degree of privacy. For instance, a couple who choose to have a private conversation in a remote corner of a park sheltered by trees could reasonably expect their conversation to be free from monitoring. Their action in situating themselves in a remote area is a factor that should be taken into account.
- (g) **Whether the defendant had been acting reasonably in the interests of the plaintiff** – An intrusion is less likely to be considered offensive if the defendant has been acting in the interests of the plaintiff who is a minor or is in need of care.

## Conclusion

6.75 We conclude that the intrusion tort requires proof of the following:

- (a) the plaintiff had a reasonable expectation of privacy in the circumstances of the case;
- (b) either an intrusion upon the solitude or seclusion of another or an intrusion into another's private affairs or concerns;
- (c) the intrusion must be done intentionally or recklessly; and
- (d) the intrusion must be seriously offensive or objectionable to a reasonable person of ordinary sensibilities.

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<sup>91</sup> A J McClurg, above, at 1066 - 1067.

6.76 We should add that an actionable intrusion may be physical or non-physical, and may be committed with or without the aid of a technical device. There should not be any requirement that the intrusion must occur in a private place or premises, nor should there be a requirement that the defendant has acquired or recorded any personal information about the plaintiff as a result of the intrusion.

6.77 An interference with private life does not necessarily involve an acquisition of personal information. Telephone tapping is objectionable even though the eavesdropper does not know the identity of the callers, or the contents of the conversation does not relate to a particular individual, or the subject matter of the conversation is not secret or private. Likewise, some voyeurs obtain immediate gratification simply by observing the activities of another without the latter knowing that he is being observed. Overhearing or observing an individual in circumstances where he has a reasonable expectation of privacy is therefore objectionable even though the observer or eavesdropper does not acquire any sensitive or intimate information about him. The objection has no necessary connection with the quality of the information obtained. It is more to do with the loss of control over what, when and how information about the individual is disclosed. We therefore consider that the acquisition of personal information should not be a necessary ingredient of the intrusion tort even though it may be taken into account by the Court in determining the magnitude of the intrusion.

### **Comments made by respondents**

6.78 Both the Bar Association and the HK Democratic Foundation agreed that intrusion should be a tort. However, the Privacy Commissioner commented that expressions such as “the solitude and seclusion of another” and “seriously offensive and objectionable to a reasonable person of ordinary sensibilities” are not expressions with clear judicially-defined meanings. Although any uncertainty may be removed by judicial interpretation, the development of case-law is likely to be slow. In our view, the ingredients of the new tort are sufficiently clear and precise for the general public to discern their meaning. The expressions used are capable of definition by using case law or an appropriate dictionary meaning. The fact that they form the basis of the intrusion tort in the US indicates that any suggestion that the new tort would lead to uncertainty and confusion is unfounded.

6.79 The Privacy Commissioner further submitted that since uncertainty in outcome was less likely to be a major concern for a plaintiff who could well afford to take the trouble and incur the expenses of bringing a lawsuit, the privacy torts might “unintentionally end up, for practical purposes, being laws for the protection of the ‘rich and famous’.” The Privacy Commissioner invited the Sub-committee to consider whether there was any “practical alternative redress mechanism”, and to compare it with the proposed creation of the two torts in terms of their respective costs (both to victims and to taxpayers), user-friendliness and effectiveness.

6.80 It may be recalled that the Sub-committee Consultation Paper on *Surveillance and the Interception of Communications* has provisionally recommended that surveillance of private premises by means of a technical device be a crime. If such criminal measures were in place, the law could afford effective protection to individuals against the most serious intrusion at negligible cost to the victims. As regards the less serious cases, unless the Personal Data (Privacy) Ordinance is amended to provide an effective remedy for invasion of privacy by means of surveillance or unwarranted publicity and the Privacy Commissioner is vested with a power to award compensation or undertake legal proceedings in the name of the complainant, the only practical way to give effect to the right to the protection of the law against unlawful or arbitrary interference with privacy under the ICCPR is to provide a civil remedy by creating the privacy torts proposed in this report.

6.81 The Hong Kong section of JUSTICE did not agree with the creation of such a tort. They stated that the proposals, if adopted, would introduce into the laws of Hong Kong new expressions such as “solitude”, “seclusion”, “private affairs or concerns”, “private life”, “seriously offensive and objectionable” and “a reasonable person of ordinary sensibilities”. These new expressions were, in their opinion, not well known to the public. We should point out that these concepts have been employed by the American courts in developing the law of privacy in the US since the early twentieth century. The Hong Kong courts could always have regard to overseas authorities in developing the law of privacy in Hong Kong. The absence of a precise and exhaustive definition has not presented insurmountable problems in the laws of negligence and defamation. Concepts such as “reasonable person” and “right-thinking members of society” are widely used by the civil courts. In any event, the introduction of new concepts is an inevitable result of law reform.

6.82 JUSTICE (HK) acknowledged that the Hong Kong Court might resort to the American jurisprudence in construing the privacy legislation, but they believed that there was little guarantee that American case-law would be accepted by the Hong Kong Court without question. A period of uncertainty and confusion would have to be expected. We note, however, that while JUSTICE (HK) distrusted the Court’s ability to remove any uncertainty in the privacy legislation by reference to American authorities, they were prepared to rely on the Court to develop the law of privacy at common law by reference to the jurisprudence in other common law jurisdictions.

6.83 JUSTICE (HK) preferred to adopt an incremental approach and choose the relatively “slow” road of judicial development of the common law. We find it difficult to understand why JUSTICE (HK) preferred judicial development of the common law to enactment of privacy legislation, which would set out in detail all the essential ingredients of a privacy tort in carefully defined terms. All individuals are entitled to legal protection against unwarranted invasion of privacy under the ICCPR. Introducing a statutory tort of invasion of privacy would achieve certainty rather than generating uncertainty. Victims of invasion of privacy should not be required to wait for judicial development to provide a remedy, nor should a victim be required to test his

case before the Court in order to seek recompense for an infringement of a fundamental human right.<sup>92</sup>

6.84 The Security Bureau recognised that there was an increasing awareness in the community of the need for protection of privacy, particularly in view of the availability of low-cost technical devices that might be used to intrude into another person's private life. They noted that certain acts of invasion of privacy were not regulated under the law. They considered that there appeared to be a need to create an intrusion tort.

### **Recommendation 2**

**We recommend that any person who intentionally or recklessly intrudes, physically or otherwise, upon the solitude or seclusion of another or into his private affairs or concerns in circumstances where that other has a reasonable expectation of privacy should be liable in tort, provided that the intrusion is seriously offensive or objectionable to a reasonable person of ordinary sensibilities.**

### **Recommendation 3**

**We recommend that the legislation should specify:**

- (a) the factors that the courts should take into account when determining whether the plaintiff had a reasonable expectation of privacy at the time of the alleged intrusion; and**
- (b) the factors that the courts should take into account when determining whether an intrusion was seriously offensive or objectionable to a reasonable person.**

6.85 **Relationship with Interception Report** – We recommended in our *Interception of Communications Report* that it should be an offence intentionally to intercept or interfere with a telecommunication while it is in the course of transmission.<sup>93</sup> We also recommended that any person who unlawfully intercepts a telecommunication should be liable to pay compensation to the victim unless the latter has been awarded compensation by the supervisory authority set up to issue warrants authorising interceptions

<sup>92</sup> See also the paragraphs in Chapter 5 under “Judicial development or legislation?”.

<sup>93</sup> HKLRC, *Report on Privacy: Regulating the Interception of Communications* (1996), ch 4. The Interception of Communications Ordinance (Cap 532) was enacted in 1997 but the Chief Executive has yet to appoint a commencement date for the operation of the Ordinance.

that would otherwise fall within the scope of the new offence. Civil remedies for unwarranted intrusion other than by means of an interception falling within the scope of the proposed legislation would have to be sought by bringing an action for invasion of privacy by intrusion.

## **Privacy in the workplace<sup>94</sup>**

6.86 In the context of workplace surveillance, we have to balance the interests of employers, employees and clients. An employee's expectation of privacy in his activities in the workplace has to be balanced against the employer's need to keep the workplace and his employees' activities under surveillance for legitimate business purposes. In determining whether an employer should be liable for the intrusion tort on the ground that he has kept his employees under surveillance, the court would have to assess whether the employee has an expectation of privacy and, if so, whether the employer has a legitimate justification for the intrusion which renders the employee's expectation unreasonable in the circumstances. This legitimate justification will usually be a business matter but it may be an external one, such as investigation into a crime which is unrelated to the business.

6.87 However, the tort of intrusion upon solitude or seclusion may not afford effective protection to employees. It would be open to employers to justify their intrusion on the ground that, for example, it is reasonably necessary to protect property or personal safety. Additional guidance is required to address the privacy concerns of surveillance in the workplace. In view of the difficulties of balancing the interests of employers, employees and clients, the Sub-committee considered that the best way to address the issue of workplace surveillance is for the Privacy Commissioner to issue an appropriate code of practice. The Consultation Paper therefore recommended that the Privacy Commissioner should give consideration to issuing a code of practice on all forms of surveillance in the workplace. No respondent objected to this proposal.

6.88 The Privacy Commissioner considered that organisations using surveillance facilities to monitor their employees should have a written policy on these activities and that their staff should be so notified. He supported the sub-committee's proposal but added that the code should initially be restricted to common forms of surveillance in the workplace, eg CCTV and telephone and email monitoring. The Commissioner has since issued a *Draft Code of Practice on Monitoring and Personal Data Privacy at Work* for public consultation. After the consultation had ended, the Commissioner decided not to issue a code of practice under the PD(P)O but to issue "best practice" voluntary data privacy guidelines on workplace monitoring instead.<sup>95</sup>

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<sup>94</sup> See HKLRC Privacy Sub-committee, *Consultation Paper on Civil Liability for Invasion of Privacy* (1998), paras 7.53 – 7.80.

<sup>95</sup> Office of the Privacy Commissioner for Personal Data, Hong Kong, *Report on the Public Consultation in relation to the Draft Code of Practice on Monitoring and Personal Data Privacy at Work* (2003), Part V.

## Defences to an action for intrusion

### **Consent**

6.89 The right to privacy ought to be restricted where an individual consents to the intrusion or he has engaged in a course of conduct that precludes him from asserting that right. A plaintiff should also be precluded from seeking relief if he has waived his right of privacy with respect to the intrusion. As succinctly summarised by *American Jurisprudence*, the right to privacy may be waived completely or only in part; it may be waived for one purpose and still be asserted for another; and it may be waived as to one individual, class, or publication, and retained as to all others.<sup>96</sup> The fact that a person deliberately courts publicity by providing intimate facts about himself should not be taken to mean that he agrees to the media taking pictures of him in circumstances where he has a reasonable expectation of privacy.

6.90 Further, the consent given by the subject must be specific to the intrusion at issue, and not another one. Nor can it derive from a previous consent that has been given for another purpose. The intrusion must not exceed, as to its form or object, the scope of his consent. The fact that a person has consented to an intrusion into his private life in the past does not necessarily mean that he has waived his right to complain for ever.<sup>97</sup>

6.91 There is implied consent if the plaintiff, by his conduct, places himself in a position where he knows or ought to know that the intrusion is the natural consequence of his conduct. Thus, if a person attends a public forum, he may be taken as having impliedly consented to the media taking pictures of him and including them in the news broadcast, even though the forum is held in private premises. Where the plaintiff has not taken measures to protect his privacy, for example, by drawing the curtains, it is likely that the courts would hold that he has no reasonable expectation of privacy in the circumstances, in which case it is unnecessary for the defendant to plead implied consent.

#### **Recommendation 4**

**We recommend that it should be a defence to an action for the intrusion tort to show that the plaintiff expressly or by implication authorised or consented to the intrusion.**

<sup>96</sup> 62A Am Jur 2d, Privacy, § 183.

<sup>97</sup> In *Miller v National Broadcasting Co* (1986, 2<sup>nd</sup> Dist) 187 Cal App 3d 1463, 69 ALR4th 1027, the appellate court rejected the contention that a person calling for emergency medical assistance impliedly consented to the entry of a camera crew which was accompanying the emergency medical personnel. The Court reasoned that a person seeking emergency medical attention does not thereby open the door for persons without any clearly identifiable and justifiable official reason who may wish to enter the premises where medical aid is being administered. Journalists could not immunise their conduct by purporting to act jointly with public officials such as police or paramedics.

## **One-party consent**

### *Recommendations of the LRC Interception of Communications Report*

6.92 The LRC report on *Interception of Communications* recommends that a person should not be guilty of an interception offence if one of the parties to the communication consented to the interception. Consensual interception occurs when a party to a communication uses a device either to record the communication or to transmit the communication to a third party without the knowledge of the other party. The Commission concludes that consensual interception by law enforcement agencies does not require a warrant after noting the following arguments against regulation:<sup>98</sup>

- (a) Many people record their conversations in order to protect their legitimate interests, particularly in commercial and business contexts. Imposing restrictions on the use of recording devices would fail to reflect contemporary practices. The use of speaker-phones has reduced the privacy expectation which a person would have when engaging in telephone conversations.
- (b) The consent given by one of the parties to the conversation may be seen as no more than an extension of the powers of recollection of that party.
- (c) The person who divulges any confidence in a conversation always runs the risk that his interlocutor will betray the confidence. The risk that an interlocutor will divulge the speaker's words and the risk that he will make a permanent electronic record of them are of the same order of magnitude.
- (d) Consensual interception is less offensive than third party interception because the party giving the consent hears nothing that the other party did not wish him to hear.
- (e) The recording device is used merely to obtain the most reliable evidence possible of a conversation in which the party giving the consent was a participant.

6.93 We examine below whether the following acts should be liable for the intrusion tort:

- (a) recording of a telephone conversation by a party to the conversation;
- (b) recording of a face-to-face conversation by one of the parties to the conversation;
- (c) covert recording or interception of a telephone conversation by a third party with the consent of a party to that conversation; and

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<sup>98</sup> HKLRC, *Report on Privacy: Regulating the Interception of Communications* (1996), paras 4.67 - 4.86. See *R v Duarte* (1990) 53 CCC (3d) 1, 21.

- (d) covert listening to, or recording of, a face-to-face conversation by a third party with the consent of a party to that conversation.

*Recording of a telephone conversation by a party to the conversation*

6.94 We consider that a person who records a telephone conversation to which he is a party does not invade the privacy of the other party: he has neither intruded upon the solitude or seclusion of another nor has he intruded into the private affairs or concerns of another. A person in his position does not secretly listen to a conversation addressed to the ears of another.<sup>99</sup> The objection to surreptitious recording comes from the risk of unauthorised use or disclosure of the tape recording the conversation, rather than the invasion of something secret or private about the parties to the conversation.<sup>100</sup> The data protection principles in the PD(P)O, the law of breach of confidence, and the new tort of unwarranted publicity to be proposed in Chapter 7 should be sufficient to safeguard the parties' privacy interests in the contents of the conversation. Indeed, under DPP 2(1) and DPP 4, all practicable steps must be taken to ensure that: (a) personal data are accurate having regard to the purpose for which the personal data are, or are to be, used;<sup>101</sup> and (b) personal data held by a data user are protected against unauthorised or accidental access, processing or other use. Making one-party recording unlawful would lead to the result that an interlocutor could take shorthand notes of a conversation and reproduce them without liability, but would not be able to use a recording device to perform exactly the same function unless he had the consent of the other party.<sup>102</sup> If the other party is untrustworthy, an interlocutor can always safeguard his position by not releasing private information about himself to that other party. In our view, the distinction between surreptitious recording by a party to a telephone conversation, and making notes by a party during or after the conversation is a fine one. The difference between the two is not significant enough to draw a distinction in law. The mere fact that surreptitious recording is immoral to some people does not justify rendering it tortious under the law of privacy.

*Recording of a face-to-face conversation by one of the parties*

6.95 The above observations apply to face-to-face conversations as well as to telephone or other electronic communications. Hence, a journalist who uses a hidden device to record an oral conversation between himself and

<sup>99</sup> *Chaplin v National Broadcasting Co* (1953, DC NY) 15 FRD 134; cited in 11 ALR3d 1296 at 1305.

<sup>100</sup> The New Zealand Court of Appeal in *Harder v The Proceedings Commissioner* [2000] NZCA 129 agreed that, in the context of the Privacy Act 1993, there is no unfairness in the manner in which the information was collected simply because a tape recorder was used by a party to the conversation.

<sup>101</sup> In holding that a barrister was not unfair in tape-recording a conversation with the complainant without the latter's knowledge, the majority of the Court in *Harder v The Proceedings Commissioner* [2000] NZCA 129 at paras 31 - 35 made reference to the Data Quality Principle in the OECD Privacy Guidelines (1980) and focused on the need of the barrister to have a full and accurate record of the information given by the complainant.

<sup>102</sup> LRC of Australia, *Privacy* (Report No 22, 1983), para 1133; LRC of Canada, *Electronic Surveillance* (Working Paper 47, 1986), p 28.

an interviewee would not be liable for intrusion under our proposals.<sup>103</sup> However, some people find surreptitious recording of face-to-face conversations more objectionable than surreptitious recording of telephone conversations. They argue that although it is not uncommon in Hong Kong for people to use speaker-phones, recording machines and extension telephones by which a third party may hear a telephone conversation, an interlocutor does not normally expect the other party to record a face-to-face conversation by covert means. Whereas an interlocutor should take the risk that the other party on the telephone line is using a speaker-phone or has an extension telephone or a recording machine, he does not expect that the person he is talking to in a face-to-face conversation has a hidden microphone with him. Although we agree that surreptitious recording of face-to-face conversations is objectionable, the fact remains that there is no intrusion such as would render the recording an invasion of privacy. We think that broadly speaking, the arguments set out above apply to face-to-face conversations as well as to telephone conversations.<sup>104</sup>

*Covert recording or interception of a telephone conversation by a third party with the consent of a party to that conversation*

6.96 A person who is not a party to a conversation is in a different position. He intrudes into the private affairs of a party to that conversation if he listens to the conversation without that party's consent. The fact that the intruder may have obtained the consent of the other party to the conversation does not alter the fact that the conversation is private to the interlocutor whose consent is lacking. Nevertheless, having regard to the views expressed in the *Interception of Communications Report*, the Sub-committee considers that a person who reads, listens to or records a communication to which he is not a party should not be liable for the intrusion tort if one of the parties to that communication authorises or consents to his doing so.

6.97 In *Commonwealth of Pennsylvania v Rekasie*,<sup>105</sup> T agreed to participate in an investigation of the defendant and consented to have his telephone conversations with the defendant taped by the police. The Supreme Court of Pennsylvania held that the defendant did not have a reasonable expectation that his telephone conversation would be free from consensual participant monitoring:

*“Applying the Katz privacy expectation construct ..., we find that while [the defendant] might have possessed an actual or subjective expectation of privacy in the telephone conversation*

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<sup>103</sup> The US Supreme Court held that, in the context of oral conversations, a person cannot have a justifiable and constitutionally-protected expectation that a person with whom he is conversing will not then or later reveal that conversation to the police: *Lopez v US*, 373 US 427, 438; *US v White*, 401 US 745, 752.

<sup>104</sup> It must, however, be borne in mind that disclosure of private information revealed in a conversation is a different matter. Although a person who has used a hidden microphone during a face-to-face conversation would not be liable for intrusion, he might be liable for breach of DPP 3, breach of confidence, or the tort of public disclosure of private facts to be proposed by us if he has given publicity to the private information revealed in the conversation without consent.

<sup>105</sup> [J-52-2000], decided on 20.8.2001.

*with T, because of the nature of telephonic communication, it is not an expectation that society would recognize as objectively reasonable. A telephone call received by or placed to another is readily subject to numerous means of intrusion at the other end of the call, all without the knowledge of the individual on the call. Extension telephones and speakerphones render it impossible for one to objectively and reasonably expect that he or she will be free from intrusion. The individual cannot take steps to ensure that others are excluded from the call. Based upon these realities of telephonic communication, and the fact that [the defendant] could not reasonably know whether T had consented to police seizure of the contents of the conversation, we hold that [the defendant] did not harbour an expectation of privacy in his telephone conversation with T that society is willing to recognize as reasonable. ...*

*Qualitatively different than a face-to-face interchange occurring solely within the home in which an individual reasonably expects privacy and can limit the uninvited ear, on a telephone call, an individual has no ability to create an environment in which he or she can reasonably be assured that the conversation is not being intruded upon by another party. On the telephone, one is blind as to who is on the other end of the line. Thus while society may certainly recognize as reasonable a privacy expectation in a conversation carried on face-to-face within one's home, we are convinced society would find that an expectation of privacy in a telephone conversation with another, in which an individual has no reason to assume the conversation is not being simultaneously listened to by a third party, is not objectively reasonable.<sup>106</sup>*

6.98            However, the position under the Article 8 of the ECHR is different. In *A v France*,<sup>107</sup> G informed the police that Mrs A had hired him to murder someone and volunteered to make a telephone conversation to Mrs A's home to discuss possible methods for carrying out the crime. G then called Mrs A from the office of a police superintendent who recorded the conversation with a tape recorder. Mrs A later complained to the European Court of Human Rights, alleging that she was a victim of a violation of Article 8. The French Government pointed out that the recording had been made on the initiative and with the consent of one of the parties, while the conversations intercepted had dealt exclusively with matters - preparations of a criminal nature - which fell outside the scope of private life. Nonetheless, the Court noted that a telephone conversation did not lose its private character solely because its content concerned or might concern the public interest. It held that the interference in issue "undoubtedly" concerned Mrs A's right to respect for her "correspondence".

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<sup>106</sup> [J-52-2000], decided on 20.8.2001, at 11-13.

<sup>107</sup> No 40/1992/385/463, Series A no 277-B, 23.11.1993.

6.99 In *MM v The Netherlands*,<sup>108</sup> the police connected a tape recorder to the telephone of a crime victim, S, in order to allow her to tape incoming conversations with the suspect. The suspect later complained to the European Court of Human Rights that the recording constituted a violation of Article 8 of the ECHR. The Government argued that the police had merely indicated to S a way of obtaining evidence against the suspect. S had acted of her own free will and there had been nothing to prevent her from using a cassette tape recorder to record her telephone conversations with the suspect. The Court nonetheless held that there had been an “interference by a public authority” with the suspect’s right to respect for his “correspondence”. The Court was not persuaded by the Government’s argument that it was ultimately S who was in control of events. To accept such an argument would be tantamount to allowing investigating authorities to evade their responsibilities under the Convention by the use of private agents.

6.100 If an individual can reasonably expect his privacy in his conversations to be protected from intrusion by law enforcement agencies, even though the agency concerned has obtained the consent of the other party to the conversation, then it is reasonable for him to expect that his privacy in his conversations will be protected from intrusion by private persons in similar circumstances.

*Covert listening to, or recording of, a face-to-face conversation by a third party with the consent of a party to that conversation*

6.101 In *Commonwealth of Pennsylvania v Brion*,<sup>109</sup> the police sent a confidential informer, wearing a wiretap, to a suspect’s home to purchase illegal drugs. The informer entered the suspect’s home and made the purchase while transmitting the conversation to the monitoring agent who recorded it. The Supreme Court of Pennsylvania held that an individual could reasonably expect that his right to privacy would not be violated in his home through the use of electronic surveillance. The fact that the suspect was engaging in illegal activity did not render his subjective expectation of privacy unreasonable. Such expectation against government intrusion also exists in a personal office and a hotel room paid for and occupied.<sup>110</sup>

6.102 In *Allan v United Kingdom*,<sup>111</sup> the police placed an informer who had been fitted with recording devices in a suspect’s prison cell for the purpose of eliciting information from the suspect. The UK Government accepted that the use of covert recording devices on a fellow prisoner amounted to an interference with the suspect’s right to private life under Article 8 of the European Convention, following *Khan v UK*,<sup>112</sup> which concerned the use of a covert listening device installed on the premises of the friend of a suspect.

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<sup>108</sup> No 39339/98, date of judgment: 8.4.2003.

<sup>109</sup> 539 Pa 256, 652 A2d 287 (1994).

<sup>110</sup> *Commonwealth of Pennsylvania v Alexander* [J-47-1996], decided on 5.3.1998.

<sup>111</sup> No 48539/99, date of judgment: 5.11.2002, para 35.

<sup>112</sup> No 35394/97, date of judgment: 12.5.2000, paras 26-28.

6.103 In *PG and JH v United Kingdom*,<sup>113</sup> the police installed covert listening devices in the cells being used by the applicants and attached covert listening devices to the police officers who were present when the applicants were charged and when their antecedents were taken. The purpose was to obtain speech samples to compare with the tapes collected from a covert listening device installed in a suspect's flat. At the hearing before the European Court of Human Rights, the UK Government submitted that the use of the listening devices did not disclose any interference, as these recordings were not made to obtain any private or substantive information. They argued that the aural quality of the applicants' voices was not part of private life but was rather a public, external feature. In particular, the recordings made while they were being charged - a formal process of criminal justice, in the presence of at least one police officer - did not concern their private life.

6.104 The European Court disagreed. It noted that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life". It pointed out that a permanent record had been made of the person's voice and it was subject to a process of analysis directly relevant to identifying that person in the context of other personal data. Though it was true that when being charged the applicants answered formal questions in a place where police officers were listening to them, the recording and analysis of their voices must still be regarded as concerning the processing of personal data about the applicants. The Court therefore concluded that the recording of the applicants' voices when being charged and when in their police cell amounted to an interference with their right to respect for private life within the meaning of Article 8(1) of the Convention.

6.105 The purpose of the recording in *PG and JH v United Kingdom* had been to obtain speech samples. If an individual's voice (as opposed to the private or substantive information conveyed by the voice) should be protected from covert recording by the police even though the recording was made with the consent of a party to the conversation, then it is arguable that an individual's face-to-face conversation with another person should also be protected from covert recording by a private person if the purpose of the recording was not to obtain speech samples but to collect private or substantive information disclosed in the conversation, whether or not the other party to that conversation has consented to the recording.

#### *Conclusions on one-party consent*

6.106 Having regard to the decisions of the European Court of Human Rights cited above, and bearing in mind that consent is already a defence, we consider that:

- (a) *the recording or interception of a telephone conversation by a person who is not a party to that conversation is an intrusion upon a party to that conversation for the purposes of the intrusion tort, even*

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<sup>113</sup> No 44787/98, date of judgment: 25.9.2001.

though another party to that conversation has consented to that person recording or intercepting the conversation; and

- (b) *the covert listening to, or recording of, a face-to-face conversation* by a person who is not a party to that conversation is an intrusion upon a party to that conversation for the purposes of the intrusion tort, even though another party to that conversation has consented to that person listening to or recording that conversation.

6.107 We therefore consider it unnecessary to adopt Recommendation 10 in the Consultation Paper, which would enable a defendant to escape liability by relying on one-party consent. A defendant who is alleged to have covertly listened to, recorded or intercepted a telephone or oral conversation to which the plaintiff was a party should not have a defence on the ground that the listening, recording or interception was authorised or consented to by another party to the conversation. However, the defendant would be exempt from liability if the intrusion is justifiable under one of the defences proposed below, such as lawful authority and the prevention, detection or investigation of crime.

### ***Lawful authority***

6.108 The Irish Law Reform Commission suggests that the exercise of a legal duty, power or right of the defendant should constitute a defence to an act of privacy-invasive surveillance. It recommends that the legislation should provide that it is a defence to an action under the surveillance tort or the disclosure tort to show that the defendant was (a) fulfilling a legal duty, or (b) exercising a legal power, or (c) defending or maintaining a legal right of the defendant; and that the surveillance or disclosure, as the case may be, was justified by and was not disproportionate to the legal interest pursued.<sup>114</sup> An example of a person acting under a legal duty would be a member of the police force lawfully obeying a lawful order of his superiors to carry out surveillance of a person in the interests of the prevention or detection of crime. The reference to a "legal power" would encompass the exercise of lawful police powers whether conferred by common law or by statute. An example of the defence based on a person's defending or maintaining a legal right of that person would be that of a person using reasonable means (including the engagement of an agent such as a private detective) to discover evidence for the purposes of civil proceedings to be brought or defended by that person.<sup>115</sup>

6.109 The defence of lawful authority is generally available in the law of torts. Where a statute or the common law authorises an act to be done which would otherwise be actionable in tort, no person should be able to maintain an intrusion action for the doing of that act.

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<sup>114</sup> LRC of Ireland, *Report on Privacy* (1998), Ch 10, Head 3(1)(ii).

<sup>115</sup> LRC of Ireland, *Report on Privacy* (1998), para 7.24 and Explanatory Note to Head 3(1)(ii).

## Recommendation 5

**We recommend that it should be a defence to an action for the intrusion tort to show that the act or conduct in question was authorised by or under any enactment or rule of law.**

### *Legitimate interests justifying an intrusion*

6.110 Apart from consent and lawful authority, there are competing interests that may override the privacy interests of an individual. Article 8(2) of the European Convention on Human Rights gives us some indication as to the legitimate interests that would turn what would otherwise be an “arbitrary” interference with privacy into a non-arbitrary one. The Article requires that any restrictions imposed on the exercise of the right to privacy must be “*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.*”<sup>116</sup>

6.111 We agree that a defendant should have a defence if the purpose of an intrusion was to protect person or property, to prevent crime or unlawful conduct, or to safeguard national security or the security of Hong Kong. An individual’s right to preserve his seclusion must give way to the operational needs of the law enforcement authorities. However, any interference with an individual’s right to privacy by the law enforcement authorities must be both lawful and non-arbitrary under Article 14 of the HK Bill of Rights. In this connection, we note that the Commission’s proposal to regulate the interception of communications by means of a judicial warrant system has yet to be implemented by the Administration.<sup>117</sup> The Interception of Communications Ordinance (Cap 532), which was introduced by way of a Private Member’s Bill, was passed in June 1997 but its commencement has been withheld pending a review by the Security Bureau. Despite a lapse of eight years, there are little signs of the review being completed. We find this state of affairs unsatisfactory and urge the Administration to introduce a judicial warrant system without further delay. In relation to the use of surveillance devices by law enforcement agencies, while our final report on Surveillance has yet to be completed, similar concerns suggest that adequate regulation of the use of surveillance devices is likely to require a judicial warrant system similar to that recommended in our *Interception of Communications Report*.

6.112 The Hospital Authority submitted that without a “private health” defence, both the Authority and a third party having responsibility for the health of a patient might be in breach of the new tort when the patient is in need of medical care or treatment. We consider that it is unnecessary to include “health or safety of a person” in the defence because “the protection of the

<sup>116</sup> The Consultation Paper proposed that consent and the protection of the person or property of another should be defences to a privacy action.

<sup>117</sup> HKLRC, *Report on Privacy: Regulating the Interception of Communications* (1996).

person” is wide enough to protect the lawful activities of the Hospital Authority and its staff.

6.113 We note that even if an intrusion is justified by one of these legitimate aims, the extent, duration or means used may transform what would otherwise be a legitimate intrusion into an illegitimate one. The intrusion must therefore be proportionate to, and not more intrusive than is necessary for, the legitimate aim pursued by the defendant. If the legitimate aim could have been pursued without intruding upon the privacy of the plaintiff or by means less intrusive than those actually employed, then the Court should be able to disallow the defence in relation to the acts actually committed. Such an approach is in line with the observations made by the UN Human Rights Committee as to what interference would be “arbitrary” under Article 17 of the ICCPR. We believe that the requirements of necessity and proportionality would ensure that the defence would not be abused.

#### **Recommendation 6**

**We recommend that it should be a defence to an action for the intrusion tort to show that the act or conduct constituting the intrusion was necessary for and proportionate to:**

- (a) the protection of the person or property of the defendant or another;**
- (b) the prevention, detection or investigation of crime;**
- (c) the prevention, preclusion or redress of unlawful or seriously improper conduct; or**
- (d) the protection of national security or security in respect of the Hong Kong SAR.**

6.114 Noting that there would be no public interest defence for those who intrude upon another’s solitude or seclusion, the HK Journalists Association argued that the proposals would be a serious impediment to investigative journalism. We should point out that press freedom is implicated when a person seeks to give publicity to a matter of public interest, but not when a person seeks to use privacy-invasive means to obtain information from an unwilling speaker. Providing a general defence of public interest would encourage private individuals to go on a “fishing expedition” by surveillance in an attempt to uncover information that might or might not subsequently prove to be of public interest. Nevertheless, although we have decided that the general defence of public interest should not be available to defendants in actions for intrusion, we have recommended above a few specific defences to exclude from the scope of the intrusion tort, certain intrusions that can be justified in the public interest. We are satisfied that by making these specific defences available to defendants, the intrusion tort would not unduly impede investigative journalism that relates to a matter of public interest.

6.115 We are aware that there is a risk of the defences in items (b) to (d) of Recommendation 6 being abused by private individuals who wish to take the law into their own hands. However, we believe that the requirement that the intrusion be “necessary and proportionate to” one of the prescribed purposes would provide sufficient safeguards against abuse. Where a crime is involved or public security is at stake, it would be difficult in all but the most unusual circumstances for a private citizen to show that it was appropriate for him to take action, rather than the law enforcement agency concerned.

6.116 The HK Federation of Women enquired whether intrusive conduct that was “well intentioned” would be caught. They quoted the example of parents reading the diaries of their children lest they befriended the wrong kind of people. It should be noted at the outset that the privacy of children is protected under Article 17 of the ICCPR and Article 16 of the UN Convention on the Rights of the Child. In determining whether or not a parent is liable for intrusion, the Court would have regard to the child’s privacy expectation and the powers and responsibilities which a parent has in relation to his child or the child’s property. The degree of privacy expectation enjoyed by a child varies with his age and maturity. A child has a higher degree of privacy expectation as he grows older. In the unlikely event that a parent is sued for intruding upon the privacy of his child by reading his diary or searching his school bag, the parent may also rely on the defence of lawful authority, the protection of person, or the prevention of unlawful or seriously improper conduct if, for example, he reasonably suspects that his child was taking drugs or has close ties with a triad society.

## Chapter 7

### Unwarranted publicity given to an individual's private life

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7.1 We begin this chapter by setting out some of the legal and jurisprudential arguments for providing a civil remedy for unwarranted publicity given to a matter concerning an individual's private life. Since the object is to protect "facts pertaining to an individual's private life" from publicity, an attempt will be made to define those facts, the publication of which would constitute an invasion of privacy. The notion of "publicity" (as opposed to "disclosure") will be employed so that gossiping or disclosure to a few persons would not be liable in tort. In recognition of the importance of freedom of expression, the new tort would protect individuals only from privacy-invasive publicity that is unwarranted. Hence, a defendant would not be liable if the publicity is in the public interest and can pass the proportionality test. To assist the courts in carrying out the balancing exercise, an attempt will be made to identify those interests which we think may override the privacy interests of the plaintiff. Whether an individual should be barred from recovery if the published facts are in the public domain is examined at the end of this chapter.

#### The need to provide a civil remedy for unwarranted publicity

7.2 **General** – Individual privacy may be invaded by unwarranted publicity given to facts concerning an individual's private life. Giving publicity to intimate information about an individual without his consent can prejudice his ability to maintain social relationships and pursue his career. For instance, publishing the fact that a woman is mentally retarded, a lesbian, a prostitute, a drug addict, a transsexual, illegitimate, a patient receiving treatment for breast cancer, or an attendant in a nightclub may make it difficult for her to maintain a normal relationship with her acquaintances and family members. The same impact would result as a consequence of a publication that discloses the fact that a man is impotent, infertile, unemployed, dependant on Government assistance, working in a funeral parlour, or earning his living by collecting nightsoil. A person may also want to keep to himself facts that tend to show him in a favourable light. Thus, an individual may not want others know that he is a prodigy, a subscriber to a philanthropic society, or a wealthy person. Individuals who are grief-stricken and public figures who have suffered a setback are particularly vulnerable to mental distress caused by unwanted publicity.

7.3 **The principle of "inviolable personality"** – Personal information is a lucrative commodity which has a large market. To some sections of the

press, giving publicity to the private lives of newsworthy persons is a source of substantial profits. The press has a private commercial interest in publishing the details of the private lives of individuals. Warren and Brandeis noted as early as in 1890 that the press might subject ordinary citizens to mental pain and distress, “far greater than could be inflicted by mere bodily injury.”<sup>1</sup> They argued that the protection afforded to thoughts, sentiments and emotions by the common law right to intellectual and artistic property, was, so far as it consisted of preventing publication, merely an instance of the enforcement of the more general right of the individual to be let alone. In their opinion, the principle which protected personal productions against publication was in reality not the principle of private property, but that of “inviolable personality”.<sup>2</sup>

**7.4 Control over the communication of personal information –** Westin describes privacy as the “*claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others*”.<sup>3</sup> Used in that sense, privacy could be defined in terms of the degree of control an individual has over his personal information; and an individual could be said to have lost privacy if information about him is disclosed without his consent for an unauthorised purpose. Although maintaining the confidentiality of personal information is one of the functions of privacy, Feldman argues that concentrating on secrecy misrepresents the nature of privacy by suggesting that it refers to cloistered or “hole-in-the-corner” activities. In his view, the right to disclose personal information or not is an aspect of privacy; controlling the flow of personal information can best be described not as secrecy but in terms of “selective disclosure”.<sup>4</sup>

**7.5 Values protected by a tort of unwarranted publicity –** Feldman explains why controlling the disclosure of personal information is instrumentally valuable as a support for privacy interests:<sup>5</sup>

- It helps us to forge and conduct personal and social relationships.
- It protects individual choice by preventing a person from being diverted from his chosen path lest others would be offended or might try to bring pressure to bear on him if his choice is made known to others.
- It enables family life to flourish in a secure home.
- It protects the privacy and freedom of private communications.
- It enables people to indulge their personal preferences in sex, play, reading matter, religious worship, food or dress, in settings where they are not visible to others.

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<sup>1</sup> S D Warren & L D Brandeis, “The Right to Privacy”, 4 Harv L Rev 193, 195 - 196. The article, written in 1890, was the genesis of the tort of invasion of privacy based on public disclosure of private facts in the US. The leading case was *Pavesich v New England Life Ins Co* 50 SE 68 (Ga 1905) in which the Supreme Court of Georgia accepted the views of Warren and Brandeis and recognised the existence of a distinct right of privacy. At present, the vast majority of states in the US have adopted the tort of public disclosure of private facts through the common law system.

<sup>2</sup> S D Warren & L D Brandeis, above, at 205.

<sup>3</sup> A F Westin, *Privacy and Freedom*, above, at 7.

<sup>4</sup> D Feldman, “Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty” (1994) 47(2) CLP 41, 53.

<sup>5</sup> Above, at 54.

7.6 Privacy enables sheltered experimentation and testing of ideas without fear of ridicule or penalty. It also provides for an opportunity to alter opinions before they are made public.<sup>6</sup> Warren and Brandeis observed that “[i]f casual and unimportant statements in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity.”<sup>7</sup>

7.7 **Argument from autonomy** – It follows from the discussion above that if people are free to publish personal information with impunity, it would have the effect of interfering with an individual’s autonomy by constraining his choices as to his private behaviour or affairs. Phillipson and Fenwick observe:

*"much privacy-invading speech, by both directly assaulting informational autonomy and indirectly threatening the individual's freedom of choice over substantive issues, far from being bolstered by the autonomy rationale, is in direct conflict with it. The state, in restricting what one citizen may be told about the private life of another, is not acting out of a paternalistic desire to impose a set of moral values thereby, but rather to assure an equal freedom to all to live by their own values."*<sup>8</sup>

7.8 **Argument from democracy** – Free speech theories also support the protection of individuals from unwarranted publicity on the basis that it is necessary for the furtherance of democracy. In the absence of legal protection in this area, individuals would be deprived of the freedom to engage in the free expression and reception of ideas and opinion, particularly those which question mainstream thoughts and values. Conversely, protecting private information from publicity would attract more talented individuals to serve the community and is conducive to the formation of public opinion and effective participation in government.

7.9 **Existing law** – Under the present law, the publication of true facts may be restrained on the basis that it constitutes a breach of confidence, contempt of court, or a breach of the Use Limitation Principle (DPP 3) in the PD(P)O, but these remedies cannot provide an adequate and effective civil remedy for the publication of true but harmful information about the private life of another.<sup>9</sup> Victims of unwarranted publicity cannot maintain an action for defamation if what was publicised is proved to be true. It matters not that the information is insulting or scurrilous. *“Newspapers are free ... to rake up a man’s forgotten past, and ruin him deliberately in the process, without risk of*

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<sup>6</sup> A F Westin, above, at 34.

<sup>7</sup> S D Warren and L D Brandeis, above, at 213 - 214.

<sup>8</sup> G Phillipson & H Fenwick, “Breach of Confidence as a Private Remedy in the Human Rights Act Era” (2000) 63 MLR 660, 682.

<sup>9</sup> See Chapter 2.

*incurring tortious liability [for defamation].*<sup>10</sup> But truth may be more injurious than falsehood. The publication of true and accurate information about an individual can be deeply embarrassing and injurious to his feelings. Unless its publication can be justified in the public interest, personal information should be protected from unwanted publicity even though the information is true and accurate.

**7.10 Personal Data (Privacy) Ordinance** – Since DPP 3 of the PD(P)O restricts the use of personal data to that for which the data were collected, the Ordinance cannot restrain unwanted publicity if the published information has been collected by the publisher precisely for the purpose of publication. As far as media coverage is concerned, the publication in the media of personal data collected by a journalist is normally consistent with the purpose for which the data were collected.<sup>11</sup> The requirement that it is practicable for the identity of the individual to be ascertained from the data also poses a problem if his name or other forms of identification is not disclosed in the publication.<sup>12</sup> The PD(P)O is therefore not effective in restraining unwanted publicity given to personal information which is not a matter of genuine public concern.

**7.11 ICCPR** – In the opinion of the UN Human Rights Committee, the parties to the ICCPR have to take effective measures to ensure that *“information concerning a person’s private life does not reach the hands of persons who are not authorised by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.”*<sup>13</sup> According to Nowak, the right to privacy under Article 17 of the Covenant encompasses *“a right to secrecy from the public of private characteristics, actions or data”*.<sup>14</sup>

**7.12 Nordic Conference** – The Nordic Conference on the Right of Privacy declared that the unauthorised disclosure of intimate or embarrassing facts concerning the private life of a person, published where the public interest does not require it, should in principle be actionable.

**7.13 Other jurisdictions** – Many jurisdictions allow recovery for unwarranted publicity.<sup>15</sup> Giving publicity to private facts is a common law tort in India, South Africa and the US.<sup>16</sup> In Canada, the Uniform Privacy Act provides that *“publication of letters, diaries or other personal documents of the individual”* is *prima facie* a violation of privacy. In mainland China, unwanted publicity is actionable as an infringement of the right to reputation under the

<sup>10</sup> M Brazier, *Streets on Torts* (Butterworths, 9th edn, 1993), p 445. Cf *Lyon v Steyn* (1931) TPD 247 in which the Court held that *“It cannot be in the public interest to rake up the ashes of the dead past and accuse a man of having done something thirty years ago.”*

<sup>11</sup> It is a moot point whether a journalist collecting personal data from a source would contravene DPP 1 if the journalist knew that the data were not being used by the source for the intended purpose.

<sup>12</sup> See the discussion of the PD(P)O in Chapter 2.

<sup>13</sup> UN Human Rights Committee, General Comment 16/32 of 23 March 1988, para 10.

<sup>14</sup> M Nowak, above, 296.

<sup>15</sup> See Chapter 4.

<sup>16</sup> *“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”* Restatement 2d, Torts, §652D.

General Principles of Civil Law. The Draft Civil Code of the PRC protects an individual from invasion of privacy by unauthorised disclosure or publication of private information. As regards the Macao SAR, the Macao Civil Code protects individuals from revelation that falls within “the intimacy of private life”. The Media Act in Austria prohibits disclosures about a person’s intimate sphere when they imply an undesired exposure to the public in the absence of a strong public interest. It is an offence in Denmark to communicate to another person any information or picture about another which concerns his private life. The Civil Codes of France, Germany and Spain also grant relief for dissemination of facts pertaining to an individual’s private life. The Civil Code of Italy provides that the publication of a picture of a person may be restrained if it causes prejudice to his dignity or reputation. The Italian courts recognise that publication of personal information in the absence of any overriding public interest is an infringement of the right of privacy. The Civil Code of the Netherlands imposes liability for publishing damaging private information about an individual in the absence of a good reason. The courts in Australia have yet to recognise an enforceable right of privacy but the Australian Law Reform Commission has recommended that a right of action for publication of “sensitive private facts” be created. Recently, the Irish Law Reform Commission recommends that unjustifiable disclosure or publication of information obtained by privacy-invasive surveillance or harassment be a tort. The Calcutt Committee in the UK was also satisfied that it would be possible to define a statutory tort of infringement of privacy which relates specifically to the publication of personal information.

7.14 **Conclusion** – We consider that a person who suffers damage as a result of another person giving publicity to a matter concerning his private life without justification should have a remedy at civil law.

## **Matters concerning an individual’s private life**

7.15 If the law should provide relief for the unauthorised publication of true facts because they relate to an individual’s private life, we need to distinguish between facts which could be regarded as relating to an individual’s private life and those which could not. Thomas Emerson suggests that in determining the scope of a tort of “public disclosure of private facts”, the law should take account of factors which derive ultimately from the functions performed by privacy and the expectations of privacy that prevail in contemporary society. After stating that one such factor is the element of intimacy, he says that the tort should only protect matters relating to the intimate details of a person’s life, ie, *“those activities, ideas or emotions which one does not share with others or shares only with those who are closest. This would include sexual relations, the performance of bodily functions, family relations, and the like.”*<sup>17</sup>

7.16 In the opinion of Nowak, personal data the publication of which would be “embarrassing or awkward for the person concerned for reasons of

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<sup>17</sup> T I Emerson, above, at 343.

morals” should enjoy legal protection. He gives the examples of “*the publication of secretly acquired nude photos or personal writings (diaries, letters, etc.) or of revelations of a person’s sex life, so-called anomalies, perversions or other (true or fabricated) peculiarities that would subject the person concerned to public ridicule.*”<sup>18</sup>

7.17 The way the tort of “public disclosure of private facts” is developed in the US also suggests that “private facts” comprise intimate details of an individual’s life. The *Restatement of Torts* observes:

*“Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man’s life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of privacy, unless the matter is one of legitimate public interest.”*<sup>19</sup>

7.18 It is difficult to maintain that the disclosure of any personal information which a person would prefer to keep private constitutes an invasion of privacy. An individual’s expectation of privacy must be reasonable in the circumstances. Raymond Wacks therefore suggests that any definition of “personal information” should refer both to the quality of the information and to the reasonable expectation of the individual concerning its use. He proposes that “personal information” be defined as consisting of “*those facts, communications, or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict their collection, use, or circulation.*”<sup>20</sup>

7.19 Clause 19(1) of the draft Unfair Publication Bill in Australia provided that a person publishes “sensitive private facts” concerning an individual where the person publishes “*matter relating or purporting to relate to the health, private behaviour, home life or personal or family relationships of the individual in circumstances in which the publication is likely to cause distress, annoyance or embarrassment to an individual in the position of the first-mentioned individual.*”

7.20 The Calcutt Committee in the UK proposed that if the privacy tort relating to the publication of personal information were to be created, “personal information” should be defined in terms of an individual’s personal life, that is to say, “*those aspects of life which reasonable members of society would respect as being such that an individual is ordinarily entitled to keep them to himself,*

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<sup>18</sup> M Nowak, above, 296.

<sup>19</sup> *Restatement 2d, Torts*, § 652D, comment b.

<sup>20</sup> R Wacks (1993), above, 26.

*whether or not they relate to his mind or body, to his home, to his family, to other personal relationships, or to his correspondence or documents.*<sup>21</sup>

7.21 The UK Consultation Paper suggested that “personal information” may be defined as “*any information about an individual’s private life or personal behaviour, including, in particular, information about: (a) health or medical treatment, (b) marriage, family life or personal relationships, (c) sexual orientation or behaviour, (d) political or religious beliefs, or (e) personal legal or financial affairs*”.<sup>22</sup>

7.22 The Committee of Ministers of the Council of Europe recommended that personal data falling within any of the categories referred to in Article 6 of the Council of Europe Convention on Privacy 1981 should not be stored in a file generally accessible to third parties. Any exception to this principle should be strictly provided by law and accompanied by the appropriate safeguards and guarantees for the data subject.<sup>23</sup> The categories of data referred to in the Article are: (a) personal data revealing racial origin, political opinion or religious or other beliefs; (b) personal data concerning health or sexual life; and (c) personal data relating to criminal convictions.<sup>24</sup>

7.23 The European Union Data Protection Directive 1995 further requires Member States to prohibit the “processing” of “personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership” and “data concerning health or sex life” unless it falls within one of the prescribed exceptions.<sup>25</sup>

7.24 In *Earl and Countess Spencer v United Kingdom*,<sup>26</sup> a newspaper reported the second applicant’s admittance to a private clinic which treated bulimia and alcoholism. The article was accompanied by a photograph of the applicant taken with a telephoto lens while she was walking in the grounds of the clinic. Since the applicant had been simply walking in the garden, the photograph in itself did not show a “private act”. Nonetheless, the European Commission of Human Rights “would not exclude” the possibility that the absence of an actionable remedy in the UK in the particular circumstances of this case could be said to show a lack of respect for private life under Article 8 of the ECHR. However, the European Commission ruled that the UK Government had not breached Article 8 because the applicants had not exhausted the remedy of breach of confidence.

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<sup>21</sup> Para 12.17. The Committee recommended that business, professional and official material be specifically excluded: para 12.18.

<sup>22</sup> The UK Consultation Paper, Annex B, para 2(iv).

<sup>23</sup> Council of Europe Recommendation No R(91)10 of the Committee of Ministers on *Communication to Third Parties of Personal Data Held by Public Bodies*, Principle 3.

<sup>24</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981), Council of Europe, European Treaty Series No 108.

<sup>25</sup> Directive of the European Parliament and the Council of Europe on the *Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data* (1995), Article 8. “Processing” is defined as including “disclosure by transmission, dissemination or otherwise making available”.

<sup>26</sup> No 28851/95 and No 28852/95, (1998) 25 EHRR CD 105.

7.25 In the view of Eric Barendt, it would be possible for legislation to list the categories of matters which might be covered by the concept or right of privacy, such as “personal correspondence, diaries, intimate photographs, medical records, and so on”. Such a list should not be exhaustive, so that the courts would be free, when appropriate, to hold that some item of information not covered by any of the explicit headings could be protected. Legislation should provide some guidance of this kind, rather than simply stipulate that the right to privacy is protected.<sup>27</sup>

7.26 The Privacy Sub-committee’s Consultation Paper provisionally recommended that for the purposes of the tort of unwarranted publicity, matters concerning the private life of an individual should include information about his private communications, home life, personal and family relationships, private behaviour, health and personal financial affairs.

7.27 We note that whether or not a particular piece of information concerns the private life of an individual depends on the customs and culture of a community, and different communities have different understanding of what private information comprises. Hence although 64% of the respondents in a survey conducted in Hong Kong would object if information about their financial status was made publicly available to anyone who wanted it,<sup>28</sup> the financial affairs of an individual are not treated as private information in some countries. Likewise, although the religious belief of an individual is a piece of sensitive information in western countries, the result of that survey revealed that only 15% of the respondents would object if their religious views were publicly disclosed. In the light of the recent controversy over whether Falun Gong is an evil cult, the Hong Kong public would probably hold the view that membership of Falun Gong is a private fact that should be protected from publicity, even though they are relaxed about their religious beliefs.

7.28 We are doubtful whether it is practicable to specify the categories of information that reasonable members of society would consider ought to be protected from unwarranted publicity. Private life is a broad term not susceptible to exhaustive definition.<sup>29</sup> Categories of facts relating to an individual’s private life are not fixed and may change over time. It is undesirable to give a definitive statement as to what facts relate to an individual’s private life for the purposes of the tort.<sup>30</sup>

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<sup>27</sup> E M Barendt, “The Protection of Privacy and Personal Data and the Right to Use One’s Image and Voice: When Does the Dissemination of Information Become an Interference with a Person’s Life?” in *Conference on Freedom of Expression and the Right to Privacy – Conference Reports* (Strasbourg: Council of Europe, 2000), DH-MM(2000)7, at 60 (arguing that the difficulties of defining the concept or right of privacy with sufficient precision to make the application of the law predictable have been “considerably exaggerated”).

<sup>28</sup> “Summary of the results of the survey on privacy attitudes in HK conducted by Dr John Bacon-Shone and Harold Traver” in HKLRC, *Report on Reform of the Law Relating to the Protection of Personal Data* (1994), Appendix 2.

<sup>29</sup> *Perry v United Kingdom*, No 63737/00, date of judgment: 17.7.2003, para 36 (ECtHR).

<sup>30</sup> A tort of invasion of privacy by public disclosure may be limited to information obtained by means of surveillance or interception of communications. However, restricting civil remedies to the disclosure of personal information obtained by unlawful means would be an inadequate response to the problems of unwanted publicity. Liability for unwanted publicity should not depend on whether the means used to obtain the information is lawful or not. A person who has exposed sensitive or intimate information about another person’s private life without justification

7.29 In this connection, we note that Article 130 of the Estonian Criminal Code made it an offence to degrade “another person’s honour and dignity in an improper form”. Although this offence was worded in general terms, the European Court of Human Rights found that it could not be regarded as so vague and imprecise as to lack the quality of “law” under the ECHR.<sup>31</sup> Likewise, section 78 of the Austrian Copyright Act<sup>32</sup> employs the imprecise wording of “legitimate interests,” thereby conferring broad discretion on the courts, but the European Court did not rule that the law was not formulated with sufficient precision to enable the persons concerned to foresee, to a degree that was reasonable in the circumstances, the consequences of a given action. The Court acknowledged that laws were frequently framed in a manner that was not absolutely precise: such considerations were particularly cogent in relation to the publication of a person’s picture, where the courts were called upon to weigh that person’s rights, such as the right to respect for his private life, against the publisher’s right to freedom of expression.<sup>33</sup>

7.30 We are mindful that investigative journalism is an important element in the exercise of press freedom. To ensure that the freedom of the press in publicising the fruits of investigative journalism would not be fettered by the new legislation, we shall recommend, in the latter part of this chapter, that the public interest defence and the defence of qualified privilege should be made available to the defendant in these actions.

7.31 As regards crimes, accidents and catastrophes, they are not normally matters concerning the private life of an individual. However, a distinction should be drawn between an event of public interest and the identity of the individual involved. While the former may be published with impunity, the latter should be protected from publicity if the purpose of keeping the public informed could be served without revealing the individual’s identity.<sup>34</sup>

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should not be allowed to avoid liability merely because these facts were obtained by lawful means. See R Wacks (1995), above, 133-143.

<sup>31</sup> *Tammer v Estonia*, No 41205/98, date of judgment: 6.2.2001, para 38.

<sup>32</sup> Quoted in Chapter 4.

<sup>33</sup> *News Verlags GmbH & CoKG v Austria*, No 31457/96, date of judgment: 11.1.2000, para 43.

<sup>34</sup> It is interesting to note that the New Zealand court in *L v G* [2002] DCR 234; 2002 NZDCR LEXIS 2 held that it was unnecessary for the complainant to be identified in the publication. The judge said at 32 and 34: “if privacy is seen by the community as a value which is peculiarly personal, in the sense that it reinforces a ‘psychological need to preserve an intrusion-free zone of personality and family’, with the consequence that ‘there is always anguish and stress when that zone is violated’ (*The Justice Game*, by Geoffrey Robertson QC, page 351), the rights which are protected by the tort of breach of privacy relate not to issues of perception and identification by those members of the public to whom the information is disclosed but to the loss of the personal shield of privacy of the person to whom the information relates. ... [I]f an accident victim is in ‘a shockingly wounded condition’, he or she may not be identifiable from a photograph. It therefore follows ... that the focus in such a scenario is on the hurt to the victim which results from the publication of a distressing photograph of him or her, and not on whether he or she could be identified from the photograph. However, whether or not the person in question can be identified, and, if so, to what extent or by what sector of the public, must of course be a relevant factor in the assessment of the damages which should be awarded for the breach in question.”

## Publicity vs disclosure to a selected few

7.32 The tort of “public disclosure of private facts” in South Africa and the US requires that the disclosure of “private facts” be a “public disclosure” and not a private one. The requirement of “public disclosure” connotes publicity in the sense of communication to the public in general or to a large number of persons, as distinguished from one individual or a few. While the simple disclosure of personal information to a single person or to a small group of persons is not sufficient to support a claim, any publication in a newspaper or magazine or statement made in an address to a large audience would suffice.<sup>35</sup>

7.33 Under the law of defamation, a defamatory statement is actionable irrespective of the extent of publication. A question arises as to whether liability for unwarranted publicity should depend on the extent of publication. Bloustein thinks that it should be:

*“The reason is simply that defamation is founded on loss of reputation while the invasion of privacy is founded on an insult to individuality. A person’s reputation may be damaged in the minds of one man or many. Unless there is a breach of a confidential relationship, however, the indignity and outrage involved in disclosure of details of a private life, only arise when there is a massive disclosure, only when there is truly a disclosure to the public. ... The gravamen of a defamation action is engendering a false opinion about a person, whether in the mind of one other person or many people. The gravamen in the public disclosure cases is degrading a person by laying his life open to public view. In defamation a man is robbed of his reputation; in the public disclosure cases it is his individuality which is lost.”<sup>36</sup>*

7.34 Gossiping about private affairs of others is as old as human history. It is said to be “a basic form of information exchange that teaches about other lifestyles and attitudes, and through which community values are changed or reinforced.”<sup>37</sup> The effect of gossip is trivial and limited because it is usually confined to friends and relatives. A person’s peace and comfort would only be slightly affected if at all. But the publication of personal information in the press is of a different order. There is a substantial distinction between the second-hand repetition of the contents of a conversation and its mass dissemination to a large number of people.

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<sup>35</sup> Restatement 2d, Torts, § 652D, comment a. *American Jurisprudence* observes that: “While an actionable disclosure is generally one made only to a large number of people, it cannot be said that disclosure of embarrassing private facts to a comparatively small number of people will automatically be insufficient to constitute a public disclosure. There is no magic formula or ‘body count’ that can be given to permit counsel to determine with certainty whether the number of persons to whom private facts have been disclosed will be sufficient in any particular case to satisfy the public disclosure requirement. The concept of public disclosure is not subject to precise or rigid formulae but is flexible, and the facts and circumstances of a particular case must be taken into consideration in determining whether the disclosure was sufficiently public so as to be actionable.” See 62A Am Jur 2d, Privacy, § 95.

<sup>36</sup> E J Bloustein, above, at 981.

<sup>37</sup> D L Zimmerman, “Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort”, (1983) 68 Cornell L Rev 291, 334.

7.35 Unwarranted publicity is objectionable even though the individual is portrayed in a favourable light and the public takes a sympathetic view of the facts disclosed:

*“What the [plaintiffs in the public disclosure cases] complain of is not that the public has been led to adopt a certain attitude or opinion concerning them - whether true or false, hostile or friendly - but rather that some aspect of their life has been held up to public scrutiny at all. In this sense, the gravamen of the complaint here is just like that in the intrusion cases; in effect, the publicity constitutes a form of intrusion, it is as if 100,000 people were suddenly peering in, as through a window, on one’s private life.*

*When a newspaper publishes a picture of a newborn deformed child, its parents are not disturbed about any possible loss of reputation as a result. They are rather mortified and insulted that the world should be witness to their private tragedy. The hospital and the newspaper have no right to intrude in this manner upon a private life. Similarly, when an author does a sympathetic but intimately detailed sketch of someone, who up to that time had only been a face in the crowd, the cause for complaint is not loss of reputation but that a reputation was established at all. The wrong is in replacing personal anonymity by notoriety, in turning a private life into a public spectacle.”<sup>38</sup>*

7.36 We agree that gossiping among friends and relatives or disclosure of information to a single individual or a few should not attract liability in tort. But if facts pertaining to an individual are disclosed to the public (or to a large number of persons) and the disclosure is not in the public interest, the individual concerned should have a remedy whether or not he is portrayed in a favourable light. We therefore conclude that the law should protect the private affairs of an individual from being dragged into public view unless the community has a legitimate concern over his affairs.

7.37 **Publicity on the Internet** – Internet users may take advantage of various communication and information retrieval methods, such as electronic mail, automatic mailing list services (“listservs”), “newsgroups”, “chat rooms”, and the World Wide Web. All these methods can be used to transmit sound, pictures and moving video images. In effect, the information superhighway turns all computer users into potential publishers and broadcasters by enabling them to communicate and share information with large groups of people at the touch of a button without incurring any significant cost. Publication is no longer the prerogative of newspaper or book publishers nor is broadcasting the prerogative of licensed broadcasters any more. Any person with a computer connected to the Internet can invade another person’s privacy by rendering facts concerning the latter’s private life accessible to a world-wide audience consisting of millions of viewers.

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<sup>38</sup> E J Bloustein, above, at 979, citing *Bazemore v Savannah Hosp*, 171 Ga 257 (1930) and *Cason v Baskin*, 155 Fla 198 (1944) as authorities.

7.38 Since the Internet facilitates publication and forwarding of personal information to large groups of people upon the click of a button, the harm which might be caused to the individual by publishing sensitive information about him on the Internet is more substantial than the publication of the same piece of information in a local newspaper. The ease with which intimate details of our lives can be assimilated, processed and disseminated to a wide audience increases the risk and magnitude of loss of privacy. This is all the more so when the record on the Internet will remain accessible to all Internet users virtually indefinitely.

7.39 By creating a tort of unwarranted publicity, the law would not only provide a remedy for unwarranted publicity in the press, but would also provide a remedy where the facts have been posted on the Internet and the aggrieved individual can find out who the publisher is. Given that the plaintiff would have to show that the defendant knew or ought to have known that the publication was seriously offensive or objectionable to a reasonable person,<sup>39</sup> an Internet (or bulletin board) service provider who is merely an innocent distributor, would not be held liable for the acts of the Internet users. This would be particularly so if the service provider has no control over the storage of the offending posting or is not aware of its existence in the server. However, if the service provider is aware of the offending posting in its server and fails to respond to a reasonable request to remove or obliterate it from the website, then it is open to the Court to hold the service provider liable as a publisher.<sup>40</sup>

## Offensiveness of the publicity

7.40 We consider that to be actionable, the publication in extent and content must be of a kind that would be seriously offensive or objectionable to a reasonable person of ordinary sensibilities. Distress, humiliation and embarrassment are key elements of the action. It is only when the publicity given to the plaintiff is such that a reasonable person would feel justified in feeling substantially hurt that he should have a cause of action. Qualifying the tort by the notion of offensiveness would check frivolous or blackmailing actions. Besides, a person should not be liable unless he knew or ought to have known that the publicity would be seriously offensive or objectionable to a reasonable person.

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<sup>39</sup> See Recommendation 7.

<sup>40</sup> Cf *Godfrey v Demon Internet Ltd* [2000] 3 WLR 1020 at 1026H-1027C (holding that an ISP is a publisher at common law if it transmits a defamatory posting to any of its newsgroup subscribers from the storage of its news server). The situation is analogous to that of the owner of a notice board: *Byrne v Deane* [1937] 1 KB 818 (holding that if a person deliberately refrained from removing or obliterating defamatory matter on premises under his control, he might make himself responsible for its continued presence in the place where it had been put). Under s 1 of the UK Defamation Act 1996, which codifies the defence of innocent dissemination at common law, an ISP has a defence if he could show that he was not the author, editor or publisher of the statement in question; he took reasonable care with regard to its publication; and he did not know, and had no reason to believe, that what he did caused or contributed to the publication of the defamatory statement. In contrast, in the US, by virtue of the Communications Decency Act 1996 (at <[www.swiss.ai.mit.edu/6805/articles/cda/cda-final.html](http://www.swiss.ai.mit.edu/6805/articles/cda/cda-final.html)>), s 230 of the Communications Act 1934 has created a federal immunity to any cause of action that would make ISP liable for information originating with a third-party user of the service, thus precluding courts from entertaining claims that would place an ISP in a publisher's role: *Zeran v America Online Inc*, 958 F Supp 1124 (E D Va 1997), aff'd 129 F 3d 327.

7.41 The Federal Supreme Court of Germany has held that even where there has been an unlawful invasion of the right of personality, the victim can claim damages for “immaterial harm” only when the gravity of the invasion makes such a *solatium* absolutely necessary. Whether such an invasion is sufficiently grave depends on the facts of the case, including:<sup>41</sup>

- (a) the seriousness and intrusiveness of the invasion;
- (b) the dissemination of the publication;
- (c) the duration of the harm to the victim’s interests and reputation;
- (d) the nature of the defendant’s conduct (or the manner of publication);
- (e) the reasons for the defendant’s conduct (or the motive of the defendant); and
- (f) the degree to which the defendant was to blame.

7.42 The gravity of an invasion is also decisive in determining the quantum of compensation in France. Whether an invasion is grave or not depends on the following factors:<sup>42</sup>

- (a) whether the means used to obtain the information is inadmissible;
- (b) whether the facts that have been disclosed are very intimate;
- (c) whether the way in which the subject has been shown or depicted to the public is intolerable;
- (d) whether the defendant has been previously and firmly warned by the plaintiff that any invasion would not be tolerated; and
- (e) the extent of the dissemination, which will determine both the extent of the harm caused to the plaintiff and the level of profits made by the defendant.

7.43 Wacks considers that the following considerations are relevant in assessing whether a publication is in the public interest:<sup>43</sup>

- (a) Is the plaintiff a public figure?
- (b) Was the plaintiff in a public place?
- (c) Is the information available on public record?
- (d) Did the plaintiff consent to publication?
- (e) How was the information acquired?
- (f) Was it essential for the plaintiff’s identity to be revealed?
- (g) Was the invasion of privacy sufficiently serious?
- (h) What was the defendant’s motive in publishing?

7.44 We agree that the legislation should specify the factors that the Court should take into account when determining whether the publicity would be seriously offensive or objectionable to a reasonable person. These factors may include:

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<sup>41</sup> See 1988 NJW 737, reproduced in B S Markesinis, *A Comparative Introduction to the German Law of Torts* (Oxford: Clarendon Press, 3<sup>rd</sup> edn, 1994), 407 at 409.

<sup>42</sup> Étienne Picard, above, 102-103.

<sup>43</sup> R Wacks, *The Protection of Privacy* (London: Sweet & Maxwell, 1980), 99 – 105.

- (a) whether the facts pertaining to an individual are very intimate;
- (b) whether the defendant used unlawful or intrusive means to collect the facts;
- (c) the manner of publication;
- (d) the extent of the dissemination;
- (e) the degree of harm to the plaintiff's legitimate interests; and
- (f) the motive of the defendant.

7.45 In conclusion, a person who gives publicity to the details of another person's private life should be liable in tort unless that publicity can be justified in the public interest.

#### **Recommendation 7**

**We recommend that any person who gives publicity to a matter concerning the private life of another should be liable in tort provided that the publicity is of a kind that would be seriously offensive or objectionable to a reasonable person of ordinary sensibilities and he knows or ought to know in all the circumstances that the publicity would be seriously offensive or objectionable to such a person.**

7.46 The tort as formulated above would require proof of the following:

- (a) the complaint relates to a matter concerning the private life of the plaintiff;
- (b) the defendant has given publicity to that matter;
- (c) the publicity would be seriously offensive or objectionable to a reasonable person of ordinary sensibilities; and
- (d) the defendant knew or ought to have known in all the circumstances that the publicity would be seriously offensive or objectionable to such a person.

#### **Recommendation 8**

**We recommend that the legislation should specify the factors that the courts should take into account when determining whether the publicity would be seriously offensive or objectionable to a reasonable person.**

7.47 The HK Democratic Foundation and the Bar Association supported the creation of the tort of unwarranted publicity. The Hong Kong section of JUSTICE did not agree. Their grounds of objection and our responses have been stated in previous chapters. The Privacy Commissioner

commented that the potential liability arising from the new tort may pose a “constant threat” to the media. He expressed the view that, unlike the commonly understood tort of defamation, the exact boundary of the new tort was far from clear, making the fear of overstepping its limits all the more relevant. We consider that this risk is overstated, as we recommend below that the legislation should provide sufficient safeguards to press freedom by way of a public interest defence and a defence based on the notion of absolute and qualified privilege in the law of libel.

## **Defences to an action for unwarranted publicity**

### **Consent**

7.48 The defendant in an action for unwarranted publicity should not be liable if the plaintiff has waived his right of privacy or consented to the publicity. A person who engages in public affairs and public life to the extent that he draws public interest upon himself may be deemed to have implicitly consented to the publication of his picture.<sup>44</sup> We agree with the following observations made in *American Jurisprudence*:

*“the existence of such a waiver carries with it the right to invade the privacy of the individual only to the extent legitimately necessary and proper in dealing with the matter which gave rise to the waiver. ... [B]y engaging in an activity of legitimate public interest, one’s entire private life and past history do not necessarily become fair game for news media exploitation. There must be at least a rational, and arguably a close, relationship between the facts revealed and the activity to be explained, and the media should not be entitled to a no-holds-barred rummaging through the private life of an individual engaged in an activity of public interest under the pretense of elucidating that activity or the person’s participation in it. ... Even in the case of a public officer or candidate for public office, the waiver of the right of privacy does not extend to those matters and transactions of private life which are wholly foreign to, and can throw no light upon, the question of his or her competency for the office, or the propriety of having it bestowed upon him or her.”<sup>45</sup>*

7.49 The French courts recognise that individuals have a personal and exclusive right to determine freely the extent to which their private matters can be made public. Thus, consent to a publication cannot automatically be deemed to imply consent to a new dissemination, although prior tolerance to publicity might diminish the amount of damages available.<sup>46</sup>

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<sup>44</sup> 62A Am Jur 2d, Privacy, § 227.

<sup>45</sup> 62A Am Jur 2d, Privacy, § 197.

<sup>46</sup> B Marquesinis *et al*, above, at 42-43.

7.50 In our view, the consent given by the subject must be specific to the publication at issue, and not another one. It cannot derive from a previous consent that has been given for another purpose. The publication must not exceed, as to its form or object, the scope of his consent. The fact that a person has consented to the publication of certain details of his private life in the past does not necessarily mean that he has waived his right to complain for ever. The fact that a person has consented to being photographed does not necessarily mean that the photographer is authorised to publish the resulting photographs in the media. Consent to intrusion and consent to publication should be treated separately.

**Recommendation 9**

**We recommend that it should be a defence to an action for unwarranted publicity to show that the plaintiff has expressly or by implication authorised or consented to the publicity.**

***Lawful authority***

7.51 We consider that the defence of lawful authority should be available in actions for unwarranted publicity as well as actions for intrusion.

**Recommendation 10**

**We recommend that it should be a defence to an action for unwarranted publicity to show that the publicity has been authorised by or under any enactment or rule of law.**

***Privileged disclosure***

7.52 According to Warren and Brandeis, the right to privacy does not prohibit the communication of any private information when the publication is made under circumstances which would render it a privileged communication according to the law of defamation.<sup>47</sup> They thought that the action for invasion of privacy must be subject to any privilege which would justify the publication of a defamatory statement, reasoning that if there is a privilege to publish matter which is both false and defamatory, there must necessarily be the same privilege to publish what is not defamatory, or true. The *Restatement of Torts* provides that the rules on absolute privilege and conditional privilege to publish defamatory matter apply to the publication of any matter that is an invasion of

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<sup>47</sup> Warren & Brandeis, above, at 216.

privacy.<sup>48</sup> In other words, publication of a private matter does not violate the right of privacy when the publication would be a privileged communication under the law of defamation.<sup>49</sup>

7.53 Statements which are absolutely privileged such that no action will lie for them even though they are false and defamatory include the following: (a) any statement made in the course of and with reference to judicial proceedings by any judge, juror, party, witness, or advocate; (b) fair, accurate, and contemporaneous reports of public judicial proceedings published in a newspaper; and (c) any words spoken before, or written in a report to, the Legislative Council or a standing or select committee of the Council.<sup>50</sup> Qualified privilege attaches to the following statements if they are made honestly and without malice: (a) statements made in performance of any legal or moral duty imposed upon the person making it;<sup>51</sup> (b) statements made in the protection of a lawful interest of the person making it;<sup>52</sup> and (c) reports of legislative and certain other public proceedings.

#### **Recommendation 11**

**We recommend that it should be a defence to an action for unwarranted publicity to show that the publicity would have been privileged had the action been for defamation.**

7.54 Both the HK Democratic Foundation and the Bar Association agreed to this recommendation.<sup>53</sup>

#### ***Publicity in the public interest***

7.55 The right to claim relief for unwarranted publicity has to be reconciled with the Basic Law guarantees of press freedom and free speech. A balance has to be struck between the interest in protecting individual privacy and the interest in the dissemination of information which constitutes a matter

<sup>48</sup> *Restatement* 2d, Torts, §§ 652F and 652G; 14 ALR2d 750 §6.

<sup>49</sup> The Irish LRC recommends that a defendant should not be liable for the disclosure tort if he can show that the disclosure was made in circumstances in which, had the action been for defamation, the defendant would have enjoyed *absolute* privilege in respect of such disclosure. LRC of Ireland, above, p 129, Head 3(1)(v).

<sup>50</sup> Legislative Council (Powers and Privileges) Ordinance (Cap 382), s 4. Section 8A of the Ordinance extends the immunity enjoyed by members of the Legislative Council to public officers designated for the purpose of attending sittings of the Council or any standing or select committee of the Council, while so attending any such sitting.

<sup>51</sup> The person to whom such a statement is made must have a corresponding interest or duty to receive it. *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862.

<sup>52</sup> There must be an interest to be protected on the one side and a duty to protect it on the other.  
<sup>53</sup> The UK Consultation Paper warned that care had to be taken in drafting this defence: “to say that there is to be a defence if there would have been had the proceedings been brought for defamation (the obvious example being that the statement in question was true, which it probably would be under a new civil wrong) the defences will not be available.” UK Consultation Paper, para 5.49.

of “public interest”. Publication which is “in the public interest” is different from that which is merely interesting to the public. Expression which falls into the former category should receive the protection of Article 27 of the Basic Law because it involves matters of genuine concern to the public. By contrast, newspaper articles which describe the private lives of ordinary individuals are not protected by these provisions if they merely satisfy public curiosity and do not contribute to the formation of public opinion. The fact that the public may be interested in the private lives of others does not of itself give anyone a licence to intrude into the private affairs of an individual or to publish details of his private life.<sup>54</sup> A careful balance must be struck between the interests of expression and the interests of privacy where the details of private life are at issue.<sup>55</sup>

### *Mores test*

7.56 The *Restatement of Torts* suggests that a “mores test” should be adopted to determine whether the matter publicised is a matter of legitimate public concern:

*“In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.”<sup>56</sup>*

7.57 As observed by David Anderson, the law applying the mores test is more interested in what is than what ought to be. The law protects privacy only to the extent it is customarily respected. It affords no protection where the conventions do not consistently condemn a particular type of disclosure, in which case the disclosure will not be sufficiently offensive to merit civil sanctions. Anderson comments that such an empirical approach takes little

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<sup>54</sup> In order to make clear the distinction between matters whose publication is justified by overriding considerations of public interest on the one hand, and matters about which the public would be interested to be informed, ie matters which are merely newsworthy on the other hand, the Irish LRC recommends that the law should provide that the disclosure of the information or material obtained by means of privacy-invasive surveillance is not in the public interest merely because the object of such surveillance, or such information or material, is or would be newsworthy. LRC of Ireland, above, p 135, Head 3(2).

<sup>55</sup> There is nothing improper in publishing matters which are not of legitimate public interest but are nevertheless interesting to the public. However, the means to acquire such materials must not be intrusive nor should the publication of such interfere with an individual's private life.

<sup>56</sup> *Restatement 2d, Torts*, § 652D, comment h.

account of context and is “self-defeating, or at least self-eroding”.<sup>57</sup> He reasons that if the law protects what the mores of a community view as private, then public expectation as to what is private are shaped by what is in fact made public; and the more privacy is invaded the less privacy is protected. Hence, if the public’s appetite for titillating news and voyeuristic entertainment continue to increase and concerns about privacy relax, publications that were once considered seriously offensive would become socially acceptable with time.<sup>58</sup>

### *Newsworthiness*

7.58 The publication of “newsworthy” information is held by the American courts to be privileged under the First Amendment to the US Constitution.<sup>59</sup> Some courts have adopted a three-pronged test to determine newsworthiness: (a) the social value of the facts published; (b) the depth of the intrusion into ostensibly private affairs; and (c) the extent to which the party voluntarily acceded to a position of public notoriety.<sup>60</sup> However, some courts have encountered difficulties in defining newsworthiness, mainly because the term may be used as either a descriptive or a normative term. The Supreme Court of California stated:

*“If ‘newsworthiness’ is completely descriptive - if all coverage that sells papers or boosts ratings is deemed newsworthy - it would seem to swallow the publication of private facts tort, for ‘it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest.’ At the other extreme, if newsworthiness is viewed as a purely normative concept, the courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste.”<sup>61</sup>*

7.59 Joseph Elford elaborates on the problems of applying the newsworthiness analysis in determining liability for publication of private facts:

*“For one, the newsworthiness analysis chills speech because it compels judges and juries to engage in ad hoc, fact-specific inquiries where they often disagree about whether speech enhances public debate even when they face almost identical*

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<sup>57</sup> D A Anderson, “The Failure of American Privacy Law” in B S Markesinis (ed), *Protecting Privacy – The Clifford Chance Lectures Volume Four* (OUP, 1999), pp 149-150.

<sup>58</sup> Similar arguments can be applied to the intrusion tort. The scope of an individual’s reasonable expectation of privacy depends partly on the methods of information gathering available to the public. Once a particular form of information gathering that was previously uncommon has been established as a custom due to its frequent use, then an individual may no longer have a reasonable expectation of privacy with respect to that method. As surreptitious surveillance with the assistance of technical devices becomes more widespread, it would be less likely for the community to view such use as seriously offensive and objectionable; and less likely for liability to be imposed for these activities. For instance, if the use of night-vision cameras becomes so ordinary that the public can no longer reasonably expect privacy in the dark or the courts no longer considers its use offensive, then the law will become ineffective with respect to the use of that technology.

<sup>59</sup> *Restatement 2d, Torts*, § 652D, comment g; 62A Am Jur 2d, Privacy, §§ 186-189.

<sup>60</sup> 62A Am Jur 2d, Privacy, § 187.

<sup>61</sup> *Shulman v Group W Productions, Inc.*, (1998) 18 Cal 4<sup>th</sup> 200 (citing Comment, “The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness” (1963) 30 U Chi L Rev 722).

*sets of facts. The results cannot be made uniform because judges and jurors will always disagree over the best means to advance the democratic purpose of the First Amendment. Although some courts have attempted to harmonize their decisions by setting forth factors to guide the newsworthiness analysis, this analysis remains inherently unpredictable because the social view allows for different, and often contradictory, reasoning on how these factors should be employed. This inconsistent reasoning leads to incoherent results: Privacy is sometimes overprotected at the expense of speech, and, other times, speech is overprotected at the expense of privacy.”<sup>62</sup>*

7.60 We consider that a test of newsworthiness would be difficult to apply. Anything that is published in the press is by definition “newsworthy”. All information is potentially useful in one way or another in forming attitudes and values. Such a test would therefore give exclusive weight to press freedom and fail to give sufficient guidance to the news media and the courts.<sup>63</sup> This probably explains why the American courts have been unable to agree on a definition of news and defer to the media’s judgment of what is and is not newsworthy.<sup>64</sup> But if the courts defer to the media’s judgments about newsworthiness, an individual’s privacy would receive little protection from the public’s insatiable demand for information.

7.61 In an attempt to elaborate on the newsworthiness test, Peter Gielniak proposes that the courts should look at the following factors when evaluating the newsworthiness of a publication:<sup>65</sup>

- (a) What is the subject matter giving rise to the publication? Does it relate to the operations or administration of the government? If not, does the publication pertain to an issue that is relevant to the exercise of democratic rights or touch upon an issue of general societal concern?
- (b) Is the plaintiff a public or private figure? The plaintiff’s occupation, position in society and connection to a newsworthy event are relevant for this purpose.
- (c) What facts were disclosed about the individual? If the disclosed facts were of a highly personal nature, courts should ask whether it was necessary to disclose that information.
- (d) Did the facts disclosed contribute anything of value to society? If the facts merely add shock appeal, then this should weigh in favour of liability. But if the facts truly contribute something to society, the press should be allowed more leeway.

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<sup>62</sup> J Elford, “Trafficking in Stolen Information: A ‘Hierarchy of Rights’ Approach to the Private Facts Tort” 105 Yale LJ 727, 735.

<sup>63</sup> Powell J stated that the application of a newsworthiness test would occasion the difficulty of forcing judges to decide on an *ad hoc* basis which publications address issues of public interest and which do not. He doubted the wisdom of committing this task to the conscience of judges. *Gertz v Robert Welch Inc*, 418 US 323 at 346 (1974).

<sup>64</sup> D L Zimmerman, above, 302.

<sup>65</sup> P Gielniak, “Tipping the Scales: Courts Struggle to Strike a Balance between the Public Disclosure of Private Facts Tort and the First Amendment” (1999) 39 Santa Clara L Rev 1217, 1263 – 1265.

- (e) What are the social policies implicated in the case? Courts should ask whether imposing liability would unduly restrain the press, and whether failure to impose liability would discourage other people from contributing their talents or skills to society for fear that their private lives would be exposed to the world.

### *Public figures*

7.62 Article 17 of the ICCPR provides that everyone has the right to the protection of the law against arbitrary or unlawful interference with his privacy. This provision should be interpreted as being applicable to "everyone" without exception, including public figures who have the same right to the protection as anyone else.

7.63 Prosser defines a "public figure" as a "*person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage'*".<sup>66</sup> People who do not seek public attention, but are thrust into the spotlight because of events outside their control are not public figures by this definition. The definition given by the Council of Europe is similar: public figures are described as "*persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.*"<sup>67</sup>

7.64 In Germany, the courts divide persons into two categories for the purposes of privacy law, namely, "public persons" who are known as "persons of contemporary history", and "private persons" who are not "public persons".<sup>68</sup> The law further divides "public persons" into two sub-categories:

- (a) An "absolute public person" is one who has yielded himself permanently to contemporary history. Such persons include heads of state, famous actors, scientists and sports stars. However, even "absolute" public persons may invoke privacy rights if there is an intrusion into the intimate sphere of their private lives.
- (b) A "relative public person" is one in whom the public has an interest that is legitimate but limited as to extent and time. He is in the public eye for a specific reason or event, such as, for example, a criminal case (though it should be noted that the family members of a victim of crime are not relative public persons). Such a person attracts public attention only for a limited period of time, and then recedes into anonymity, when his right of privacy eventually revives. This

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<sup>66</sup> W L Prosser, "Privacy" (1960) 48 Cal L Rev 383, 410.

<sup>67</sup> Council of Europe Parliamentary Assembly, Resolution 1165 (1998), para 7.

<sup>68</sup> G J Thwaite & W Brehm, "German Privacy and Defamation Law: The Right to Publish in the Shadow of the Right to Human Dignity" [1994] 8 EIPR 338 at 340; B Markesinis *et al*, "Concerns and Ideas about our Developing Law of Privacy" (Institute of Global Law, University College London, 2003), at 14-17. For the position in England, see *A v B plc* [[2002] EWCA Civ 337, [2002] 2 All ER 545, para 11(xii)].

category of public persons is accorded a higher level of protection than an “absolute public person”.

7.65 In a case involving the illegal tapping by an unknown person of a telephone conversation between two leading political figures of an opposition party, the Federal Supreme Court in Germany held that everyone, including politicians in the limelight, was entitled to have their privacy respected.<sup>69</sup> Since the conversation was private and its subject matter was not of legitimate interest to the public, the plaintiffs were successful in obtaining an injunction to restrain a magazine from publishing the script of the conversation. The position in France is similar. The French law accords greater protection to “temporary” public figures as far as the publication of intrusive images and information is concerned. But even “permanent” public figures may invoke privacy rights if intimate information is published in the absence of clear public interest.<sup>70</sup>

7.66 It may be legitimate for readers to be informed of certain facts relating to the private lives of persons in public life. It is also true that some public figures sometimes contact the media and voluntarily supply details of their private lives to journalists. These public figures need media attention to maintain their celebrity status and preserve their fame. However, this does not lead us to the conclusion that the public is entitled to know everything about public figures. The private lives of public figures are entitled to protection except in those cases where they may have an effect on their public lives, or the public figures concerned have consented to the publication. The fact that an individual holds a public post or figures in the news does not deprive him of a right to a private life.<sup>71</sup>

7.67 The reasonableness of publishing the same set of facts pertaining to an individual’s private life may depend on the subject matter under discussion and the status of that individual. Some facts relating to the private life of an individual who is active in public life may be published without liability even though the same may not be true as regards an ordinary individual.<sup>72</sup> Warren and Brandeis concluded:

*“In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.”<sup>73</sup>*

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<sup>69</sup> BGHZ 73, 120, cited and discussed in B S Markesinis & N Nolte, “Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places” in P Birks (ed), *Privacy and Loyalty* (Oxford: Clarendon Press, 1997), pp 120-121.

<sup>70</sup> B Markesinis *et al*, above, at 17.

<sup>71</sup> Council of Europe Parliamentary Assembly, Resolution 428 (1970) and Resolution 1003 (1993), para 23.

<sup>72</sup> Warren & Brandeis, above, 215. Whereas disclosing the fact that a cabinet minister has had a relationship with a prostitute may well be a legitimate disclosure in the public interest, it might not be so if an ordinary citizen has had a similar relationship.

<sup>73</sup> Warren & Brandeis, above, 216.

7.68            **Voluntary public figures** – In *Woodward v Hutchins*,<sup>74</sup> Bridge LJ said:

*“those who seek and welcome publicity of every kind bearing on their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light.”*

We have reservations adopting such a proposition. To suggest that public figures should be precluded from complaining about unwanted publicity because they have sought publicity on previous occasions would deny them the very control over personal information that is inherent in the notion of personal autonomy. As pointed out by Lindsay J, to hold that those who have sought any publicity lose all protection would be to repeal the application of the privacy provisions to many of those who are most likely to need it.<sup>75</sup>

7.69            In *Tammer v Estonia*,<sup>76</sup> an editor complained to the European Court of Human Rights that the Estonian courts had unjustifiably interfered with his right to freedom of expression by finding him guilty of insulting a former political aide, L, by describing L both as a mother who had not cared for her child and a person who had broken up someone else’s marriage. The editor contended that L was a public figure in her own right, a fact which made her open to heightened criticism and close scrutiny by the press. L had played a role in the political life of Estonia by holding the position of counsellor to the Minister of the Interior as well as by being an active social figure and an editor of a popular magazine. She had also sought publicity by putting herself in the centre of a political scandal. However, the European Court noted that L had resigned from her governmental position in the wake of the scandal and held that the remarks related to aspects of her private life. Despite L’s continued involvement in politics, the Court did not find it established that the impugned remarks were justified by considerations of public concern or that they bore on a matter of general importance.<sup>77</sup>

7.70            We agree with the views expressed in *American Jurisprudence* below:

*“A person who by his or her accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his or her doings, affairs, and character, may be said to have become a public personage, thereby relinquishing at least a part of his or her right of privacy. ... [A]ny person who engages in a pursuit or occupation which calls for the*

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<sup>74</sup> [1977] 2 All ER 751, [1977] 1 WLR 760 at 765.

<sup>75</sup> *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996, para 225.

<sup>76</sup> No 41205/98, date of judgment: 6.2.2001 (ECtHR).

<sup>77</sup> See also *Neves v Portugal*, No 20683/92, date of judgment: 20.2.1995 in which the European Commission of Human Rights dismissed an application by a publisher who complained that he had been fined and imprisoned for publishing photographs of a well-known businessman with a number of young women. The Commission found the penalty to be a proportionate response to the legitimate aim of protecting the businessman’s privacy.

*approval or patronage of the public submits his or her private life to examination by those to whom he or she addresses his or her call, to the extent that may be necessary to determine whether it is wise and proper to accord him or her the approval or patronage which he or she seeks.*<sup>778</sup>

7.71 The *Restatement of Torts* makes a similar observation:

*“One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavourable to him. So far as his public appearances and activities themselves are concerned, such an individual has, properly speaking, no right of privacy, since these are no longer his private affairs.”*<sup>779</sup>

7.72 We consider that the private character and conduct of a person who fills a public office or takes part in public affairs may be a matter of public interest insofar as it relates to or tends to throw light on his fitness to occupy the office or perform the duties thereof. The mere fact that a person is an artiste or is engaged in some occupation which brings him into public notice is not of itself enough to make his private life a matter of public interest. Publicity given to an individual's private life concerning a matter which is wholly unconnected with his fitness for a public office or profession or his ability to discharge public or professional duties should not come within the scope of this defence.<sup>80</sup>

7.73 **Accused persons** – Press reporting of criminal proceedings contributes to their publicity and is consonant with the requirement that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. This is all the more so where a public figure is involved, such as a politician or a former member of the Government.<sup>81</sup> In *Craxi (No 2) v Italy*,<sup>82</sup> the applicant was a former Prime Minister charged with certain offences. There were also criminal proceedings pending against him. The police intercepted his telephone calls. The Prosecutor filed the transcripts with the court registry and asked that they be admitted as evidence against him. The content of certain intercepted conversations was subsequently published by private newspapers. The European Court of Human Rights held that:

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<sup>78</sup> 62A Am Jur 2d, Privacy, §193 (emphasis added).

<sup>79</sup> *Restatement 2d, Torts*, s 652D, comment e (emphasis added).

<sup>80</sup> There appears to be a lack of consensus as to whether unethical behaviour in private life has a bearing on the performance of public duties. Whereas the public in Britain and the US tend to hold the view that such behaviour may manifest a character flaw that may carry over into the performance of public duties, the public in France appears not to think that it falls within the realm of public lives. Hence, although it was common knowledge that President Mitterrand had a daughter from a long-standing relationship outside his marriage, this story was left uncovered in France for many years.

<sup>81</sup> *Worm v Austria*, 83/1996/702/894, date of judgment: 29.8.1997 (ECtHR).

<sup>82</sup> No 25337/94, date of judgment: 17.7.2003 (ECtHR).

*“public figures are entitled to the enjoyment of the guarantees set out in Article 8 of the Convention on the same basis as every other person. In particular, the public interest in receiving information only covers facts which are connected with the criminal charges brought against the accused. This must be borne in mind by journalists when reporting on pending criminal proceedings, and the press should abstain from publishing information which [is] likely to prejudice, whether intentionally or not, the right to respect for the private life and correspondence of the accused persons . . . . The Court observes that in the present case some of the conversations published in the press were of a strictly private nature. They concerned the relationships of the applicant and his wife with a lawyer, a former colleague, a political supporter and the wife of Mr Berlusconi. Their content had little or no connection at all with the criminal charges brought against the applicant. . . . In the opinion of the Court, their publication by the press did not correspond to a pressing social need. Therefore, the interference with the applicant's rights under Article 8 § 1 of the Convention was not proportionate to the legitimate aims which could have been pursued and was consequently not ‘necessary in a democratic society’ within the meaning of the second paragraph of this provision.”<sup>83</sup>*

**7.74 Involuntary public figures** – There are also individuals who have not sought publicity or consented to it, but through their own conduct or by force of circumstances, have become part of an event of public concern. Those who have committed crime and those who are unfortunate enough to be victims of crime or accidents may therefore become a legitimate subject of public interest.<sup>84</sup> However, the mere fact that an individual is in the public eye does not provide a *carte blanche* to expose all aspects of his private life before the whole world. Apart from the social value of the public event involved, the public interest in publishing the facts concerning an individual's private life also depends on the extent to which that individual played an important role in the event; hence, on a comparison between the information revealed and the nature of the event that brought him to public attention.<sup>85</sup>

**7.75** The public interest defence requires the existence of a logical nexus between the plaintiff and the matter of public interest. There must also be a logical relationship between the events or activities that brought the individual into the public eye and the private facts disclosed.<sup>86</sup> The public's

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<sup>83</sup> No 25337/94, date of judgment: 17.7.2003 (ECtHR), paras 65-67.

<sup>84</sup> *Restatement 2d, Torts*, § 652D, comment f.

<sup>85</sup> *Kapellas v Kofman* (1969) 1 Cal 3d 20 at 36.

<sup>86</sup> *Shulman v Group W Productions, Inc* (1998) 18 Cal 4<sup>th</sup> 200. “Some reasonable proportion is . . . to be maintained between the events or activity that makes the individual a public figure and the private facts to which publicity is given. Revelations that may properly be made concerning a murderer or the President of the US would not be privileged if they were to be made concerning one who is merely injured in an automobile accident.” *Restatement 2d, Torts*, § 652D, comment h. The story of Oliver Sipple is illustrative: Sipple knocked a gun out of the hands of a would-be assassin of President Ford. Shortly after the incident, the media revealed that he was active in the gay community, a fact unknown to his family, who then broke off relations with him. His entire

right to know will be outweighed by the privacy interest if the information revealed ceases to have any substantial connection to the subject matter in which the public interest resides.<sup>87</sup> Intimate revelations might not, in a given case, be justified as being in the public interest if they bear only slight relevance to the subject.<sup>88</sup> The fact that the publication is lurid or indecent, or is primarily designed to appeal to prurient interest or sensationalism, is a factor to be taken into account.

**7.76 Former public figures** – The position in the US as summarised by the *Restatement of Torts* is as follows:

*“The fact that there has been a lapse of time, even of considerable length, since the event that has made the plaintiff a public figure, does not of itself defeat the authority to give him publicity or to renew publicity when it has formerly been given. Past events and activities may still be of legitimate interest to the public, and a narrative reviving recollection of what has happened even many years ago may be both interesting and valuable for purposes of information and education. Such a lapse of time is, however, a factor to be considered, with other facts, in determining whether the publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community. This may be true, for example, when there is a disclosure of the present name and identity of a reformed criminal and his new life is utterly ruined by revelation of a past that he has put behind him. Again the question is to be determined upon the basis of community standards and mores. Although lapse of time may not impair the authority to give publicity to a public record, the pointing out of the present location and identity of the individual raises a quite different problem.”<sup>89</sup>*

**7.77** We consider that the publication of the existing whereabouts and other aspects of the private life of a former public figure cannot be justified if it is merely the past event which is a matter of present public concern. While the past event involving a former public figure could be raised by the press if it is a matter of public knowledge, his private life *after* he has decided to retire into a life of seclusion should not be exposed unless it has become a matter of present legitimate concern to the public or his identity has been concealed in the reports.

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life was shattered as a result of the publication. Discussed in R Cohen-Almagor, “Why Tolerate? Reflections on the Millian Truth Principle”, *Philosophia*, vol 25, nos 1 – 4 (1997), pp 131-52.

<sup>87</sup> Eg *Barber v Time, Inc* (1942) 348 Mo 1199 (use of plaintiff’s name and photograph in a newspaper article about her unusual medical condition); *Vassiliades v Garfinkels’ Brooks Bros* (DC 1985) 492 A2d 580 (use of plaintiff’s photograph to illustrate presentations on cosmetic surgery); *Green v Chicago Tribune Co* (Ill App Ct 1996) 675 NE2d 249 (a mother’s private words over the body of her murdered son as it lay in a hospital room were held to be non-newsworthy despite legitimate public interest in the subjects of gang violence and murder).

<sup>88</sup> *Haynes v Alfred A Knopf, Inc* (7<sup>th</sup> Cir 1993) 8 F 3d 1222 at 1234-1235 (although the private facts disclosed in the book at issue were germane to the book’s subject matter, that protection may not extend to publication of “intimate physical details the publicizing of which would be not merely embarrassing and painful but deeply shocking to the average person”).

<sup>89</sup> *Restatement 2d, Torts*, § 652D, comment k.

## Concluding remarks

7.78 In determining whether the publicity could be justified on the grounds of public interest, we should look to the nature of the subject matter as well as the status of the individual in relation to whom the facts are published. The mere fact that the individual is a public figure is not conclusive. We need to go further and examine whether the published facts are matters of genuine public concern. We consider that the public interests in privacy and free speech can be harmonised by providing a defence to an action for unwarranted publicity where the publicity was in the public interest.<sup>90</sup>

### Recommendation 12

**We recommend that it should be a defence to an action for unwarranted publicity to show that the publicity was in the public interest.**

## Principle of proportionality

7.79 The German courts have developed a form of proportionality analysis to resolve the conflicts between the right of personality and other competing public interests. The German Constitutional Court is of the view that the particular interests must be weighed to determine “*whether the pursuit of the public interest merits precedence generally and having regard to the features of the individual case, whether the proposed intrusion of the private sphere is required by this interest in this form and extent, and whether it is commensurate with the importance of the case.*”<sup>91</sup> The European Court of Human Rights also accepted that the more intimate the aspect of private life which is being interfered with, the more serious must be the reasons for interference before the latter can be legitimate.<sup>92</sup>

7.80 John Craig proposes that the following factors should be taken into account when applying a proportionality analysis for the purpose of determining the reasonableness of a “public exposure”:<sup>93</sup>

- (a) the defendant’s objective (ie, what did the defendant hope to accomplish by placing the plaintiff in the public spotlight);

<sup>90</sup> Cf PD(P)O, s 61.

<sup>91</sup> 35 BverfGE 202; extracted from B S Markesinis, *A Comparative Introduction to the German Law of Torts* (Oxford: Clarendon Press, 3<sup>rd</sup> edn, 1994), 394 at 392; translated by F H Lawson and B S Markesinis.

<sup>92</sup> *Dudgeon v United Kingdom* [1982] 4 EHRR 149 para 152. *Douglas v Hello! Ltd*, [2001] 2 WLR 992, para 168 (noting that any consideration of Article 8 rights must reflect the Convention jurisprudence which acknowledges different degrees of privacy). In the *Douglas* case, Keene LJ observed that a purely private wedding would have a lesser but still significant degree of privacy warranting protection.

<sup>93</sup> J D R Craig, “Invasion of privacy and Charter Values: The Common-Law Tort Awakens” 42 McGill LJ 355, 392 – 395.

- (b) alternatives available to the defendant (ie, whether or not the impugned publication could reasonably have been made without the alleged privacy invasion, or with a less serious exposure of the plaintiff's private life);<sup>94</sup>
- (c) the status of the plaintiff (ie, whether or not the plaintiff is a public figure);
- (d) the severity of the privacy invasion (ie, the value, or importance, of the private object that has been compromised by a public exposure).<sup>95</sup>

7.81 The Irish Law Reform Commission agrees that even if the publication of details of a person's private life can be justified in the public interest, its extent or detail must not have exceeded what was required to satisfy the public interest. It comments that the legitimate public interest in knowing certain facts about an individual may be satisfied by information of a more or less general nature without going into the intimate details of that individual's private life. It recommends that the public interest defence should be disallowed, not in its entirety, but only to the extent that the publication was excessive. The bill drafted by the Irish Commission therefore incorporates the proportionality principle by way of a proviso to the public interest defence.<sup>96</sup>

7.82 The Bar Association commented that not all matters of public interest would automatically justify giving publicity to an individual's private life. The Court might still have to balance the conflicting claims. Accordingly, they proposed that the public interest defence should be formulated in such a way that the defendant shall not be liable if the publicity is a necessary and proportionate response for the protection of the public interest. We agree that the proportionality principle should be expressly incorporated into the public interest defence to protect individuals against excessive disclosure.

7.83 In applying the proportionality test, the Court may take into account:

- (a) the nature of the facts disclosed (ie, whether intimate or not);
- (b) the extent to which the facts have been disseminated (ie, whether the facts have been disclosed to the whole population or to a small group of people);
- (c) the importance of the public good being served by the publicity; and
- (d) the alternatives available to the defendant to achieve the legitimate

<sup>94</sup> Craig refers to a German case in which the Court concluded that if the purpose of the impugned newspaper story was simply to expose the hardships faced by persons with AIDS, as claimed by the defendant, then this could have been accomplished without providing details sufficient to identify the plaintiff as an AIDS victim. J D R Craig, above, at 393.

<sup>95</sup> Craig points out that French law has recognised certain matters of intimacy where public exposure will be difficult to justify, such as matters relating to health, sexual activities and death. However, the French courts will be more deferential to public exposure of non-intimate matters, such as information concerning a person's finances. J D R Craig, above, 394.

<sup>96</sup> The proviso reads: "*where, though disclosure of information concerning the particular subject was justified in principle by overriding considerations of the public interest, the particular disclosure which was actually effected, by reason of its detail or salaciousness, or of the extent of its intrusiveness into private life, or otherwise ... was excessive, the [public interest defence] shall only be allowed to the extent that such disclosure was not so excessive.*" LRC of Ireland, above, Ch 10, clause (b) of Proviso to Head 3 at p 130.

object of the publicity (ie, whether or not the object could be achieved without giving publicity to the facts about the plaintiff, or with a less serious exposure of his private life, or without providing such particulars as would enable the recipients to identify the plaintiff).<sup>97</sup>

### ***Legitimate aims of giving publicity to an individual's private life***

7.84 The HK Journalists Association was concerned that “middle-class and well-educated judges” might adopt a very narrow view of what constituted a matter of public interest and might make rulings which restrain what journalists would consider to be legitimate investigative reporting. In order to address the concern that a widely phrased defence of public interest would create uncertainty, we consider that the legislation should give some guidance by providing that the following are presumed to be matters of public interest for the purposes of the publicity tort:<sup>98</sup>

- (a) the prevention, detection or investigation of crime;
- (b) the prevention or preclusion of unlawful or seriously improper conduct;<sup>99</sup>
- (c) the ability of a person to discharge his public or professional duties;
- (d) the fitness of a person for any public office or profession held or carried on by him, or which he seeks to hold or carry on;<sup>100</sup>

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<sup>97</sup> Since an objective test should be applied in determining whether the publicity was proportionate to the legitimate aim pursued, the defendant's motive is irrelevant for this purpose.

<sup>98</sup> The Bar Association agreed that the legislation should set out what could constitute matters of public interest. But they also pointed out not all information “relating to” the prevention or detection of crime was necessarily a matter of public interest. For example, although the personal information of an undercover policeman “relates to” the detection of crime, giving publicity thereto would seriously undermine the efforts of the police in detecting crime. Providing a mandatory deeming provision as suggested in the Consultation Paper would therefore preclude the Court from exercising discretion and would foreclose consideration of real issues. We therefore recommend that the legislation should create a presumption rather than a mandatory deeming provision of what constitutes public interest.

<sup>99</sup> Browne-Wilkinson V-C in *Stephens v Avery* [1988] 2 WLR 1280 at 1284 stated that the law of confidence and copyright would not protect “matters which have a grossly immoral tendency”. Under the PD(P)O, personal data relating to the prevention, preclusion or remedying of “seriously improper conduct” are exempt for the purposes of the Use Limitation Principle (DPP 3): s 58(1)(d) & (e). “Seriously improper conduct” is defined as including conduct whereby a person ceases or would cease to be a fit and proper person for any office, profession or occupation which is required by law to be held, engaged in or carried on by a fit and proper person: ss 2(9), (10) & (13). Berthold and Wacks suggest that the reference to “seriously improper conduct” in the Ordinance embraces a broad range of regulatory activity focusing on behaviour which is not unlawful as such, including “*the enforcement of regulatory codes of conduct, disciplinary proceedings, and the regulation of other behaviour that may have escaped formal inclusion in codes or disciplinary rules but is nevertheless such that it is not tolerated by the community generally or the professional sector concerned*”: M Berthold & R Wacks, *Hong Kong Data Privacy Law* (Sweet & Maxwell Asia, 2<sup>nd</sup> edn, 2003), para 15.52. We think that this statement serves as a good pointer to what constitutes “seriously improper conduct”.

<sup>100</sup> Organisations which are accountable to the public because they perform a public function or they seek public funds or membership from the general public fall within the public interest category. “Public office” includes any office held by a Government official or a director or senior manager of a quasi-governmental body or a public company.

- (e) the prevention of the public being materially misled by a public statement made by the plaintiff;<sup>101</sup>
- (f) the protection of public health or safety;<sup>102</sup>
- (g) the protection of national security or security in respect of Hong Kong.

7.85 The Hospital Authority proposed that the protection of “private health”, as opposed to “public health”, should be a specific defence to cover health treatment for an individual. Since the disclosure of information about a patient to a hospital or clinic would not constitute publicity, we consider that it is unnecessary to add the defence proposed by the Authority.

7.86 **Misleading the public** – Although most individuals prefer to keep private their dishonest behaviour and wrongdoing, *“the cohesiveness and durability of any social organisation depends upon the ability of its members to evaluate each other accurately and to use their observations to exert, modify, or develop social controls.”*<sup>103</sup> Zimmerman therefore argues that a person who reveals the truth about another’s character helps to preserve the foundations of the society.<sup>104</sup> Richard Posner also observes that many people seek privacy because they want to conceal discreditable information about themselves, thereby misleading those with whom they have dealings; and that even if the information is not discreditable, they may wish to keep it secret in order to exploit any misapprehensions which others may have about them. He therefore contends that legal protection should not be accorded to discreditable information about an individual and to personal information which, if revealed, would correct misapprehensions that the individual is trying to exploit. Restricting the disclosure of this information “is no better than that for permitting fraud in the sale of goods”.<sup>105</sup>

7.87 We agree that if a person who is seeking or holding public office misleads the public by telling them a lie about his private life which is relevant to his public role, the press should be free to report the truth in the media. Hence, if a candidate for political office stands for family values and advocates the sanctity of marriage, the press should not be held liable for disclosing the fact that he keeps a mistress. The protection of privacy should not be abused by an individual who is guilty of double standards by suggesting to the public that he is a pillar of virtue and rectitude when the truth reveals that he is a person of dubious character. We therefore consider that the prevention of the public (or some section of the public) being materially misled by a statement previously

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<sup>101</sup> The Irish LRC recommends that in deciding whether the public interest defence has been established, the Court should have regard to all the relevant circumstances, including: *“whether such disclosure was justified in the interests of preventing the public from being misled by public conduct (including statements) of a person having or seeking a public office or function or in or seeking to be in a position of leadership, influence or importance in the eyes of the public, where the true facts, in the light of such conduct or otherwise, are relevant to the situation of that person (including that person’s suitability, capacity or credibility) in relation to that office, function or position.”* LRC of Ireland, above, p 129, Head 3(3).

<sup>102</sup> *Malone v Metropolitan Police Commissioner* [1979] 2 WLR 700 at 716; *Hubbard v Vosper* [1972] 2 QB 84 at 95 and 96.

<sup>103</sup> D L Zimmerman, above, 327-328.

<sup>104</sup> D L Zimmerman, above, 329.

<sup>105</sup> R A Posner, “The Right of Privacy” (1978) 12 Georgia L Rev 393, 401.

made public by the plaintiff is a matter of public interest the publication of which should not render the publisher liable for the publicity tort. This formulation is wider and more favourable to the press than that of prevention of “public dishonesty”, which was deemed to be a matter of public interest in Recommendation 19(b) of the Consultation Paper.<sup>106</sup> Under the new proposal, a defendant who could show that the plaintiff has materially misled the public would have a defence notwithstanding that the plaintiff has not been dishonest in doing so.

### **Recommendation 13**

**Without limiting the generality of Recommendation 12, we recommend that any publicity given to a matter concerning an individual’s private life should be presumed to be in the public interest if the publicity was necessary for:**

- (a) the prevention, detection or investigation of crime;**
- (b) the prevention or preclusion of unlawful or seriously improper conduct;**
- (c) establishing whether the plaintiff was able to discharge his public or professional duties;**
- (d) establishing whether the plaintiff was fit for any public office or profession held or carried on by him, or which he sought to hold or carry on;**
- (e) the prevention of the public being materially misled by a public statement made by the plaintiff;**
- (f) the protection of public health or safety; or**
- (g) the protection of national security or security in respect of the Hong Kong SAR**

**and was proportionate to the legitimate aim pursued by the defendant.**

7.88 We should add that although the names of individuals may be public information, this does not entitle a publisher to name the individual when covering his private life in an article. Even where particular facts about an individual’s private life can be published on the ground that they relate to a matter of public interest, the individual’s identity should be treated separately and should not be publicised if the legitimate aim can be achieved without revealing his identity.<sup>107</sup>

7.89 **Public responses to Consultation Paper** – Noting that “news reporting” was not specifically identified in the Consultation Paper as one of the legitimate concerns of the public, the Privacy Commissioner suggested that further consideration be given to making some allowance for the media under

<sup>106</sup> “Public dishonesty” was defined in the Consultation Paper as dishonest behaviour that amounted to a fraud on the public: para 11.102.

<sup>107</sup> *Melvin v Reid* (1931) 112 Cal App 285, 291; *Times-Mirror v Superior Court* (1988) 198 Cal App 3d 1420, 1428.

the publicity tort. In our view, by allowing publications that can be justified in the public interest and by prescribing the publications that are *prima facie* in the public interest, fraudsters, politicians and other public figures would not be able to escape from public scrutiny by relying on the publicity tort.

7.90 The Bar Association was of the opinion that “public interest” was too broadly defined in the Consultation Paper and might therefore be subject to abuse by the law enforcement agencies and the press. They proposed to confine the definition of “public interest” to a few well recognised instances, without at the same time limiting the generality of the general defence of public interest, namely: (a) the prevention, detection of crime or investigation of crime; (b) the ability and fitness of a person to discharge his public office; and (c) the protection of public health or safety. In effect, the Bar was saying that national security and security in respect of Hong Kong, the prevention of unlawful or seriously improper conduct, and the prevention of “public dishonesty” should be excluded.

7.91 We are inclined to adopt a generous approach in defining matters of public interest. It is essential that the press has enough breathing space to serve the functions of the press clause in the Basic Law. Although the scope of the public interest defence is wide, the principle of proportionality would ensure that the defence would not be abused by the press and the law enforcement agencies. We are satisfied that the proposal to create a public interest defence would safeguard press freedom and the public’s right to know.

### **Facts concerning an individual’s private life that are available in the public domain**

7.92 The tort of “public disclosure of private facts” in the US protects facts that are “private, secluded or secret” but not information that is already known to the public.<sup>108</sup> The *Restatement of Torts* reads:

*“There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus there is no liability for giving publicity to facts about the plaintiff’s life that are matters of public record . . . . Similarly, there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus he normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant’s newspaper. Nor is his privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public.”<sup>109</sup>*

7.93 The Sub-committee concluded in the Consultation Paper that the publisher should not be held liable if he could show that the private facts could

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<sup>108</sup> 57 ALR3d 16 § 3; 62A Am Jur 2d §§100-101.  
<sup>109</sup> *Restatement 2d, Torts*, § 652D, comment b.

be found in a public record which was readily accessible to the public, or otherwise has come into the public domain through no fault of his own. They were of the view that there should generally be no restrictions on the publication of facts that are readily accessible to the public through a public library or a public registry.

7.94 The HK Journalists Association argued that prior publication should be a defence in all circumstances, even if the information had been culled from newspaper clippings several years before re-publication. In their view, the argument that this defence should apply only to prior publication in a public record “which was readily accessible to the public” threatens the activities of investigative journalists who may have the time and resources to delve into archives which are not so readily accessible to the public. The only possible exception they accept is spent convictions.

7.95 We consider that the approach adopted in the American *Restatement* and the Consultation Paper does not accord with the legitimate privacy expectation of an individual. The mere fact that the facts in question are open to public view or can be found in a public record does not necessarily entitle a person to give further publicity to the facts. We explain below how we come to such a conclusion by examining the privacy interests of an individual in three types of situations:

- (a) facts available in public records;
- (b) facts concerning an individual’s private life in public places; and
- (c) facts which have previously been disclosed to others.

### ***Facts available in public records***

7.96 We start our discussion by identifying the privacy risks of court proceedings. As evidence concerning the medical records, employment records, financial information and tax returns of litigants and third parties may be adduced in legal proceedings, material disclosed in civil and criminal proceedings contains a vast amount of private and sensitive information that is available as a matter of public record. Examples of these risks can be found in bankruptcy, family and negligence cases. The risk is particularly acute where the personal information revealed in the proceedings relate to third parties who are not able - or are not aware how - to protect their privacy by applying for a court order.<sup>110</sup>

7.97 In *Cox Broadcasting Corp v Cohn*,<sup>111</sup> the US Supreme Court held that the state may not impose sanctions on the accurate publication of the name of a rape victim obtained from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection: First Amendment protection must be extended to coverage of

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<sup>110</sup> “Privacy and Access to Electronic Case Files in the Federal Courts”, 15.12.99, produced by staff in the Office of Judges Programs of the Administrative Office of the US Courts.

<sup>111</sup> 420 US 469 at 491 & 495 (1972).

material disclosed in court records available for public inspection because of the importance of public supervision of government affairs.

7.98 However, Karen Rhodes argues that publication of material derived from court records often does little to advance the public's interest in understanding and supervising the conduct of public affairs. She says that a distinction should be drawn between coverage that merely uses court records as a source of information in which the public would otherwise have no legitimate interest, and coverage providing information that truly sheds light upon the performance of the judiciary or upon the conduct of public business more generally.<sup>112</sup>

7.99 Rhodes further argues that even if publication of information about court proceedings advances the public's supervisory interests, it is not clear that the First Amendment requires absolute protection for courtroom coverage to vindicate those interests. She points out that the media in the US may be liable for publishing defamatory material disclosed in a court proceeding if they fail to give a "fair and accurate" report of the proceeding as a whole. We may mention in passing that under section 13 of the Defamation Ordinance (Cap 21), only a "fair and accurate" report of open court proceedings that is published "contemporaneously" and does not contain any "blasphemous or indecent matter" is absolutely privileged for the purposes of defamation law. In the view of Rhodes, defamation law stands for the proposition that First Amendment does not require that public-supervisory interests in courtroom proceedings be protected by a categorical privilege for publication of any material derived from such proceedings.<sup>113</sup> The broad defence of "legitimate public concern" in the American "public disclosure" tort already protects any publication that is truly concerned with monitoring the conduct of public business. By constitutionally protecting *all* publications of matters of public record rather than simply those publications truly advancing public-supervisory interests, the *Cohn* decision serves only to protect those who publish matters of public record without any nexus to the supervision of government affairs.<sup>114</sup>

7.100 The Court in the *Cohn* case also asserted that restraining publication of information derived from court proceedings or public records would have an impermissible chilling effect upon the press. In the view of Rhodes, insulating the press from the chilling effect of tort liability only in the context of public records seems unwarranted:

*"A critical observation suggests that the supervisory interests in public-record information are not more deserving of constitutional protection than the interests that inhere in information from other sources: the very same interests may be involved in both situations. If the interest invoked to support First Amendment protection is the public's interest in knowing about and supervising public affairs, that interest is implicated by all*

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<sup>112</sup> K Rhodes, "Notes: Open Court Proceedings and Privacy Law: Re-examining the Bases for the Privilege" 74 Texas L Rev 881 at 891.

<sup>113</sup> Above, at 892.

<sup>114</sup> Above, at 893.

*information regarding the conduct of public business, not simply that business that the government has made a matter of public record. (In fact, it is arguably the public's interest in non-public-record government affairs that demands special First Amendment protection for the press because it is precisely in this area that the government may be most in need of public supervision.) Because identical supervisory interests may inhere in public-record and non-public-record information, the variance in constitutional protection based precisely on the significance of these interests is questionable.”<sup>115</sup>*

7.101 With regard to the assertion that material derived from court records is inherently a matter of legitimate public concern because the public has an interest in the workings of the judiciary, Rhodes suggests that its factual basis is “highly suspect”:

*“much published information derived from court records bears no logical connection to the functioning of the judiciary. If the goal is to protect disclosures that truly shed light upon the administration of justice, the rule protecting all publications whose source is a court record is grossly overinclusive. To advance the asserted interest, the tort law need go no further than protecting matters of legitimate public concern; relying upon a direct application of this element rather than upon a blanket protection for disclosures of public-record material would allow courts to separate those publications that truly advance the public interest in knowledge about government administration (as well as those publications that are matters of legitimate public concern for other reasons) from those publications that are truly matters of no legitimate public concern.”<sup>116</sup>*

7.102 In *Doe v City of New York*,<sup>117</sup> the plaintiff alleged that the employer refused to hire him because he was a single gay man suspected of being infected with HIV. He filed a discrimination claim with the New York City Commission on Human Rights. The Commission issued a press release about the resolution of the case. The plaintiff maintained that the press release contained sufficient information to enable people to identify him as the claimant, thereby exposing him to discrimination, embarrassment and extreme anxiety. The district court held that the constitutional right to privacy did not extend to matters of public record, and once the plaintiff filed his complaint with the Commission, his HIV status became a matter of public record. This decision was reversed by the US Court of Appeals, which held that the plaintiff possessed a constitutional right to privacy regarding his HIV status. His HIV status did not, as a matter of law, automatically become a public record when he filed his claim with the Commission and entered into a conciliation agreement. The Court called “Orwellian” the notion that all information provided to the Commission automatically becomes a public record, even when

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<sup>115</sup> Above, at 897.

<sup>116</sup> Above, at 910.

<sup>117</sup> 15 F 3d 264 (2d Cir. 1994); discussed in *The News Media & The Law*, Spring 1994, p 11.

the complainants go to the Commission because of violations of the right to privacy. It remanded the case to the district court to determine if the city had a substantial interest in the disclosure of the conciliation agreement that outweighed the plaintiff's interest in confidentiality.

7.103 In *US Department of Justice v Reporters Committee for Freedom of the Press*,<sup>118</sup> the respondents contended that since events summarised in a "rap sheet"<sup>119</sup> had been previously disclosed to the public, the subject's privacy interest in avoiding disclosure of a federal compilation of these events approached zero. The US Supreme Court rejected such a "cramped notion" of privacy:<sup>120</sup>

*"To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another."<sup>121</sup> Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private. According to Webster's initial definition, information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.' ... [T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information."<sup>122</sup>*

7.104 The Court observed that the very fact that information is hard to obtain altered the privacy interest involved: *"Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."<sup>123</sup> Commenting on the privacy interests in information which has already appeared in public records, the Court pointed out that *"the common law recognised that one did not necessarily forfeit a privacy interest in matters made part of the public record, albeit the privacy interest was diminished and another who obtained the facts from the public record might be privileged to publish it."<sup>124</sup> In particular, an ordinary citizen has a privacy interest in the**

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<sup>118</sup> 489 US 749 (1989).

<sup>119</sup> Rap sheets are criminal identification records containing certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subjects. The principal use of the information is to assist in the detection and prosecution of offenders; it is also used by courts and corrections officials in connection with sentencing and parole decisions.

<sup>120</sup> Above, at 763.

<sup>121</sup> The Court endorsed the view that *"Meaningful discussion of privacy ... requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure"* (quoting Karst, "The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data", (1966) LCP 342, 343-344).

<sup>122</sup> Above, at 763-764.

<sup>123</sup> Above, at 764. The Court noted at 765 that the power of compilations to affect individual privacy outstrips the combined power of the bits of information contained therein.

<sup>124</sup> Above, fn 15.

aspect of his criminal history that may have been wholly forgotten.<sup>125</sup> *“The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high.”*<sup>126</sup> The Court therefore held that disclosure of the contents of the rap sheet to a third party could reasonably be expected to constitute an unwarranted invasion of privacy within the meaning of Exemption 7(C) of the Freedom of Information Act. The Court’s conclusions are applicable to privacy law’s definition of a “private” fact, insofar as the decision recognises that *“privacy is not properly conceived of in terms of theoretical degrees of accessibility, but instead demands consideration of ‘the practical obscurity’ of certain facts.”*<sup>127</sup>

7.105 In the English case of *R v Chief Constable of North Wales, ex parte AB*,<sup>128</sup> the applicants had served long sentences for serious sexual offences against a number of children. Although information relating to the applicants’ convictions and sentences, having been pronounced in open court, was in the public domain and as such subject to no duty of confidence, Lord Bingham CJ stated that he was prepared to accept that disclosure by the police of such information could in principle amount to an interference with the applicants’ exercise of the right to privacy under the ECHR.<sup>129</sup> Buxton J also considered that a wish that certain facts in one’s past, however notorious at the time, should remain in that past is an aspect of the subject’s private life sufficient at least potentially to raise questions under Article 8 of the European Convention.<sup>130</sup>

7.106 In the New Zealand case of *Tucker v News Media Ownership Ltd*,<sup>131</sup> the plaintiff sought donations from the public to pay for a heart transplant operation. He applied for an interim injunction when he found out that a magazine might publish details of his previous convictions, which included convictions relating to indecency. The Court of Appeal granted an interim injunction against the publisher, suggesting that a public fact such as a previous conviction could over time become a private fact.

7.107 The judiciary in the US recognises that there is a common law right that judicial records and documents are open for public inspection. However, the right to inspect and copy judicial records is not absolute. *“Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”*<sup>132</sup> The decision to deny public access involves a balance between the presumption in favour of access, and the privacy or other interests that may justify restricting access. As examples of documents to which access has been denied, the US Supreme Court referred to records used to gratify spite or

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<sup>125</sup> Above, at 769 (referring to *Department of Air Force v Rose*, 425 US 352 (1976)).

<sup>126</sup> Above, at 780.

<sup>127</sup> K Rhodes, above, at 911.

<sup>128</sup> [1997] 3 WLR 724.

<sup>129</sup> Above, at 736C.

<sup>130</sup> Above, at 738B.

<sup>131</sup> See [1986] 2 NZLR 716 at 731-733.

<sup>132</sup> *Nixon v Warner Communications, Inc*, 435 US 589 at 598 (1978).

promote scandal and files that might "serve as reservoirs of libellous statements for press consumption."<sup>133</sup>

7.108 American courts recognise the privacy interest inherent in the non-disclosure of certain information even where the information may have been at one time public. In weighing the public interest in releasing personal information kept by a government agency against the privacy interests of individuals, the US Supreme Court defined the public's interest as "shedding light on the conduct of any Government agency or official",<sup>134</sup> rather than acquiring information about a particular private citizen. The Court also noted that the fact that "*an event is not wholly 'private' does not mean that an individual has no interests in limiting disclosure or dissemination of the information.*"<sup>135</sup> Although it may be pointless to attempt to protect privacy by restraining further publication once a private fact has been made public, there is a great difference between information which is publicly accessible in a very limited descriptive sense and information which has been widely publicised by the mass media.<sup>136</sup> It is arguable that an individual has a privacy interest in averting any harm that may result from wider exposure of information falling in the first category if it relates to his private life.

7.109 We agree that personal data recorded in public records are to some extent public if the records are open for public inspection. However, the fact that the records are accessible to the public does not make the data a matter of public knowledge. Accessibility to public records is generally limited for practical reasons. The right to gain access to the records in a public register often depends on physical presence at the registry and requires the payment of a fee. The way the data are recorded and indexed also requires prior knowledge of certain relevant details before a search can be carried out. Furthermore, the Personal Data (Privacy) Ordinance restricts the use of public register personal data collected by a member of the public to the lawful purpose for which the data were collected by him. Hence, much personal information contained in public registries is and remains unknown to the general public. The "practical obscurity" of personal information in public records is something that ought to be taken into account by the law.<sup>137</sup> It is one thing to make

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<sup>133</sup> Above. See also *In re National Broadcasting Co.*, 653 F 2d 609 at 613 (D C Cir 1981) ("*The public has in the past been excluded, temporarily or permanently, from ... the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputation of victims of crimes, as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity.*").

<sup>134</sup> *US Dept of Justice v Reporters Committee for Freedom of the Press*, 489 US 749 at 773 (1989).

<sup>135</sup> Above, at 770; quoting Rehnquist, "Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?", *Nelson Timothy Stephens Lectures*, University of Kansas Law School, pt 1, p 13 (Sept 26-27, 1974).

<sup>136</sup> "*Only the extremely callous can be oblivious to the real-world differences in privacy invasion between the disclosure of a personal fact in a dusty public record hidden somewhere in the bowels of a county courthouse and a similar disclosure disseminated through the mass technology of the modern press.*" S Ingber, "Rethinking Intangible Injuries: A Focus on Remedy" (1985) 73 Cal L Rev 772, 848-849; quoted in E Paton-Simpson, "Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts'" (1998) 61 MLR 318 at 327.

<sup>137</sup> In PCO's Complaint Case Notes Case No AR9798-20, the court documents in relation to the divorce proceedings to which the data subject was a party were left on the reception desk of the office in which the data subject worked while waiting for her to acknowledge receipt. As a result, the contents of the documents were read by the receptionist and could be read by anyone walking passed the desk. The Privacy Commissioner held that the law firm concerned had

information in a public record available to a member of the public who has a legitimate interest in receiving the information; it is another to *give publicity* to such information in the absence of any public interest. Despite the public nature of the record, the individual concerned retains a privacy interest in having the information protected from unwarranted publicity.

7.110 In our view, the law should aim at opening government records to public inspection without compromising privacy interests. As suggested by Paton-Simpson, if the purposes of public access are adequately served by the opportunity for inspection and there is no further legitimate purpose served by media coverage, then the balance of interests justifying public inspection may not extend to mass communication.<sup>138</sup> She thinks that a better approach would be to abandon any special exemption for public records and simply ask the same questions as for other information, ie, whether the information is of legitimate public concern, and to what extent the information is already public knowledge.<sup>139</sup> She argues that by drawing a distinction in terms of privacy between accessibility and publication, personal information in public records can be protected from mass dissemination and yet be accessible to anyone who is motivated enough to specifically seek it out. Hence, the privacy interests in public records can be protected without unduly restricting freedom of information. Any impact such an approach would have on freedom of the press would be counterbalanced by the introduction of a defence based on the public interest of the disclosure.

7.111 We agree with the views of Paton-Simpson in the foregoing paragraph, except that giving publicity to facts pertaining to an individual's private life which are obtained from a public registry should not attract civil liability if the publicity was consistent with the purpose for which the facts were made public by the registry. Where the publication of facts is consistent with the purpose for which they were made public by a registry, this should not fall within the scope of the publicity tort. In the light of the above observations, and given that we have recommended that publications in the public interest should be exempt from liability, it is unnecessary to exempt public records as originally proposed in the Consultation Paper.

### ***Facts concerning an individual's private life in public places***

7.112 The Consultation Paper stated that information about activities and incidents which occur in a public place is in the public domain; and an individual has no privacy in personal information about himself which is in the public domain. After further deliberation, we come to the view that the mere fact that the facts are revealed in a public place or have previously been disclosed to others does not necessarily preclude recovery under the publicity tort.

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breached Data Protection Principle 4. Although the information in question was accessible in public records and hence not confidential in the strict sense, it was still of a sensitive nature to the data subject who was distressed as a result.

<sup>138</sup> E Paton-Simpson, "Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts'", (1998) 61 MLR 318 at 328.

<sup>139</sup> E Paton-Simpson, above, 329.

7.113 Étienne Picard points out that the fact that a person belongs to a church and practices a particular religion, or is a member of a trade union, an association, or a political party may bring into play privacy rules even though these facts may also be in the public domain. In his view, private life implies some external and public dimensions; privacy is not confined within the circle of intimate private life. The relative publicity characterising these activities should not be increased by others unless the subject accepts or tolerates this.<sup>140</sup> Such a view is consistent with that of the European Court of Human Rights in the *Niemietz* case, which held that respect for private life must comprise the right to establish and develop relationships with other human beings.<sup>141</sup>

7.114 In the case involving the publication of photographs of Princess Caroline of Monaco having dinner in a secluded part of a garden restaurant, the German Federal Supreme Court held that even though the photographs were taken in a restaurant which was a public place, the publication of the photographs violated her private sphere because she was then in a secluded place and had manifested a desire to be left alone. The spatial zone of legal protection of privacy in Germany therefore extends to public places that are secluded from the general public, such as a gymnasium or a room in a restaurant.<sup>142</sup>

7.115 Unlike Germany, the protection of private life under the Civil Code in France does not depend on a spatial definition of what “private” means. According to Matthias Prinz, it is not important whether the event occurred in a public place, but whether the activity in which the person was engaged was of a private or public character. As far as photography is concerned, the fact that a photograph is taken in a public place does not automatically lead to the presumption that the photographed activity is a “public activity”. There is an unlimited protection of the private sphere, without any restrictions to certain rooms or spaces. Where high-performance telephoto lenses have been used in order to capture things or events on film that could not otherwise be captured, the publication of the photographs is always considered to be unlawful.<sup>143</sup> Furthermore, the publication of a person’s photograph taken in a public place is unlawful under French law, unless the photograph is incidental to the overall context of the picture. A person can object to publication on the grounds of privacy and image rights if the complainant is the main subject of a photograph, but not if his image is only one of the component elements of a whole public subject, even though he may still be identifiable.<sup>144</sup>

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<sup>140</sup> Étienne Picard, above, 86-87.

<sup>141</sup> Series A, No 251-B (1992).

<sup>142</sup> BGH NJW 1996, 1128 (19.9.1995), cited and discussed in B S Markesinis & N Nolte, “Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places” in P Birks (ed) *Privacy and Loyalty* (Oxford: Clarendon Press, 1997), pp 118-122.

<sup>143</sup> M Prinz, “Remedies against an infringement of privacy: the effect of sanctions and compensation and their proportionality” in *Conference on Freedom of Expression and the Right to Privacy – Conference Reports* (Strasbourg: Council of Europe, 2000), DH-MM(2000)7, at 70 – 71.

<sup>144</sup> Étienne Picard, above, pp 90 & 95.

7.116 In Italy, events that are strictly personal and relating to the family and which are not of legitimate concern to the public are protected from publicity even though they take place outside the domestic residence.<sup>145</sup>

7.117 In the Quebec case of *Aubry v Éditions Vice-Versa Inc.*,<sup>146</sup> the plaintiff sued the publisher of a magazine for publishing a photograph showing the plaintiff sitting on the steps of a building. The photograph was taken in a public place without the plaintiff's consent. That photograph was in no way reprehensible, and the text of the article was serious. Nevertheless, the Court of Appeal held that the unauthorised publication of the photograph constituted an infringement of the plaintiff's anonymity, which was an essential element of the right to privacy.<sup>147</sup> On further appeal, the Supreme Court of Canada held that the balancing of the right to privacy and the right to freedom of expression depended both on the nature of the information and on the situation of those concerned. Since none of the exceptions based on the public's right to information was applicable, the Court held that the publication of the photograph was an unwarranted infringement of the plaintiff's right to privacy, even though it was taken in a public place. The Court did not accept the publisher's submission that it would be very difficult in practice for a photographer to obtain the consent of all those he photographed in public places before publishing the photographs:

*"To accept such an exception would, in fact, amount to accepting that the photographer's right is unlimited, provided that the photograph is taken in a public place, thereby extending the photographer's freedom at the expense of that of others. We reject this point of view."*<sup>148</sup>

7.118 In a New Zealand case,<sup>149</sup> the tombstone marking the plaintiff's burial plot appeared in the defendant's film as a backdrop to a sequence shot at a public cemetery. The film was described in reviews as a "splatter film". It satirised a number of attitudes and forms of behaviour by showing them in the extreme. After stating that the facts disclosed to the public must be private facts and not public ones, the High Court of New Zealand held that there could scarcely be anything less private than a tombstone in a public cemetery. However, the Court added that it is conceivable that in certain circumstances the fact that something occurs or exists in a public place does not necessarily mean that it should receive widespread publicity if it does not involve a matter of public concern.<sup>150</sup>

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<sup>145</sup> Guido Alpa, "The Protection of Privacy in Italian Law" in B S Markesinis (ed), *Protecting Privacy – The Clifford Chance Lectures Volume Four* (OUP, 1999), pp 121-124.

<sup>146</sup> 157 DLR(4<sup>th</sup>) 577; applied by the UK House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22, paras 122 – 123.

<sup>147</sup> 141 DLR(4<sup>th</sup>) 683.

<sup>148</sup> 157 DLR(4<sup>th</sup>) 577, para 65.

<sup>149</sup> *Bradley v Wingnut Films* [1993] 1 NZLR 415.

<sup>150</sup> It pointed out that had the defendant chosen to involve the tombstone directly in the action of the film as if, for example, the clergyman in the film had been impaled upon it or the zombie had been seen to appear out of it, the situation might have been different. Above, at 424.

7.119 In *M G (a minor) v Time Warner*,<sup>151</sup> a publication and a television programme used a team photograph of a Little League team to illustrate stories about adult coaches who sexually molest youths playing team sports. The plaintiffs, all of whom appeared in the photograph, had been players or coaches on the Little League team. The team's manager had pleaded guilty to molesting children he had coached in the Little League. Four of the player-plaintiffs had been molested by the manager and four had not. After the article and the programme appeared, the plaintiffs were teased and harassed at school. As a consequence, some of them were forced to quit school, to transfer, or to be home-schooled. The defendants asserted that the information was not private because the plaintiffs had played a public sport and the team photograph had been taken on a public baseball field. Furthermore, the manager had admitted molesting Little League players. The California Court of Appeal held that the plaintiffs had demonstrated a *prima facie* case of invasion of privacy. It reasserted that the claim of a right of privacy is not “*so much one of total secrecy as it is of the right to define one's circle of intimacy – to choose who shall see beneath the quotidian mask.*”<sup>152</sup> Information disclosed to a few people may remain private.

7.120 The decisions of the European Court of Human Rights have also provided some insight into this subject. In *Rotaru v Romania*,<sup>153</sup> the Romanian intelligence services held data relating to: (a) the membership of the applicant in a political movement when he was studying at a university; (b) his application to publish two political pamphlets; (c) his affiliation to the youth section of a political party; (d) the fact that he had no criminal record; and (e) the fact that he had been questioned by the intelligence services about his views. The Romanian Government argued that the information related not to the applicant's private life but to his public life: by deciding to engage in political activities and having pamphlets published, the applicant had implicitly waived his right to “anonymity” inherent in private life. As to his questioning by the police and his criminal record, the Government argued that they were public information. After referring to the Council of Europe Convention on Privacy 1981 and reiterating that respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings, the European Court stated that:

*“public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past.”*<sup>154</sup>

In the Court's opinion, information about an individual's life, when systematically collected and stored in a file held by the State, falls within the scope of “private life” for the purposes of Article 8(1). Both the storing by a public authority of information relating to an individual's private life and the use

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<sup>151</sup> E027632 (Super Ct No SCV 64216), filed 5/30/01.

<sup>152</sup> Citing *Briscoe v Reader's Digest Association, Inc* (1971) 57 ALR3d 1 at 5.

<sup>153</sup> No 28341/95, date of judgment: 4.5.2000 (ECtHR).

<sup>154</sup> Above, para 43.

of it and the refusal to allow an opportunity for it to be refuted amount to an interference with the right to respect for private life secured in Article 8(1).

7.121 In *Perry v United Kingdom*,<sup>155</sup> the applicant complained that he had been covertly videotaped at the custody suite of a police station using a closed circuit video camera. The UK Government submitted that the filming did not take place in a private place with any intrusion into the “inner circle” of his private life. It pointed out that the custody suite of the police station was a communal administrative area through which all suspects had to pass and where the camera, which was easily visible, was running as a matter of security routine. The images also related to public, not private, matters. He must have realised that he was being filmed, with no reasonable expectation of privacy in the circumstances. The European Court noted that the normal use of security cameras *per se*, whether in the public street or on premises such as shopping centres or police stations where they serve a legitimate and foreseeable purpose, do not raise issues under Article 8(1). However, the police in question regulated the security camera so that it could take clear footage of the applicant in the custody suite. The footage had also been used for identification parade purposes and shown in a public court room. Whether or not he had been aware of the cameras running in the custody suite, there was no indication that the applicant had had any expectation that footage was being taken of him within the police station for use in a video identification procedure and, potentially, as evidence prejudicial to his defence at trial. This went beyond the normal or expected use of that type of camera. The footage had not been obtained voluntarily or in circumstances where it could be reasonably anticipated that it would be recorded and used for identification purposes. The Court therefore considered that both the recording and use of the footage disclosed an interference with his right to respect for private life.<sup>156</sup>

7.122 In *Peck v United Kingdom*,<sup>157</sup> the applicant complained that a borough council had disclosed to local and to national media organisations a film taken on the council’s CCTV, installed for the purpose of preventing crime, allegedly showing him attempting to commit suicide in a public street. The UK Court held that the council had not acted irrationally in disclosing the footage, even though the disclosure had resulted in images of the applicant being published and broadcast widely. The UK Government submitted that, given the substance of what was filmed and the location and circumstances of filming, the applicant’s actions were in the public domain:

*“Disclosure of those actions simply distributed a public event to a wider public and could not change the public quality of the applicant’s original conduct and render it more private.”*

The Government also maintained that he had waived his rights by choosing to do what he did, where he did. The European Court of Human Rights noted that although the applicant was in a public street, he was not there for the purposes

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<sup>155</sup> No 63737/00, date of judgment: 17.7.2003 (ECtHR).

<sup>156</sup> Above, paras 40-43, 48.

<sup>157</sup> No 44647/98, date of judgment: 28.1.2003 (ECtHR); applied by the UK House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22, paras 122 – 123.

of participating in any public event. It was late at night. He was deeply perturbed and in a state of some distress. He was not a public figure, nor was he charged with any offence. The footage was disclosed to the media for further broadcast and publication purposes, and his identity was not adequately, or in some cases not at all, masked in the photographs and footage eventually published and broadcast. As a result,

*“the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation ... and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on [that night]”.*<sup>158</sup>

The European Court therefore considered that the disclosure of the CCTV footage to the media for broadcast constituted a “serious interference” with the applicant’s private life, notwithstanding that he was in a public place at the time.<sup>159</sup> The Court then ruled that the applicant had no effective remedy in relation to the violation of his right to respect for his private life guaranteed by Article 8 of the Convention. It did not accept as relevant the UK Government’s argument that any acknowledgement of the need to have a remedy would undermine the important conflicting rights of the press.<sup>160</sup>

7.123 As pointed out by Gavin Phillipson, *Peck* indicates that a public location *per se* cannot rule out protection under Article 8. The critical question is whether the extent of publicity subsequently given to the events in question went beyond that which could have been foreseen at the time:

*“Where there is no expectation either of being photographed or overheard, as where surreptitious photographs are taken of a person relaxing by a hotel pool, on a beach, or in a restaurant, or where there is no expectation that any images recorded will be afforded mass publicity – as in Peck itself – the fact that the location was a public or semi-public one will not prevent there being an invasion of private life.”*<sup>161</sup>

7.124 In cases involving the unforeseen use by the authorities of photographs which had been previously voluntarily submitted to them, or the use of photographs taken by the authorities during a public demonstration, the European Commission of Human Rights has attached importance to whether the photographs amounted to an intrusion into the applicant’s privacy (as, for instance, by entering and taking photographs in a person’s home), whether the photographs related to private or public matters, and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public.<sup>162</sup> In *Friedl v Austria*,<sup>163</sup> the applicant complained that,

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<sup>158</sup> Above, para 62.

<sup>159</sup> Above, para 63.

<sup>160</sup> Above, para 113.

<sup>161</sup> G Phillipson, “Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act” (2003) 66 MLR 726, 739.

<sup>162</sup> See the discussion in *Peck v UK*, above, para 61.

during a public demonstration, the police had photographed him, checked his identity and taken down his particulars. But the European Commission of Human Rights noted that there was no intrusion into the “inner circle” of the applicant's private life, the photographs taken of a public demonstration related to a public event, and they had been used solely as an aid to policing the demonstration on the relevant day. In this context, the Commission attached weight to the fact that the photographs taken remained anonymous, in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action had been taken to identify the persons photographed on that occasion by means of data processing.

### ***Facts which have previously been disclosed to others***

7.125 In *R v Broadcasting Complaints Commission, ex parte Granada Television Ltd*,<sup>164</sup> the death of Helen Sandford in 1987 was reported in a local newspaper and discussed in a medical journal. Three years later, Granada broadcast “The Allergy Business” which showed photographs of three people, including a photograph of Helen with the word “dead” superimposed. Helen’s parents were not forewarned that the programme would include material relating to her and saw it at home by chance. The Broadcasting Complaints Commission in the UK ruled that the transmission without forewarning the parents was an unwarranted infringement of their privacy. The English Court of Appeal agreed, holding that the fact that a matter had once been in the public domain could not prevent its resurrection, possibly many years later, from being an infringement of privacy. It referred to Article 8 of the ECHR and expressed the view that it would be an unacceptably narrow interpretation of the meaning of privacy and contrary to common sense to confine privacy to matters concerning the individual complainant and not as extending to his family.

7.126 The Constitutional Court of Spain made a similar observation in the *Pantoja* case.<sup>165</sup> In that case, the footage of a famous artist’s death, which had been broadcast on a news programme, was subsequently included in a commercial videotape about the artist’s life. The Constitutional Court held that although the privacy rights of the widow of the artist had not been violated by the playing of a video of the artist’s death on a television news programme, the makers of the commercial videotape had invaded her privacy by including the same footage in their commercial tape. The Court made a distinction between a lawful invasion of privacy when there is a legitimate public interest in the information, and an unlawful invasion of privacy motivated primarily by an economic interest in selling the information. It observed that the fact that the videotape had been broadcast on a news programme did not place it in the public domain for all purposes and thus did not destroy the widow’s privacy interests in the tape.

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<sup>163</sup> No 15225/89, date of judgment: 31.1.1995 (ECtHR), friendly settlement; European Commission of Human Rights report of 19.5.94.

<sup>164</sup> [1995] 3 EMLR 163, [1995] COD 207.

<sup>165</sup> STC 231/88, *Boletín de Jurisprudencia Constitucional* 92, 1577; cited and referred to in ARTICLE 19, *The Article 19 Freedom of Expression Handbook – International and Comparative Law, Standards and Procedures* (Avon: The Bath Press, 1993), p 164.

7.127 In New Zealand, a broadcaster has a statutory duty to maintain standards which are consistent with the privacy of individuals.<sup>166</sup> The NZ Broadcasting Standards Authority enumerated seven privacy principles it intended to apply in respect of complaints which alleged a breach of that duty. The first principle states that *“the protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities”*. Then follows the second principle, which reads:<sup>167</sup>

*“The protection of privacy also protects against the public disclosure of some kinds of public facts. The ‘public’ facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to a reasonable person.”*

7.128 In *TV3 Network Services Ltd v Broadcasting Standards Authority*, Eichelbaum CJ, now also a Non-Permanent Judge of the HK Court of Final Appeal, held that the Broadcasting Standards Authority in New Zealand could properly have taken the view that privacy should include relief from individuals being harassed with disclosure of past events having no sufficient connection with present public interest.<sup>168</sup> He had this to say in relation to the Broadcasting Act 1989 in New Zealand:<sup>169</sup>

*“‘privacy’ is not an absolute concept. The term should receive a fair, large and liberal interpretation ... . On any sensible construction the meaning of that expression cannot be restricted to facts known to the individual alone. Although information has been made known to others a degree of privacy, entitled to protection, may remain. In determining whether information has lost its ‘private’ character it would be appropriate to look realistically at the nature, scale and timing of previous publications.”*

7.129 In *R v Mahanga*,<sup>170</sup> the trial of an accused was filmed by a television company with the permission of the judge. A videotaped interview of the accused by police was shown during the trial and recorded by the company, but the result was of poor quality. The company applied for access to the original videotape for use in a documentary. The New Zealand Court of Appeal refused their application. It did not agree that the private character of the videotaped interview ceased to exist once it was played in Court, and held that protection of individual privacy was a legitimate factor to be taken into account in the balancing process. The Court said:

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<sup>166</sup> Broadcasting Act 1989, s 4(1).

<sup>167</sup> New Zealand Broadcasting Standards Authority, “Privacy Principles”, at <[http://www.bsa.govt.nz/\\_priv\\_princ.htm](http://www.bsa.govt.nz/_priv_princ.htm)>, principle (ii).

<sup>168</sup> [1995] 2 NZLR 720, 728.

<sup>169</sup> [1995] 2 NZLR 720, 731.

<sup>170</sup> *R v Mahanga* [2001] 1 NZLR 641; 2000 NZLR LEXIS 125.

*“There is a significant difference in the impact on privacy between playing a videotape of a police interview in open Court, where the media can observe and report what was said, and the playing of it, or excerpts, on national television. Furthermore, during the trial process the privacy interests of the accused will generally be outweighed by the greater interests of the public, and indeed all accused persons, in open justice. But once a criminal trial has concluded there is more room to recognise individual privacy interests in applications such as the present.”*<sup>171</sup>

7.130 In Germany, the right to publish photographs of convicted criminals gradually recedes, while the right to make a fresh start takes precedence. The public trial is the place where offenders take responsibility for their actions, but after that they eventually regain the right not to be exposed publicly.<sup>172</sup>

7.131 In *Times-Mirror v Superior Court*,<sup>173</sup> a newspaper published the name of the woman who had discovered the body of a rape victim and confronted the murderer. Despite the fact that the woman had revealed this fact to her neighbours, friends, family members and officials investigating the murder, the California Court of Appeal held that she had not rendered otherwise private information public by cooperating in the investigation and seeking solace from friends and relatives. Talking to selected individuals did not render private information public.<sup>174</sup>

7.132 In *Venables v News Group International*,<sup>175</sup> the Attorney-General of England and Wales applied to commit the defendant for contempt on the ground that it had published information which was likely to lead to the identification of the whereabouts of two prisoners in breach of a court order. Since the defendant would not be liable if the information was in the public domain at the date of the order, the defendant pointed out that the information could be obtained by searching Government Department websites, or publications which were available in public libraries. The court agreed that information available in the public library was accessible to the public. However, the publication provided detailed and complicated information and statistics not easy to digest by anyone not accustomed to its format or with sufficient background information to know where to look. The court therefore did not consider that such information was realistically accessible to the wider public merely by being on a library shelf. In relation to the information placed on the website of a Government Department, the court noted that it would require some degree of background knowledge and persistence for this to become available to a member of the public and would not be widely recognised as

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<sup>171</sup> *R v Mahanga* [2001] 1 NZLR 641; 2000 NZLR LEXIS 125, para 41.

<sup>172</sup> B Marquesinis *et al*, above, at 44.

<sup>173</sup> 198 Cal App 3d 1420 (1988).

<sup>174</sup> See E M Barendt, “The Protection of Privacy and Personal Data and the Right to Use One’s Image and Voice: When does the Dissemination of Information Become an Interference with a Person’s Life?”, above, at 65. (“[The public domain argument] can easily be abused. One reason why privacy should be protected is that people value choice in areas of personal life: we choose whom to give information to and whom to undress for.”)

<sup>175</sup> [2001] EWHC QB 452.

available. The court therefore concluded that the information was not public knowledge.<sup>176</sup>

7.133 The law relating to breach of confidence does not provide protection against the use or disclosure of information which is already in the public domain. This means that there may be circumstances in which the information is so generally accessible that it cannot be regarded as confidential.<sup>177</sup> However, the fact that information may be known to a limited number of members of the public does not of itself prevent its having and retaining the character of confidentiality, even if it has previously been widely available.<sup>178</sup> The court may restrain a newspaper from publishing, for example, the address or whereabouts of a person if the information is not generally known, nor generally accessible for the public at large.<sup>179</sup> Nonetheless, the public domain principle gives rise to difficulties if personal, rather than commercial, information is disclosed. The following example given by the English Law Commission illustrates the issues involved:

*“Personal information may, for example, have been given by a patient in confidence to his doctor. The latter in breach of that confidence reveals the information to a newspaper which, with knowledge of its confidential origin, nevertheless publishes it. The newspaper may be a local one with a small circulation, but once the information is thus revealed and is regarded as thereby having been put into the public domain the information may be republished by a national newspaper, with the result that the pecuniary loss or distress (or risk of it) to the plaintiff is greatly increased. If the latter is denied protection in damages or by way of an injunction against the national newspaper because the information is now in the public domain, many people might regard it as unjust to him.”<sup>180</sup>*

7.134 The English Law Commission therefore suggested in a working paper that the public domain principle was inappropriate where personal information was in issue:

*“Much information which is technically available to the public is not generally known and may in fact be known only to a handful of people. For example, the back files of a local newspaper may, if properly and assiduously searched, yield a good deal of information not generally known about a person who spent his early life in the area - his family and educational background, his business connections, his political beliefs and his personal and social problems. Perhaps they show that he was at the centre of an unfortunate affair at his school, that he attempted to take his*

<sup>176</sup> [2001] EWHC QB 452, paras 32-33.

<sup>177</sup> *Attorney-General v Guardian Newspapers (No 2)* [1990] AC 109, 281.

<sup>178</sup> *Mills v News Group Newspapers Ltd* [2001] EMLR 41, para 25.

<sup>179</sup> *X (a woman formerly known as Mary Bell) v O'Brien* [2003] EWHC QB 1101; *Mills v News Group Newspapers Ltd* [2001] EMLR 41.

<sup>180</sup> The Law Commission, *Breach of Confidence* (LAW COM No 110) (London: HMSO, Cmnd 8388, 1981), para 5.12.

*own life, that he took part in a political demonstration in favour of an unpopular cause, that he associated in his business or private life with someone later convicted of grave crimes against society or even that he 'helped the police' with their inquiries into an offence with which he was never charged. These facts will, of course, be known to and remembered by those who were directly involved, but if the publication took place a long time ago it is quite possible that nobody now knows or remembers them solely by reason of the publication in the local newspaper.*"<sup>181</sup>

7.135 Nevertheless, the English Law Commission concluded in its final report that in any statutory framework for the action for breach of confidence the requirement that the information is not in the public domain should be stated in broad terms, leaving the courts to decide in the circumstances of the case whether the information at the time of the alleged breach was "relatively secret" or "available to the public". The Commission stressed that if a person suffered hardship by reason of the repetition of true stories about him which were already in the public domain, the question whether he should be given a remedy depended not on the law of confidence, but on the law of privacy.<sup>182</sup>

7.136 In the privacy context, the fact that certain facts concerning an individual's private life have been disclosed or are known to a small group of people does not justify a full exposé to the whole world. It has been the practice of the UK Press Complaints Commission to apply the privacy provision of its Code of Practice to prohibit newspapers from publishing the home address of a celebrity, or material which might enable people to discover its whereabouts. In the information age, sensitive personal data may be posted on a public "newsgroup" on the Internet without the individual's consent. A person who discovers the data by performing a search on the Internet might publish them in a newspaper. Such data may never have been viewed or retrieved by anyone in Hong Kong. But if the public domain defence is available and the data are held by the court to be in the public domain once they are posted on the Internet, anyone in Hong Kong may republish it without being held liable for invasion of privacy even though the subsequent publication does not serve any public interest.

### **Concluding remarks**

7.137 As pointed out by Paton-Simpson, "public" and "private" are not mutually exclusive all-or-nothing categories but are matters of degree, existing on a continuum.<sup>183</sup> The aphorism that "what is public is not private and what is private is not public" is an oversimplification of the issues. Not all personal information open to public view is by definition not private. The mere fact that a fact can be classified in some sense or to some degree as "public" is not

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<sup>181</sup> The Law Commission, *Breach of Confidence - Working Paper No 58* (London: HMSO, 1974), para 102.

<sup>182</sup> The Law Commission, *Breach of Confidence* (LAW COM No 110), above, para 6.69.

<sup>183</sup> E Paton-Simpson, "Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts'" (1998) 61 MLR 318 at 324.

conclusive in determining whether or not the fact can be made public. The mere fact that something happens in a public place, or a place which is visible or accessible to the public, does not necessarily entitle a news organisation to cover the event in the media. As the editors of *Prosser and Keeton on the Law of Torts* put it:

*“merely because a fact is one that occurred at a public place and in the view of the general public, which may have been only a few persons, or merely because it can be found in a public record, does not mean that it should receive widespread publicity if it does not involve a matter of public concern. There can be such a thing as highly offensive publicity to something that happened long ago even though it occurred in a public place.”*<sup>184</sup>

7.138 What is at issue is whether someone has given “publicity” to “a matter concerning the private life of another”, not whether someone has given publicity to “personal information which is not in the public domain”. In determining whether a person is liable for the tort of unwarranted publicity, it is immaterial whether the matter publicised by that person has already been “made public” or “disclosed” in the public domain. The mischief is unwarranted “publicity”, not unauthorised “disclosure” (in the sense of first revelation) of a fact pertaining to an individual. Giving publicity to a fact which has already been disclosed in the public domain, or giving further publicity to a fact which has once been publicised, should not automatically deprive the individual of the protection against unwarranted “publicity”. Prior disclosure or publicity would not alter the private nature of a fact if that fact relates to the private life of an individual: further publicity would only aggravate the injury caused by the initial publicity.

7.139 In the light of the above discussion, we consider that it is unnecessary and inappropriate for the privacy legislation to provide for a public domain defence to exempt facts that can be found in records that are readily accessible to the public, or have come into the public domain through no fault of the defendant.<sup>185</sup> Use of personal data for a purpose other than that for which the data were collected is contrary to the Use Limitation Principle in the PD(P)O whether or not the data are in the public domain.<sup>186</sup> There are no provisions in the Ordinance whereby information ceases to be “personal data” under the Ordinance simply because it was collected from the public domain.<sup>187</sup> The absence of a public domain defence for the publicity tort would not impinge on press freedom because the fruits of investigative journalism would be sufficiently protected by the public interest defence and the defence of qualified privilege. If the legislation provided for a public domain defence, a victim of unwarranted publicity would be unable to seek redress from a person who had given publicity to details of his private life that are in the public domain, even though the publicity constitutes a serious and unjustifiable interference with his

<sup>184</sup> W P Keeton (ed), *Prosser and Keeton on Torts* (Minn, St Paul, West Publishing Co, 5<sup>th</sup> edn, 1984), 859.

<sup>185</sup> See also the discussion in Chapter 8 (Privacy of ex-offenders).

<sup>186</sup> See the case summary in Office of the Privacy Commissioner HK, *Annual Report 2002-03*, at 28.

<sup>187</sup> See *Report of the Committee on Data Protection* (HMSO, Cmnd 7341, 1978), Chapter 31 (Published information), paras 31.02 – 31.08.

privacy. In our view, the fact that the facts are, or have once been, made publicly available should not necessarily deprive an individual of legal protection from unwarranted publicity. The publisher should not automatically have a defence simply by showing that the facts were or are in the public domain. He should justify the publicity by arguing, for example, that it is privileged or in the public interest.

#### **Recommendation 14**

**We recommend that the legislation should provide that the plaintiff in an action for unwarranted publicity given to an individual's private life should not be precluded from obtaining relief by reason merely of the fact that the matter to which the defendant has allegedly given publicity:**

- (a) could be found in a register to which the public or a section of the public had access;**
- (b) has been disclosed by the plaintiff to his family members, friends, neighbours and/or other selected individuals;**
- (c) has been disclosed or published by a third party without the consent of the plaintiff;**
- (d) has been made available on the Internet by a third party without the consent of the plaintiff; or**
- (e) related to an occurrence or event which happened in a place which was visible or accessible to members of the public.**

### **Relationship between intrusion and unwarranted publicity**

**7.140 Relevance of lawfulness of acquisition to the public interest defence** – We consider that in assessing the public interest in the publicity given to the plaintiff's private life, the court should not take into account the manner in which the published facts were acquired. Whether the means employed to collect the facts is lawful or not is a separate issue and should not be a factor in determining whether the defendant has a public interest defence to the publication of facts collected by these means.<sup>188</sup>

**7.141 Relevance of public interest disclosure to liability for the intrusion tort** – It has been suggested that any law of privacy should include

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<sup>188</sup> *Liberty Lobby Inc v Pearson*, 261 F. Supp 726 (1966) (holding that the courts may not restrain the publication of news merely because the person responsible for the publication obtained it in a manner that may perhaps be illegal or immoral). See also Hill, "Defamation and Privacy under the First Amendment", above, 1279-80. For the position in Germany, see the decision of the Federal Supreme Court in BGHZ 73, 120; referred to in B S Markesinis & N Nolte, "Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places" in P Birks (ed), *Privacy and Loyalty* (Oxford: Clarendon Press, 1997), pp 120-121.

the defence that the act of intrusion was committed in the course of investigations made with publication in the public interest in view. In our view, whether information acquired by means of an intrusion is a matter of public interest is irrelevant for the purposes of the intrusion tort. Likewise, a defendant in an action for intrusion should not be able to avoid liability purely on the ground that he has not obtained any sensitive information about the plaintiff. The Court in *Pearson v Dodd* held:

*“Where there is intrusion, the intruder should generally be liable whatever the content of what he learns. An eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinion of legitimate interest to the public; for purposes of liability that should make no difference.”*<sup>189</sup>

7.142 We agree that the fact that the publicity can be justified on one of the prescribed grounds should not preclude the court from holding the defendant liable for intrusion if he has used privacy-invasive means to collect the published facts. None of the justifications for freedom of speech can be used to justify intrusions upon privacy. The means of acquiring personal information and the publication of the information acquired by such means are separate issues which should not be conflated.<sup>190</sup> If the law accepted that the end could justify the means and make exposure in the public interest a defence to an action for intrusion, a person would be tempted to intrude upon the privacy of another on the pretext that he might find something newsworthy to publish. We conclude that in determining liability for invasion of privacy by intrusion, the courts should not take into account whether the disclosure of any information obtained by means of the intrusion in question can be justified on one of the grounds prescribed in the legislation.

7.143 **Eventual publication relevant in determining damages for intrusion** – In an intrusion case, whether or not the defendant has subsequently disseminated information about the plaintiff that was acquired during the intrusive act is irrelevant for the purposes of determining his liability for intrusion. However, the fact that the information has subsequently been wrongfully disseminated by the same defendant who is liable for intrusion may be relevant in determining the quantum of damages for intrusion. In *Dietemann v Time*,<sup>191</sup> the US Court of Appeals held that no interest protected by the First

<sup>189</sup> 410 F2d 701, 705 (D C Cir), *cert denied*, 395 US 947 (1969).

<sup>190</sup> This is also the approach adopted in the PD(P)O. The exemptions available to the media under the Ordinance from the Data Protection Principles relate only to the use and disclosure of personal data and the right of access to personal data. The media is not exempt from the Collection Limitation Principle under DPP 1. A reporter who uses unlawful or unfair means to collect personal data cannot argue that the publication of the data is in the public interest. In *HKSAR v Tsun Shui Lun* [1999] 3 HKLRD 215, the defendant obtained a copy of the medical report of the Secretary for Justice with a view to leaking it to the press. He was charged with the offence of obtaining access to a computer with a view to dishonest gain for himself, contrary to s 161(1)(c) of the Crimes Ordinance. He pleaded that he did so because the Government had lied and he thought that the public had the right to know the truth. Chan CJHC held at p 227G that it was unnecessary for the Court to rule whether the public had the right to know the truth. Apparently, the plea that the subsequent *publication* could be justified to be in public interest did not preclude the Court from holding the defendant liable for *obtaining access* to a computerised record without lawful authority.

<sup>191</sup> 449 F2d 245 at 250 (1971, CA9 Cal).

Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Finding that assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired information is published chills intrusive acts but not freedom of expression, the Court concluded that a rule excluding the fact of publication from consideration when assessing damages would deny redress to the plaintiff without any countervailing benefit to the legitimate interest of the public in being informed. It would also encourage conduct by the news media that grossly offends the public.

7.144 We should add that although the fact that information obtained by intrusion has subsequently been wrongfully disseminated by the same defendant may be relevant in determining the damages for intrusion, damages for unwarranted publicity should not be enhanced on the basis that the information in question have been collected by the defendant by means of an intrusion.<sup>192</sup>

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<sup>192</sup> Though this is one of the factors that the courts would take into account when determining whether the disclosure is seriously objectionable to a reasonable person.

## Chapter 8

### Privacy of ex-offenders

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**8.1 Preliminary views of the Privacy Sub-committee** – The Consultation Paper examined whether the law should permit the publication of forgotten criminal records in the absence of any legitimate public interest. While the Sub-committee agreed that publicising a person’s criminal record for no good reason constitutes an interference with his private life, they also noted that the publication of criminal records raises issues which go beyond the privacy of ex-offenders. The Sub-committee expressed the view that the statutory right not to have a “spent conviction” divulged protected reputation rather than privacy. Judgments rendered in open court are information in the public domain; the fact that they are matters of public record prevents such convictions from being private. The Consultation Paper therefore concluded that criminal convictions are public records, and their publication should not be restrained on the ground that it is a breach of privacy.

**8.2 The need to keep criminal records confidential** – Some commentators have argued that persons who have been convicted of minor offences should have a right to have their criminal records forgotten. They contend that public knowledge and increased awareness of a particular crime may be gained by discussing past records without revealing the identities of the offenders. Divulging such records would shatter the newly found respectability of former offenders, and may ruin their future and cause their friends and relatives to shun them. Michael Gentot, the President of the National Data Processing and Liberties Commission in France, observes that criminal proceedings are generally conducted in public and yet, in all democracies, the criminal records of accused persons are the most protected and least accessible of files. In his view, the delivery of criminal sentences can legitimately be made public but the compilation, stocking and storage of these records must be kept confidential. Otherwise, important values such as the concern for reintegration and the spirit of rehabilitation - in short, the right to forget - will be seriously eroded.<sup>1</sup>

**8.3 Macao, China** – Article 78 of the Civil Code prohibits the public disclosure or use of data about the “personal history” of an identified individual without his consent. However these provisions do not apply if the public disclosure or use is in the interest of security or the administration of justice, for the purpose of science, culture or instruction, or can be justified by other interests concerning public figures that ought to be taken into account.

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<sup>1</sup> M Gentot, “Access to Information and Protection of Personal Data” collected in the Conference Proceedings of the 21<sup>st</sup> International Conference on Privacy and Personal Data Protection organised by the HK Privacy Commissioner’s Office (1999), 207 at 211-212.

8.4 **France** – The courts in France used to apply a subjective test to deal with this issue.<sup>2</sup> In determining whether a “rediscovery” amounted to a breach of the right to respect for private life under Article 9 of the Civil Code, they took into account such matters as the circumstances of publication, the motive of the defendant in publishing and the public interest in the publication. Redmond-Cooper states that the application of a subjective test could be justified on the following grounds: (a) the previous authorisation to publish private facts should not be presumed to last for ever; (b) the individual should have a right to repent; (c) the subsequent publication may reach a different readership and therefore be capable of causing real harm; and (d) the context and form of presentation of private facts are important considerations and the press should not use sensational extracts out of context.<sup>3</sup>

8.5 In 1980, the Supreme Court of France substituted an objective test of invasion of privacy in rediscovery cases. It held that once an event had been made known, that event then ceased to form part of the individual’s private life and could be freely recounted.<sup>4</sup> Hence, the public’s legitimate interest to be informed prevails over a person’s “right to be forgotten”. A person could not rely on his “right to be forgotten” in order to prohibit a new publication of facts relating to an old criminal affair which had attracted public odium. But in cases where the defendant invokes the right to information, the courts would ensure that the publication does not constitute a fault or an abuse, which are terms defined *in concerto* and *ex post*.<sup>5</sup>

8.6 **New Zealand** – According to one of the privacy principles enumerated by the Broadcasting Standards Authority of New Zealand, “public facts” concerning criminal behaviour which have, in effect, become private again through the passage of time should be protected from public disclosure even though the facts may properly be described as “public” in nature.<sup>6</sup> In *Tucker v News Media Ownership Ltd*, the plaintiff had been convicted of certain criminal offences, including offences of indecency. Years later, his doctor advised that he required a heart transplant operation. Since large sums were involved in such an operation, the plaintiff had to appeal to the public for funds. When he was told that the defendant’s newspaper would publish details of his convictions, he sought an interim injunction against the defendant. Holding that a person who lives an ordinary private life has a right to be left alone and to live the private aspects of his life without being subjected to unwarranted publicity, Jeffries J granted an interim injunction on the basis that the right to privacy in the circumstances before the Court might provide the plaintiff with a valid cause of action. On appeal, the Court of Appeal agreed that the plaintiff’s allegations raised serious arguable issues to be decided.<sup>7</sup> This injunction was followed by further *ex parte* injunctions granted to the plaintiff against the Broadcasting Corporation of New Zealand and another publisher. Shortly after the plaintiff

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<sup>2</sup> R Redmond-Cooper, “The Press and the Law of Privacy” (1985) 34 ICLQ 769.

<sup>3</sup> R Redmond-Cooper, above, at 777.

<sup>4</sup> R Redmond-Cooper, above, at 777-778.

<sup>5</sup> Étienne Picard, “The Right to Privacy in French Law” in B S Markesinis (ed), *Protecting Privacy – The Clifford Chance Lectures Volume Four* (OUP, 1999), p 94.

<sup>6</sup> New Zealand Broadcasting Standards Authority, “Privacy Principles”, at <[http://www.bsa.govt.nz/\\_priv\\_princ.htm](http://www.bsa.govt.nz/_priv_princ.htm)>, principle (ii).

<sup>7</sup> [1986] 2 NZLR 716, 731-732.

commenced proceedings for permanent injunctions against these three defendants, the details of the convictions were broadcast by much of the independent radio network in New Zealand. In pressing for the continuation of the injunctions, the plaintiff argued that publication was likely to cause him grievous physical or emotional harm, particularly when his doctor had advised that the effects of stress on him could be lethal. In determining whether the injunction should continue, McGechan J observed that the need for protection whether through the law of tort or by statute in a day of increasing population pressures and computerised information retrieval systems was becoming more and more pressing. He held that the injunctions were correct when granted, but had been subverted by other publications to the point where their continuation was futile.<sup>8</sup> He therefore refused to make the injunctions permanent.

8.7 **United States** – In *Melvin v Reid*,<sup>9</sup> the defendant made a film depicting the plaintiff as a prostitute who had been involved in a murder case. The scandalous behaviour shown in the film took place many years before it was made, and at the time when the film was released, the plaintiff had become entirely rehabilitated. The Court held that the defendant had violated the plaintiff's right to privacy by publishing unsavoury incidents in the past life of the plaintiff coupled with her true name. It concluded that "*Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime.*"<sup>10</sup> The decision may be explained on the grounds that the disclosure of the identity and whereabouts of the plaintiff were not part of the revived "news", or that the revelation of a former offender's past when she was trying to lead a respectable life could not pass the mores test.<sup>11</sup>

8.8 In *Briscoe v Reader's Digest Association Inc*,<sup>12</sup> a magazine published an article on truck hijacking and included a description of such a crime committed by the plaintiff 11 years earlier, using the plaintiff's true name. As a result of the publication, the plaintiff's 11-year-old daughter and his friends scorned and abandoned him. The Supreme Court of California observed that while reports of *recent* crimes and the names of suspects or offenders will be deemed protected by the First Amendment, reports of the facts of *past* crimes and the identification of *past* offenders may not serve the same public interest functions. The Court conceded that the facts of past crimes are newsworthy but identification of the *actor* in reports of long past crimes usually serves little independent public purpose:

*"Once legal proceedings have terminated, and a suspect or offender has been released, identification of the individual will not usually aid the administration of justice. Identification will no longer serve to bring forth witnesses or obtain succor for victims.*

<sup>8</sup> [1986] 2 NZLR 716, 733-736.

<sup>9</sup> 297 P 91 (Cal Dist Ct App, 1931).

<sup>10</sup> 297 P 91 at 93 (Cal Dist Ct App, 1931).

<sup>11</sup> W L Prosser, "Privacy" (1960) 48:3 California L Rev 383 at 419.

<sup>12</sup> 57 ALR3d 1; (1971) 4 Cal 3d 529, 541-543. Cf *Forsher v Bugliosi* (1980) 26 Cal 3d 792 at 813 in which the Court observed that *Briscoe* was an exception to the more general rule that "once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the ends of his days."

*Unless the individual has reattracted the public eye to himself in some independent fashion, the only public 'interest' that would usually be served is that of curiosity.*<sup>13</sup>

8.9 The Court expressed the view that a rehabilitated offender should be allowed to “melt into the shadows of obscurity” so that he can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts. It concluded that a jury could reasonably find the plaintiff’s identity as a former hijacker to be non-newsworthy. The publication of the plaintiff’s identity in connection with his past crime was of “minimal social value” and a jury could certainly find that he had once again become an anonymous member of the community. Furthermore, the publication would tend to interfere with the State’s interest in rehabilitating criminals and returning them to society.

8.10 In *Department of Air Force v Rose*,<sup>14</sup> student editors of the New York University Law Review sought access to Air Force Academy Honor Code case summaries (with identifying data deleted) under the Freedom of Information Act. The case summaries were prepared by the Honor Code Committee which had been established to hear cases concerning suspected violations of the Code by cadets. Copies of the summaries were widely disseminated for examination by fellow cadets and administration officials. Case summaries for not-guilty cases were circulated with the names deleted; in guilty cases, the guilty cadet’s name was not deleted from the summary. The US Supreme Court observed that the disclosure of these summaries implicated privacy values; for “*identification of disciplined cadets - a possible consequence of even anonymous disclosure - could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends.*”<sup>15</sup> Despite the fact that no one could guarantee that all those who were “in the know” would hold their tongues, the Supreme Court ruled that if deletion of personal references and other identifying information was not sufficient to safeguard privacy, then the summaries should not be disclosed to the respondents.<sup>16</sup>

8.11 The privacy interests in the criminal histories of individuals was a subject of discussion in *US Department of Justice v Reporters Committee for Freedom of the Press*.<sup>17</sup> The US Supreme Court in that case observed that the courts had recognised the privacy interest inherent in the non-disclosure of certain information even where the information may have been at one time public. Referring to the *Rose* case above, the Court noted that even though the summaries, with only names redacted, had once been public, there might be an invasion of privacy through later recognition of identifying details. It held that “*If a cadet has a privacy interest in past discipline that was once public but may have been 'wholly forgotten', the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.*”<sup>18</sup>

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<sup>13</sup> 57 ALR3d 1 at 9.

<sup>14</sup> 425 US 352 (1976).

<sup>15</sup> 425 US 352 at 376-377 (1976); quoting Court of Appeals, 495 F2d 261 at 276 (1974).

<sup>16</sup> 425 US 352 at 380-381 (1976).

<sup>17</sup> 489 US 749 at 753 and fn 2 (1989).

<sup>18</sup> 489 US 749 at 769.

8.12 In the *Reporters Committee* case, the Court noted that although arrests, indictments, convictions and sentences are public events that are usually documented in court records, 47 States placed substantial restrictions on the availability and dissemination of criminal history summaries compiled by the Federal Bureau of Investigation. In these States, non-conviction data were not available at all, and even conviction data were generally unavailable to the public. The Court observed that this provided evidence that the law enforcement profession generally assumed that individual subjects had a “significant” interest in their criminal histories.<sup>19</sup>

8.13 **Germany** – In a German case, a newspaper article entitled “How Women Can Protect Themselves” referred to an individual who had been convicted of rape. The Court held that it was not necessary to identify the individual by mentioning his name, age, residence and occupation. The right of the criminal to be left alone gained increasing importance after the legitimate interest of the public in receiving information had been satisfied.<sup>20</sup>

8.14 In the *Lebach* case,<sup>21</sup> the petitioner was serving a term of six years’ imprisonment for being an accessory to an armed robbery. A television station commissioned a documentary play based on the crime. The play showed a likeness of the petitioner and mentioned him by name. At the time he sought an injunction to restrain the company from broadcasting the play, he was soon to be released because his rehabilitation had made good progress. The German Federal Constitutional Court held that Article 2(1) in conjunction with Article 1(1) of the German Basic Law had been violated. It issued a temporary injunction prohibiting the broadcasting of the play to the extent that the play mentioned the petitioner by name and reproduced his likeness. The Court also laid down the following criteria that are relevant in assessing televised broadcasts of the kind in issue.<sup>22</sup>

*“3. In balancing generally the interest in receiving information ... by televised reporting within these limits against the invasion of the sphere of personality of the culprit which must follow inevitably, the interest in receiving information must generally prevail in so far as current reporting of crimes is concerned. ... However, the interest to receive information does not prevail absolutely. The importance of the right to personality, which is a corner-stone of the Constitution, requires not only that account must be taken of the sacrosanct innermost personal sphere [reference] but also a strict regard for the principle of proportionality. The invasion of the personal sphere is limited to the need to satisfy adequately the interest to receive information, and the disadvantages suffered by the culprit must be proportional to the seriousness of the offence or to its importance otherwise for the public. Consequently, it is not always*

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<sup>19</sup> 489 US 749 at 768.

<sup>20</sup> See Lorenz, “Privacy and the Press - A German Experience” in *Butterworth Lectures 1989-90* (London: Butterworths, 1990), 79 at 112.

<sup>21</sup> 35 BVerfGE 202, reproduced in B S Markesinis, *A Comparative Introduction to the German Law of Torts* (Oxford: Clarendon Press, 3<sup>rd</sup> edn, 1994), 390.

<sup>22</sup> Above, at 395-397, translated by F H Lawson & B S Markesinis.

*admissible to provide the name, a picture, or any other means of identifying the perpetrator. ...*

4. *The reflex effect of the constitutional guarantee of personality does not, however, allow the media of communication, apart from contemporary reporting, to deal indefinitely with the person of the criminal and his private sphere. Instead, when the interest in receiving information has been satisfied, his right 'to be left alone' gains increasing importance in principle and limits the desire of the mass media and the wish of the public to make the individual sphere of his life the object of discussion or even of entertainment. Even a culprit, who attracted public attention by his serious crime and has gained general disapproval, remains a member of this community and retains his constitutional right to the protection of his individuality. If with the prosecution and conviction by a criminal court the act attracting the public interest has met with the just reaction of the community demanded by the public interest, any additional continued or repeated invasions of the personal sphere of the culprit cannot normally be justified.*

5. (a) *The time-limit when the reporting of current events which is admissible in principle becomes subsequently an inadmissible account or discussion cannot be stated generally; certainly it cannot be stated in months and years so as to cover all cases. The decisive criterion is whether the report concerned is likely to cause the culprit considerable new or additional harm, compared with the information which is already available. (b) In order to determine the time-limit more clearly, the interest in reintegrating the criminal into society and to restore his social position may be treated as the decisive point of reference. (c) Altogether a repeated televised report concerning a serious crime which is no longer justified by the interest to receive information about current events is undoubtedly inadmissible if it endangers the social rehabilitation of the culprit. The vital chance necessary for the existence of the culprit and the interest of the community to restore his social position must prevail in principle over the interest in a discussion of the crime."*

8.15 **United Kingdom** – In *R v Chief Constable of the North Wales Police, ex parte AB*,<sup>23</sup> the applicants were released from prison after serving sentences for serious sexual offences against a number of children. They moved onto a caravan site where they intended to remain. The police sought to persuade them to leave the site before the Easter holidays when large numbers of children would be there. When the applicants refused to leave, the police showed the site owner material from the local press relating to their convictions and sentences. Lord Bingham CJ stated that he was prepared to accept that disclosure by the police of the personal details concerning the applicants which they wished to keep to themselves could in principle amount to an interference

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<sup>23</sup>

[1997] 3 WLR 724.

with the applicants' exercise of the right to privacy under Article 8 of the ECHR.<sup>24</sup> Buxton J also accepted that the police's knowledge that the applicants had committed serious crimes was not something that the police were free to impart to others without restraint.<sup>25</sup>

8.16 In *R (Ellis) v Chief Constable of Essex Police*,<sup>26</sup> the police identified the claimant, who had numerous convictions for offences of dishonesty and car-related crime, as a possible candidate for their Offender Naming Scheme. The scheme involved displaying posters at train stations and other travel locations shortly after the offenders had been sentenced, and then again for three weeks at least 12 months prior to the offender's release back into the community. Those posters would contain a photograph of the offender, his name, the nature of the offence he had committed and the sentence he was serving. It was not disputed that the scheme would involve an interference with the right to respect for private and family life under Article 8(1) of the ECHR. The Court was asked to pronounce on the lawfulness of the scheme as a matter of principle.

8.17 Lord Woolf CJ, in giving the judgment of the Court in *Ellis*, pointed out that the rights of offenders and the public (including the victims of crime) had to be taken into account. The dangers of the scheme interfering with the rehabilitation of offenders was also relevant, as it was in the public interest to reduce crime. He then drew attention to two principles of law. Firstly, the police were not entitled to punish an offender by "naming and shaming" him. This was the responsibility of the courts. Secondly, subject to any legislative provision to the contrary, a prisoner retained all his rights that were not taken away by the fact of his imprisonment. Lord Woolf CJ refused to grant a declaration, observing that whether or not the scheme was lawful would depend upon the circumstances of the offenders solicited for the scheme and how it was operated in practice. He nevertheless held that the family of the offender had rights under Article 8 which might be interfered with by the scheme. He said:

*"Damage could be done to the claimant's family even if his partner and child had changed their names. The family of the offenders and in particular any children of the offender, have rights under Art 8 as well. The need to safeguard children is particularly important. It does not need much imagination to see how a poster campaign in relation to a child's father could produce unfortunate reactions in the playground of the child's school. The change in name of the child would provide little if any protection against children who know the child by the offender's name. The child could already be affected by the break up of the*

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<sup>24</sup> Above, at 736C. He said at 736G: "While the risk of repeated offending may in some circumstances justify a very limited measure of official disclosure, a general policy of disclosure can never be justified, and the media should be slow to obstruct the rehabilitation of ex-offenders who have not offended again and who are seriously bent on reform." Nevertheless, he held that the disclosure was plainly within the exception in Article 8(2).

<sup>25</sup> Above, 737A (adding that that restraint did not spring from the law of confidence). He considered that a wish that one's previous convictions not be publicly disclosed was an aspect of the subject's private life: at 738B.

<sup>26</sup> [2003] EWHC 1321 (Admin), [2003] 2 FLR 566.

*relationship between his parents and continued publicity could increase the problem. There is a real question as to whether it would ever be appropriate to nominate a father of young children; ... .*<sup>27</sup>

8.18 **European Court of Human Rights** – The European Court in *Rotaru v Romania*<sup>28</sup> held by sixteen votes to one that criminal records,

*“when systematically collected and stored in a file held by agents of the State, falls within the scope of ‘private life’ for the purposes of Article 8 § 1 of the Convention”.*

The unease of the only dissenting judge was focused on the censure by the Court of the *storage* of criminal records. Even he agreed that *“the wanton and illegitimate disclosure of the contents of those records could very well raise issues under Article 8”*.<sup>29</sup>

8.19 **Rehabilitation of Offenders Act 1974 (UK)** – The Act enables some criminal convictions to become “spent”, or ignored, after a period of time has elapsed from the date of conviction. This “rehabilitation period” varies depending upon the sentence or order imposed by the courts. For prison sentences of six months or less, the rehabilitation period is 7 years; while for prison sentences between six months and 30 months, the period is 10 years. For fines, community service orders and probation orders, the period is five years; while for supervision orders, care orders, conditional discharges and binding over orders, the period is one year or until the order expires, whichever is the longer. Since it was accepted that changes of personality take place more quickly during most people’s teens, some rehabilitation periods are halved for people under 18 years of age at the date of conviction.

8.20 The UK Act empowers the Home Secretary to make an order exempting certain professions, occupations and activities. The existing exceptions cover the legal, medical, accountancy and teaching professions, caretakers, social workers, the police, judges, probation officers and others concerned with the administration of justice. Hence, a person may be asked about his spent convictions in order to assess his suitability for the specified offices or occupations or for admission to the specified professions, and a spent conviction may be a ground of dismissal or exclusion of persons from these offices, employment or profession.

8.21 After the rehabilitation period has elapsed, the ex-offender is not normally obliged to mention the spent conviction when applying for a job or taking out an insurance policy. In civil proceedings, the ex-offender need not answer questions that might lead to disclosure of his spent convictions. This rule does not apply to proceedings relating to children or when the court is satisfied that justice cannot be done unless evidence of spent convictions is admitted. Spent convictions can be cited in criminal proceedings but the Lord

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<sup>27</sup> [2003] EWHC 1321 (Admin), [2003] 2 FLR 566, para 35.

<sup>28</sup> No 28341/95, date of judgment: 4.5.2000 (ECtHR), para 44.

<sup>29</sup> Above, partly dissenting opinion of Judge Bonello, para 10.

Chief Justice and the Home Office have advised the courts that these convictions should not be mentioned except in very special circumstances.

8.22 To safeguard spent convictions against unauthorised disclosure, the Act makes it an offence for anyone with access to criminal records to disclose spent convictions without authority. The Act also makes it a more serious offence to obtain information about spent convictions from criminal records by means of fraud, dishonesty or bribes. Furthermore, an ex-offender with a spent conviction can bring an action for libel if someone makes an allegation about his spent conviction with malice. We may add that under the Data Protection Act 1998 in the UK, information relating to a person's criminal record is one of the seven categories of "sensitive personal data", which must be processed in compliance with an especially high level of safeguards.

8.23 It is interesting to note that the research undertaken by the Northern Ireland Association for the Care and Resettlement of Offenders reveals that only Germany and the UK impose a limit on the length of sentences which are eligible for rehabilitation:

*"In Germany this restriction is only for life sentences and for placement in preventive detention in a psychiatric hospital. The UK, however, restricts rehabilitation to a sentence of two and a half years or less. This is very different from the policy in every other member state (again with the exception of the Republic of Ireland) and puts people who have been given sentences longer than this at a serious disadvantage."*<sup>30</sup>

8.24 The Rehabilitation of Offenders Act 1974 has been criticised for being too complicated and for not helping ex-offenders to put their past behind them. The rehabilitation periods are considered long, limiting the prospects of the resettlement of ex-offenders. In 1999, a Government task force called for a review of the Act with a view to simplification of its rehabilitation periods.<sup>31</sup> It also proposed that the Act should be extended to cover the removal of police cautions from criminal records.<sup>32</sup> Subsequently, the Government published a report on the review of the Act.<sup>33</sup> Its major recommendations were as follows:

- Certain types of posts, professions and licensing bodies should continue to be excepted from the disclosure scheme.
- A new judicial discretion should be considered to disapply the normal disclosure periods in cases where the sentencer decides there is a particular risk of significant harm.
- The disclosure scheme should be based on fixed periods.

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<sup>30</sup> NIACRO, *Regulating the Yellow Ticket* (Belfast: 1996). The research was undertaken on behalf of the European Commission; quoted in Penal Affairs Consortium, "The Rehabilitation of Offenders Act 1974: The Case for Review and Reform" (1999).

<sup>31</sup> Better Regulation Task Force, *Fit Person Criteria* (Central Office of Information, 1999).

<sup>32</sup> The Home Office followed up on the latter point by issuing a consultation paper in August 1999: *The Rehabilitation of Offenders Act 1974 and Cautions, Reprimands and Final Warnings – A Consultation Paper* (1999).

<sup>33</sup> UK Home Office, *Breaking the Circle – A report of the review of the Rehabilitation of Offenders Act*, July 2002, at <[www.homeoffice.gov.uk/docs/breakcircle.pdf](http://www.homeoffice.gov.uk/docs/breakcircle.pdf)>.

- The fixed periods should be based on sentence, with different periods applied to custodial and non-custodial sentences.
- The disclosure periods should comprise the length of the sentence plus an additional ‘buffer’ period.
- Separate disclosure periods should be set for young offenders (aged 10 to 17).
- Consideration should be given to the development of criteria to identify young offenders convicted of minor and non-persistent crime so that their records may be wiped clean for the purposes of employment at the age of 18.
- The scheme should apply to all ex-offenders who have served their sentence.

8.25 The Review had this to say in relation to the recommendation that the cut-off point of a 30-month custodial sentence should be removed so that the scheme applies to all ex-offenders who have served their sentence:

*“The changes in sentencing practice demonstrate that, whilst a 30 month custodial sentence may have been considered lengthy in 1974, this is no longer the case. However, not only has there been ‘sentence inflation’ but also changes in attitudes towards rehabilitation and resettlement. The successful rehabilitation work undertaken by the Prison and Probation Services with prisoners with lengthy custodial sentences, and the relatively low reconviction rates for this category of offender, indicate that there is no group of offenders who should be automatically excluded, by virtue of their sentence, from the disclosure scheme. The only exception to this rule will be those who remain on life licence.”<sup>34</sup>*

8.26 This recommendation was strongly welcomed by all but the Council of Circuit Judges and the Senior Presiding Judge for England and Wales who proposed that the 30-month cut-off point should be amended to four years. The UK Government has announced its intention to implement the majority of the recommendations by drafting a Bill.<sup>35</sup>

8.27 **Rehabilitation of Offenders Ordinance** – Hong Kong law recognises that rehabilitation of offenders can be just as important as truth in reporting materials available in the public domain. But section 2 of the Rehabilitation of Offenders Ordinance (Cap 297) renders a first conviction “spent” only if it is an offence in respect of which the offender was not sentenced to imprisonment exceeding three months or to a fine exceeding \$10,000.<sup>36</sup> It is worth noting that only a first conviction can become “spent” under the Ordinance, in contrast to the position adopted in the UK legislation.

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<sup>34</sup> Above, para 4.39.

<sup>35</sup> UK Home Office, *Breaking the Circle – A Summary of the Views of Consultees and the Government Response to the Report on the Review of the Rehabilitation of Offenders Act 1974*, April 2003, at <[www.homeoffice.gov.uk/docs/roaresponse.pdf](http://www.homeoffice.gov.uk/docs/roaresponse.pdf)>, at 8.

<sup>36</sup> Three years must elapse before the conviction becomes “spent”.

8.28 Once a conviction has become “spent”, no evidence is admissible in any proceedings which tends to show that the offender was so convicted. However, the Ordinance does not prevent the disclosure of a “spent” conviction for sentencing purposes in criminal proceedings in which the individual concerned is subsequently convicted of a further offence; nor does it prevent its disclosure in any criminal proceedings if he is subsequently convicted of a further offence, regardless of whether he is the defendant or not.<sup>37</sup>

8.29 The number of ex-offenders who benefit from the scheme is therefore limited. The practice of the Police disclosing a “spent” conviction in a Certificate of No Criminal Conviction has also been criticised as defeating the purposes of the Ordinance.

#### **Recommendation 15**

**We recommend that serious consideration should be given to amending the Rehabilitation of Offenders Ordinance (Cap 297) so that: (a) more ex-offenders could benefit from the rehabilitation scheme under the Ordinance; and (b) ex-offenders falling within the scope of the Ordinance could benefit more fully from the scheme, taking full account of the experience of the United Kingdom in the operation and reform of the Rehabilitation of Offenders Act 1974.**

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Cap 297, s 3(3) & (4).

## Chapter 9

### Anonymity of victims of crime

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#### Anonymity of victims of sexual offences

9.1 Section 156, in conjunction with section 157, of the Crimes Ordinance (Cap 200) makes it an offence to publish any matter which is likely to lead members of the public to identify any person as the complainant in a “specified sexual offence”.<sup>1</sup> “Specified sexual offence” is defined as meaning any of the following:<sup>2</sup>

*“rape, non-consensual buggery, indecent assault, an attempt to commit any of those offences, aiding, abetting, counselling or procuring the commission or attempted commission of any of those offences and incitement to commit any of those offences”.*

9.2 This definition does not cover all sexual offences. We are particularly concerned that the following offences under the Crimes Ordinance are not included in the definition: incest (sections 47 and 48); assault with intent to commit buggery (section 118B); buggery with a defective or a person under the age of 21 (sections 118C, 118D and 118E); gross indecency with a male defective or a man under the age of 21 (sections 118H and 118I); procurement of unlawful sex by threats or false pretences (sections 119 and 120); administering drugs to obtain or facilitate unlawful sex (section 121); intercourse with a defective or a girl under the age of 16 (sections 123, 124 and 125); and gross indecency with or towards a child under the age of 16 (section 146). The following offences in the Mental Health Ordinance (Cap 136) are also omitted from the definition: unlawful intercourse with a woman who is detained or receiving treatment for a mental disorder in a mental hospital (section 65); and unlawful intercourse with a woman under guardianship (section 65A). The offence of burglary with intent to rape in section 11 of the Theft Ordinance (Cap 210) is another significant omission.

9.3 As far as juveniles are concerned, although section 20A(1) of the Juvenile Offenders Ordinance (Cap 226) restrains the press from revealing the name and address of any juvenile concerned in the proceedings in a juvenile court, or any particulars which are calculated to lead to the identification of any such juvenile, only juvenile offenders and witnesses appearing before a

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<sup>1</sup> The judge may direct that the prohibition does not apply in relation to the complainant if the direction is required for the purpose of inducing persons to come forward as witnesses and the conduct of the defence is likely to be substantially prejudiced if the direction is not given: s 156(2). See also subsections (3A) and (4).

<sup>2</sup> Cap 200, s 117.

juvenile court are protected.<sup>3</sup> Juvenile victims who do not fall within the scope of section 156 of the Crimes Ordinance or section 20A(1) of the Juvenile Offenders Ordinance are protected from unwanted publicity only if the court before which the offender is tried makes a direction pursuant to section 20A(3) of the Juvenile Offenders Ordinance that the name and address of the juvenile (or any particulars which are likely to identify him) could not be reported. A newspaper or broadcaster which publicises the particulars in contravention of section 20A(1) or (3) is guilty of an offence. Since the power under section 20A(3) is discretionary, these juvenile victims have no right to anonymity.

9.4 In the UK, section 4 of the Sexual Offences (Amendment) Act 1976 granted anonymity to victims of rape offences. Subsequently, the Criminal Justice Act 1987 extended anonymity to cases involving conspiracy to rape and burglary with intent to rape. In the House of Lords, the minister from the Home Office stated that any further extension of the anonymity laws would be the thin end of the wedge. But five years later, anonymity was extended to all cases of sexual offences pursuant to the Sexual Offences (Amendment) Act 1992.<sup>4</sup> Apparently, any fears that the media and government officials had about the adverse consequences of an extension of anonymity have failed to materialise.

9.5 In Canada, section 486(3) of the Criminal Code provides that when an accused is charged with a specified sexual offence, the Court may “make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way”. Section 486(4) requires that the judge must inform any witness under the age of 18 and the complainant, at the first reasonable opportunity, of the right to make an application for an order under subsection (3). If an application is made by the prosecutor, the complainant or any such witness, the judge must make such an order. Anyone who fails to comply with an order under subsection (3) is guilty of a summary offence. Once an order is made, it continues in effect until varied by a court having jurisdiction to do so.

9.6 In *Regina v Canadian Newspapers Co Ltd*,<sup>5</sup> the complainant in a sexual offence applied for an order under section 442(3) of the Criminal Code directing that her identity and any information that could disclose it should not be published in any newspaper or broadcast. The making of an order under section 442(3) was mandatory upon application of the complainant or the prosecutor. The respondent, a newspaper publisher, appeared at the accused’s trial and opposed the application on the basis that section 442(3) violated the freedom of the press guaranteed by the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada observed that the impugned provision purported to foster complaints by victims of sexual assault by protecting them from the trauma of widespread publication resulting in embarrassment and humiliation. Further, by encouraging victims to come

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<sup>3</sup> Section 20A(1).

<sup>4</sup> The Act contains special rules for cases of incest or buggery: s 4. Written consent is a defence to an offence under s 5(1) of the Act: s 5(2) & (3). Cf Criminal Justice Act 1985 (New Zealand), s 139.

<sup>5</sup> 52 DLR(4<sup>th</sup>) 690 (1988).

forward and complain, it facilitated the prosecution and conviction of those guilty of sexual offences. Hence, the legislative objective of the publication ban was to favour the suppression of crime and improve the administration of justice. The Supreme Court had this to say about the impact of the provision on press freedom:<sup>6</sup>

*“While freedom of the press is none the less an important value in our democratic society which should not be hampered lightly, it must be recognised that the limits imposed by s. 442(3) on the media’s rights are minimal. The section applies only to sexual offence cases, it restricts publication of facts disclosing the complainant’s identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant’s identity is concealed from the public. Therefore, it cannot be said that the effects of s. 442(3) are such an infringement on the media’s rights that the legislative objective is outweighed by the abridgement of freedom of the press.”*

9.7 The Consultation Paper stated that it was an anomaly that a victim’s privacy was protected where she was raped or indecently assaulted but not when the offence was one of incest or assault with intent to commit buggery.<sup>7</sup> The Consultation Paper therefore recommended that the right to anonymity under section 156 of the Crimes Ordinance should be extended to victims of other sexual offences. The HK section of JUSTICE, the HK Women Professionals and Entrepreneurs Association, the HK Journalists Association, Security Bureau, the Child Protection Policy Unit of the HK Police Force, Andrew Bruce SC and Paula Scully all supported this proposal.<sup>8</sup> The Child Protection Policy Unit also proposed to extend the statutory prohibition under the Crimes Ordinance to “offences of sexual abuse” as defined in section 79A of the Criminal Procedure Ordinance (Cap 221).<sup>9</sup>

### **Recommendation 16**

**We recommend that the prohibition on identifying victims of rape, non-consensual buggery and indecent assault under**

<sup>6</sup> 52 DLR(4<sup>th</sup>) 690 at 698 (1998).

<sup>7</sup> B S Markesinis, “Our Patchy Law of Privacy - Time to do Something about It” (1990) 53 MLR 802, 805-6.

<sup>8</sup> In connection with the remark made by the HKJA that the Government should consider how best to protect victims from the time a sexual offence takes place, we should point out that the provisions come into effect as soon as “an allegation is made that a specified sexual offence has been committed” against the complainant.

<sup>9</sup> An offence of sexual abuse means an offence against Part VI (incest) or Part XII (sexual and related offences), other than ss 126 (abduction of unmarried girl under 16), 147A (prohibition of signs advertising prostitution) and 147F (obstruction), of the Crimes Ordinance (Cap 200).

**section 156 of the Crimes Ordinance (Cap 200) should be extended to cover victims of other sexual offences.**

9.8 Paula Scully submitted that the protection should also be extended to civil proceedings or any proceedings before tribunals or boards. She pointed out that victims of sexual assault may give evidence before the District Court in proceedings under the Sex Discrimination Ordinance (Cap 480). These cases may never end up as criminal cases if the victims do not make a complaint to the police.<sup>10</sup> Examples of the press revealing the identities of plaintiffs suing for sexual harassment are given in Annex 2, section H of our *Privacy and Media Intrusion Report*. The Association for the Advancement of Feminism has also referred us to the plight of these plaintiffs<sup>11</sup> and suggested that they should be entitled to a court order prohibiting the media from publishing their photographs. We agree that the law should protect the identity of claimants who bring an action in tort pursuant to section 76 of the Sex Discrimination Ordinance alleging that another person has committed an act of sexual harassment against him or her which is unlawful by virtue of Part III or IV of the Ordinance.

#### **Recommendation 17**

**We recommend that the District Court in proceedings under section 76 of the Sex Discrimination Ordinance (Cap 480) should have the power to make an order prohibiting the publication of any matter which is likely to lead to the identification of the claimant. Any person who fails to comply with such an order should be guilty of an offence.**

### **Anonymity of victims of non-sexual crime**

9.9 **General** – Crime reports which identify the victims may cause embarrassment or grief to them and their family members. This is all the more so when the plight of the victims is publicised only to satisfy the readers' thirst for gossip and sensational journalism. The offenders might also commit further offences against the victims if the victim's whereabouts is exposed. It is therefore arguable that the identity of a victim of crime should be protected by way of an anonymity order. In this connection, we note that the Calcutt Committee recommended that criminal courts should have the power to make an order prohibiting the publication of anything likely to lead to the identification of the victim of an offence, provided that this is reasonably necessary to protect the victim's mental or physical health, his personal security or the security of his

<sup>10</sup> In relation to proceedings under the Disability Discrimination Ordinance (Cap 487), see *L v Equal Opportunities Commission* [2002] 3 HKLRD 178. Regarding proceedings before the Medical Council, see Medical Registration Ordinance (Cap 161), s 22(4).

<sup>11</sup> Case H4 in Annex 2 of our *Privacy and Media Intrusion Report* (2004).

home.<sup>12</sup> The Council of Europe Committee of Ministers has also recommended that governments of member states review their legislation and practice in accordance with the following guidelines:

*“15. Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or the particular status or personal situation and safety of the victim make such special protection necessary, either the trial before the judgment should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate;*

*16. Whenever this appears necessary, and especially when organised crime is involved, the victim and his family should be given effective protection against intimidation and the risk of retaliation by the offender”.*<sup>13</sup>

**9.10 Inherent jurisdiction of Court** – A court has a wide inherent jurisdiction to control proceedings before it. It has power to make an anonymity order for the purpose of protecting the due administration of justice. Hence, in exercise of its control over the conduct of proceedings, a court may decide to sit wholly or partly in a closed court, or direct that a witness be referred to by letter or number to conceal his identity.<sup>14</sup> But a person who makes public that which has been concealed in court does not necessarily commit a contempt of court. Lord Diplock stated in *AG v Levens Magazine Ltd*:<sup>15</sup>

*“[A] ‘ruling’ [or ‘order’] by the court as to the conduct of proceedings can have binding effect as such within the courtroom only, so that breach of it is not ipso facto a contempt of court unless it is committed there. Nevertheless where (1) the reason for a ruling which involves departing in some measure from the general principle of open justice within the courtroom is that the departure is necessary in the interests of the due administration of justice and (2) it would be apparent to anyone who was aware of the ruling that the result which the ruling is designed to achieve would be frustrated by a particular kind of act done outside the courtroom, the doing of such an act with knowledge of the ruling and of its purpose may constitute a contempt of court, not because it is a breach of the ruling but because it interferes with the due administration of justice.”*

**9.11** Although the Court has a common law power to make an order directing that the identity of a victim should not be publicised, that power is

<sup>12</sup> Calcutt Report (1990), para 10.15. Cf Criminal Justice Act 1985 (New Zealand), s 140.

<sup>13</sup> Recommendation No R(85)11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted on 28.6.1985.

<sup>14</sup> *L v Equal Opportunities Commission* [2002] 3 HKLRD 178. The court is likely to make such a direction in blackmail or official secrets cases.

<sup>15</sup> *Attorney-General v Levens Magazine* [1979] AC 440, 451-2 (HL).

exercisable only if it is necessary in the interests of the due administration of justice, and not for the purpose of protecting the victims' privacy or well-being. There are therefore cases where the victim's private lives have to undergo public scrutiny notwithstanding that he has already been unfortunate enough to suffer at the hands of the accused. Occasionally, the Court requests the media not to publish the identity of a witness but the media is not always prepared to comply.<sup>16</sup>

9.12 **Protecting the identities of witnesses** – In an English case,<sup>17</sup> a publisher was cited for contempt when it reported the names of two victims of blackmail. In giving the reasons for the court, Lord Widgery CJ found that the salutary effects of conducting judicial proceedings in public could be maintained even with a restriction on the names of witnesses. He observed that such a course was suitable for blackmail cases where the complainant had done something disreputable or discreditable and would not come forward unless he was thus protected:

*“Where one has a hearing which is open, but where the names of the witnesses are withheld, virtually all the desirable features of having the public present are to be seen. The only thing which is kept from their knowledge is the name of the witness. Very often they have no concern with the name of the witness except a somewhat morbid curiosity. The actual conduct of the trial, the success or otherwise of the defendant, does not turn on this kind of thing, and very often the only value of the witness's name being given as opposed to it being withheld is that if it [is] published up and down the country other witnesses may discover that they can help in regard to the case and come forward.”<sup>18</sup>*

9.13 **Europe** – In some European jurisdictions, the media may agree among themselves not to publish the names of victims of sexual offences, or of child victims. This practice is effective in jurisdictions where there is no sensation-seeking tabloid press. Other jurisdictions give the courts a statutory power to place specific restrictions on press coverage in relation to individual cases as the need may arise. General restrictions have also been placed on the media protecting victims of specified categories of offences, such as rape and sexual assault. In jurisdictions with a particularly tough tabloid press, the state may further make it a criminal offence to publish personal details of (certain groups of) victims of crime.<sup>19</sup>

9.14 **Canada** – By virtue of section 486(1) of the Canadian Criminal Code, a Canadian criminal court may exclude all or any members of the public

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<sup>16</sup> See “Clearer Rules Needed”, *South China Morning Post*, 24.11.00 (noting that newspapers were not always prepared to comply with a request made by a judge that parts of the proceedings not be reported).

<sup>17</sup> *R v Socialist Worker Printers and Publishers Ltd, ex parte AG* [1975] 1 QB 637, 651-652.

<sup>18</sup> Above, at 652.

<sup>19</sup> M E I Brien and E H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85)11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Nijmegen, The Netherlands: Wolf Legal Productions, 2000), ch 27, section 4.1.

from the court room for all or part of the criminal proceedings in the interests of, *inter alia*, public morals or the proper administration of justice.<sup>20</sup> In *Canadian Broadcasting Corp v New Brunswick (Attorney General)*,<sup>21</sup> the Canadian Supreme Court held that the exclusion of the public under section 486(1) was a means by which the court might control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests and thereby afforded a remedy to the under-reporting of sexual offences. Hence, the provision constitutes a reasonable limit on the freedoms guaranteed by the Canadian Charter of Rights and Freedoms, and is also proportionate to the legislative objective.

9.15 Pursuant to section 486(4.1) of the Canadian Criminal Code, a Canadian court may, in any criminal proceedings other than in respect of an offence specified in section 486(3) of the Code, make an order directing that the identity of a victim or witness, or any information that could disclose their identity, shall not be published in any document or broadcast, provided that the court is satisfied that the order is necessary for the proper administration of justice.<sup>22</sup> The order may be made on the application of the prosecutor, a victim or a witness. Such an order may be subject to any conditions that the court thinks fit to apply. A person who fails to comply with the order is guilty of an offence.

9.16 **New Zealand** – By virtue of section 140 of the Criminal Justice Act 1985, a New Zealand court may make an order prohibiting the publication, in any report relating to any proceedings in respect of an offence, of the name, address, or occupation of “any person connected with the proceedings”, or any particulars likely to lead to his identification. The order may be made to have effect only for a limited period, whether fixed in the order or to terminate in accordance with the order; or if it is not so made, it shall have effect permanently. An order having effect only for a limited period may be extended either for a further period or permanently. It is an offence to commit a breach of an order made under that section.

9.17 **United Kingdom** – Section 46 of the Youth Justice and Criminal Evidence Act 1999 gives the UK courts a power to restrict media reports about certain adult witnesses in criminal proceedings. It applies where a party to the proceedings makes an application for the court to give a “reporting direction” in relation to a witness in the proceedings (other than the accused) who has attained the age of 18. A “reporting direction” is a direction that “*no matter relating to the witness shall during the witness's lifetime be included in any publication if it is likely to lead members of the public to identify him as being a*

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<sup>20</sup> In determining whether to make an order under that subsection, the Court would consider the following factors: (a) the right to a fair and public hearing; (b) whether there is a real and substantial risk that the victim or witness would suffer significant harm if their identity were disclosed; (c) whether the victim or witness needs the order for their security or to protect them from intimidation or retaliation; (d) society's interest in encouraging the reporting of offences and the participation of victims and witnesses; (e) whether effective alternatives are available to protect the identity of the victim or witness; (f) the salutary and deleterious effects of the proposed order; (g) the impact of the proposed order on the freedom of expression of those affected by it; and (h) any other factor that the judge or justice considers relevant: s 486(4.7).

<sup>21</sup> [1996] 3 SCR 480. Cf *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326.

<sup>22</sup> *French Estate v Ontario (Attorney General)* 134 DLR (4<sup>th</sup>) 587 at 602.

witness in the proceedings.” The section provides, *inter alia*:

(2) *If the court determines-*  
(a) *that the witness is eligible for protection, and*  
(b) *that giving a reporting direction in relation to the witness is likely to improve-*  
(i) *the quality of evidence given by the witness, or*  
(ii) *the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case,*  
*the court may give a reporting direction in relation to the witness.*

(3) *For the purposes of this section a witness is eligible for protection if the court is satisfied-*  
(a) *that the quality of evidence given by the witness, or*  
(b) *the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case,*  
*is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified by members of the public as a witness in the proceedings.*

(4) *In determining whether a witness is eligible for protection the court must take into account, in particular-*  
(a) *the nature and alleged circumstances of the offence to which the proceedings relate;*  
(b) *the age of the witness;*  
(c) *such of the following matters as appear to the court to be relevant, namely-*  
(i) *the social and cultural background and ethnic origins of the witness,*  
(ii) *the domestic and employment circumstances of the witness, and*  
(iii) *any religious beliefs or political opinions of the witness;*  
(d) *any behaviour towards the witness on the part of-*  
(i) *the accused,*  
(ii) *members of the family or associates of the accused, or*  
(iii) *any other person who is likely to be an accused or a witness in the proceedings. ...*

(8) *In determining whether to give a reporting direction the court shall consider-*  
(a) *whether it would be in the interests of justice to do so, and*  
(b) *the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings.*

(9) *The court or an appellate court may by direction ("an excepting direction") dispense, to any extent specified in the excepting direction, with the restrictions imposed by a reporting direction if-*

*(a) it is satisfied that it is necessary in the interests of justice to do so, or*

*(b) it is satisfied-*

*(i) that the effect of those restrictions is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and*

*(ii) that it is in the public interest to remove or relax that restriction;*

*but no excepting direction shall be given under paragraph (b) by reason only of the fact that the proceedings have been determined in any way or have been abandoned."*

9.18 **The need to protect the right of anonymity of victims of non-sexual crime** – Bearing in mind Article 14(1) of the International Covenant on Civil and Political Rights and Article 10 of the HK Bill of Rights (Cap 383), both of which provide that the press and the public may be excluded from all or part of a trial “when the interest of the private lives of the parties so requires”, we consider that it is desirable to have specific provisions protecting the privacy of victims of non-sexual offences. There are cases where the identities of victims ought to be protected from publicity even though the offence with which the defendant is charged is not a sexual offence. For example, the victim may have contracted AIDS or have become impotent as a result of the defendant’s unlawful act. The privacy interests of victims in these cases are analogous to those of victims of sexual offences. However, notwithstanding Article 14(1) of the Covenant, the interest of the private life of a witness (or an alleged victim) is not one of the grounds specified in the Criminal Procedure Ordinance for excluding the public from a criminal court or holding the whole or part of the criminal proceedings in a closed court.<sup>23</sup>

9.19 We consider that protecting the privacy interests of victims of non-sexual offences is consistent with the principles underlying the protection of victims of sexual offences. A victim’s privacy should be protected in so far as it would not prejudice the interests of justice. Without derogating from the common law power to make an anonymity order to protect the due administration of justice, the Court should have the power to direct that the identity of a victim of crime should not be publicised outside the courtroom.

9.20 **Views of respondents** – The Sub-committee recommended in the Consultation Paper that the criminal court should have a power to make an order prohibiting the publication of any matter which is likely to lead to the identification of a victim of crime until the conclusion of the proceedings or until such time as may be ordered by the Court, provided that the making of such an order is in the interests of the private life of the victim and would not prejudice the interests of justice. The Child Protection Policy Unit of the HK Police Force

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<sup>23</sup> See Criminal Procedure Ordinance (Cap 221), ss 122 and 123.

supported this recommendation. They noted that there were cases where a victim's identity, occupation and private life had been disclosed even though these details had had no bearing on the evidence of the cases. They considered that such unnecessary disclosure had an unfair impact on victims, especially during the trial. The Unit also proposed that the prohibition under section 156 of the Crimes Ordinance should be extended to "offences of cruelty" as defined in section 79A of the Criminal Procedure Ordinance.<sup>24</sup> They pointed out that vulnerable witnesses, including victims of child abuse cases, were often required to give evidence in proceedings involving these offences. We agree that the law should protect the identities of victims of an "offence of cruelty". However, the ban should be discretionary and not mandatory as required under section 156 of the Crimes Ordinance. We believe that the concerns of the Child Protection Policy Unit could be sufficiently addressed by recommending that the Court may make an anonymity order to protect a victim of crime.

9.21 Andrew Bruce SC strongly supported giving the Court a right to prohibit the publication on privacy grounds of aspects of the victim. He suggested that there ought to be a *prima facie* right to protection unless there were good reasons to the contrary. In addition, he proposed that the right should be extended to non-disclosure of material to the accused which "unnecessarily violates the privacy interests of victims and possibly witnesses." We have reservations with this proposal because such material might be relevant to the defendant's case as the trial unfolds and, hence, should not be withheld on privacy grounds.

9.22 Paula Scully supported the Sub-committee's recommendation but added that the ban should be extended indefinitely. She did not see any reason for limiting the ban to the duration of the proceedings. She explained that it is often after the defendant has been jailed that the press will seek to interview the victim for her views on the sentence. Victims live in such fear of reprisal and exposure that revealing their names and addresses, whether work or home, constitutes a form of abuse which prolongs their trauma. It also deters them and other victims from reporting crime because of the fear of unwanted publicity, or the friends of the accused taking revenge when they find out the identity of the victim. Ms Scully's concerns are real, but there is also a risk of an accused being wrongly convicted on the basis of a false allegation made by an alleged victim. Nevertheless, we agree that the Court in criminal proceedings not involving sexual offences should have discretion in determining the duration of an anonymity order in the circumstances of the case.

9.23 The Security Bureau commented that the power to make an anonymity order should be extended to cover victims of "triad-related" and "child abuse" cases and, in appropriate cases, witnesses of these crimes who are equally vulnerable. They pointed out that this would help the Government honour the privacy provisions in the *Victims of Crime Charter*, which requires all

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<sup>24</sup> Section 79A of Cap 221 provides that an "offence of cruelty" in Part IIIA of Cap 221 means an offence against s 26 (exposing child whereby life is endangered) or s 27 (ill-treatment or neglect by those in charge of child or young person) of the Offences against the Person Ordinance (Cap 212).

people involved in the criminal justice system to respect for the dignity and privacy of victims of crime. We agree that the protection should be extended to witnesses in criminal proceedings who are not victims of an alleged offence.

9.24 The HK Journalists Association commented that while it might be legitimate to protect the identity of an AIDS sufferer, there might be other cases in which an influential personality might wish to seek a court order preventing identification merely to protect him from some relatively inconsequential embarrassment. We would point out that as there is no public interest in suppressing the identities of the victims referred to in the example, it is unlikely that the Court would exercise discretion in their favour.

9.25 The Hong Kong section of JUSTICE did not agree to the Sub-committee's recommendation. They submitted that the guarantee in Article 14(1) of the ICCPR is confined solely to the exclusion of the press and the public from all or part of a trial. They pointed out that the contraction of AIDS or impotency as a result of the injuries sustained by the offender's acts might be an aggravating factor that justified a higher starting point in sentencing; it was simply not an example of a victim's private life becoming the subject of public scrutiny. In their view, the proposal was "a departure from the principle of open justice". We examine this view in the light of the European Court of Human Rights decision in *Z v Finland* discussed below.

9.26 **European Court of Human Rights** – Article 6 of the European Convention on Human Rights provides that "*the press and public may be excluded from all or part of the trial ... where ... the protection of the private life of the parties so require*".<sup>25</sup> In *Z v Finland*,<sup>26</sup> Z's husband, X, was discovered to be HIV positive during an investigation of X for a number of sexual offences. X was subsequently tried on several counts of attempted manslaughter. Apart from the first hearing of the City Court, the case was heard *in camera* before the City Court and the Helsinki Court of Appeal. In order to find out whether X had knowledge of his medical condition at the time of commission of the sexual assaults, orders were issued obliging the doctors treating X and Z to give evidence. The leading daily, *Helsingin Sanomat*, reported the seizure of Z's medical records under the headline "The Prosecutor obtains medical records of wife of man accused of HIV rapes". The article stated that the wife of X, whose first name and family name were mentioned in full, was a patient in a hospital unit treating patients suffering from HIV infection. X was subsequently convicted on three counts of attempted manslaughter by the City Court, and on two further counts by the Court of Appeal, which disclosed Z's identity and her medical data in the judgment. A copy of the Court of Appeal judgment was made available to the press. Both courts also ruled that the confidentiality of the proceedings should be maintained for a period of ten years. *Helsingin Sanomat* published an article about the case shortly after the Court of Appeal delivered its judgment. The article referred to the Court's finding that Z was HIV

<sup>25</sup> *Diennet v France* (1995) 21 EHRR 554 ("If it had become apparent during the hearing that there was a risk of a breach of professional confidentiality or an intrusion on private life, the tribunal could have ordered that the hearing should continue in camera.")

<sup>26</sup> (1997) 25 EHRR 371. See also *Imberechts v Belgium* (1991) 69 DR 312 and *Guenoun v France* (1990) 66 DR 181 (holding that derogations from the principle of public hearings may be justified particularly by the need to protect the private lives of the parties or by the interests of justice).

positive and stated that the conviction had been based on the statement of “[X]’s Finnish wife”, while mentioning his name in full.

9.27 The European Court of Human Rights had doubts as to whether the publication of Z’s full name as well as her medical condition following their disclosure in the Court of Appeal’s judgment could be said to have pursued any of the legitimate aims enumerated in Article 8(2) of the European Convention.<sup>27</sup> The Court observed:

*“The disclosure of [confidential information about a person’s HIV infection] may dramatically affect his or her private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism. For this reason it may also discourage persons from seeking diagnosis or treatment and thus undermine any preventive efforts by the community to contain the pandemic. The interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued. Such interference cannot be compatible with Article 8 of the Convention unless it is justified by an overriding requirement in the public interest. In view of the highly intimate and sensitive nature of information concerning a person’s HIV status, any state measures compelling communication or disclosure of such information without the consent of the patient call for the most careful scrutiny on the part of the Court, as do the safeguards designed to secure an effective protection.*

*At the same time, the Court accepts that the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime and in the publicity of court proceedings.”<sup>28</sup>*

9.28 After noting that Z had already been subjected to a “serious” interference with her right to respect for private and family life as a result of the evidence in issue having been adduced without her consent, the European Court unanimously held that the further interference which she would suffer if the medical information were to be made accessible to the public after 10 years was not supported by reasons which could be considered sufficient to override her interest in the data remaining confidential for a longer period. The order to make the material so accessible would, if implemented, amount to a disproportionate interference with her right to respect for her private and family life, in violation of Article 8 of the European Convention.<sup>29</sup>

9.29 The applicant in *Z v Finland* also complained that the disclosure of her identity and medical data in the text of the Court of Appeal’s judgment

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<sup>27</sup> (1997) 25 EHRR 371, para 78.

<sup>28</sup> (1997) 25 EHRR 371, paras 96 & 97.

<sup>29</sup> (1997) 25 EHRR 371, para 112.

had violated her right to privacy. Under Finnish law, the Court of Appeal had the discretion, firstly, to omit mentioning any names in the judgment permitting the identification of the applicant and, secondly, to keep the full reasoning confidential for a certain period and instead publish an abridged version of the reasoning, the operative part and an indication of the law which it had applied. Since the European Court found that the impugned publication was not supported by any cogent reasons, it unanimously held that the publication had given rise to a violation of the applicant's right to respect for her private and family life as guaranteed by Article 8.<sup>30</sup>

9.30 **Conclusion** – In our view, prohibiting the press from identifying a crime victim or a witness giving evidence is less restrictive than excluding the press and the public from the trial. Giving the Court a discretionary power to make an anonymity order is proportionate to the legitimate aim of protecting the privacy of the victim or witness without compromising press freedom and the interests of justice. Even if a court made such an order, the public and the press would still be free to observe and report the whole proceedings, including any evidence given by the victim or witness concerned. Where the continuation of the order is not in the interests of justice, it would be open to the Court to revoke the order. We are satisfied that the proposal is compatible with Article 14(1) of the ICCPR.

#### **Recommendation 18**

**We recommend that the courts in criminal proceedings should have the power to make an order prohibiting the publication of any matter which is likely to lead to the identification of the victim of an alleged offence or any witness in the trial until such time as may be ordered by the Court, provided that the making of such an order is in the interests of the private life of the victim or witness and would not prejudice the interests of justice. Any person who fails to comply with such an order should be guilty of an offence.**

9.31 One respondent suggested that if the recommendation were implemented, then the staff at court registries or the High Court Library should be given sensitivity training to ensure that the names and identifying details of victims are not revealed in any court pleadings or judgments. We agree.

### **Judicial Proceedings (Regulation of Reports) Ordinance**

9.32 One respondent submitted that, insofar as juvenile offenders are protected from identification, the names of juveniles or child non-offenders should not be revealed under section 3(1) of Judicial Proceedings (Regulation

<sup>30</sup> (1997) 25 EHRR 371, para 113.

of Reports) Ordinance (Cap 287). Section 3(1) provides that it shall not be lawful to publish, in relation to any proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, any particulars other than the following: (a) the names, addresses and occupations of the parties and witnesses; (b) a concise statement of the charges, defences and counter-charges in support of which evidence has been given; (c) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon; and (d) the summing-up of the judge, the finding of the jury (if any), the judgment of the court, and observations made by the judge in giving judgment.<sup>31</sup>

9.33 This respondent argued that since the right to know what was going on in the courts was a lesser right than protection of the privacy of the children or the parties in family law cases, section 3(1) should be repealed. Noting that all the sexual details from proceedings for divorce, nullity or judicial separation could be published in the media, she submitted that it was a gross invasion of privacy more appropriate to an age when matrimonial offences such as adultery were publicised as a moral deterrent. She was particularly concerned that children involved in such cases would be adversely affected by the press giving publicity to these matters.

9.34 The respondent further proposed that section 3(4) of the Ordinance should be amended so that all names and identifying details are deleted from the law reports. Subsection (4) provides that nothing in section 3 shall apply to the printing or publishing of any matter in a law report or a publication of a technical character intended for circulation among members of the legal or medical profession. The respondent noted that whilst names and identifying details were included in the law reports in Hong Kong, they were never published in the law reports or unreported judgments in Ireland, as all identifying details had been carefully erased by court registry staff before the judgments were publicised.

9.35 We note that the courts have power to order non-disclosure of the names of parties and witnesses during a trial. The extent to which such personal particulars could be published is basically a matter for the judge. Nevertheless, the Administration or the Judiciary may wish to consider whether to take on board these comments.<sup>32</sup>

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<sup>31</sup> Any person who contravenes s 3(1) is guilty of an offence.

<sup>32</sup> See South African Law Commission, *Publication of Divorce Proceedings: Section 12 of the Divorce Act (Act 70 of 1979)*, (Discussion Paper 98, Project 114, 2001).

## Chapter 10

### Appropriation of a person's name or likeness

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#### Is appropriation of a person's identity a privacy concern?

10.1 We examine in this chapter whether the appropriation of a person's name or likeness is a privacy concern and, if so, whether the law ought to protect that concern. Appropriation may be for a political or commercial purpose. In relation to the use of a person's name or likeness to support candidature for public office, the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554) already makes it an offence to publish an election advertisement that includes the name or pictorial representation of a person without his prior written consent in such a way as to imply that he supports a particular candidate at an election.<sup>1</sup> As regards appropriation for commercial gain, this normally involves a portrayal of a well-known figure in an advertisement, implying that he commends the product promoted. A picture showing a public figure using a particular brand of product conveys a message that he is satisfied with the quality of the product and that he is pleased to commend it to others. However the truth might be that he does not have a high opinion of the product, or that even if he is satisfied with its quality, he does not want his opinion exploited by others.

10.2 **Personal Data (Privacy) Ordinance** – One who appropriates another person's likeness or other indicia of identity by using the latter's personal data for the purpose of commercial exploitation or "character merchandising" in contravention of DPP 3 is liable under the PD(P)O. However, there is no breach of DPP 3 if the personal data have been collected for that very purpose, even though the consent of the subject is lacking. The data subject might have a remedy for breach of DPP 1 if the collector did not collect the individual's likeness by means that were lawful and fair in the circumstances. But according to the Court of Appeal decision in the *Eastweek* case, there is no cause for complaint if the person who collected and used the likeness did not intend or seek to identify him.

10.3 **Copyright Ordinance** – A person does not have any intellectual property right in his own image. If a photographer takes a photograph of another, then all the rights in the photograph belong to the photographer. An exception is when the photographer is commissioned to take the photograph, in which case the ownership of the copyright depends on the terms of the agreement between the parties.<sup>2</sup> However, the law of copyright does not

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<sup>1</sup> Section 27.

<sup>2</sup> Where the person who commissioned a photograph does not own the copyright, he still has an exclusive licence to exploit the photograph for all purposes that could reasonably have been contemplated by the parties at the time the photograph was commissioned: s 15, Cap 528.

protect the name or appearance of an individual. Copyright in a person's photograph or portrait or in a videotape of his performance does not extend to his likeness or other identifying features.

10.4 In *Oriental Press Group v Apple Daily*,<sup>3</sup> the plaintiff took a photograph of a popular entertainer in the baggage claim area of an airport in Beijing. Godfrey JA, delivering the judgment of the Court of Appeal, noted that "*Public sentiment has turned, or seems to be turning, against those who are guilty of invasion of the privacy of public figures by taking their photographs on private occasions without their consent and then selling those photographs for large sums which reflect the cupidity of the publishers and the prurience of their readers.*" He suggested that the Court might have to hold that the protection of copyright would not be extended to photographs of public figures taken on private occasions without their consent if the legislature failed to introduce measures to protect the privacy of public figures.<sup>4</sup>

10.5 **Common law** – Although some American jurisdictions recognise that an individual has a right to his name or likeness at common law,<sup>5</sup> appropriation of an individual's name or likeness is not actionable at common law in either England or Hong Kong. In *Dockrell v Dougall*,<sup>6</sup> the plaintiff argued that a person had a property in his own name *per se*. The Court rejected this contention and held that an injunction to prevent unauthorised use of his name could not be granted unless he could show that the defendant had done something more than making unauthorised use of his name, such as an interference with his right of property, business or profession by a wrongful user of his name which had caused him pecuniary loss.

10.6 Unauthorised use of a person's name or likeness may give rise to an action in defamation if the defendant depicts a person's personal appearance or manners in a ridiculous light or places the name of a well-known novelist as the author of an inferior work. However, there may be appropriation without any injury to a person's reputation. For instance, the image of an ordinary citizen who wishes to be let alone may feature in an advertisement of a household appliance without his consent. He does not normally have a remedy even though his image has been used in the public realm for profit against his will.

10.7 The tort of passing-off provides some protection against misappropriation of a person's mark, business name or "get up" in the course of any trade or business. However, a plaintiff whose name or likeness has been misappropriated has to prove that he has a trading reputation in his name or

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<sup>3</sup> [1997] 2 HKC 525.

<sup>4</sup> Godfrey JA based his opinion on the public policy grounds that no copyright can subsist in matters which have a grossly immoral tendency. Cf R Wacks, "Pursuing paparazzi; privacy and intrusive photography" (1998) 28 HKLJ 1 (arguing that if privacy is to be subsumed under copyright, in most cases what the law would be protecting is less the plaintiff's right of privacy than his right of publicity).

<sup>5</sup> Appropriation of name or likeness was the first privacy tort recognised in the US. Unlike England and Hong Kong, half of the jurisdictions in the US provides a remedy for infringement of the right of publicity.

<sup>6</sup> (1899) 80 LT 556. See also *Tolley v Fry* [1930] 1 KB 467, at 478. T Frazer, "Appropriation of Personality - A New Tort?" (1983) 99 LQR 281.

likeness in business activities relating to the goods or services in question. This requirement poses a problem for plaintiffs who do not trade on their names or likeness. Further, since a plaintiff also has to show that members of the public have been misled by the defendant's conduct into thinking that they are securing the goods or services of the plaintiff, the plaintiff cannot seek redress if his name or likeness is used merely to attract the attention of the public and does not represent that the plaintiff endorses the defendant's goods or services or has any arrangements with the defendant. In addition, the plaintiff may face difficulty in proving financial loss where there is no common field of activity in which both the plaintiff and the defendant are engaged.

**10.8 Local cases** – Following wind-surfer Lee Lai-shan's gold medal for Hong Kong in the Olympic Games, it was reported that her image had been used on at least ten products without her permission.<sup>7</sup> Another example concerned a Mr Or who succeeded in "driving over" the Yellow River in China in a motor vehicle. Mr Or alleged that the manufacturer of the vehicle had used his name in its advertisement without his consent and he felt aggrieved as a result.<sup>8</sup> Actress Nancy Sit also complained that her image was being used without her permission to promote a wide range of products used by middle-aged women.<sup>9</sup> And a photograph of the Financial Secretary praying inside a church had appeared in an advertisement for computer products.<sup>10</sup> The images of five performing artists who were still living at the time had also been used by a funeral service company to produce sample pictures for use on gravestones.<sup>11</sup> Another example involves singer Leon Lai whose pictures were reported to have been superimposed on obscene photographs in a website bearing his name.<sup>12</sup> At a news conference arranged by the International Federation of Actors, actress Maggie Cheung, representing the HK Performing Artistes Guild, supported a new international treaty to protect performers' work or images against misuse on the Web or through other forms of digital piracy. She said that about 25 websites featured photographs and film clippings of her for which she had never given authorisation.<sup>13</sup> Even the names of three senior police officers have been used without their authority in an advertisement for a newly formed company.<sup>14</sup>

**10.9 A privacy right or a proprietary right?** – Some academics argue that the right to the commercial use of one's name or likeness is a proprietary right and that the person whose identity has been appropriated should look to the laws of passing off and unjust enrichment for remedies. Harry Kalven, for example, suggests that the rationale for the protection afforded by the appropriation tort in the US is one of preventing unjust enrichment by the theft of good will. The defendant should not get for free some aspect of the plaintiff that would have market value and for which he

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<sup>7</sup> *South China Morning Post*, 18.5.1998.

<sup>8</sup> *Ming Pao Daily News*, 23.7.1997.

<sup>9</sup> *South China Morning Post*, 18.5.1998.

<sup>10</sup> *Ming Pao Daily News*, 17.3.99. Apparently, the photograph had been taken and published without his consent

<sup>11</sup> *Apple Daily*, 17.3.01, C1.

<sup>12</sup> *The Sun*, 22.6.00, C2.

<sup>13</sup> M Stone, "Actors Urge Stronger Online Privacy Protection", *Newsbytes.com*, 13.12.00.

<sup>14</sup> *Apple Daily*, 31.7.00, A 9, referring to an article in the *South China Morning Post* on 30.7.00.

would normally pay.<sup>15</sup> Raymond Wacks also holds the view that the tort is essentially a proprietary wrong at the heart of which lies the unjust enrichment which the defendant obtains by his gratuitous use of the plaintiff's identity.<sup>16</sup>

10.10 There are, however, academics who think otherwise. William Beaney, for instance, defines privacy as including the freedom of an individual to determine the extent to which another individual may obtain or make use of his name, likeness, or other indicia of identity.<sup>17</sup> Edward Bloustein also expresses the view that everyone has a right to prevent the commercial exploitation of his personality only because it is an affront to human dignity:

*"No man wants to be 'used' by another against his will, and it is for this reason that commercial use of a personal photograph is obnoxious. Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interest of others. In a community at all sensitive to the commercialization of human values, it is degrading to thus make a man part of commerce against his will."<sup>18</sup>*

10.11 Harvey Zuckman observes that although the interest implicated here is mainly financial and perhaps not as compelling as that protected by the intrusion tort, the appropriation tort furthers individual autonomy and personhood. He says:<sup>19</sup>

*"Fundamental justice would seem to require that the civil law permit one whose identity has commercial value to control the commerce in his identity. The law should protect such individuals so they may decide for themselves whether to defend their privacy by withholding their celebrity from commerce or to waive privacy by making such celebrity available for a price. So long as protection is limited to purely commercial trading in human identity, there can be little objection to a tort that secures control of that commerce to the person whose identity is involved."*

10.12 Tim Frazer is another academic who supports the view that appropriation is an aspect of privacy:

*"Privacy includes the interest a person has in determining the use to which his or her personality will be put; it is an aspect of a person's interest in determining the social sphere or context in which he or she wishes to appear. The injury caused by appropriation of personality - humiliation, bruised dignity, annoyance, shame, etc., can be satisfactorily explained on the basis of an invasion of privacy, as defined above. What is complained of is that the person's control over the position he or*

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<sup>15</sup> H Kalven, "Privacy in tort law - Were Warren and Brandeis wrong?" (1966) 31 LCP 326, 331.

<sup>16</sup> R Wacks, *The Protection of Privacy* (London: Sweet & Maxwell, 1980), p 18.

<sup>17</sup> W M Beaney, "The Right to Privacy and American Law" (1966) 31 LCP 253, 254.

<sup>18</sup> E J Bloustein, above, at 988.

<sup>19</sup> H L Zuckman, "Invasion of Privacy - Some Communicative Torts Whose Time Has Gone" 47 Washington and Lee L Rev 253 at 255.

*she takes in relation to others has been removed. An uncontrolled change in position occurs when the person becomes more 'public', and therefore less 'private'. ... [All cases of appropriation of personality] involve loss of control over the degree of 'publicity' enjoyed or endured by the individuals".<sup>20</sup>*

10.13 Frazer therefore argues that the concept of privacy may be used to explain the injury suffered by an ordinary individual when a photograph of him sunbathing on a public beach is published without his consent in an advertisement. However, the injury suffered by a well-known person requires different considerations. Frazer explains that “[p]rivacy is not relevant to a person who seeks to enter into, and to remain prominent in, the public sphere in so far as the use made of the personality is consistent with the nature of the sphere chosen by the person concerned.” Thus, privacy is not relevant when the photograph of a famous sportsman appears without his consent on an advertisement for sportswear. The complaint here is not explicable on the basis of loss of control over entry into the public sphere. The complaint is that he has lost control over the timing and nature of the advertisement or the identity of the products associated with his name. The injury is not hurt feelings or bruised dignity but *“the loss of the fee he would normally be able to command for such use of his image and any diminution in his future earning capacity by reason of such unauthorised use.”*<sup>21</sup> The situation is different if a photograph of the sportsman is used in an advertisement for pharmaceuticals. The publicity may cause him as much injury to his feelings and dignity as other ordinary individuals. Even a public figure should be protected from such publicity.

10.14 **Australia** – Clause 23 of the Unfair Publication Bill drafted by the Australian Law Reform Commission creates a right of action in favour of a person whose name, identity or likeness is appropriated by another. A person would be liable under this clause:

*“if he, with intent to exploit for his own benefit, the name, identity, reputation or likeness of that other person and without the consent of that other person, publishes matter containing the name, identity or likeness of that other person - (a) in advertising or promoting the sale, leasing or use of property or the supply of services; or (b) for the purpose of supporting candidature for office.”*<sup>22</sup>

10.15 **Austria** – Pictures of individuals are protected from public disclosure under section 78(1) of the Copyright Act, which provides that:

*“Images of persons shall neither be exhibited publicly, nor disseminated in any other way in which they are made accessible to the public, where the legitimate interests of the person in question or, in the event that they have died without having*

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<sup>20</sup> T Frazer, above, 296 - 297.

<sup>21</sup> Above.

<sup>22</sup> LRC of Australia (1979), para 250.

*authorised or ordered publication, of a close relative would be injured.”*

10.16 **Canada** – The courts in Canada ruled that there is a tort of “appropriation of personality” at common law.<sup>23</sup> Rainaldi explains that this tort protects two distinct interests: the right of a person not to be the object of publicity for another’s ends without consent; and the right of publicity which is “an exclusive right in the celebrity to the publicity value of his persona”.<sup>24</sup> Appropriation cases in British Columbia, Manitoba, Newfoundland and Saskatchewan are actionable under the respective privacy legislation. For instance, the Manitoba Act provides that privacy may be invaded by:

*“the unauthorised use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person”.*<sup>25</sup>

Similar provisions can be found in other Canadian privacy statutes, except that the British Columbia Privacy Act makes the use of the plaintiff’s name or portrait without consent a distinct tort.<sup>26</sup>

10.17 **Quebec** – Article 36 of the Civil Code of Quebec provides that the use of a person’s name, image, likeness or voice for a purpose other than the legitimate information of the public is an invasion of privacy. It will be recalled that the Supreme Court of Canada in *Aubry v Éditions Vice-Versa Inc* held that the publication of the photograph of the plaintiff sitting on the steps of a building was an unwarranted infringement of her right to privacy, even though the photograph was in no way reprehensible and the text of the article was serious.<sup>27</sup> The Supreme Court agreed with the Quebec Court of Appeal that the right to one’s image is an element of the right to privacy under section 5 of the Quebec *Charter of Human Rights and Freedoms*:

*“If the purpose of the right to privacy guaranteed by s. 5 of the Quebec Charter is to protect a sphere of individual autonomy, that right must include the ability to control the use made of one’s image, since the right to one’s image is based on the idea of individual autonomy, that is, on the control each person has over his or her identity. It can also be stated that this control implies a personal choice. ... Since the right to one’s image is included in the right to respect for one’s private life, it is axiomatic that every*

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<sup>23</sup> This tort is actionable where “the defendant has appropriated some feature of the plaintiff’s life or personality, such as his face, his name or his reputation, and made use of it improperly, ie, without permission, for the purpose of advancing the defendant’s own economic interests.” See G H L Fridman, above, 194 - 197.

<sup>24</sup> L D Rainaldi, above, vol 3, p 24-14. See also R Howell, “The Common Law Appropriation of Personality Tort” (1986) 2 IPJ 149 at 160.

<sup>25</sup> Section 3(c).

<sup>26</sup> British Columbia Privacy Act 1996, s 3.

<sup>27</sup> 157 DLR(4<sup>th</sup>) 577.

*person possesses a protected right to his or her image. This right arises when the subject is recognizable. There is, thus, an infringement of the person's right to his or her image, and therefore fault, as soon as the image is published without consent and enables the person to be identified. ... Since every person is entitled to protection of his or her privacy, and since the person's image is protected accordingly, it is possible for the rights inherent in the protection of privacy to be infringed even though the published image is in no way reprehensible and has in no way injured the person's reputation.*<sup>28</sup>

10.18 The question before the Court was whether the public's right to information could justify dissemination of a photograph taken without authorisation. After holding that certain aspects of the private life of a person who is engaged in a public activity or has acquired certain notoriety can become matters of public interest, the Court continued:

*“Another situation where the public interest prevails is one where a person appears in an incidental manner in a photograph of a public place. An image taken in a public place can then be regarded as an anonymous element of the scenery, even if it is technically possible to identify individuals in the photograph. In such a case, since the unforeseen observer's attention will normally be directed elsewhere, the person ‘snapped without warning’ cannot complain. The same is true of a person in a group photographed in a public place. Such a person cannot object to the publication of the photograph if he or she is not its principal subject. On the other hand, the public nature of the place where a photograph was taken is irrelevant if the place was simply used as background for one or more persons who constitute the true subject of the photograph.”*<sup>29</sup>

10.19 Although two justices dissented on the question of damage suffered by the plaintiff, all the seven justices of the Supreme Court agreed that the publication of the photograph was an infringement of the plaintiff's right to her image, which outweighed the interest in publication. The judgment of the majority reads:

*“In our view, the artistic expression of the photograph, which was alleged to have served to illustrate contemporary urban life, cannot justify the infringement of the right to privacy it entails. It has not been shown that the public's interest in seeing this photograph is predominant. The argument that the public has an interest in seeing any work of art cannot be accepted, especially because an artist's right to publish his or her work, no more than other forms of freedom of expression, is not absolute.”*<sup>30</sup>

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<sup>28</sup> 157 DLR(4<sup>th</sup>) 577, paras 52-54.

<sup>29</sup> 157 DLR(4<sup>th</sup>) 577, paras 58-59.

<sup>30</sup> 157 DLR(4<sup>th</sup>) 577, para 62, per L'Heureux-Dubé and Bastarache JJ, Gonthier, Cory and Iacobucci JJ concurring. Lamer CJC and Major J dissented but agreed that the right to privacy

10.20 **Mainland China, Taiwan and Macao** – In mainland China, the right to one’s name and portrait is recognised in Articles 99 and 100 of the PRC General Principles of Civil Law. Article 99 provides that all citizens enjoy the right of personal name and are entitled to determine, use, or change their personal names in accordance with relevant provisions. “Interference with, usurpation of and false representation of personal names” are prohibited. Article 100 guarantees to all citizens the right to portrait. It makes it unlawful to use a citizen’s portrait for profit without his consent. An aggrieved individual can demand that the infringing act be stopped and ask for compensation or an apology. The unauthorised use of a citizen’s image in an advertisement, trademark or a shop window is actionable under Article 100. In Taiwan, the right of personality protected under the Civil Code includes the right to one’s name and portrait. The right to name enables a person to claim relief for the appropriation or misuse of his name. The Civil Code of Macao also recognises the right to name and portrait.<sup>31</sup>

10.21 **France** – Since the French courts held that the unauthorised use of a person’s name, image or voice is a “fault” under Article 1382 of the Civil Code, any person who has used the name, image or voice of another without authority is liable to compensate the other for any harm caused by such use. The protection covers not only exploitation for commercial gain but also the unauthorised taking of one’s picture and publication generally.

10.22 The case-law in France has developed the right to one’s image both as a property right, and as an extension of the right to personality. Picard explains that this right actually refers to two different rights or two forms of the same right, namely the “right to one’s image” (“*droit à son image*”) and the “right over one’s image” (“*droit sur son image*”). While the right over one’s image allows the person to exploit commercially his image and is distinguished from privacy proper, the right to one’s image pertains to privacy because it protects a person’s anonymity which, under the privacy law of France, has to be protected from interference by third parties who have no right to know it. Thus, the right to image does not correspond only to the material representation of a person’s image by means of a picture, but also to other facets of his physical aspect which enable others to recognise him, such as his particular voice.<sup>32</sup>

10.23 **Germany** – A right to one’s portrait was created and protected by Articles 22 and 23 of the Act on the Protection of Copyright in Works of Art and Photographs 1907 (also known as the Act of Artistic Creations). Article 22 prohibits the publication of a private person’s picture during his lifetime and for

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includes a person’s right to his image and that to appropriate another person’s image without his consent to include it in a publication constitutes a fault. They held that the plaintiff’s rights of privacy and to one’s image prevailed over the public interest in freedom of expression because the photographer could have requested her consent to the publication of her photograph, but did not do so. Above, at para 23 & 82..

<sup>31</sup> Articles 80 and 82. The Chinese translation can be found in: 趙秉志總編，〈澳門民法典〉，中國人民大學出版社，1999年，頁29 - 34。

<sup>32</sup> See Étienne Picard, above, pp 84-85 and C Dupré, “The Protection of Private Life versus Freedom of Expression in French Law” in M Colvin (ed), *Developing Key Privacy Rights* (Hart Publishing, 2002), at 50-51.

a period of 10 years after death. A picture may be distributed or shown publicly only with the subject's consent. However, under Article 23, consent is not required in the following cases: (a) portraits of contemporary history; (b) pictures of landscape or localities in which the person depicted is only a secondary object; (c) pictures of meetings, demonstrations and other public events in which the depicted persons participated; and (d) portraits which have not been made on the order of the person injured, provided that the distribution or exhibition serves a high interest in art. The right to portrait is an aspect of the general right of personality under the German Civil Code. A person whose name is used by another without permission may demand the cessation of such use. The person affected may also claim damages from any person who wrongfully uses his name for any loss he suffers.

10.24 In the *Herrenreiter* case,<sup>33</sup> an amateur show-jumper brought an action for the unauthorised use of his portrait in an advertisement for a sexual potency drug. The basis of his portrait was a photograph taken by a press agency at a show-jumping competition. The plaintiff complained that the advertisement had humiliated him and made him an object of ridicule. Because of the professional and social position of the plaintiff, he would never have allowed his portrait to be used for advertising purposes, in particular for the defendant's drug. The Supreme Court pointed out that the dissemination of the advertisement without the plaintiff's permission injured his personality right, namely, his right to deal with his portrait. It held that Article 22 of the Act deals with deprivation of the free and responsible exercise of will:<sup>34</sup>

*“For the protection afforded by § 22 ... rests in essence on the fundamental principle of a person's freedom in his highly personal private life, in which the outward appearance of human being plays an essential part. The unauthorized publication of a portrait constitutes ... an attack on the freedom of self-determination and the free expression of the personality. The reason why a third person's arbitrary publication of a portrait is not allowed is that the person portrayed is thereby deprived of his freedom to dispose by his own decision of this interest in his individual sphere.”*

10.25 **Ireland** – In its Consultation Paper on Privacy, the Irish Law Reform Commission expresses the view that actions for unauthorised use of name or likeness have a dual character:

*“where the person does not consent to such use of the photograph, she or he may feel offended or embarrassed simply because they dislike publicity or because they dislike being associated with the product. In such cases, the protected interest is not necessarily proprietary or commercial. It is human dignity. ... It seems to us therefore that, in some cases, the interest protected by these causes of action is indeed privacy. In*

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<sup>33</sup> 26 BGHZ 349.

<sup>34</sup> 26 BGHZ 349, extracted from B S Markesinis, *A Comparative Introduction to the German Law of Torts* (Oxford: Clarendon Press, 3<sup>rd</sup> edn, 1994), 384; translated by F H Lawson & B S Markesinis.

*other cases, however, perhaps the majority of cases, the interest is essentially commercial.*<sup>35</sup>

10.26 **Italy** – The right over one’s image is premised on Article 41(2) of the Constitution, which grants individuals the freedom to engage in commercial initiatives provided they do not damage human dignity. Thus, the freedom to commercially exploit the image of another person is conditional upon obtaining the subject’s consent.<sup>36</sup>

10.27 **Norway** – Section 15 of the Act on Rights in Photographic Pictures requires a person’s permission prior to the publication of his photograph. This provision recognises a public interest exception, which usually makes seeking permission unnecessary for the press.<sup>37</sup>

10.28 **South Korea** – A Seoul court found that five female university students were entitled to damages when a *Newsweek* photographer without their permission published a photograph of them at school, in conjunction with an unfavorable accompanying article.<sup>38</sup>

10.29 **United Kingdom** – The draft bill appended to the Report of the British section of JUSTICE defined “right of privacy” as including freedom from appropriation of personality. However, the Calcutt Committee did not find a pressing social need to provide an additional remedy for those, such as politicians or actors, whose images or voices were appropriated without their consent for advertising or promotional purposes. They thought that the law of defamation might avail such a complainant if he could establish an innuendo.<sup>39</sup> There is, however, a narrowly defined right to privacy under the Copyright, Designs and Patents Act 1988. Section 85 of the Act provides that a person who, for private or domestic purposes, commissions the taking of a photograph or the making of a film, has the right not to have (a) copies of the work issued to the public; (b) the work exhibited or shown in public; or (c) the work broadcast or included in a cable programme service. Subject to certain exceptions, a person who does any of those acts infringes that right. There are no equivalent provisions in the Copyright Ordinance of Hong Kong.

10.30 **United States** – The *Restatement of the Law of Torts* states that “one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”<sup>40</sup> To

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<sup>35</sup> LRC of Ireland, *Consultation Paper on Privacy: Surveillance and the Interception of Communications* (1996), paras 9.69 - 9.70.

<sup>36</sup> Guido Alpa, “The Protection of Privacy in Italian Law” in B S Markesinis (ed), *Protecting Privacy – The Clifford Chance Lectures Volume Four* (OUP, 1999), p 122.

<sup>37</sup> S Wolland, “Press Law in Norway” in ARTICLE 19, *Press Law and Practice* (1993), ch 7 at p 122.

<sup>38</sup> *Sun-Jeong Kwon, Hyun-Ju Kim and Yun-Hwa Kim v Newsweek Inc*, Seoul Civil Dist Ct, 92 Gadan 57989 July 8, 1993; cited in *Privacy & Human Rights 2003*, above, “Republic of Korea”.

<sup>39</sup> Para 12.8.

<sup>40</sup> *Restatement 2d*, Torts, § 652C. See “Invasion of Privacy by Use of Plaintiff’s Name or Likeness for Nonadvertising Purposes” 30 ALR3d 203; “Invasion of Privacy by use of Plaintiff’s Name or Likeness in Advertising” 23 ALR3d 865. The following states have appropriation statutes: New York (N Y Civ Rights Law §§ 50-51); Virginia (Va Code Ann § 8.01-40); Nebraska (Neb Rev Stat §§ 20-201 to 20-211); Rhode Island (R I Gen Laws § 9-1-28.1); Wisconsin (Wis Stat Ann § 895.50); Florida (Fla Stat Ann § 540.08); Oklahoma (Okla Stat Ann § 21-839); and Utah (Utah Code Ann § 45-3).

establish a *prima facie* claim for invasion of appropriation privacy, the plaintiff has to prove that the defendant has made some commercial or other use of the plaintiff's identity or persona without permission and that the defendant's use has caused some damage to the plaintiff's peace of mind and dignity. The tort protects "the reputation, prestige, social or commercial standing, public interest, or other values of the plaintiff's name or likeness".<sup>41</sup> Apart from some statutes, the rule is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one and the benefit sought to be obtained is not a pecuniary one.<sup>42</sup>

10.31 In *Pavesich v New England Life Insurance*, the plaintiff's photograph was used without consent in an insurance advertisement in a newspaper. The Georgia Supreme Court held:

*"The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master."*<sup>43</sup>

10.32 In the US, the distinction between appropriations involving injured feelings and those involving economic interest is expressed as the difference between a right of privacy and a right of publicity. Most American courts now recognise the distinction between the traditional human dignity interest protected by the appropriation type of privacy and the commercial property interest in human identity protected by the right of publicity.<sup>44</sup> The former is founded upon psychic damage but the latter upon traditional notions of theft of commercial property. Thomas McCarthy explains:

*"Invasion of the right of privacy by commercial appropriation is triggered by an injury to human feelings. Mental trauma from loss of self-esteem forms the basis for this tort. ... Commercial use of some aspect of a person's identity without permission is in effect an involuntary placing of a person on exhibition for someone else's financial benefit. ... On the other hand, infringement of the Right of Publicity by commercial appropriation is triggered by an injury to a commercial proprietary interest. Plaintiff's claim is not founded upon emotive or reputational damage but upon the unauthorised taking of a valuable commercial property right*

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<sup>41</sup> 62A Am Jur 2d, § 69.

<sup>42</sup> 62A Am Jur 2d, § 70.

<sup>43</sup> 50 SE 68 at 80 (Ga 1905). The plaintiff was an ordinary citizen.

<sup>44</sup> J T McCarthy, *The Rights of Publicity and Privacy* (Clark Boardman Callaghan, 1994), ss 1.6 - 1.11.

*which defendant has benefited from without compensation to the owner.*<sup>45</sup>

*“The appropriation branch of the Right of Privacy gives control over another’s commercial use of one’s identity only insofar as one can establish some bruised feelings. The interest protected is purely one of freedom from a particular kind of infliction of mental distress. The Right of Publicity takes the next logical step and makes the right of control over commercial use of one’s identity complete by giving to each person a complete right to control all unpermitted uses of one’s personality, that is, the right to prevent commercial use regardless of the infliction of mental distress.”*<sup>46</sup>

In summary, the appropriation form of privacy protects an individual who does not desire publicity in any form but the right of publicity protects the individual’s claim to exploit himself the publicity value of his name or likeness.

10.33 The *Restatement of the Law (Third), Unfair Competition*, issued by the American Law Institute in 1995 gives recognition to the right of publicity in the law of unfair competition. Anyone who “appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade” is subject to liability for injunctive or monetary relief. Use “for purposes of trade” does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or non-fiction, or in advertising that is incidental to such uses.<sup>47</sup>

10.34 **Conclusion** – The Privacy Sub-committee agrees that unauthorised use of a person’s name or likeness for commercial gain is immoral and should be condemned. Such conduct damages a person’s personality rights as well as his commercial interests. By using the name or likeness of a person for a commercial purpose against his will, both his dignity and autonomy are undermined. However, the Sub-committee also notes that an appropriation tort does not require the invasion of something secret, secluded or private pertaining to the individual. The mischief is of marginal relevance to the privacy interests with which they are most concerned. Any privacy interest that exists in cases of misappropriation is not of such significance as to merit the creation of a new privacy tort. The Consultation Paper therefore provisionally concluded that the privacy issue involved in an unauthorised use of a person’s name or likeness is not substantial enough to warrant the creation of a tort of invasion of privacy by appropriation of a person’s name or likeness.

10.35 The Hong Kong section of JUSTICE agrees with the conclusion but the Bar Association is not convinced that there is no need for such a tort. The Bar is of the view that a person must have a right not to be the object of

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<sup>45</sup> J T McCarthy, § 5.8[C], p 5-69.

<sup>46</sup> J T McCarthy, § 5.8[F], p 5-76.

<sup>47</sup> §§ 46 – 49.

publicity for another's ends without prior consent, whether the ends are economic, political or otherwise. They believe that it is a wrong approach to acknowledge the existence of the problem and then not to deal with it.

10.36 In the *Eastweek* case,<sup>48</sup> a reporter used a long-range lens to take a photograph of the complainant while she was exercising her right as a citizen to use a public street, without inviting media or public attention. That photograph, which was taken without her knowledge and consent, appeared in an article in *Eastweek*. The article described the complainant as "Japanese Mushroom Head" and subjected her choice of attire to sarcasm and derision. Although the magazine was not in breach of the Collection Limitation Principle in the PD(P)O because she was not identified in the article, Ribeiro JA observed that she would be "entirely justified" in regarding the article and the photograph as an "unfair and impertinent intrusion into her sphere of personal privacy". It appears that the HK Court of Appeal does not rule out the possibility that the unauthorised publication of a picture of a person taken in a public place without his consent could amount to an invasion of privacy.

10.37 We note that the Intellectual Property Department issued a paper entitled *Unfair Competition and Intellectual Property Rights* in November 2000. Chapter 3 of the paper deals with the right of commercial exploitation of personality. It discusses the arguments for and against the protection of personality rights in Hong Kong. The Department was of the opinion that personality rights should be considered in conjunction with the law of privacy, the law of advertising as well as other unfair trade practices. It did not, however, have any definitive views on the subject at the time the paper was issued.

10.38 We agree that the law should protect an individual's name, likeness or other indicia of identity against unauthorised use. Every individual should have a right to prevent his personality from being exploited by a third party without his consent, whether he is a celebrity or not. But since commercial exploitation of a person's personality does not fall within the remit of the privacy reference, any remedy for misappropriation of a person's name or likeness must lie in the law of intellectual property. As far as the commercial use of a person's name or likeness is concerned, the subject is best treated as a tort in its own right, rather than as a tort of invasion of privacy.

#### **Recommendation 19**

**We recommend that serious consideration should be given to according legal protection to individuals against the unauthorised use of their name, likeness or other indicia of identity for a purpose other than for the legitimate information of the public.**

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*Eastweek Publisher v Privacy Commissioner* [2000] HKC 692.

## Use of personal data in advertisements

10.39 The codes of practice on advertising standards issued by the Broadcasting Authority do not contain any provisions on privacy matters. The Generic Code of Practice on Television Advertising Standards, for example, simply states the general principle that all television advertising should be “legal, clean, honest and truthful”. As for the print media, except for certain exceptions,<sup>49</sup> there are no specific controls over the advertising content appearing in newspapers and magazines.

10.40 The broadcasting media in the UK is subject to the *Advertising Standards Code* issued by the Independent Television Commission.<sup>50</sup> The Code contains a separate paragraph on the unauthorised portrayal of individuals in advertisements. Rule 6.5 (protection of privacy and exploitation of the individual) of the Code reads:

*“With limited exceptions, living people must not be portrayed, caricatured or referred to in advertisements without their permission.*

*Note: Exceptions are made only for:*

- (a) advertisements for specific publications (books, films or specific editions of radio or television programmes, newspapers, magazines etc) which feature the person referred to in the advertisement. This is provided the reference or portrayal is neither offensive nor defamatory.*
- (b) generic advertising for news media. Prior permission is not required if it would be reasonable to expect that the individuals concerned would not object. If they do object, however, the advertising must be suspended immediately pending resolution of the complaint.*
- (c) advertisements where the appearance is brief and incidental, for example in a crowd scene.”*

10.41 The *Advertising and Sponsorship Code* of the Radio Authority in the UK also contains provisions in this area.<sup>51</sup> Rule 14 (protection of privacy and exploitation of the individual) provides:

*“Advertising must not claim or imply an endorsement where none exists.*

*Advertisers are urged to obtain written permission in advance if they portray, refer or allude to living individuals in any advertisement. Clearance given will be on the basis that it is recommended that such permission is sought.*

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<sup>49</sup> Eg Undesirable Medical Advertisements Ordinance (Cap 231).

<sup>50</sup> *The ITC Advertising Standards Code* (2002), at <[http://www.itc.org.uk/itc\\_publications/codes\\_guidance/index.asp](http://www.itc.org.uk/itc_publications/codes_guidance/index.asp)>.

<sup>51</sup> December 2000, at <<http://www.radioauthority.org.uk/index.html>>.

*Advertisers who have not obtained prior permission from those featured should ensure that they are not portrayed in an offensive, adverse or defamatory way. Additionally, portrayals and references should not interfere with those individual's private or family lives: legal advice is strongly advisable. In cases of doubt, legal advice must be obtained prior to clearance being given that the person concerned is unlikely to have any successful legal claim.*

*Even if the advertisement contains nothing that is inconsistent with the position or views of the person featured, Licensees and advertisers should be aware that those who do not wish to be associated with the advertised product may have a legal claim. ...*

*Impersonations, soundalikes, parodies or similar take-offs of celebrities are only permissible where this device is instantly recognisable as such and where it could be reasonably expected that the persons concerned had no reason to object. Nevertheless, advertisers are urged to obtain advance permission and/or seek legal advice before clearance. Copyright permission should be sought for references to, or portrayals of, well-known characters or their names or persona."*

10.42 As regards print and cinema advertising in Britain, they are regulated by *The British Code of Advertising, Sales Promotion and Direct Marketing*,<sup>52</sup> which is the rule book for non-broadcast advertisements, sales promotions and direct marketing communications. Complaints about breaches are investigated and adjudicated by the Advertising Standards Authority. Rule 13 (protection of privacy) of the Code provides:

*"13.1 Marketers should not unfairly portray or refer to people in an adverse or offensive way. Marketers are urged to obtain written permission before:*

- (a) referring to or portraying members of the public or their identifiable possessions; the use of crowd scenes or general public locations may be acceptable without permission*
- (b) referring to people with a public profile; references that accurately reflect the contents of books, articles or films may be acceptable without permission*
- (c) implying any personal approval of the advertised product; marketers should recognise that those who do not wish to be associated with the product may have a legal claim.*

*13.2 Prior permission may not be needed when the marketing communication contains nothing that is inconsistent with the position or views of the person featured. ...*

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11<sup>th</sup> edn (2003), at <[http://www.asa.org.uk/the\\_codes/index.asp](http://www.asa.org.uk/the_codes/index.asp)>.

*13.4 Members of the Royal Family should not normally be shown or mentioned in marketing communications without their prior permission. Incidental references unconnected with the advertised product, or references to material such as books, articles or films about members of the Royal Family, may be acceptable. ...”*

10.43 We note that the *Code of Advertising Standards* issued by the Association of Accredited Advertising Agents of Hong Kong imposes restrictions on the use of pictures of individuals in advertisements which suggest that the individuals endorse the products or services advertised.<sup>53</sup> Any member of the Association which is in breach of the Code may be disciplined in accordance with the Rules of the Association. Although such self-regulatory measures are commendable, it would be preferable if similar provisions could be incorporated into the codes of practice on advertising standards issued under the Broadcasting Authority Ordinance. The Sub-committee therefore made such a recommendation in the Consultation Paper.

10.44 Since the Broadcasting Authority does not have jurisdiction over the print media, the Sub-committee also recommended that the Privacy Commissioner should give consideration to issuing a Code of Practice on the use of personal data in advertising materials using the provisions quoted above as a starting point. Any code issued by the Privacy Commissioner would apply to both the print and broadcasting media.

10.45 However, the Broadcasting Authority did not believe that there was a need to introduce privacy provisions in its advertising codes on the following grounds: (a) the Authority had not received any complaints about unauthorised use of a person’s name or likeness in connection with the broadcast of an advertisement; (b) an aggrieved individual might seek compensation under the PD(P)O if his likeness was recorded and used for an unauthorised purpose; and (c) an individual might also look to the laws of contract, infringement of copyright or passing off for remedies in appropriate circumstances.

10.46 The Hong Kong section of JUSTICE agreed with the principle behind the recommendations, but was doubtful whether instances of infringement of privacy in this area were so frequent as to merit the “substantial” effort of drafting a code. The Privacy Commissioner agreed with the recommendations in principle. He expressed the view that a code under the PD(P)O would benefit from being drafted by professional bodies representing the interests of the advertising industry in Hong Kong. The HK Women Professionals and Entrepreneurs Association also welcomed the proposals.

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<sup>53</sup> The Association of Accredited Advertising Agents of HK, *Standards of Practice* (February, 1997), Principles (B)(i) and (D)(ii).

**Recommendation 20**

**We recommend that the Privacy Commissioner for Personal Data should give consideration to issuing a code of practice on the use of personal data in advertising materials for the practical guidance of advertisers, advertising agents and the general public.**

**Recommendation 21**

**We recommend that the Broadcasting Authority should give consideration to adopting in their Codes of Practice on Advertising Standards provisions governing the use of personal data in advertisements broadcast by the licensed television and sound broadcasters in Hong Kong.**

## Chapter 11

### Publicity placing someone in a false light and factual inaccuracies reported in the press

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11.1 We consider in this chapter whether or not publicity placing someone in a false light should be rendered a tort in Hong Kong, and whether or not a person affected by the publication of inaccurate personal information about him should have a remedy by way of a right of reply, which may provide a remedy for factual inaccuracies reported in the press.

11.2 The false light tort requires that the representation about an individual be false. For example, publishing a picture of a person visiting a methadone centre would lead the public into believing that he was a drug addict. This would place him in a false light if this was not the case. Another example is the posting of a woman's photograph in the lonely-hearts section of a sex-related website without her knowledge or consent. There are also cases involving the attribution of interviews or statements to an individual which he did not give.

#### Existing protection

11.3 **Freedom to impart information** – The freedom to impart information under Article 19 of the International Covenant on Civil and Political Rights is the freedom to communicate information, not misinformation. Lord Hobhouse said:

*“There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed.”<sup>1</sup>*

11.4 **Broadcasting Authority Ordinance** – As far as the broadcast media is concerned, the Broadcasting Authority's *Generic Code of Practice on Television Programme Standards* requires that the presentation of news by domestic television programme services should observe the following rules:<sup>2</sup>

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<sup>1</sup> *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609; [1999] UKHL 45, p 41.

<sup>2</sup> *Generic Code of Practice on Television Programme Standards*, 27.6.2003, Chapter 9.

*“7(b) Pictorial representation of news should be carefully selected to ensure fairness and should not be misleading or sensational. ... (e) Correction of factual errors should be made as soon as practicable after the original error, or at the end of the current programme or the beginning of a subsequent programme. In some circumstances it may be appropriate for a statement to appear in print. ...*

*9. The licensees have a responsibility to avoid unfairness to individuals or organisations featured in factual programmes, in particular through the use of inaccurate information or distortion. They should also avoid misleading the audience in a way which would be unfair to those featured in the programme. ...*

*15. Licensees should take special care when their programmes are capable of adversely affecting the reputation of individuals, companies or other organizations. Licensees should take all reasonable care to satisfy themselves that all material facts are so far as possible fairly and accurately presented.*

*16. Where a factual programme reveals evidence of iniquity or incompetence, or contains a damaging critique of an individual or organization, those criticized should be given an appropriate and timely opportunity to respond.”*

11.5 The *Radio Code of Practice on Programme Standards* contains similar provisions.<sup>3</sup> Since the Television and Radio Codes already provide adequate protection against inaccurate or misleading coverage in the broadcast media, our focus is on whether it is necessary to provide relief for inaccurate or misleading coverage in the print media.

11.6 **Defamation Ordinance** – Section 14 of the Defamation Ordinance (Cap 21) provides for a limited right of reply. Under that provision, certain newspaper reports are protected by qualified privilege if the newspaper concerned affords the complainant an opportunity to explain or contradict the defamatory allegation. However, the newspaper is not obliged to afford the complainant such an opportunity, nor is the newspaper required to accept the complainant’s reply as true and accurate. Even if the court has determined that the newspaper has published a false and defamatory statement, the newspaper may not be compelled to publish in its paper a retraction or a notice declaring that a court has determined that the impugned statement was false.<sup>4</sup>

11.7 **Copyright Ordinance** – By virtue of sections 92 and 96 of the Copyright Ordinance (Cap 528), a person has a right not to have his work

<sup>3</sup> See in particular, paras 26, 28, 32-35 of the Code (1.6.2001).

<sup>4</sup> J A Barron, “The right of reply to the media in the United States” (1993) 15 *Hastings Comm & Ent LJ* 1 at 13 (arguing that a right of reply is a fuller and more adequate remedy for defamatory attack than is the vindication remedy, unless the latter is accompanied by a requirement of mandatory publication).

subjected to derogatory treatment, and not to have a work falsely attributed to him as an author. An infringement of this right is actionable under section 114 as a breach of statutory duty. Where an author's work is subjected to derogatory treatment, the court may grant an injunction prohibiting the doing of any act unless a disclaimer is made dissociating the author from the treatment. These provisions are of limited application.

11.8 **Personal Data (Privacy) Ordinance** – We recommended in our *Data Protection Report* that “all data representing information or opinion, *whether true or not*, which facilitate directly or indirectly the identification of the data subject to whom it relates be regulated by law”.<sup>5</sup> We also recommended that: (a) the Data Quality Principle should apply without qualification to the media; and (b) the media should be required to take all practicable steps to disseminate a correction where inaccurate data have been published.<sup>6</sup> The PD(P)O implements recommendation (a) by not exempting the media from its requirements to ensure the accuracy of personal data provided for in DPP 2(1), which apply no less to deliberate as to inadvertent inaccuracies. The requirements of the PD(P)O to disseminate corrections of inaccurate personal data are provided for in DPP 2(1) and section 23(1). However, the way DPP 2 and section 23 are drafted may not give full effect to recommendation (b) in our *Data Protection Report*.

11.9 DPP 2 provides that where personal data disclosed to a third party were inaccurate at the time of the disclosure and are materially inaccurate having regard to the purpose for which the data *are, or are to be, used* by the third party, all practicable steps must be taken to ensure that the third party is informed that the data are inaccurate, and that the third party is provided with such particulars as will enable him to rectify the data having regard to that purpose. DPP 2 does not normally assist an individual where inaccurate data about him have been published in the news section of a newspaper. News reports containing personal data are published in a newspaper for the general information or immediate consumption of its readers. It is difficult for a data subject to argue that his data in a previous issue are still being used by the readers for that purpose.

11.10 Section 23(1) of the PD(P)O facilitates the correction of inaccurate personal data, a copy of which has been supplied by the data user to the data subject in accordance with a data access request made by the latter. It provides, *inter alia*, that if inaccurate personal data supplied to the data subject in accordance with his data access request have been disclosed to a third party and the data user has no reason to believe that the third party has ceased using those data for the purpose for which the data were disclosed to the third party, then the data user must, on the request of the data subject that the necessary correction be made to the data, take all practicable steps to supply the third party with a copy of those corrected data, accompanied by a notice stating the reasons for the correction. To the extent that a news report in a newspaper is published for the general information or immediate consumption of its readers, it is difficult for a data subject to contend that the readers are still using the

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<sup>5</sup> *Report on Reform of the Law Relating to the Protection of Personal Data* (1994), para 8.17.

<sup>6</sup> Para 18.50.

inaccurate data in a previous issue for that purpose after the day of publication.<sup>7</sup>

11.11 Furthermore, section 66(1) of the PD(P)O enables an individual to claim compensation from a newspaper if the individual suffers damage by reason of a breach of DPP 2 by the newspaper. However, a newspaper that has published inaccurate data in breach of DPP 2 has a defence if the personal data accurately recorded data that had been received or obtained by the newspaper from a third party.<sup>8</sup> This defence provides the media with a shield not available to it in defamation actions. It would seem that such is the case even though the data were “materially inaccurate” having regard to the purpose for which the data are to be used by readers,<sup>9</sup> the newspaper did not take such care as was reasonably required to avoid the breach,<sup>10</sup> and failure to take such care amounts to a breach of journalistic ethics.

11.12 Newspapers are offered for sale in the market to anyone who is willing to pay the price. In contrast to banks or credit reference agencies which disclose personal data to known parties who have a continuing relationship with the banks or agencies, a newspaper publisher does not know the identities of those who have read the newspaper, let alone the identities of those who are still using the data in question after the day of publication. The application of DPP 2 and section 23(1) to factual errors reported in the press is therefore problematic. So far, there is no evidence that any newspaper has been asked to publish a correction for a breach of DPP 2. Apparently, DPP 2 and section 23(1) do not provide a right to the dissemination of a correction in the media. This is unsatisfactory, bearing in mind that the news media is exempt from the Individual Participation Principle in DPP 6, which provides for the right of access to, and correction of, data held by the data user, prior to publication. We agree that there is a need to exempt the news media from the application of DPP 6 prior to publication of data, but as pointed out by the Working Party set up under the European Union Data Protection Directive:

*“Limits to the right of access and rectification prior to publication could be proportionate [to the aim of protecting freedom of expression] only in so far as individuals enjoy the right to reply or obtain rectification of false information after publication.”<sup>11</sup>*

11.13 To the extent that the news media is exempt from DPP 6 and section 18(1)(b) of the PD(P)O prior to publication,<sup>12</sup> and the remedies afforded by DPP 2 and section 23 do not seem to have created a right to the dissemination of a correction in the medium concerned after publication, it is necessary to provide a mechanism through which inaccuracies (including fabrications) and distortions, whether deliberate or inadvertent, about an individual that have been published in the print media can be corrected in a

<sup>7</sup> However, it is arguable that DPP 2 and s 23 apply to Internet newspapers that store back issues for continuing use by their subscribers.

<sup>8</sup> Cap 486, s 66(3)(b).

<sup>9</sup> Cf DPP 2(1)(c).

<sup>10</sup> Cf Cap 486, s 66(3)(a).

<sup>11</sup> “Data Protection Law and the Media”, Recommendation 1/97, adopted by the EU Data Protection Working Party, above, at the Conclusions.

<sup>12</sup> Cap 486, s 61.

subsequent issue.<sup>13</sup> Not all publication of inaccurate (including fabricated) or misleading personal information would give rise to an action for libel. In any event, libel actions are expensive and few injured parties would wish to take the time and trouble to bring an action against the publisher.

## Overseas jurisprudence

11.14 **Views of academics** – Eric Barendt contends that false portrayal which creates an inaccurate impression of an individual should be covered by privacy laws if the portrayal would be offensive to most people. He says false suggestions that someone is seriously depressed or is having an affair or plans to marry “clearly intrude on private matters”.<sup>14</sup> However, Harry Kalven points out that there is a great deal of overlapping of defamation in false light cases. He says that the overlap with defamation might have been thought substantial enough to make an approach via privacy superfluous.<sup>15</sup> Raymond Wacks also argues that many of the issues characterised as questions of false light may be resolved by the law of defamation and that it requires strong justification to treat publicity placing someone in a false light as an independent tort.<sup>16</sup>

11.15 In the view of Harvey Zuckman, the problem arises from the very nature of the false light tort as one going beyond defamation. The tort encompasses false non-defamatory statements as well as defamatory statements, and thereby increases the chill on free expression:<sup>17</sup>

*“This chill can be substantial given the hierarchical nature of the news and information media. News and information is normally gathered by reporters and researchers, and then presented to editors for processing and the decision whether to publish. Because defamatory material injures reputation, such material usually provides to the editors a red warning flag of legal danger that can be countered by careful verification of the questionable material or its modification or excision. But false statements that are neutral or even laudatory with respect to a subject’s reputation or status provide no such warning to editors. Consequently, editors are unable to protect themselves and their publishers from liability except at the expense of laboriously checking the accuracy of all statements of facts about individuals presented by the reporters and researchers. There are thus two alternatives confronting editors because of the false light tort: either risk liability by failing to double check every asserted fact about individuals, or avoid liability at a great expenditure of time*

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<sup>13</sup> Inaccurate, in relation to personal data, is defined in s 2(1) of the PD(P)O (Cap 486) as meaning that the data are “incorrect, misleading, incomplete or obsolete”.

<sup>14</sup> E M Barendt, “The protection of privacy and personal data and the right to use one’s image and voice: when does the dissemination of information become an interference with a person’s life?”, above, at 62.

<sup>15</sup> H Kalven, “Privacy in tort law - Were Warren and Brandeis wrong?” (1966) 31 LCP 326, 340.

<sup>16</sup> R Wacks, *The Protection of Privacy* (London: Sweet & Maxwell, 1980), at 171.

<sup>17</sup> H L Zuckman, “Invasion of Privacy – Some Communicative Torts Whose Time Has Gone” 47 Washington and Lee L Rev 253 at 257-258.

*and money. The news and information media are burdened under either alternative.”*

11.16 **Nordic Conference on Privacy** – The Nordic Conference on Privacy organised by the International Commission of Jurists resolved in 1967 that the publication of words or views falsely ascribed to a person or the publication of his words, views, name or likeness in a context which places him in a false light should be actionable.

11.17 **Council of Europe** – Resolution (74)26 on the right of reply adopted by the Council of Europe Committee of Ministers in 1974 recommends to member governments that the position of the individual in relation to the media should be in accordance with, *inter alia*, the following principle:<sup>18</sup>

*“In relation to information concerning individuals published in any medium, the individual concerned shall have an effective possibility for the correction, without undue delay, of incorrect facts relating to him which he has a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication.”*

11.18 The term “effective possibility for the correction” means “*any possibility which can be used as a means of redress, whether legal or otherwise, such as a right of correction, or a right of reply, or a complaint to press councils*”.<sup>19</sup> This principle is included in addition to the principle that an individual should have an effective remedy against the publication of facts and opinion about him which constitute an interference with his privacy or an attack upon his dignity, honour or reputation.

11.19 Resolution (74)26 further recommends that member governments, when adopting legislation concerning the right of reply, should make provision for the right of reply in the press and on radio and television and any other periodical media on the pattern of the following minimum rules:

*“1. Any natural and legal person, as well as other bodies, irrespective of nationality or residence, mentioned in a newspaper, a periodical, a radio or television broadcast, or in any other medium of a periodical nature, regarding whom or which facts have been made accessible to the public which he claims to be inaccurate, may exercise the right of reply in order to correct the facts concerning that person or body.*

*2. At the request of the person concerned, the medium in question shall be obliged to make public the reply which the person concerned has sent in.*

*3. By way of exception the national law may provide that the*

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<sup>18</sup> Resolution (74)26 on the Right of Reply – Position of the Individual in relation to the Press, para 1.

<sup>19</sup> Above, para 4(iii).

*publication of the reply may be refused by the medium in the following cases:*

- i. if the request for publication of the reply is not addressed to the medium within a reasonably short time;*
- ii. if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;*
- iii. if the reply is not limited to a correction of the facts challenged;*
- iv. if it constitutes a punishable offence;*
- v. if it is considered contrary to the legally protected interests of a third party;*
- vi. if the individual concerned cannot show the existence of a legitimate interest.*

*4. Publication of the reply must be without undue delay and must be given, as far as possible, the same prominence as was given to the information containing the facts claimed to be inaccurate.*

*5. In order to safeguard the effective exercise of the right to reply, the national law shall determine the person who shall represent any publication, publishing house, radio, television or other medium for the purpose of addressing a request to publish the reply. The person who shall be responsible for the publication of the reply shall be similarly determined and this person shall not be protected by any immunity whatsoever.*

*6. The above rules shall apply to all media without any distinction. This does not exclude differences in the application of these rules to particular media such as radio and television to the extent that this is necessary or justified by their different nature.*

*7. Any dispute as to the application of the above rules shall be brought before a tribunal which shall have power to order the immediate publication of the reply.”*

11.20 In a resolution on the ethics of journalism passed in 1993, the Parliamentary Assembly of the Council of Europe stated that:

*“At the request of the persons concerned, the news media must correct, automatically and speedily, and with all relevant information provided, any news item or opinion conveyed by them which is false or erroneous. National legislation should provide for appropriate sanctions and, where applicable, compensation.”<sup>20</sup>*

11.21 The Assembly also recommended in a resolution on the right to

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<sup>20</sup> Resolution 1003 (1993), para 26.

privacy passed in 1998 that legislation guaranteeing the right to privacy should contain the following guideline:

*“when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned”.*<sup>21</sup>

11.22 **European Court of Human Rights** – The European Court pointed out that Article 10 of the European Convention on Human Rights protects journalists’ right to divulge information on issues of general interest *“provided that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism”.*<sup>22</sup> It also noted that:

*“a correct statement can be and often is qualified by additional remarks, by value judgments, by suppositions or even insinuations. It must also be recognised that an isolated incident may deserve closer scrutiny before being made public; otherwise an accurate description of one such incident can give the false impression that the incident is evidence of a general practice.”*<sup>23</sup>

11.23 In *Rotaru v Romania*,<sup>24</sup> the Romanian Intelligence Services (RIS) kept files which contained various pieces of information about the applicant’s life, in particular, his studies, his political activities and his criminal record. Some of this information had been gathered more than 50 years earlier. The applicant brought proceedings against the RIS, claiming that some of the information was false and defamatory. The Bucharest Court of Appeal upheld his claim and declared the details null and void, without making any order as to damages and costs. The European Court of Human Rights held that the redress afforded by the judgment of the domestic court was only partial. In particular, the judgment did not rule on the applicant’s claim for compensation for non-pecuniary damage and for costs. Besides, the false information was still recorded in the RIS’s files and no mention of the judgment had been made in the file concerned. The European Court held that:

*“[the information about the applicant’s life], when systematically collected and stored in a file held by agents of the State, falls within the scope of ‘private life’ for the purposes of Article 8(1) of the Convention. This is all the more so in the instant case as some of the information has been declared false and is likely to injure the applicant’s reputation. Article 8 consequently applies.”*<sup>25</sup>

*“Both the storing of that information and the use of it, which were*

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<sup>21</sup> Resolution 1165 (1998), para 14 (iii).

<sup>22</sup> *Fressoz v France*, No 29183/95, date of judgment: 21.1.99, para 54.

<sup>23</sup> *Markt Intern v Germany* (1989), 12 EHRR 161, para 35.

<sup>24</sup> No 28341/95, date of judgment: 4.5.2000 (holding by 16 votes to one that there had been a violation of Article 8 of the ECHR).

<sup>25</sup> Above, para 44. The partly dissenting opinion of Judge Bonello noted at para 13 that *“Opening up Article 8 to these new perspectives [ie the falsity and defamatory nature of information] would add an exciting extra dimension to human rights protection.”*

*coupled with a refusal to allow the applicant an opportunity to refute it, amounted to interference with his right to respect for his private life as guaranteed by Article 8(1).<sup>26</sup>*

**11.24 Council of Europe Convention on Privacy and European Union Data Protection Directive** – The views of the European Court are consistent with the Council of Europe Convention on Privacy 1981,<sup>27</sup> which lays down the principle that personal data undergoing automatic processing must be “accurate and, where necessary, kept up to date”.<sup>28</sup> The European Union Data Protection Directive 1995 further provides that:

*“every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified”.*<sup>29</sup>

Although Member States may provide for exemptions or derogations from the general rules on the lawfulness of the processing of personal data (including the Data Quality Principle) for the processing of personal data carried out solely for journalistic purposes if they are necessary to reconcile the right to privacy with the rules governing freedom of expression,<sup>30</sup>

*“the right to reply and the possibility to have false information corrected, the professional obligations of journalists and the special self-regulatory procedures attached to them, together with the law protecting honour ... must be taken into consideration when evaluating how privacy is protected in relation to the media.”*<sup>31</sup>

**11.25 American Convention on Human Rights** – The Inter-American Court of Human Rights is of the view that the right of reply or correction under Article 14 of the American Convention is closely related to the right to freedom of expression, which is subject to restrictions necessary to ensure “respect for the rights and reputations of others”.<sup>32</sup> Article 14 of the Convention provides:

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<sup>26</sup> Above, para 46.

<sup>27</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

<sup>28</sup> *Amann v Switzerland*, No 27798/95, date of judgment: 4.5.00, para 43. The purpose of the Convention is to secure for every individual “respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him”. The Data Quality Principle in the *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data 1980* also provides that personal data should be “accurate, complete and kept up-to-date”: para 8. The Explanatory Memorandum to the Guidelines notes that there has been a tendency to broaden the traditional concept of privacy (“the right to be left alone”) and to identify a more complex synthesis of interests which may be termed privacy and individual liberties.

<sup>29</sup> Article 6(1)(d).

<sup>30</sup> EU Data Protection Directive, Article 9.

<sup>31</sup> “Data Protection Law and the Media”, Recommendation 1/97, adopted by the Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up by the EU Directive, at <[http://europa.eu.int/comm/internal\\_market/en/dataprot/wpdocs/wp1en.htm](http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp1en.htm)>.

<sup>32</sup> *Enforceability of the Right to Reply or Correction*, Advisory Opinion OC-7/86, Inter-Am Ct HR (Ser A) No 7 (1986), para 23.

“1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred. ...”

11.26 In the *Right of Reply* case,<sup>33</sup> the Inter-American Court of Human Rights advised that Article 14(1) of the Convention recognised an internationally enforceable right to reply or to make a correction, and that when the right is not enforceable under domestic law, the State concerned has the obligation to adopt legislative or other measures to give effect to this right.

11.27 **UN Human Rights Committee** – In the General Comment made in relation to the right to privacy under the ICCPR, the UN Human Rights Committee specifically requires that personal information stored in automatic data files must be accurate:

*“Every individual should ... be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.”*<sup>34</sup>

11.28 **Australia** – In Australia, the Privacy Act 1988 expressly defines “personal information” as meaning information or an opinion “whether true or not” about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.<sup>35</sup> Privacy Principle 12 of the Australian Privacy Charter 1994 also requires that personal information should be relevant to each purpose for which it is used or disclosed, and should be accurate, complete and up-to-date at that time.

11.29 **Denmark** – Under the Danish Media Liability Act, where a media organisation has published factual information relating to an individual which might cause anyone significant financial or other damage, that individual may request the right of reply in the publication concerned unless the correctness of the information is unquestionable. Requests for reply must be made within four weeks after the publication of the factual information. The content of the reply should be restricted to the necessary factual information. The reply has to be published free of charge without undue delay and in any such conspicuous manner as may reasonably be warranted in the circumstances. If the request is turned down or is inadequate, the individual concerned may complain to the Danish Press Council set up under the Media Liability Act, which has jurisdiction to decide whether a media organisation is under an obligation to

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<sup>33</sup> Above, para 35.

<sup>34</sup> General Comment 16 (1988), para 10.

<sup>35</sup> Section 6(1).

publish a reply, and, if so, to decide on the content, form and location of the reply. The Press Council may direct the editor of the media organisation against which the complaint has been lodged to publish its decision. Failure to comply with an order for publication is an offence.

11.30 **France** – The press law in France includes a right of reply for a person mentioned, or clearly insinuated against, in an article. It is irrelevant whether the article is correct or not, nor does it matter whether it is defamatory. The reply must be published within three days in the case of a daily publication, and in the next issue in the case of a periodical. In theory, the reply should be published in the same spot and in the same characters as the original article. The length of the reply is limited to that of the previous article, with a maximum of 200 lines.<sup>36</sup> The right can be enforced by the courts.

11.31 In addition to the general right of reply, a public servant in France has a right of rectification whereby he may correct any newspaper report of his official performance which he deems inaccurate. The rectification must be published in the next issue but its length must not exceed twice the length of the original article.<sup>37</sup>

11.32 **Germany** – Whereas the broadcast of a television programme involving a fictitious psychoanalysis session with the Princess of Wales might not have given rise to any cause of action in England, the publication of a fictitious interview with Princess Caroline of Monaco was actionable in Germany. In the latter case,<sup>38</sup> the German Federal Supreme Court observed that the newspaper deliberately exploited the personality of Princess Caroline to promote its own commercial interests. The Court therefore ordered a correction and a disclaimer, as well as an award of damages. It also ordered that the disclaimer be printed on the same page (the front page) where the alleged exclusive interview had earlier been published.<sup>39</sup>

11.33 In another German case, the Federal Supreme Court approved a judgment which awarded Empress Soraya of Iran damages for the publication of a fictitious exclusive interview under the heading “The Shah doesn’t write to me any longer”. In the Court’s view, the publication of an entirely fabricated report about personal matters in a weekly of the “yellow press” was apt to restrict the plaintiff’s freedom of social activity and therefore seriously affected her personality.<sup>40</sup> An appeal to the Constitutional Court was unsuccessful.

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<sup>36</sup> Gustaf von Dewall, *Press Ethics: Regulation and Editorial Practice* (Düsseldorf: European Institute for the Media, Media Monograph 21, 1997), at 37-38.

<sup>37</sup> Above.

<sup>38</sup> BGHZ 128, 1; cited and discussed in B S Markesinis & N Nolte, above, at 125-127.

<sup>39</sup> The disclaimer is an explanation by the editor that the facts published in the newspaper were wrong. The Court also held that the newspaper’s economic gain was a legitimate factor in the determination of non-pecuniary damages.

<sup>40</sup> BGH 8.12.1964, NJW 1965, 685; cited and referred to in H Stoll, “The General Right to Personality in German Law: An Outline of its Development and Present Significance” in B S Markesinis (ed), *Protecting Privacy – The Clifford Chance Lectures Volume Four* (OUP, 1999), at 37.

11.34 In the *Schacht* case,<sup>41</sup> the plaintiff sent a letter to the defendant newspaper requesting it to publish a reply to an article which contained statements criticising the plaintiff's activities. However, instead of publishing his reply as a counter-statement enforceable under the Press Law, the defendant published the plaintiff's letter under the heading "Letters from Readers", with part of its contents falsified by omissions. The Federal Supreme Court held that a modified reproduction of private notes infringed the personality rights of the author because such unauthorised alterations could spread a false picture of his personality. It added that, in general, not only were unauthorised omissions of essential parts of the author's notes an unacceptable attack, but also additions through which his notes acquired a different colour or tendency from that which he had chosen when presenting his notes for publication.<sup>42</sup>

11.35 In yet another German case,<sup>43</sup> the plaintiff complained that the main headline of the defendant newspaper was so drafted as to suggest that she would accept, or had accepted, money in return for being portrayed in the nude. The Court of Appeal of Hamburg found that the words "K Nude – DM 80,000" were readable from a distance. Adjoining the headline was a coloured picture of the plaintiff, partially naked; only closer inspection revealed this to be a drawing. The truth that the plaintiff was claiming damages from the publisher of a calendar was revealed only in the final sentence of the text below the drawing. The great majority of those unable to read the text, especially those who did not buy the newspaper, would conclude to the discredit of the plaintiff that she was ready to display her body in the nude for a fee. Although what had been published was not independently defamatory, the way the front page was laid out placed the plaintiff in a context "*highly prejudicial to her honour as a woman, diminished her seriousness as a politician and reduced her standing as a public figure.*" Given the wide circulation of the newspaper, the headline must have been taken in by a large number of people who read no further. Even those who read the text would have had the same impression, for in the main they would conclude that the plaintiff allowed herself to be portrayed in the nude in the calendar in question and was now demanding a fee for it. The Court concluded that the headline invaded the plaintiff's right of personality under the German Civil Code and that an award of damages for pain and suffering was justified. After acknowledging that the press need not concern itself with cursory readers who might misunderstand a newspaper report, the Court said:

*"But it is different when headlines on the front page are calculated to excite the interest of people with no mind to read anything else in the paper, such as those who are wondering whether to buy the paper or glancing at a copy read by someone else in a train or a bus. Such a headline must be considered on its own, independently of the body of the article it heralds, for it can be foreseen that it will often be read cursorily in this way, and the*

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<sup>41</sup> 13 BGHZ 334; translated by F H Lawson & B S Markesinis in B S Markesinis (1994), above, at 376.

<sup>42</sup> Above, at 379.

<sup>43</sup> 1988 NJW 737, reproduced in B S Markesinis (1994), above, at 407.

*press must certainly strive to avoid recognisable risks of likely misunderstandings ... . That is the case here.*"<sup>44</sup>

11.36 The press laws of most German states also provide for a right of reply. This right affords protection against misuse of personal information in the press. It applies to facts, but not opinion, and applies whether the allegation is flattering or derogatory. For instance, the Hamburg Press Law provides that the press is obliged to publish a contradiction or reply by any person affected by an assertion of fact. The reply must be printed without additions or omissions in the same type and in the same section as the original item. It should be published in the next edition following the receipt of the reply. The reply must confine itself to factual assertions. If the publication refuses to publish it, the alleged injured party is entitled to request the court to order the publication to do so.<sup>45</sup>

11.37 **Hungary** – Section 79 of the Civil Code provides a remedy for spreading false facts about a person or putting true facts in a false light.

11.38 **Italy** – Since the right to personality is guaranteed by the Constitution and an individual's name and image are protected by the Civil Code, an individual has a right of action if someone gives him an image different from the one he has in reality, causing damage to his identity. The High Court has held that everyone has the right not to have his intellectual, religious, political, social and ideological beliefs changed or distorted.<sup>46</sup>

11.39 Italian law also provides for a right of reply called rectification. Where a person believes that an article concerning his statements or actions is erroneous or prejudicial to his dignity, he may ask the newspaper to publish a rectification within two days of receipt of the request. The rectification must be no longer than 30 lines, and must be given the same prominence as the publication to which it refers. If the editor rejects the request, the person concerned may apply to the court to order the newspaper to publish a rectification.<sup>47</sup>

11.40 **Lithuania** – The civil laws in Lithuania provide for compensation for moral damage caused by the dissemination of unlawful or false information demeaning the honour and dignity of a person in the mass media.

11.41 **Macao, China** – Article 81 of the Civil Code declares that an individual has the right to be protected from an allegation that a false fact relates to him or his life, even though that fact does not infringe his honour or affect other people's perception of him and does not involve his private life.

11.42 **New Zealand** – The Defamation Act 1992 of New Zealand provides that in any proceedings for defamation, the Court may recommend that the defendant publish or cause to be published a correction of the matter

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<sup>44</sup> Above, at 408.

<sup>45</sup> Gustaf von Dewall, above, at 63-64.

<sup>46</sup> Decision 3769 of 22 June 1985, cited in Gustaf von Dewall, above, at 103.

<sup>47</sup> Gustaf von Dewall, above, at 104.

complained of.<sup>48</sup> Further, the NZ Court of Appeal has held that the Court has jurisdiction to grant a mandatory injunction ordering publication of a correction or retraction of defamatory statements whenever it is required by justice. It expressed the view that the freedom to impart information under the NZ Bill of Rights may well be supported by a jurisdiction to compel the publication of corrective statements when the plaintiff has established actionable defamation.<sup>49</sup>

11.43 **Russia** – An individual may petition the court to demand retraction of data which have damaged his honour, dignity or business reputation unless the person who has published the data could prove that the information was accurate. Where these data were published in the media, the retraction must be published in the same media. The injured party may also request the publication of a rejoinder in court without prior application to the media which has published the data.<sup>50</sup>

11.44 **South Africa** – The disclosure of false or misleading personal information is wrongful in South Africa for the purposes of the common law tort of infringement of privacy through an act of disclosure of private facts.

11.45 **United Kingdom** – The use of a person's name as a sponsor of a product may support a defamation action. In *Tolley v Fry*,<sup>51</sup> an amateur golf champion was depicted on a poster advertising chocolate bars while playing golf. The court held that the poster bore a defamatory meaning because it suggested that the plaintiff had consented to the use of his portrait as advertising for gain and had "prostituted" his reputation as an amateur golfer. It appears that the action would have failed if the plaintiff were a celebrated professional.

11.46 In *Charleston v News Group Newspaper*,<sup>52</sup> the plaintiffs were an actor and actress who played the parts of Harold and Madge Bishop, a respectable married couple, in the television serial "Neighbours". They complained that the defendant newspaper had published an article with a headline across most of the page in capital letters three-quarter of an inch high which read: "Strewth! What's Harold up to with our Madge?" Below it was a large photograph of the plaintiffs, semi-naked and engaging in an act of intercourse. A smaller photograph showed the female plaintiff wearing a right-fitting blouse or jacket with holes cut to expose her bare breasts. The accompanying text made it clear that the photographs had been produced by the makers of a pornographic computer game by superimposing the plaintiffs' faces on the near-naked bodies of models in pornographic poses without the consent of the plaintiffs. Nevertheless, the plaintiffs alleged that the readers would have drawn the inference that the plaintiffs had been willing participants

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<sup>48</sup> Defamation Act 1992 (New Zealand), ss 26 and 27. In recommending the publication of a correction, the Court may specify the content and the time of publication and the prominence to be given to the correction. Where the defendant complies with the recommendation, the proceedings will be deemed to be finally determined so far as they relate to that defendant.

<sup>49</sup> *TV3 Network v Eveready New Zealand* [1993] 3 NZLR 435.

<sup>50</sup> Martindale-Hubbell, *Russian Federation Law Digest*, TORTS.

<sup>51</sup> [1931] AC 333.

<sup>52</sup> [1995] 2 WLR 450 (HL).

in the production of the photographs, either by posing for them personally or by agreeing that their faces should be superimposed on the bodies of others. The House of Lords recognised that the plaintiffs must have found that publication deeply offensive and insulting. It showed “considerable sympathy” with the view that the law ought to give some redress to the plaintiffs against the publication of such degrading faked photographs, irrespective of what the text might have said. However, it declined to consider whether the publication of the photographs by itself constituted some novel tort, and focused entirely on the question of whether the plaintiffs had any remedy in the tort of defamation.

11.47 The plaintiffs argued that the eye-catching headline and the eye-catching photograph would attract the reader’s attention first and that a significant number of readers would not trouble to read any further. The House of Lords held that this argument fell foul of two principles of the law of libel. The first was that where no innuendo was alleged, the natural and ordinary meaning of an allegedly defamatory publication was the meaning conveyed to the mind of the “ordinary, reasonable and fair-minded reader”. The second principle was that, although a combination of words might in fact convey different meanings to the minds of different readers, the jury in a libel action was required to determine the single meaning which the publication conveyed to the notional reasonable reader and to base its verdict on the assumption that this was the one sense in which all readers would have understood it. The proposition that the prominent headline, or the headline plus the photographs, might found a claim in libel in isolation from its related text, because some readers only read headlines, was therefore held to be unacceptable. The plaintiffs were therefore left with no remedy under English libel law.

11.48 The **Younger Committee** did not support the view of those who argued that the publication of an untruth about a person should be treated by the law as an invasion of privacy rather than under the heading of defamation. They argued that there could be a threat to freedom of speech if the safeguards for it that have been built into the law of defamation were to be put in jeopardy by the process of subsuming defamation into the false light tort.<sup>53</sup> The **1977 Royal Commission on the Press** recommended against creating a mechanism for ensuring a right of reply. The Commission’s grounds were that “*the press should not be subjected to a special regime of law, and that it should neither have special privileges nor labour under special disadvantages compared with the ordinary citizen*”. The **Calcutt Committee** suggested in 1990 that a right to privacy would include protection from “publication of inaccurate or misleading personal material”.<sup>54</sup> They thought it right that an individual who was the subject of a seriously inaccurate story should be able to seek a correction and an apology. However, they were not convinced that whether or not a story contained a factual inaccuracy could always be ascertained under a speedy and informal procedure. The Committee therefore recommended that a statutory right of reply should not be introduced. They considered that their recommendation that the Press Complaints Commission should consider complaints of both inaccuracy and unfairness and should,

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<sup>53</sup> *Report of the Committee on Privacy* (London: HMSO, Cmnd 5012, 1972), paras 70-71.

<sup>54</sup> *Report of the Committee on Privacy and Related Matters* (London: HMSO, Cm 1102, 1990) (“Calcutt Report”), para 3.8.

where appropriate, recommend the publication of a correction and an apology would satisfy one of the main arguments for a right of reply.<sup>55</sup>

11.49 The **House of Commons National Heritage Committee** recommended in 1993 that the publication of “inaccurate or misleading information” should be a tort under the Protection of Privacy Bill proposed by it.<sup>56</sup> The subsequent **UK Consultation Paper** issued by the National Heritage Department pointed out, in relation to the false light tort in the US, that:

*“if it is accepted that another aspect of privacy is anonymity, which is lost when attention is paid to an individual, excessive publicity about a person, even where the statement is untrue, may therefore amount to an infringement of privacy.”<sup>57</sup>*

The UK Consultation Paper therefore considered that a person who had suffered or was likely to suffer substantial harm as a result of the publication of inaccurate or misleading information about him should probably be able to obtain relief if anonymity was a part of privacy.<sup>58</sup>

11.50 Although there is no right of reply in English law, by virtue of the **Defamation Act 1996**, where the court disposes of the claim under the summary procedure in the Act, it may order that the defendant publish or cause to be published “a suitable correction and apology”. The content of any correction and apology, and the time, manner, form and place of publication, are for the parties to agree. But if they cannot agree on the content, the court may direct the defendant to publish or cause to be published a summary of its judgment; and if they cannot agree on the time, manner, form or place of publication, the court may direct the defendant to take such reasonable and practicable steps as it considers appropriate.<sup>59</sup>

11.51 **United States** – There is no right of reply in the US. In *Miami Herald Publishing Co v Tornillo*,<sup>60</sup> Mr Tornillo brought an action to enforce a “right of reply” statute in Florida, which provided that if a newspaper attacked the personal character or official record of a candidate for nomination or election, the candidate had the right to demand that the newspaper publish, free of cost, any reply the candidate might make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges, provided it did not take up more space than the charges. Failure to comply with the statute constituted an offence. The US Supreme Court held that the statute violated the First Amendment.<sup>61</sup>

*“The Florida statute exacts a penalty on the basis of the content*

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<sup>55</sup> Calcutt Report, above, paras 11.14-11.16.

<sup>56</sup> National Heritage Committee, *Privacy and Media Intrusion, Fourth Report* (London: HMSO, 294-I, 1993), vol I, para 48.

<sup>57</sup> Above, para 5.29. Nonetheless the Consultation Paper doubted whether false light cases were a sufficiently distinct category of infringements to justify an express reference in legislation.

<sup>58</sup> Above, para 5.30.

<sup>59</sup> See Defamation Act 1996 (UK), ss 8 and 9.

<sup>60</sup> 418 US 241 (1974).

<sup>61</sup> 418 US 241, 256-258 (1974), citations omitted.

*of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.*

*Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'. ...*

*Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."*

11.52 It should, however, be noted that *Tornillo* did not deal with a private individual's right of reply to attacks in the press; it dealt with a state statute that afforded a right of reply to political candidates who were attacked prior to an election in which they were running. Nor did the case deal with the validity under the First Amendment of a right of reply statute directed at providing a remedy for defamatory attack.<sup>62</sup>

11.53 Although the US does not have a right of reply, publicity placing someone in a false light is a tort of invasion of privacy in many US jurisdictions.

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<sup>62</sup> J A Barron, "The right of reply to the media in the United States" (1993) 15 Hastings Comm & Ent LJ 1 at 5. Brennan and Rehnquist JJ specifically pointed out at 258 that the court addressed only "right of reply" statutes and implied no view upon the constitutionality of "retraction" statutes which afforded plaintiffs who were able to prove defamatory falsehoods a statutory action to require publication of a retraction.

Under this tort, one who gives publicity to a matter concerning another that places the other before the public in a false light is liable to the other for invasion of privacy if: (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed.<sup>63</sup> In order to bring an action based on the false light tort, the publicity must involve the private affairs of the plaintiff, and cannot relate to any matter which is inherently “public” or “of legitimate interest to the public”. The tort protects the interest of the individual in not being made to appear before the public in an objectionable false light or, in other words, otherwise than as he is. However, some American jurisdictions refuse to recognise this cause of action on the grounds that the interests protected under the false light tort are adequately served by actions in defamation and that these interests are not worth protecting at the expense of freedom of speech and of the press.

**11.54 Central and South American countries** – Most countries in Central and South America recognise a right of reply. They include: Argentina; Bolivia; Brazil; Chile; Colombia; Costa Rica; Cuba; Dominican Republic; Ecuador; El Salvador; Guatemala; Haiti; Honduras; Mexico; Panama; Paraguay; Peru; Uruguay; and Venezuela. The right entitles an injured party to reply in the same medium and sometimes under the same conditions of length and page or section of that of the original publication. The right is created by domestic legislation in all these countries except Argentina and Costa Rica in which the right of reply is enforced under Article 14 of the American Convention on Human Rights which forms part of their domestic law.<sup>64</sup>

## Conclusion

**11.55 Publicity placing someone in a false light** – If publicity placing someone in a false light is actionable as an invasion of privacy, the making of false statements about the private life of an individual would be actionable even though the maker is not liable in defamation. This would expand the scope of the law of defamation. The law of copyright already provides a remedy where an individual’s work is subjected to derogatory treatment or where a work is falsely attributed to him as an author. The tort of malicious falsehood might also be relevant in appropriate circumstances if the plaintiff has suffered special damage.<sup>65</sup> Freedom of speech might be unduly restricted if liability for the making of false statements were to be extended. We have therefore decided that it is unnecessary to create a tort of giving publicity to a matter concerning an individual that places him before the public in a false light.

**11.56 Factual inaccuracies reported in the press** – One of the key

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<sup>63</sup> *Restatement 2d, Torts, § 652E.* See R G Donaldson, “False Light Invasion of Privacy - Cognizability and Elements” 57 ALR4th 22.

<sup>64</sup> J E Lanao, “Legal challenges to freedom of the press in the Americas”, University of Miami LR, Jan 2002, 347, at 371-2 and fn 92.

<sup>65</sup> An action for malicious falsehood lies in cases where a person has maliciously made a false statement to a third party respecting the plaintiff or his property as a result of which the third party is deceived and induced to act to the plaintiff’s detriment.

elements of privacy is the ability of an individual to control the release and use of information about himself. The publication of inaccurate facts about an individual adversely affects his personal, family and business relationships. Wrongly reporting that a named person is a lottery winner, a debtor, a homosexual, a prostitute, mentally ill, infertile, licentious or receiving social security assistance is no less an interference with that person's privacy than would be the case if the report were true. We therefore consider that accuracy of facts about an individual is a core principle in the protection of privacy.

11.57 We recommend in our *Privacy and Media Intrusion Report* that the Press Privacy Code enforced by the proposed self-regulating privacy press complaints commission must require newspapers and magazines: (a) to take care not to publish inaccurate (including fabricated) or misleading information about an individual; and (b) where a significant inaccuracy (including fabrication) or misleading statement about an individual has been published (whether deliberately or inadvertently), to publish a correction promptly when requested to do so and, as far as possible, with a prominence equal to that given to the original publication.<sup>66</sup> Providing a correction mechanism through the proposed press complaints commission would reduce the number of libel claims in the courts. With a cheap and speedy alternative means of redress, an individual whose reputation or private life has been adversely affected by a false statement in the press is less likely to feel the need to seek financial compensation in the courts, which is currently the individual's sole option. This possible settlement outside the Court would reduce legal costs for both the public and the press. Further, if a swift remedy is available to the injured parties shortly after the impugned report, they would be able to avoid some of the harmful consequences that publication could bring.<sup>67</sup>

#### **Recommendation 22**

**We conclude that it is unnecessary to create a tort of giving publicity to a matter concerning an individual that places him before the public in a false light. However, we recommend that (unless the recommendations in our *Privacy and Media Intrusion Report* in relation to inaccurate and misleading reports in the print media about an individual have been implemented in full) the legislation should create a right to correct factual inaccuracies about an individual along the lines of the *Minimum Rules Regarding the Right of Reply* set out in Resolution (74)26 of the Council of Europe Committee of Ministers so that inaccurate facts published in the print media about an individual could be corrected without undue delay and with, as far as possible, the same prominence given to the original publication.**

<sup>66</sup> Recommendation 22.

<sup>67</sup> Eg *Chu v Apple Daily* [2001] 1375 HKCU 1.

## Chapter 12

### Enforcing the right to privacy

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#### Proof of damage

12.1 Remedies for invasion of privacy may include damages, injunction, an account of profits, and delivery up of articles or documents obtained in consequence of the invasion. Damages payable to the plaintiff for loss or damage he suffers by reason of an invasion of privacy may include pecuniary loss. However, such loss or damage might be negligible in privacy cases. If so, the plaintiff would not be able to apply for an injunction restraining the defendant to commit or repeat the infringing act unless the privacy tort is actionable without proof of damage. The problem to be addressed is whether it is necessary for the plaintiff to prove that he has suffered actual damage comparable with personal injury or loss of or damage to property before he has a right to bring an action for invasion of privacy.

12.2 The tort of violation of privacy under the Canadian statutes is actionable without proof of damage. The Report by the British section of JUSTICE said that actual damage should be assumed because it would be difficult in many cases of infringement of privacy for the plaintiff to show actual loss.<sup>1</sup> The Irish Law Reform Commission recommends that the plaintiff need not show that he suffered any damage. It comments that it is the affront to human dignity, not the damage which may result from the invasion of privacy, which is the essence of the wrong for which the victim should be compensated.<sup>2</sup>

#### **Recommendation 23**

**We recommend that both the tort of intrusion upon another's solitude or seclusion and the tort of unwarranted publicity should be actionable without any proof of damage.**

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<sup>1</sup> JUSTICE, above, para 144.

<sup>2</sup> LRC of Ireland, *Consultation Paper on Privacy: Surveillance and the Interception of Communications* (1996), para 9.32.

## Damages<sup>3</sup>

12.3 The primary aim of compensatory damages is to put the plaintiff into as good a position as if no tort had been committed. Since the gravamen of the cause of action for invasion of privacy is civil wrongs of a personal character which result in injury to the plaintiff's feelings, pain and suffering are proper elements of damages in privacy actions.<sup>4</sup> Damages in an action for invasion of privacy should therefore include compensation for the mental distress, embarrassment and humiliation suffered by the plaintiff.<sup>5</sup> The defendant's conduct after the infringement may be relevant because damages may be mitigated if the defendant has published a timely retraction or apology. Where the defendant acted with intent to injure the plaintiff and with full knowledge of the extent and severity of the plaintiff's injuries, the award of aggravated damages would be justified.

12.4 As for exemplary or punitive damages, their object is to punish the defendant for his wrongful conduct. Exemplary damages have been awarded where the defendant's conduct had been calculated to make a profit for himself which may exceed the compensation payable to the plaintiff.<sup>6</sup> Where the defendant has published facts pertaining to the plaintiff in the newspaper with a view to increasing its profit by an amount which would exceed usual compensatory damages, the defendant might be required by the Court to pay exemplary damages to the plaintiff.<sup>7</sup>

## Injunction

12.5 The injunction to restrain publication is valuable where there is a threat to publish information obtained by intrusion. It should also be available where the publication itself is actionable as unwarranted publicity concerning the plaintiff's private life, whether the information has come into the hands of the defendant by lawful or unlawful means. The harm which the plaintiff is likely to suffer in these situations would not be adequately compensated by damages if an injunction were not granted. A plaintiff is usually more concerned with the prevention or cessation of intrusion or publication than with the amount of damages he is likely to receive from the defendant after the invasion. Once the

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<sup>3</sup> On remedies for invasion of privacy, see generally: Matrix Media and Information Group, *Privacy and the Media*, above, Chapters 4 and 5; and Lord Chancellor's Department and the Scottish Office, *Infringement of Privacy – Consultation Paper* (1993), ch 6.

<sup>4</sup> 62A Am Jur 2d, Privacy, §§ 252 and 253.

<sup>5</sup> *Peck v UK*, No 44647/98, date of judgment: 28.1.2003, at paras 118-119. The European Court of Human Rights in that case observed that “*some forms of non-pecuniary damage, including emotional distress, by their very nature cannot always be the object of concrete proof. However, this does not prevent the Court from making an award if it considers that it is reasonable to assume that an applicant has suffered injury requiring financial compensation.*”

<sup>6</sup> *Cassell v Broome* [1972] AC 1027 at 1079; *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 2 WLR 1789. In proceedings under s 76(1) of the Sex Discrimination Ordinance (Cap 480), the District Court may order the respondent to pay to the claimant “punitive or exemplary damages”: s 76(3A)(f). See also s 72(4)(f) of the Disability Discrimination Ordinance (Cap 487).

<sup>7</sup> The Parliamentary Assembly of the Council of Europe declares that “*economic penalties should be envisaged for publishing groups which systematically invade people's privacy*”. Resolution 1165 (1998), Guideline (iv).

details of an individual's private life are made public, the damage is irreversible and no amount of damages may compensate him. It would be unjust to the plaintiff if nothing can be done until the breach has actually occurred.<sup>8</sup> To avoid the causing of irreparable harm in so far as this is possible, we consider that a plaintiff should be able to apply to the Court for injunctive relief if the defendant has invaded or threatened to invade his privacy.

## Apology

12.6 An apology would offer the plaintiff an opportunity to vindicate his claim that the invasion is wrongful. A plaintiff in a privacy action might be satisfied with an apology without any financial relief. Under the Broadcasting Ordinance (Cap 562), the Broadcasting Authority may, by notice in writing, direct a television broadcaster to include in its licensed service “a correction or apology, or both, in a form approved by the Broadcasting Authority, in such manner (including within such period and within such time of day) as is specified in the notice” if the Authority finds that the broadcaster has contravened a provision in a code of practice, a requirement under the Ordinance, a licence condition, or a direction or order of the Authority.<sup>9</sup> The Broadcasting Authority Ordinance (as amended) also provides that the Authority may, in similar circumstances, direct a sound or television broadcaster to include in “a sound broadcasting service specified in the notice”, a correction or apology, or both, again in a form approved by the Authority and in such manner as is specified in the notice.<sup>10</sup>

12.7 A compulsory apology may also be required under the Disability Discrimination Ordinance (Cap 487). Under that Ordinance, the Court may order the respondent to perform “any reasonable act or course of conduct to redress any loss or damage suffered by the claimant”.<sup>11</sup> The Court of Final Appeal in *Ma Bik Yung v Ko Kuen*<sup>12</sup> held that a court may order an apology if the making of an apology is a reasonable act for the defendant to perform. It further held that an order made against an unwilling defendant for him to make an apology for unlawful conduct under the Disability Discrimination Ordinance does not necessarily infringe his guaranteed rights and freedoms. The questions whether (a) freedom of thought and conscience would be infringed or (b) the freedom to manifest one's belief or freedom of expression would be infringed and if so, whether the prescribed restrictions are applicable, depend

<sup>8</sup> The Parliamentary Assembly of the Council of Europe declares: “provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an assessment by the court as to the merits of the claim of an invasion of privacy”. Resolution 1165 (1998), Guideline (vii).

<sup>9</sup> Cap 562, s 30 (licensee to include correction or apology in television programme service). The licensee may announce that it is broadcasting the correction or apology pursuant to a direction of the Authority.

<sup>10</sup> Cap 391, s 25A (licensee to include correction or apology in sound broadcasting service).

<sup>11</sup> Cap 487, s 72(4)(b). See also Sex Discrimination Ordinance (Cap 480), s 76(3A)(b). Note that the Privacy Commissioner may serve a notice on a data user, directing him to “take such steps as are specified in the notice” to remedy a contravention under the PD(P)O, which includes a breach of the Data Quality Principle under DPP 2: Cap 486, s 50(1).

<sup>12</sup> [2001] HKCFA 46, para 35.

on the circumstances of each case. Whether an unwilling defendant's apology, albeit insincere, has the effect of redressing the plaintiff's loss and damage to some extent also depends on the circumstances of each case. Nonetheless, such an order should not be lightly made against an unwilling defendant.<sup>13</sup>

12.8 Since a forced apology is not an apology in the real sense, and an order for apology has free speech implications under the Basic Law, we decide not to recommend that the Court should have the power to order a private or published apology. However, where the infringement is committed by a newspaper or magazine, the injured party may opt for the alternative of complaining to the press privacy complaints commission proposed in our *Privacy and Media Intrusion Report*. Under our proposals, the commission would have the power to require an offending newspaper or magazine to publish its rulings.

## **Account of profits**

12.9 An account of profits seeks to recover the profit which the defendant has obtained by his wrongdoing. This remedy is available for breach of confidence and torts involving infringement of intellectual property rights. The purpose of ordering an account of profits is not to inflict punishment on the defendant but to prevent an unjust enrichment of the defendant by compelling him to surrender those parts of the profits made from his wrongdoing.

12.10 Given that photographs and details of public figures' private lives have become highly profitable merchandise, and damages required to compensate the victim do not match the profit generated by the photographs and the news, damages are not sufficient to deter publishers. Publishers are willing to risk liability, and budget for the damages they have to pay when they lose a suit. To deter privacy-invasive conduct and to prevent the wrongdoers from benefiting from their own wrong, we consider that the Court should have a power to make an order for an account of profits.

## **Delivery up**

12.11 In actions concerning breach of confidence, the order normally requires the defendant to deliver the goods or material containing confidential information to the plaintiff. Where there has been an infringement of intellectual property rights, the Court may order the defendant to deliver up any infringing articles to the plaintiff or the Court for destruction, or to undertake on oath to destroy them himself. The latter remedy may be granted even though the plaintiff does not own the articles ordered to be destroyed. Another example is libel, where the Court may grant an order requiring the defendant to destroy or erase the libellous material.

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<sup>13</sup> [2001] HKCFA 46, paras 47-53.

12.12 The remedy is useful where the material in the defendant's possession was obtained by an intrusion. The order may, in such cases, direct the defendant to deliver for destruction any records of, or articles embodying, information about the plaintiff which is seriously offensive or objectionable to a reasonable person. The Court would not order full destruction of the material if the rights of the plaintiff could be effectively protected by removing the information from the material.

**Recommendation 24**

**We recommend that in an action for intrusion or unwarranted publicity, the Court may:**

- (a) award damages, including, where appropriate, exemplary damages;**
- (b) grant an injunction if it shall appear just and convenient;**
- (c) order the defendant to account to the plaintiff for any profits which he has made by reason or in consequence of the intrusion or unwarranted publicity; or**
- (d) order the defendant to destroy or deliver up to the plaintiff any articles or documents containing information about the plaintiff which have come into the possession of the defendant by reason or in consequence of the intrusion or, as the case may be, which have resulted in the defendant being held liable to the plaintiff for unwarranted publicity.**

**Recommendation 25**

**We recommend that damages should include injury to feelings.**

**Recommendation 26**

**We recommend that in awarding damages the Court should have regard to all the circumstances of the case, including:**

- (a) the effect of the intrusion or unwarranted publicity on the health, welfare, social, business or financial position of the plaintiff or his family;**

- (b) any distress, annoyance, embarrassment or humiliation suffered by the plaintiff or his family; and
- (c) the conduct of the plaintiff and the defendant both before and after the intrusion or unwarranted publicity, including publicity for, and the adequacy and manner of, any apology or offer of amends made by the defendant.

## Form of trial

12.13 **Jury trial** – The general rule is that all civil actions are heard before a judge without a jury. The only exceptions are actions for defamation, malicious prosecution and false imprisonment. The British section of JUSTICE thought that questions such as whether an infringement was “substantial and unreasonable” or whether one of the defences applies could best be determined by a jury. They recommended that, where a case comes to trial in the High Court, either party should have the right to ask for trial by jury.<sup>14</sup> Winfield also held the view that the question of offensiveness ought to be one for the jury, subject to the judge’s power to decide whether there is or is not sufficient evidence of offensiveness for a jury to decide as a matter of fact.<sup>15</sup>

12.14 The UK Consultation Paper noted that although actions for defamation carry the right to opt for jury trial, the parties in actions for breach of confidence do not have such a right. It argued that jury trial should not be available in privacy actions on the following grounds:

- (a) there has been some concern as to whether juries are able to handle trials involving difficult issues;
- (b) the arguing of defences may involve detailed legal issues, especially in early cases, which may be best suited to trial by judge alone;
- (c) the use of a jury usually increases the costs of a case, chiefly because more time is needed; and
- (d) it is not easy to achieve consistency between awards where they are made by juries.<sup>16</sup>

We agree with the views expressed in the UK Consultation Paper and decide that privacy actions need not be heard before a jury.

12.15 **Power to hold hearings in camera** – Article 14(1) of the ICCPR provides that *“The Press and the public may be excluded from all or part of a trial for reasons of morals ... in a democratic society, or when the interest of the*

<sup>14</sup> JUSTICE, above, para 147.

<sup>15</sup> P H Winfield, “Privacy” (1931) 47 LQR 23, at 41.

<sup>16</sup> Para 6.23.

*private lives of the parties so requires*". According to Nowak, the latter ground should cover "family matters, sexual offences or other cases in which publicity might violate the private and familial sphere of the parties or of the victim."<sup>17</sup> The European Court of Human Rights held that the need to protect professional confidentiality and the private lives of patients may justify holding proceedings in camera, but such an occurrence must be strictly required by the circumstances.<sup>18</sup> The Court recognised that "even in a criminal-law context where there is a high expectation of publicity, it may on occasion be necessary under Article 6 [of the European Convention on Human Rights] to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice".<sup>19</sup> It is arguable that the law should facilitate access to the courts in order to ensure that individuals whose privacy has been invaded are not, in practice, impeded from bringing a civil action.

12.16 In mainland China, section 66 of the Civil Procedure Law provides that evidence concerning personal privacy should be kept confidential and should not be adduced in open court. Section 120 of that Law further provides that civil cases involving personal privacy may be conducted in private.

12.17 Section 486(1) of the Canadian Criminal Code provides that in all criminal proceedings a judge may exclude all or any members of the public from the court room for all or part of the proceedings if it is "in the interest of public morals, the maintenance of order or the proper administration of justice". The Supreme Court of Canada stated that exclusion of the public is a means by which a court may control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests, thereby affording a remedy to the underreporting of sexual offences.<sup>20</sup> It held that the subsection constitutes a justifiable limit on the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*.

12.18 The Irish Law Reform Commission recommends that the legislation creating the surveillance and disclosure torts should confer a discretion on the court to order that the proceedings be held otherwise than in public or to impose restrictions on publication where, on balance, privacy so

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<sup>17</sup> M Nowak, above, p 250.

<sup>18</sup> *Diennet v France* (1995) 21 EHRR 554, para 34. In *Imberechts v Belgium* (1991) 69 DR 312, the European Commission of Human Rights considered that an appeals board, which heard appeals from the council of a medical association, could reasonably have formed the view that protection of the patients' private lives justified, in the special circumstances of the case, an exception to the principle of public hearings, on the ground that such publicity might be prejudicial to the public interest. See also *Guenoun v France* (1990) 66 DR 181. In *X v Austria*, No 1913/63, 2 Digest 438 (1965), the applicant was charged with homosexual offences committed against young boys. The European Commission considered that it was not a violation of Article 6(1) of the European Convention on Human Rights to exclude the public from the proceedings. And in *X v UK*, No 7366/76, 2 Digest 452 (1977), the European Commission observed that the fact that divorce proceedings had been conducted in chambers was not in conflict with the applicant's right to a public hearing; the reason being Article 6(1) allows the public to be excluded where "the protection of the private life of the parties so requires".

<sup>19</sup> *B v United Kingdom; P v United Kingdom*, Application Nos 36337/97 and 35974/97 (date of judgment: 24.4.01), para 37.

<sup>20</sup> *Canadian Broadcasting Corporation v AG for New Brunswick* [1997] 1 LRC 521, 536.

warrants. Accordingly, it suggests that the legislation should provide that:

*“at any stage of any civil proceedings in tort under these Heads ... the court may on the application of any person who claims that his or her rights under these Heads have been or are about to be infringed, where the court considers it necessary for the purpose of either preventing such infringement or of protecting the rights of privacy of such person from the consequences of such infringement, and in light of all the circumstances including particularly the public interest in the administration of justice in public, make all or any of the following orders:-*

- (a) an order that the proceedings or any part of the proceedings including any interlocutory application should be heard otherwise than in public;*
- (b) an order that members of the public (excluding the parties to the proceedings and bona fide members of the press) should be excluded from attendance at the hearing;*
- (c) an order providing for the anonymity of any person in connection with the proceedings;*
- (d) an order providing for the prohibition of the publication or broadcasting of matter likely to lead members of the public to identify any particular person in connection with the proceedings.”<sup>21</sup>*

12.19 The British section of JUSTICE recommends that the courts should be given the power to hear actions for infringement of privacy otherwise than in open court:

*“An infringement may be complete before there is any publication, and publicity is the very harm which the plaintiff may most be concerned to avoid. The certainty of a public trial could therefore easily make an action for infringement of privacy an empty remedy in many cases. The situation appears to us to be closely analogous to that of trade secrets, where a public trial could destroy the very substance of the action, and the courts therefore have power, frequently exercised, to sit in private.”<sup>22</sup>*

12.20 The general rule in England is that a hearing is to be in public. But rule 39.2(3) of the Civil Procedure Rules 1998 provides, *inter alia*, that a hearing, or any part thereof,<sup>23</sup> may be held in private if:

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<sup>21</sup> LRC of Ireland, *Report on Privacy* (1998), para 9.34, and Ch 10, Head 12(2) at p 162.

<sup>22</sup> JUSTICE, above, para 147.

<sup>23</sup> The principle of proportionality is relevant when deciding whether all or part of the hearing should be held in private.

- (a) publicity would defeat the object of the hearing;
- (b) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
- (c) a private hearing is necessary to protect the interests of any child or patient; or
- (d) the court considers this to be necessary in the interests of justice.

It is interesting to note that proceedings brought under the Protection from Harassment Act 1997 are in the first instance listed as hearings in private under rule 39.2(3).<sup>24</sup> Rule 39.2(4) further provides that the court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.<sup>25</sup>

### **Recommendation 27**

#### **We recommend that:**

- (a) a hearing in an action for intrusion or unwarranted publicity may be held in private if publicity would defeat the object of the hearing; and**
- (b) the court may order that the identity of any party or witness shall not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.**

## **Limitation period**

12.21 The British section of JUSTICE suggests that the following principles should be applied in determining what limitation period would be appropriate for the statutory tort of infringement of privacy:

- “(a) Since many invasions of privacy are carried out in secret and may remain undetected for long periods, it would be wrong for a plaintiff to lose his remedy by reason of the mere passage of time, unless he was himself at fault in failing to make the discovery;*
- (b) on the other hand, once the facts are known, we can see no reason why a plaintiff should not proceed promptly if the infringement was serious enough to merit a lawsuit;*

<sup>24</sup> Practice Direction 39PD-001, para 1.5(9).

<sup>25</sup> CPR 39.2 is not unlawful or *ultra vires*, nor does it breach Article 6 of the ECHR: *R v Bow County Court, ex p Pelling* [2001] EWCA Civ 122. Cf *Z v Finland* (1997) 25 EHRR 371.

- (c) *lastly, since there must be finality in all litigation, we consider that there should be an absolute period after the expiry of which no action should be brought.*"

12.22 Accordingly, the British section of JUSTICE recommends that the limitation period should be three years. This period would run from the time when the plaintiff first became aware (or by the exercise of reasonable diligence could have become aware) of the infringement, but no action should be brought more than six years after the cause of action accrued to the plaintiff.<sup>26</sup>

12.23 In general, an action founded on tort cannot be brought after the expiration of six years from the date on which the cause of action accrued.<sup>27</sup> Since a person whose privacy is invaded should take prompt action to seek redress, the standard limitation period of six years for tort actions is too long. We consider that a period of three years is more appropriate.

#### **Recommendation 28**

**We recommend that no action for intrusion or unwarranted publicity should be brought after the expiration of three years from the time when the plaintiff first became aware, or ought reasonably to have become aware, of the occurrence of the act, conduct or publication in question, subject to the normal rules applicable to plaintiffs who are under a disability.**

### **Parties to a privacy action**

12.24 The Law Amendment and Reform (Consolidation) Ordinance (Cap 23) lays down the general rule that on the death of any person, "*all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate*".<sup>28</sup> There is, however, no survival of causes of action for defamation.<sup>29</sup> Since the mischief of an invasion of privacy

<sup>26</sup> Para 148. The Irish LRC recommends that an action for privacy-invasive surveillance or disclosure of information obtained by such means be time-barred after a three-year period commencing from the date on which the plaintiff became aware or ought reasonably to have become aware of the tort and of the identity of the defendant. LRC of Ireland, *Report on Privacy* (1998), para 7.37 and Head 7 at p 143.

<sup>27</sup> Limitation Ordinance (Cap 347), s 4(1).

<sup>28</sup> Cap 23, s 20(1).

<sup>29</sup> Proviso to Cap 23, s 20(1). Salmond argues that defamation may cause much more harm to the next-of-kin than an assault, and it is hard to see why the death of the defamer should deprive the plaintiff of his damages: R F V Heuston & R A Buckley, *Salmond & Heuston on the Law of Torts* (Sweet & Maxwell, 19th edn, 1987), p 495. In Canada, all the privacy statutes except the Manitoba Privacy Act provide that the cause of action is extinguished by the death of the person whose privacy is alleged to have been violated. The Irish LRC recommends that an action for relief under their recommendations, other than one for damages or an account of profits, should

is the mental harm and injured feelings suffered by an individual, only living individuals should be allowed to seek relief. Where the subject of a privacy invasion is a deceased person, his personal representative should not be allowed to bring an action unless the privacy of the personal representative has also been invaded by the defendant's act or conduct.

**Recommendation 29**

**We recommend that:**

- (a) actions for intrusion or unwarranted publicity should be limited to living individuals and that the person to whom any right of action should accrue is the individual whose right of privacy is threatened or has been infringed; and**
- (b) on the death of the plaintiff or defendant, the cause of action should survive for the benefit of the plaintiff's estate or, as the case may be, against the defendant's estate.**

12.25 Both the Bar Association and the HK Democratic Foundation supported the above recommendations.

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survive the death of the victim and be available to the personal representative of the deceased or a member of the family of the deceased. LRC of Ireland, *Report on Privacy* (1998), para 7.35.

# Chapter 13

## Summary of recommendations

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### Chapter 2 – Protection of privacy under existing laws

13.1 The Personal Data (Privacy) Ordinance (Cap 486) should be amended to enable the Privacy Commissioner for Personal Data to provide legal assistance to persons who intend to institute proceedings under section 66 of the Personal Data (Privacy) Ordinance, along the lines of section 85 of the Sex Discrimination Ordinance (Cap 480) and section 81 of the Disability Discrimination Ordinance (Cap 487). (*Recommendation 1, para 2.62*)

### Chapter 6 – Intrusion upon the solitude or seclusion of another

13.2 Any person who intentionally or recklessly intrudes, physically or otherwise, upon the solitude or seclusion of another or into his private affairs or concerns in circumstances where that other has a reasonable expectation of privacy should be liable in tort, provided that the intrusion is seriously offensive or objectionable to a reasonable person of ordinary sensibilities. (*Recommendation 2, para 6.84*)

13.3 The legislation should specify:

- (a) the factors that the courts should take into account when determining whether the plaintiff had a reasonable expectation of privacy at the time of the alleged intrusion; and
- (b) the factors that the courts should take into account when determining whether an intrusion was seriously offensive or objectionable to a reasonable person. (*Recommendation 3, para 6.84*)

13.4 It should be a defence to an action for the intrusion tort to show that the plaintiff expressly or by implication authorised or consented to the intrusion. (*Recommendation 4, para 6.91*)

13.5 It should be a defence to an action for the intrusion tort to show that the act or conduct in question was authorised by or under any enactment or rule of law. (*Recommendation 5, para 6.109*)

13.6 It should be a defence to an action for the intrusion tort to show that the act or conduct constituting the intrusion was necessary for and proportionate to:

- (a) the protection of the person or property of the defendant or another;
- (b) the prevention, detection or investigation of crime;

- (c) the prevention, preclusion or redress of unlawful or seriously improper conduct; or
- (d) the protection of national security or security in respect of the Hong Kong SAR. (*Recommendation 6, para 6.113*)

## **Chapter 7 - Unwarranted publicity given to an individual's private life**

13.7 Any person who gives publicity to a matter concerning the private life of another should be liable in tort provided that the publicity is of a kind that would be seriously offensive or objectionable to a reasonable person of ordinary sensibilities and he knows or ought to know in all the circumstances that the publicity would be seriously offensive or objectionable to such a person. (*Recommendation 7, para 7.45*)

13.8 The legislation should specify the factors that the courts should take into account when determining whether the publicity would be seriously offensive or objectionable to a reasonable person. (*Recommendation 8, para 7.46*)

13.9 It should be a defence to an action for unwarranted publicity to show that the plaintiff has expressly or by implication authorised or consented to the publicity. (*Recommendation 9, para 7.50*)

13.10 It should be a defence to an action for unwarranted publicity to show that the publicity has been authorised by or under any enactment or rule of law. (*Recommendation 10, para 7.51*)

13.11 It should be a defence to an action for unwarranted publicity to show that the publicity would have been privileged had the action been for defamation. (*Recommendation 11, para 7.53*)

13.12 It should be a defence to an action for unwarranted publicity to show that the publicity was in the public interest. (*Recommendation 12, para 7.78*)

13.13 Without limiting the generality of Recommendation 12, we recommend that any publicity given to a matter concerning an individual's private life should be presumed to be in the public interest if the publicity was necessary for:

- (a) the prevention, detection or investigation of crime;
- (b) the prevention or preclusion of unlawful or seriously improper conduct;
- (c) establishing whether the plaintiff was able to discharge his public or professional duties;
- (d) establishing whether the plaintiff was fit for any public office or profession held or carried on by him, or which he sought to hold or carry on;
- (e) the prevention of the public being materially misled by a public statement made by the plaintiff;

- (f) the protection of public health or safety; or
- (g) the protection of national security or security in respect of the Hong Kong SAR

and was proportionate to the legitimate aim pursued by the defendant. *(Recommendation 13, para 7.87)*

13.14 The legislation should provide that the plaintiff in an action for unwarranted publicity given to an individual's private life should not be precluded from obtaining relief by reason merely of the fact that the matter to which the defendant has allegedly given publicity:

- (a) could be found in a register to which the public or a section of the public had access;
- (b) has been disclosed by the plaintiff to his family members, friends, neighbours and/or other selected individuals;
- (c) has been disclosed or published by a third party without the consent of the plaintiff;
- (d) has been made available on the Internet by a third party without the consent of the plaintiff; or
- (e) related to an occurrence or event which happened in a place which was visible or accessible to members of the public.

*(Recommendation 14, para 7.139)*

## **Chapter 8 – Privacy of ex-offenders**

13.15 Serious consideration should be given to amending the Rehabilitation of Offenders Ordinance (Cap 297) so that: (a) more ex-offenders could benefit from the rehabilitation scheme under the Ordinance; and (b) ex-offenders falling within the scope of the Ordinance could benefit more fully from the scheme, taking full account of the experience of the United Kingdom in the operation and reform of the Rehabilitation of Offenders Act 1974. *(Recommendation 15, para 8.29)*

## **Chapter 9 – Anonymity of victims of crime**

13.16 The prohibition on identifying victims of rape, non-consensual buggery and indecent assault under section 156 of the Crimes Ordinance (Cap 200) should be extended to cover victims of other sexual offences. *(Recommendation 16, para 9.7)*

13.17 The District Court in proceedings under section 76 of the Sex Discrimination Ordinance (Cap 480) should have the power to make an order prohibiting the publication of any matter which is likely to lead to the identification of the claimant. Any person who fails to comply with such an order should be guilty of an offence. *(Recommendation 17, para 9.8)*

13.18 The courts in criminal proceedings should have the power to make an order prohibiting the publication of any matter which is likely to lead to the identification of the victim of an alleged offence or any witness in the trial

until such time as may be ordered by the Court, provided that the making of such an order is in the interests of the private life of the victim or witness and would not prejudice the interests of justice. Any person who fails to comply with such an order should be guilty of an offence. (*Recommendation 18, para 9.30*)

## **Chapter 10 – Appropriation of a person’s name or likeness**

13.19 Serious consideration should be given to according legal protection to individuals against the unauthorised use of their name, likeness or other indicia of identity for a purpose other than for the legitimate information of the public. (*Recommendation 19, para 10.38*)

13.20 The Privacy Commissioner for Personal Data should give consideration to issuing a code of practice on the use of personal data in advertising materials for the practical guidance of advertisers, advertising agents and the general public. (*Recommendation 20, para 10.46*)

13.21 The Broadcasting Authority should give consideration to adopting in their Codes of Practice on Advertising Standards provisions governing the use of personal data in advertisements broadcast by the licensed television and sound broadcasters in Hong Kong. (*Recommendation 21, para 10.46*)

## **Chapter 11 – Publicity placing someone in a false light and factual inaccuracies reported in the press**

13.22 We conclude that it is unnecessary to create a tort of giving publicity to a matter concerning an individual that places him before the public in a false light. However, we recommend that (unless the recommendations in our *Privacy and Media Intrusion Report* in relation to inaccurate and misleading reports in the print media about an individual have been implemented in full) the legislation should create a right to correct factual inaccuracies about an individual along the lines of the *Minimum Rules Regarding the Right of Reply* set out in Resolution (74)26 of the Council of Europe Committee of Ministers so that inaccurate facts published in the print media about an individual could be corrected without undue delay and with, as far as possible, the same prominence given to the original publication. (*Recommendation 22, para 11.57*)

## **Chapter 12 – Enforcing the right to privacy**

13.23 Both the tort of intrusion upon another’s solitude or seclusion and the tort of unwarranted publicity should be actionable without any proof of damage. (*Recommendation 23, para 12.2*)

13.24 In an action for intrusion or unwarranted publicity, the Court may:

- (a) award damages, including, where appropriate, exemplary damages;
- (b) grant an injunction if it shall appear just and convenient;
- (c) order the defendant to account to the plaintiff for any profits which he has made by reason or in consequence of the intrusion or unwarranted publicity; or
- (d) order the defendant to destroy or deliver up to the plaintiff any articles or documents containing information about the plaintiff which have come into the possession of the defendant by reason or in consequence of the intrusion or, as the case may be, which have resulted in the defendant being held liable to the plaintiff for unwarranted publicity. (*Recommendation 24, para 12.12*)

13.25 Damages should include injury to feelings. (*Recommendation 25, para 12.12*)

13.26 In awarding damages the Court should have regard to all the circumstances of the case, including:

- (a) the effect of the intrusion or unwarranted publicity on the health, welfare, social, business or financial position of the plaintiff or his family;
- (b) any distress, annoyance, embarrassment or humiliation suffered by the plaintiff or his family; and
- (c) the conduct of the plaintiff and the defendant both before and after the intrusion or unwarranted publicity, including publicity for, and the adequacy and manner of, any apology or offer of amends made by the defendant. (*Recommendation 26, para 12.12*)

13.27 (a) A hearing in an action for intrusion or unwarranted publicity may be held in private if publicity would defeat the object of the hearing. (b) The court may order that the identity of any party or witness shall not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness. (*Recommendation 27, para 12.20*)

13.28 No action for intrusion or unwarranted publicity should be brought after the expiration of three years from the time when the plaintiff first became aware, or ought reasonably to have become aware, of the occurrence of the act, conduct or publication in question, subject to the normal rules applicable to plaintiffs who are under a disability. (*Recommendation 28, para 12.23*)

13.29 (a) Actions for intrusion or unwarranted publicity should be limited to living individuals and that the person to whom any right of action should accrue is the individual whose right of privacy is threatened or has been infringed. (b) On the death of the plaintiff or defendant, the cause of action should survive for the benefit of the plaintiff's estate or, as the case may be, against the defendant's estate. (*Recommendation 29, para 12.24*)

**List of those who responded to the Privacy Sub-committee's Consultation Paper on *Civil Liability for Invasion of Privacy***

1. Broadcasting Authority
2. Child Protection Policy Unit, HK Police Force
3. Department of Health
4. Hong Kong & Kowloon Trades Union Council
5. Hong Kong Bar Association
6. Hong Kong Democratic Foundation
7. Hong Kong Federation of Women
8. Hong Kong Journalists Association
9. Hong Kong section of the International Commission of Jurists
10. Hong Kong Women Professionals & Entrepreneurs Association
11. Hospital Authority
12. Law Society of Hong Kong
13. Legal Aid Department
14. Office of the Privacy Commissioner for Personal Data
15. Prosecutions Division, Department of Justice
16. Security Bureau
17. The Society of Publishers in Asia
18. Television Broadcasts Ltd
19. Mr Tim Hamlett, Department of Journalism, HK Baptist University
20. Ms Paula Scully
21. Mr John Walden