

# Privacy Right and Common Law Protection

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## Abstract

In English law, there are calls by a section of the public that Parliament should enact privacy law, to offer protection for the right to privacy which is guaranteed under the Human Rights Act 1998. However, the current tort system provides various ways of protecting privacy. This article will demonstrate how private nuisance, trespass to land, battery, the Protection from Harassment Act 1997, defamation, misuse of private information and other means can be used to protect such rights. The call for a Bills of Rights and the ongoing Leveson Inquiry may have an impact on privacy in English law. This article will show that ‘the let us study as we go’ approach adopted by the court will be more appropriate, rather than legislation by parliament.

**Key words:** Privacy, Human Rights, Press Intrusion, Freedom of Expression

## 1. Introduction

The coming into force of the Human Rights 1998 has sparked controversies about privacy rights in England. Article 8 of the 1998 Act<sup>1</sup> gives individuals right to privacy. Such rights have been challenged in tort law since 1998 Act was passed. There has been outcry by politicians, celebrities, lawyers, academics and others for privacy law in England and Wales. However, in *Wainwright v Home Office*<sup>2</sup>, Lord Hoffman said there is no tort law for privacy. Lord Hoffman said in the aforementioned case that at common law there is no such tort and that new right are not within the powers of judges, but parliament must create such rights<sup>3</sup>. The House of Commons Culture and Sport Committee, Press Standards, Privacy and Libel concluded in February 2010 that for now, matters relating to privacy should continue to be determined according to common law<sup>4</sup>. In this article, one will demonstrate that even though there is no tort of privacy, there are ways that tort law provides protection for such private rights. Also, one will look at press intrusion and its relationship with private rights. Further, the article will examine the relationship between privacy rights and the Human Rights Act 1998 and finally the future of privacy rights in respect of tort law.

## 2. Protecting Privacy Rights

Individuals should be able to peaceably enjoy privacy on their land without any inferences from others. Unjustified interferences with the enjoyment of one’s land gives rise to nuisance. For example, if a neighbour frequently throws parties or has barbeques on his premises and the noise continuously competes with your interest to enjoy your land, a claimant can seek an order of injunction or damages to rectify such a situation. Even though there is no tort of privacy, private nuisance can be used to protect privacy on the use of land. However, a claimant can only complain of a private nuisance if the claimant has either possession of the land or has a property right in it. See *Hunter v Canary Wharf*<sup>5</sup> where the House of Lord affirmed that a claimant must either have possession of land or has a property right in it.

Land owners, and individuals with interests in the property should be able to enjoy privacy on their lands by keeping others from entering them. Trespass to land can be used to restrain others from such land. Precautionary measures could be used to warn such trespassers to the land. It could be a display of warning not to trespass. In *Lord Bernstein v Skyviews and General Limited*<sup>6</sup> the court took exception that the aircraft taking pictures from the air was trespass to the land. It said that there is a limit to the level that the aircraft flies out and that Lord Bernstein cannot claim trespass in the airspace. The use of the aforesaid tort to protect privacy is subject to the limitation that there is the need for physical entry upon the land for the claim to lie.

<sup>1</sup> Article 8 of Human Rights Act 1998 gives rights to private and family life

<sup>2</sup> *Wainwright v Home Office* Mrs Wainwright and his son visited a relation in prison. They were searched not in line the prison’s rules. They brought an action for breach of privacy in tort law. Their action failed but succeeded at the ECHR.

<sup>3</sup> *ibid*

<sup>4</sup> House of Commons Culture and Sport Committee, Second Report Press Standards, Privacy and Libel, February 2010

<sup>5</sup> [1997] 2 ALL ER 426

<sup>6</sup> [1978] 1 QB 479

A claim for battery can be brought by an individual to protect interferences with personal autonomy and body integrity by others. Battery in *Collins v Wilcock*<sup>7</sup> was defined by Goff LJ as actual infliction of unlawful force on another person. To establish a claim for battery, firstly, the act must be intentional, secondly, the application should be of direct and immediate force and finally the contact must be unlawful. This tort is actionable per se without the proof of damage needed. The extent to its usage is limited; there should be the need for physical contact. See *Wainwright v Home Office*<sup>8</sup>

The Protection from Harassment Act 1997 can be used by claimants to protect behaviour intended to disturb or upset, and it is characteristically repetitive. Harassments tend to violate privacy in so many respects. S. 7(2) of 1997 Act "References to harassing a person include alarming the person or causing the person distress." There has been tremendous success with the use of this Act to protect privacy. The limitation to the use of this Act to protect privacy is that the act by the defendant should be more than once. S. 7(3) defines (a) in the case of conduct in relation to a single person conduct on at least two occasions in relation to that person, (b) in the case of conduct in relation to two or more persons conduct on at least one occasion in relation to each of those persons.

Reputation is cherished by a lot of individuals, politicians, celebrities, professionals and public holders. Invasion of privacy through undesired publicity or mockery can be protected through the tort of defamation. Reputation deserves substantial legal protection; however, there must be reconciliation with competing demand for freedom of speech. Freedom of speech is guaranteed under Article 10 of Human Right Act 1998.<sup>9</sup> See *Newstead v London Express Newspaper Limited*.<sup>10</sup> The importance attached to the maintenance of a good reputation had led virtually every legal system in the world to afford it some protection. However, no system offers absolute protection for reputation. In order for a liability to arise in defamation, firstly, it should be a defamatory statement, secondly, it referred to the claimant and finally, the statement must have been published. The use of defamation to protect your privacy as respects to reputation is subject to defences of justification, honest opinion and other defences. David Mangan (2010) argues that insofar as it pertained to honest comment, the draft bill departed from the current law.<sup>11</sup>

The tort of misuse of private information is now the main route through which aspects of privacy may be protected. It developed from the equitable doctrine of breach of confidence, and has been in existence for the past 10 years. Lord Hoffman confirmed this tort in *Campbell v Mirror Group Newspaper 2004*.<sup>12</sup> Misuse of privacy information is an extension of the breach of confidence action. The impact of the Human Rights Act has led to the development of this tort. In *McKennit v Ash* Buxton LJ stated that the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10.<sup>13</sup> Two test applications were developed for this action. First, is the information private in the sense that it is in principle protected by article 8? If "no", that is the end of the case. If "yes", the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10? The latter inquiry is commonly referred to as the balancing exercise,<sup>14</sup> Case laws such as *Douglas v Hello!*<sup>15</sup>, *Campbell v Mirror Group Newspaper 2004*, *Mosley v News Group Newspaper*<sup>16</sup>, *HRH Prince of Wales v Associated Newspapers Ltd*<sup>17</sup> among others have been used in this respect. This is mostly used for protecting aspects of privacy because a super injunction is easily obtainable as compared with defamation. The limitation with this action is that 12(3) of the Human Rights 1998<sup>18</sup> require the court to give particulars regards to freedom of expression.

### 3. Press Intrusion And Privacy Rights

<sup>7</sup> [1984] 1 W.L.R

<sup>8</sup> ibid

<sup>9</sup> Article 10 of Human Rights Act 1998

<sup>10</sup> [1940] 1 K.B. 377

<sup>11</sup> D Mangan, 'An Argument for the Common Law Defence of Honest Comment' (2011) 16 Communications Law 140

<sup>12</sup> [2004] UKHL 22; [2004] 2 A.C. 457. Comment: Morgan (2004) 120 L.Q.R. 563 and Moreham [2004] C.L.J. 555.

<sup>13</sup> [2008] Q.B. 73 at para.11

<sup>14</sup> ibid

<sup>15</sup> [2005]EWCA Civ 595

<sup>16</sup> [2008] EWHC 1777 (QB)

<sup>17</sup>[2006] EWCA Civ 1776

<sup>18</sup> Section 12(3) of Human Rights Act 1998 states 'that 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'

In the wake of allegations about the way in which the News of the World and other papers have sought to access personal data of individuals, politicians and celebrities there has been a ‘wakeup call’ to journalism. This has created alarming public concern about privacy and media intrusion. This has led David Cameron to establish under the Inquiries Act 2005, the Leveson Inquiry on 13 July 2011 to investigate the role of the press and police in the phone-hacking scandal.

The Leveson Inquiry into the culture, practices and ethics of the press is running in four modules. These are:

- the relationship between the press and the public and looks at phone-hacking as well as other potentially illegal behaviour.
- the relationships between the press and police and the extent to which that has operated in the public interest.
- the relationship between the press and politicians.
- Recommendations for a more effective policy and regulation that supports the integrity and freedom of the press while encouraging the highest ethical standards.

The outcome of the Leveson Inquiry may change the paradigm of privacy and press intrusions in England. It has been argued that there is the need for tougher regulation of the media houses, in order to make them more responsible. Others are calling for the creation of regulatory bodies for press and ethic control and others are in support of the current system of self regulation by the media house.

In the Reuters Institute for the Study of Journalism report on privacy and media intrusion (2009), Stephen Whittle suggested that all media organisations should follow the same approach to intrusion and that the codes of the PCC, the self-regulatory body for the Press, and Office of Communications (Ofcom), the statutory regulator for broadcasting, should have a two-stage process: firstly, to justify the intrusion, then secondly, to defend putting the material into the public domain<sup>19</sup>.

In May 2003, House of Commons Culture, Media and Sport Committee stated that there are a number of issues that arise in advance of the publication of a story that do not amount to “prior restraint” or “press censorship”. We believe that the PCC should consider establishing a dedicated pre-publication team to handle inquiries about these issues from the public and liaison with the relevant editor on the matters raised. This team should also handle issues related to media harassment, including the production and promotion of guidance to both press and the public, liaison with the broadcasters and the transmission of “desist messages” from those who do not want Privacy and media intrusion want to talk to the media. The first job for the pre-publication team should be the collaborative work with Ofcom on “media scrums”.<sup>20</sup>

It has also been argued that the justification of public interest for publishing or intruding for information for publication is giving rise to this problem. However, Stephen Whittle, Visiting Fellow at the Reuters Institute for the Study of Journalism (RISJ) and former BBC Controller of Editorial Policy said a robust definition of the public interest is possible. It is already implicit in codes, statements and legislation.

Also, Privacy and Media Intrusion report admitted that the “public interest” is a concept of crucial importance. However, it was a confusing term. The public interest had not traditionally been regarded as the same as “that which interests the public” and indeed this was the firmly stated position of the PCC<sup>21</sup>.

There is the need to enforce the current laws and codes for the media house. The call for a regulatory body in this regard can impede freedom of speech and expression. Journalists should be encouraged to practise responsible journalism. The journalism association should create or enforce their Codes of Ethics.

The European Court of Human Rights (ECHR) in *Von Hannover v Germany*<sup>22</sup> gave circumstances in which public interest will arise. Thus we should lay to rest the confusion as to the public interest.

#### **4. Privacy And Human Rights Acts 1998**

It is undeniable that the actions for rights to privacy have been anchored by the enactment of the 1998 Act. Article 8 of the 1998 Act gives;

<sup>19</sup> Report on privacy and media intrusion [http://www.ox.ac.uk/media/news\\_stories/2009/090713](http://www.ox.ac.uk/media/news_stories/2009/090713) June 23/2012

<sup>20</sup> House of Commons Culture, Media and Sport Committee, Privacy and media intrusion, Fifth Report of Session 2002-03 (Volume I, 21 May 2003) page 4

<sup>21</sup> Ev 13 Q 55

<sup>22</sup> [2005] 40 E.H.R.R. 1 Photograph taken of Princess Caroline of Monaco in her daily life was deemed not to be in the public interest.

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

However, Article 10 gives right to freedom of speech. Inasmuch as everyone has a right to privacy, there is also a right to free speech. These rights must be balanced. In jurisdiction, where there is no such Acts, there have been established cases of right to privacy.

Prior to the enactment of the 1998 Act, there were established cases where aspects of privacy had been challenged, for example, *Stephens v Avery*<sup>23</sup>, *Prince Albert v Strange*<sup>24</sup>, *Wainwright*<sup>25</sup> and among others. Thus calls for the abolition of the 1998 Act will not have effect on the development on the law on privacy. If the Human Rights Acts is replaced with a bill of rights, matters of freedom of speech and right to privacy are still anchored in every such bill of rights. International Conventions such as United Nations Universal Declarations on Human Rights and others feeds into most bill of rights of other jurisdictions, of which the UK will not be exception.

Also, since the UK is a signatory to the European Convention on Human Rights, the Strasbourg jurisprudence will still have influence on English Law. The abolition of the Human Rights Act will still not have effect on privacy because the European Convention on Human Rights will still be part of the English Law. Thus, any judgement given by the European Court of Human Rights in Strasbourg will have influence in England.

## 5. Conclusion

Even though there is no tort of privacy, there are adequate protections in tort that can be used to protect aspects of privacy. Private nuisance, trespass to land, battery, Protection from Harassment Act 1997, defamation, copyright laws, Data Protection Act 1998 and now Misuse of Private Information for such protection.

There have been calls for Parliament to develop privacy law because it is argued that it is able to set broad parameters of what should be in privacy law. It is undeniable that parliament is bestowed with the responsibilities of creating new law; however, such development will tilt the balance of Articles 8 and 10 of the Human Rights Act 1998 more in another direction. This is because parliament may develop privacy law that will be pro-privacy rights which may have a chilling effect of free speech. On the other hand, it is also possible that such privacy law may give special regards to free speech at the expense of privacy rights.

New privacy laws developed by parliament should be consistent with the European Convention on Human Rights. Parliament coming out with privacy law is likely to be inconsistent with the European Convention on Human Rights. The tilting of the balance of Article 8 of the Human Rights Act over Article 10 will be inconsistent with the Convention. The only remedy is for England to leave the European Union, which will be practically unbeneficial.

It has been argued that there should be a statutory body, established to deal with press regulations including privacy matters. It has been likened to Press Complaint Commission (PCC), which should have exclusive jurisdiction on privacy matters. However, such a statutory body may not offer absolute protection of privacy for individuals because of the right to freedom of expression. Journalists should be encouraged to practise responsible journalism. In *Jameel (Mohammed) v. Wall Street Journal Europe (SPRL)*<sup>26</sup> Baroness Hale offered guidelines as to what will constitute responsible journalism.

Section 12 of the Human Rights Acts 1998 requires the court to give particular regards to freedom of expression. It has been argued that Section 12 of the 1998 Act should be amended so that privacy claims can easily succeed. Freedom of speech and free press is a golden thread in democracy, thus any attempt to amend the aforementioned will be a threat to democracy and respect for the rule of law. Other than amending the section, we should rather move towards the model in the United States of America, where special weight is given to freedom of speech.

Introduction of a Bill of Rights as replacement of the Human Rights Acts as been advocated by a section of the population will have little significance to privacy rights. The UK is signatory to EU treaties, thus, Strasbourg jurisprudence will have influence on the English law.

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<sup>23</sup> [1988] Ch. 449

<sup>24</sup> 64 E.R. 293; (1849) 2 De G. & Sm. 652

<sup>25</sup> *ibid*

<sup>26</sup> [2007] 1 AC 359 (HL)

The Leveson Inquiry which is currently on going may significantly affect privacy rights in English law. If the committee recommends that legislation should be passed by parliament as respects to privacy, and the government issued a white paper and subsequently passes such law. Then it will compel the courts to recognise such and give effects to it. However, if the committee recommends that privacy should still be protected by the current tort system, it will lead judges towards creativity in respect of the law.

I agree with the argument that 'let us study the law as we go', approach which is currently being adopted by the court. The current system allows the courts to fine tune the law to meet current developments in respect of technology, other jurisprudence and changes in society. Thus current tort law is adequate in the protection of privacy rights.

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