RETHINKING PRIVACY: EXCLUSIVITY, PRIVATE RELATION AND TORT LAW

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Referencing recent decisions in the high courts of England, Australia and New Zealand that have recognized a right to privacy as a protected interest in tort law, the author examines whether the extension of tort law's protection to "privacy" can be justified. This inquiry focuses on tort law's fundamental norms by examining whether the interest can be rationalized with a conception of liability for interference with a person's rights in his or her external things or in his or her own bodily integrity. The author ultimately discerns and assesses two possible justifications: first, protecting the plaintiff's interest in his or her privacy where it represents a resource from which the plaintiff has excluded the defendant; and second, upholding the dignity of persons.

Faisant référence à des récentes décisions des cours supérieures d'Angleterre, d'Australie et de Nouvelle-Zélande qui ont reconnu le droit du respect de la vie privée en tant qu'intérêt protégé dans le droit de la responsabilité délictuelle, l'auteur examine si on peut justifier d'étendre la protection de la responsabilité délictuelle à « la vie privée ». Cette enquête étudie les normes fondamentales de la responsabilité délictuelle en examinant s'il est possible de rationaliser cet intérêt au moyen d'une conception de responsabilité pour ingérence dans les droits d'une personne à l'égard de ses biens internes et externes ou son intégrité corporelle. En définitive, l'auteur fait la distinction et étudie deux justifications éventuelles : d'abord, protéger les intérêts du plaideur dans sa vie privée dans le cas d'une ressource que le plaideur aurait exclus du défendeur et ensuite, respecter la dignité de la personne.

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I. INTRODUCTION

The law of torts in Canada is in flux. At the Supreme Court of Canada, important and occasionally controversial pronouncements have addressed subjects as diverse as the duty of care,[1] causation,[2] pure economic loss[3] and the vicarious liability of employers for their employees' intentional torts.[4] Despite such a doctrinally broad scope of engagement with tort law, one aspect of civil private relation — that of "privacy" — has remained almost entirely

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1 *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; and *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79.

2 *Athey v. Leonati*, [1996] 3 S.C.R. 458.

3 *Kamloops v. Nielsen*, *supra* note 1; *Cooper v. Hobart*, *supra* note 1; *Winnipeg Condominium No. 36 v. Bird Construction*, [1995] 1 S.C.R. 85; and *Canadian National Railway v. Norsk Pacific Steamship*, [1992] 1 S.C.R. 1021.

4 *Bazley v. Curry*, [1999] 2 S.C.R. 534.

untouched by tort law's application in Canada. This has not precluded legislative influence: privacy is statutorily protected under tort law in four of Canada's common law provinces,[5] and Quebec's *Charter of Human Rights and Freedoms* provides that "[e]very person has a right to respect for his private life."[6] Yet judicial recognition and development in Canada of a protected legal interest in privacy — whether under the umbrella of an extant nominate tort, or as a new and discrete judge-made tort expressly contemplating the protection of a privacy interest — remains elusive. While there have been a few trial pronouncements, mostly from Ontario, suggesting that a tort law right to privacy might be judicially recognized,[7] the most recent Ontario pronouncement directly on point has expressed doubt that there is "a clear recognition" of privacy as a protected interest under the law of torts.[8] Moreover, no appellate court in Canada has recognized a common law tort of breach of privacy.[9]

This lacuna is now all the more evident in the wake of pronouncements, all within the past four years, of the high courts of three other Commonwealth jurisdictions – England,[10] Australia[11] and New Zealand[12] — each of which has recognized privacy as a legally protected interest in the law of torts. My general aim in this article is to consider, with reference to these recent Commonwealth case authorities, whether the extension of tort law's protection to "privacy" can be justified. My justificatory inquiry will be fundamental, in the sense that I will discuss whether a protected interest in "privacy" emanates from tort law's coherent and widely shared understanding of juridical right, descriptive of a person's interest in his or her

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5 See *Privacy Act*, R.S.B.C. 1996, c. 373, s. 1(1); *Privacy Act*, R.S.S. 1978, c. P-24, s. 2; *Privacy Act*, R.S.M. 1987, c. P125, s. 2(1); and *Privacy Act*, R.S.N. 1990, c. P-22, s. 3.

6 R.S.Q., c. C-12, s. 5 [Quebec *Charter*]. In *Aubry v. Éditions Vice-Versa.*, [1998] 1 S.C.R. 591, a unanimous (on this issue) Supreme Court of Canada held that where a photograph was taken of a teenager in a public place but without her permission, the defendant's right to free expression provided in s. 3 of the Quebec *Charter* was outweighed by the plaintiff's s. 5 right to a private life.

7 The leading authorities were canvassed by Carruthers C.J.P.E.I. in *Dyne Holdings Ltd. v. Royal Insurance Co. of Canada* (1996), 138 Nfld. & P.E.I.R. 318 (P.E.I.S.C.-A.D.) and led him to conclude (at para. 63): "It would seem to me the courts in Canada are not far from recognizing a common law right of privacy if they have not already done so. It is also clear that Canadian courts do not hesitate to protect privacy interests under some recognized tort." The strongest recent statement tending to a protected legal interest in privacy is that of McRae J. in *Lipiec v. Borsa* (1996), 31 C.C.L.T. (2d) 294 (Ont. Gen. Div.) where, at 300, McRae J. stated that "[i]ntentional invasion of privacy has also been recognised as actionable in Ontario in several cases."

8 *Haskett v. Trans Union of Canada* (2002), 10 C.C.L.T. (3d) 128 (Ont. Sup. Ct.), where Cumming J. cited the following excerpt from Lewis Klar, *Tort Law* (Toronto: Carswell, 1991) at para. 41: "Despite some encouraging suggestions from a few courts, it would be fair to say that the Canadian tort law does not yet recognize a tort action for invasion of privacy *per se*" [emphasis omitted].

9 That said, two appellate decisions have advanced some particular aspects of "privacy." In *Motherwell v. Motherwell*, [1976] 1 A.R. 47, the Alberta Court of Appeal extended private nuisance in order to grant recovery for "abuse of the telephone system" (at para. 24; specifically, false accusations leveled at the plaintiffs by repetitious telephone calls). And in *Krouse v. Chrysler Canada Ltd.* (1973), 1 O.R. (2d) 225 [*Krouse*], the Ontario Court of Appeal recognized a tort of appropriation of personality. See also the text associated with note 34.

10 *Douglas v. Hello! Ltd. No. 3*, [2003] 3 All E.R. 996, 2003 EWHC 786 (Ch.) [*Douglas* (Ch.)], aff'd (in part) [2005] 3 W.L.R. 881, 2005 EWCA 595 [*Douglas* (C.A.)]; and *Campbell v. MGN Ltd.*, [2002] I.P&T. 612, 2002 EWHC 499 (Q.B.) [*Campbell* (Q.B.)], rev'd [2003] 1 All E.R. 224, 2002 EWCA Civ 1373 [*Campbell* (C.A.)], rev'd [2004] 2 A.C. 457, 2004 UKHL 22 [*Campbell* (H.L.)].

11 *Australian Broadcasting Corp. v. Lenah Game Meats Pty Ltd.* (2001), 185 A.L.R. 1 (H.C.) [*Lenah*].

12 *Hosking v. Runting*, [2003] 3 N.Z.L.R. 385 (H.C.) [*Hosking* (H.C.)], aff'd (2004), [2005] 1 N.Z.L.R. 1, 2004 NZCA 34 [*Hosking* (C.A.)].

property or bodily integrity,[13] which underpins tort law's protective norms. That is, I will consider whether a legally protected interest in "privacy" can be rationalized with a conception of liability for interference with a person's rights in his or her external things or in his or her own body, which conception, even if only implicitly, is the presupposed intrinsic object of the most basic doctrines of tort law.

In the course of my inquiry, I will focus on two proposed justifications that emerge from these recent Commonwealth case authorities: first, a concern stated at the House of Lords for protecting the plaintiff's interest in his or her privacy where it represents a resource held by the plaintiff, from which the plaintiff has *excluded* the defendant; and second, the impulse, expressed at the New Zealand Court of Appeal, to uphold the *dignity* of persons, instantiated by a right to a private life. The judicial imperative in the first instance — that of exclusivity — is to remedy the plaintiff's loss to the defendant of something in respect of which the plaintiff, independently of and prior to the loss, could have asserted an interest superior to that of the defendant. As to the second proposed justification — that of dignity — the judicial concern here is to recognize privacy as a "value" underlying tort law's juridical conception of right supporting the recognition of a new nominate tort of breach of privacy. With the backdrop of these recent case authorities, then, I will consider whether their contrasting rationales of exclusivity and dignity are sufficient to justify recognizing a legally protected interest in privacy. At stake is our ability to claim an account for such an extension of tort law's protective force that is juridical.

As a preliminary step, however, any meaningful discourse on extending tort law's reach into "privacy" necessitates a brief explication of the sense in which an interest in "privacy" is to be understood. There is, after all, a prodigious body of philosophical, sociological and legal literature which considers privacy's meaning. In the legal canon alone, privacy has been described in general and abstract incantations such as "the right to be let alone,"[14] "autonomy,"[15] "the reconciliation of community and autonomy,"[16] empowerment of "sense of [self] as an independent or autonomous person,"[17] "secrecy, anonymity and solitude,"[18]

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13 My presentation of the juridical conception of right here is a summary of other more detailed discussions of how this conception informs different parts of private law. See, in particular, Peter Benson, "Philosophy of Property Law," in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy* (Oxford: Oxford University Press, 2002).

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

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

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

17 *Ibid.* at 973.

18 Ruth Gavison, "Privacy and the Limits of Law" (1980) 89 Yale L.J. 421 at 433.

"concealment of information,"[19] "concealment of *discreditable* information,"[20] "preservation of the individual's dignity"[21] and "a precondition of personhood."[22]

It is small wonder, in view of these broad ascriptions, that privacy has become an unwieldy device. Such undisciplined and peremptory competing claims to privacy's meaning leave privacy in disrepute[23] and serious discourse on privacy in disrepair, because no single version can possibly claim common assent. As a consequence, we have no reference point to determine whether "privacy" has been "breached." Rather than engage the intellectual scholarly confusion that generated this *corpus*, I intend to tame privacy by imposing juridical order in the form of a specific *conception* (as opposed to a general *concept*)[24] which allows us to evaluate privacy. Having done so, I will then proceed to my principal justificatory inquiry.

II. WHAT I MEAN BY "PRIVACY"

Among those various definitions of privacy advanced in the legal canon, the most recognized and long-standing is that stated by Samuel D. Warren and Louis D. Brandeis as "the right to be let alone."[25] It contemplates that, as an incident of our own agency and liberty, we may conduct our own lives as we choose, without external influence. This definition's abstract breadth is apparent in William O. Douglas J.'s statement that "the right to be let alone" is "the beginning of *all* freedom,"[26] and indeed it has also been treated as synonymous with the general interest derived from the juridical conception of right.[27] Privacy, so understood, would extend beyond concepts of space necessary to foster individual autonomy and an independent consciousness, embracing conceptions of private relation that may be incompatible with social organization. Such breadth of scope instantiates the undisciplined and discredited discourse on privacy to which I have already referred and as such is obviously unhelpful for the purposes of my discussion, even where it is occurring at a generalized and abstract level.

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

20 Richard A. Posner, "The Right of Privacy" (1978) 12 Ga. L. Rev. 393 at 400 [emphasis added] [Posner, "Right of Privacy"].

21 Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 N.Y.U.L. Rev. 962 at 1007.

22 Jeffrey H. Reiman, "Privacy, Intimacy, and Personhood" (1976) 6 Philosophy & Public Affairs 26 at 39.

23 For example, Daniel J. Solove has observed that "[p]rivacy seems to be about everything, and therefore it appears to be nothing" (Daniel J. Solove, "A Taxonomy of Privacy" [forthcoming (2005) 154 U. Pa. L. Rev.]). See also Daniel J. Solove, "Conceptualizing Privacy" (2002) 90 Cal. L. Rev. 1087.

24 Here I am drawing from Ronald Dworkin's distinction between "concept" and "conception." See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 134-36.

25 Warren & Brandeis, *supra* note 14 at 195.

26 *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952), dissent, at 467. Justice Douglas' views on privacy have most recently been canvassed in Diana Rachel Hyman, *Defences of Solitude: Justice Douglas, the Right to Privacy and the Preservation of the American Wilderness* (Phd. Thesis, Harvard University, 2003) [unpublished].

27 Peter Benson, "Equality of Opportunity and Private Law" in Daniel Friedman & Daphne Barak-Erez, eds., *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) 201. Similarly, Lord Hoffmann observed in *Campbell* (H.L.), *supra* note 10 (at para. 43) that "privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action."

Even a more nuanced treatment of privacy by William L. Prosser,[28] which formed the basis of the *Second Restatement*,[29] is so broad as to encompass, in part, interests that already fall within the scope of currently recognized causes of action.[30] Prosser identified four varieties of breach of privacy:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his or her private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff individual in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[31]

The third variety that Prosser identifies — publicity which places an individual in a false light in the public eye — relates to one's interest in reputation, which is protected by the tort of defamation.[32] The fourth — appropriation of an individual's name or likeness — is instantiated by cases involving complaints about exploitation of one's own personality. While this can in one respect be understood as a form of unjust enrichment (whereby one's celebrity is "devalued" in order to commercially benefit another),[33] in Canada, a person's rights in his or her own "personality" have received express protection under the tort of "appropriation of personality."[34]

Even instances involving the first two varieties of breach of privacy identified by Prosser — intrusion and public disclosure of embarrassing facts — *might* fall within nominate torts such as trespass (where the misconduct involved interference with a person's possession of realty) or intentional infliction of emotional distress (where the impugned disclosure was calculated to produce the resulting harm). In some cases, however, it will not. As a result, Warren and Brandeis observed:

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."[35]

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28 William L. Prosser, "Privacy" (1960) 48 Cal. L. Rev. 383.

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

30 Lewis Klar has stressed the redundancy of a tort of breach of privacy in view of the protection afforded by several extant nominate torts. See Lewis Klar, *Tort Law*, 3d ed. (Toronto: Thomson Carswell, 2003) at 77-80.

31 Prosser, *supra* note 28 at 389.

32 Indeed, the Manitoba Court of Queen's Bench, in *Parasuik v. Canadian Newspapers Co. Ltd.* (1988), 53 Man. R. (2d) 78 (Q.B.), found that such facts support an action in defamation, but *not* an action under Manitoba's *Privacy Act*, *supra* note 5.

33 See for example the analysis of Colin H.H. McNairn & Alexander K. Scott, *Privacy Law in Canada* (Markham, Ont.: Butterworths Canada Ltd., 2001) at 9.

34 See for example *Krouse*, *supra* note 9. For further commentary, see Eric M. Singer, "The Development of the Common Law Tort of Appropriation of Personality in Canada" (1998) 15 Can. I.P. Rev. 65. See however, the limits placed on this tort in *Gould Estate v. Stoddart Publishing* (1996), 30 O.R. (3d) 520 (Gen. Div.), aff'd (1998) 39 O.R. (3d) 545 (C.A.), in which Lederman J. distinguished between the use of photographs and interview notes for the purpose of educating the public, as opposed to for the purpose of selling the book.

35 Warren & Brandeis, *supra* note 14 at 195.

Concerns for technology and its ability to frustrate the corrective force of extant nominate torts also impelled Rich J.'s famous dissent in *Victoria Park Racing and Recreational Grounds Ltd. v. Taylor*.[36] Writing in 1937, he presciently invoked the spectre of "the prospects of television" which might someday force the courts to recognize that "protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life."[37] Such concerns have not abated. Fully a century after the statement of Warren and Brandeis, and nearly 70 years after *Victoria Park*, Lord Phillips stated in *Douglas v. Hello!*:

> Special considerations attach to photographs in the field of privacy. They are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances voyeur would be the more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive. This is quite apart from the fact that the camera, and the telephoto lens, can give access to the viewer of the photograph to scenes where those photographed could reasonably expect that their appearances or actions would not be brought to the notice of the public.[38]

Aside from the question of whether the activity falls within a protected legal interest, Lord Phillips' statement presupposes that it can properly be understood as falling within the realm of "privacy," perhaps because it usually occurs within the "sacred precincts of private and domestic life" so valued by Warren and Brandeis. This is not, however, so obvious. With respect to the video or audio recording and broadcast of activities, innumerable familiar scenarios would engage those first two varieties of breach of privacy identified by Prosser — the lawful disciplining of a child by a parent, the exchange of marital vows, or the eruption of a family dispute. Admittedly, in each of these instances, it might well be the case that the participants could, in Lindsay J.'s words, "reasonably expect that their appearances or actions would not be brought to the notice of the public."[39] For example, the parent might be disciplining his or her child inside the family home. But this is not always going to be the case. The home-bound activity might, for example, be visible from another setting, such as the bordering sidewalk, or possibly it is occurring in a different setting altogether. Perhaps

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36 (1937), 58 C.L.R. 479 (Aust. H.C.) [*Victoria Park*].

37 *Ibid.* at 505. Technologically related concerns continue to be expressed. In his address to the Ontario Institute of the Canadian Bar Association, the federal Privacy Commissioner, Bruce Phillips, argued for promoting respect for individual privacy as a fundamental human right. In doing so, he cited, *inter alia*, "the ever increasing intrusiveness of technology" (Bruce Phillips, "The Evolution of Canada's Privacy Laws" (Speaking Notes, prepared for the Canadian Bar Association Ontario Institute 2000" (28 January 2000) [unpublished]).

38 *Douglas* (C.A.), *supra* note 10 at para. 84. The emergence of cyberspace has also deepened jurists' concerns. See James B. Rule, "Toward Strong Privacy: Values, Markets, Mechanisms and Institutions" (2004) 54 U.T.L.J. 183 at 185. Chief Justice Gleeson of the High Court of Australia made a similar observation in *Lenah*, *supra* note 11 while contrasting cases of intellectual property with cases such as *Donnelly v. Amalgamated Television Services Pty Ltd.* (1998), 45 N.S.W.L.R. 570 (S.C.) [*Donnelly*], where police, executing a search warrant, took a video recording of the plaintiff, in his underpants, in a bedroom: "A film," Gleeson C.J. memorably commented, "of a man in his underpants would ordinarily have the necessary quality of privacy to warrant the application of the law of breach of confidence" (*Lenah*, *supra* note 11 at 16. Both *Douglas* and *Lenah* are discussed below in this article at the text associated with notes 61 and 41, respectively).
While one is tempted to dismiss the facts of *Donnelly* as unique or apocryphal, similar allegations may be the subject of future litigation in English courts. See "Saddam to Sue over Prison Photos" *BBC News* (20 May 2005), online: BBC News <http://news.bbc.co.uk/2/hi/middle_east/4567341.stm>.

39 *Douglas* (Ch.), *supra* note 10 at para. 84.

the marital vows are being exchanged in a controlled setting within a nonetheless public facility, such as a cordoned-off area within a restaurant. Alternatively, perhaps the family dispute has erupted at a public park. Peter Birks offered an even more compelling example:

> A celebrity is pregnant and goes into labour. Journalists besiege the hospital. One team, armed with the latest technology and able to avoid the least trespass on private land, manages to secure a complete soundtrack of the birth. At common law, is this outrageous intrusion upon the most private hours of a famous woman an actionable tort? Will an injunction against publication issue, and an order for delivery up? The answer to these questions must be yes. But that answer is still not completely secure.[40]

Different normative considerations might arise in each of these scenarios, leaving us to consider whether the interests in such cases ought to be generally recognized as worthy of legal protection. Given the law's insecure footing here, and also given privacy's unwieldy nature and evaluative immunity where it is employed as an unconfined *concept*, I intend in this article to confine my analysis to a particular and concrete *conception* of privacy. This conception, moreover, is not (at least necessarily) addressed by any of the extant nominate torts, but arises in each of the recent Commonwealth case authorities to which I have already referred. Specifically, I will focus on "privacy" as an interest which might be injured by the recording and broadcasting of images and activities in circumstances that do not give rise to a cause of action under a currently recognized tort, such as trespass, defamation, appropriation of personality or intentional infliction of emotional distress.

Having confined the meaning of "privacy" as I will be considering it here, I turn now to my principal inquiry. Specifically, and with reference to those case authorities, I will now embark upon the justificatory inquiry of rationalizing a protected interest in privacy with a juridical concept of private relation, grounded in a right.

III. AUSTRALIA AND ENGLAND

A. THE TORT OF BREACH OF CONFIDENCE

The 2001 pronouncement of the High Court of Australia in *Australian Broadcasting Corporation v. Lenah Game Meats*[41] involved the claim of a corporate plaintiff, a commercial processor and supplier of game meat. Its product line included the meat of Tasmanian brushtail possums, which it stunned, killed and processed in large numbers at licensed abattoirs. "A person or persons unknown" broke into one of those abattoirs and installed hidden cameras, surreptitiously filming the possum-stunning and killing operations. The film was supplied to Animal Liberation Ltd., a self-described "animal rights organization" which, in turn, supplied at least part of the film to the defendant Australian Broadcasting Corporation for intended broadcast.

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40 Peter Birks, ed., Editor's Preface, *Privacy and Loyalty* (Oxford: Clarendon Press, 1997) v at v-vi [Birks, *Privacy and Loyalty*].

41 *Lenah*, *supra* note 11.

The plaintiff, fearing loss of business (which fear was said by Gleeson C.J. to be "not inherently improbable"[42]), was granted an interim injunction at first instance to restrain publication on a number of grounds, including breach of the plaintiff's right to privacy. The majority at the High Court discharged the injunction on the strict procedural basis that the lower court did not have the jurisdiction under the relevant enabling statute[43] to grant it. The justices did, however, comment on the substantive claim of breach of a right to privacy, Gaudron, Gummow and Hayne JJ. concluding that a right of privacy might develop in Australia to embrace these facts, but only for natural persons and, therefore, not for the corporate plaintiffs in that case. Chief Justice Gleeson rejected such a possibility, relying instead on the "English approach," which has been to rely on the tort of breach of confidence to protect privacy interests.

As to that "English approach," Gleeson C.J. was correct. English courts have not recognized a tort of "breach of privacy" *per se*, but have instead chosen to protect privacy interests by treating injury to such interests as an unconscionable violation of confidence, thereby invoking the equitable tort of breach of confidence.[44] The law's association of privacy with confidence has a substantial pedigree. As early as 1849, English courts had identified a right to privacy as underlying a claim for breach of confidence,[45] inasmuch as such a right was contemporarily understood as protection from

> an unbecoming and unseemly intrusion ... offensive to that inbred sense of propriety ... if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life, — into the home (a word hitherto sacred to us).[46]

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42 *Ibid.* at 9. By way of explanation, he added: "A film of vertically integrated process of production of pork sausages, or chicken pies, would be unlikely to be used for sales promotion."

43 *Supreme Court Civil Procedure Act 1932* (Tas.), ss. 10-11.

44 *Wainwright v. Home Office*, [2003] 3 W.L.R. 1137, 2003 UKHL 53. The plaintiff and her disabled son were strip-searched before visiting another of her children in prison. The Court found that English law did not recognize a general tort of breach of privacy. Master of the Rolls Lord Phillips in *Campbell* (C.A.), *supra* note 10, expressly acknowledged (at para. 61) that in England, "protection of privacy by expanding the scope of breach of confidence ... [is] in the course of development." Indeed, four of the five Law Lords — including the two dissenters — in *Campbell* (H.L.), *supra* note 10, emphasized that the tort of breach of confidence, as applied in that case, was for breach of privacy. Lord Hoffmann (at para. 43, in dissent) was the most restrained, describing "the right to privacy" as "one of the values ... which underlies a number of more specific causes of action, ... [one of which] is the equitable action for breach of confidence." His co-dissenter, Nicholls L.J., expressly described the tort of breach of confidence (at para. 14) as "better encapsulated now as misuse of private information." Lord Hope (at para. 105) described a "right to privacy" as "[lying] at the heart of an action for breach of confidence." Baroness Hale, while acknowledging (at para. 134) that there was no general tort of breach of privacy, stated that the scope of breach of confidence encompassed protection of "informational autonomy."

45 *Prince Albert v. Strange* (1849), 2 De G. & Sm. 652, 64 E.R. 293 (Ch.) [*Prince Albert*, cited to De G. & Sm.].

46 *Ibid.* at 698. Prince Albert and Queen Victoria had commissioned copies struck from various etchings and drawings they had made. The worker employed to strike those copies printed additional copies which eventually made their way into the hands of the defendant Strange, who published a catalogue with a view to exhibiting them. Prince Albert applied for an injunction, both as to the catalogue and the exhibition, and Knight-Bruce V.C. granted it. The vice-chancellor's reasons, however, relied (with respect to Strange) on a property right which he found Prince Albert to have in the etchings, which right had been infringed. The opinion contained no acknowledgment of a right of privacy that was distinct from a property right.

As a springboard to recognizing a protected legal interest in privacy, however, this cause of action, at least initially, bore a severely limiting characteristic. Specifically, it depended upon the existence of a relationship of confidence between the parties; in those circumstances, an equitable obligation of confidence would be impressed upon the defendant.

In the late twentieth century, two significant events shifted the law of confidence as it related to privacy interests. First, in its 1988 pronouncement in *A.G. v. Guardian Newspapers Ltd. (No. 2)*,[47] the House of Lords discarded the requirement of a confidential relationship. Under the force of Lord Goff of Chieveley's criticism of that requirement as illogical where an "obviously confidential document" came into the hands of someone with whom the injured party had no confidential relationship, the House of Lords instead expressly recognized the tort of breach of confidence as having taken two forms. The first, a commercial form "concerned with trade secrets," would continue to impose a duty of confidence arising from "a transaction or relationship between the parties"[48] which was based upon confidence. In its second form — the "privacy" form[49] — a finding of breach of confidence would be preconditioned upon circumstances where a relationship, whether of confidence or otherwise, existed. Reformulating the underlying principle of breach of confidence as applied to privacy cases, Lord Goff said:

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

Or, as Phillips M.R. explained for the Court of Appeal in *Douglas v. Hello!*, the information must be "confidential in nature," but "it is now recognised that [the requirement of a pre-existing duty of confidence] is not necessary if it is plain that the information is confidential, *and for the adjective 'confidential' one can substitute the word 'private.'*"[51]

The second cause of further development in the English law of confidence towards protection of privacy was more subtle, occurring as a result of the coming into full force in October 2000 of the *Human Rights Act 1998*.[52] The *HRA* had the effect of, *inter alia*, conferring upon individuals the ability to litigate in British courts to enforce the rights conferred upon them in the *Convention for the Protection of Human Rights and Fundamental*

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47 [1990] 1 A.C. 109 (H.L.) [*Guardian Newspapers*].

48 *Ibid.* at 281.

49 Lord Hope in *Campbell* (H.L.), *supra* note 10 at para. 105, described "the right to privacy" as "[lying] at the heart of an action for breach of confidence."

50 *Guardian Newspapers*, *supra* note 47 at 281. This statement was accepted by the European Commission of Human Rights as representing English law in *Earl Spencer v. U.K.* (1998), 25 E.H.R.R. C.D. 105 [*Spencer*] and was reaffirmed by the House of Lords in *Campbell* (H.L.), *supra* note 10 (*Campbell* and its facts are discussed below at the text associated with note 72). In *Spencer*, the Commission dismissed the Spencers' claim that the U.K. had failed to protect them from invasions of privacy by the newsmedia on the basis that the Spencers had not yet exhausted their common law remedy of damages for breach of confidence.

51 *Douglas* (C.A.), *supra* note 10 at para. 83 [emphasis added].

52 (U.K.), 1998, c. 42 [*HRA*]. It was already partially in force in Scotland.

Freedoms.[53] Section 6 of the *HRA*, which provides that "it is unlawful for a public authority to act in a way which is incompatible with a *Convention* right," *also* provides that "public authority" expressly includes courts and tribunals.[54] The obvious but controversial implication here is that a British court would be acting unlawfully if it failed to develop the law — including the common law of torts — in a manner which is compatible with *Convention* rights.[55] Indeed, the English Court of Appeal has, rather reluctantly, concluded that it is required to do just that — that is, "to adopt, as the vehicle for performing such duty as falls on the courts in relation to Convention rights, the cause of action formerly described as breach of confidence." Lamenting that "[w]e cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action for breach of confidence claims for publication of unauthorised photographs of a private occasion,"[56] the Court added that it nonetheless felt compelled to do so:

> [I]t seems to us that sections 2, 3, 6 and 12 of the Human Rights Act 1998 all point in the same direction. The court should, in so far as it can, develop the action for breach of confidence in such a manner as will give effect to [*Convention*] rights.[57]

As to those *Convention* rights, art. 8 provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." This is, however, only a guarantee of privacy against public authorities.[58] Strictly speaking, it is unconcerned with the protection of privacy against intrusions by private parties — art. 8 would not, for example, be directly justiciable against the newsmedia. Nonetheless, because of the implications of s. 6 of the *HRA*, it *is* concerned with the failure of *the state* to prevent intrusions against privacy by private parties. As a result, English courts, having regard to art. 8's provisions, have "shifted" the "centre of gravity of the action for breach of confidence" in its privacy form — that is, "when it is used as a remedy for the unjustified publication of personal information."[59] Or, as Hoffmann L.J. recently explained, post-2000 common law adjudication in the area of privacy was influenced by the *Convention*, albeit indirectly, such that protection of privacy against intrusions by private parties became a more pressing imperative:

> What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person.... I can see no logical ground for saying

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53 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [*Convention*]. For an explanation of this process and of its historical and constitutional context, see Joanna Harrington, "Rights Brought Home: The United Kingdom Adopts a 'Charter of Rights'" (2000) 11 Const. Forum Const. 105. As Harrington explains (at 106-07), the right of individuals in the U.K. to complain of the breach of a *Convention* right at an international level (to the European Court of Human Rights in Strasbourg) had existed since 1966. The *HRA* was enacted to expand parties' litigation routes by enabling them to litigate *Convention* rights in British courts as well.

54 *Supra* note 52, s. 6(3)(a).

55 Harrington, *supra* note 53 at 110.

56 *Douglas* (C.A.), *supra* note 10 at para. 53.

57 *Ibid.*

58 Article 8(2) of the *Convention* provides that "[t]here shall be no interference by a *public authority* with the exercise of this right" [emphasis added].

59 *Campbell* (H.L.), *supra* note 10 at para. 51.

that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification.[60]

Post-*Guardian* and post-*Convention* development of this area of English law has centred principally around two incidents, each involving celebrities and "papparazzi." The first occurred on 18 November 2000, when actors Michael Douglas and Catherine Zeta-Jones were married at the Plaza Hotel in New York. Extensive security arrangements had been made to ensure that access to the ceremony and reception would be restricted to invited guests. The couple had, however, sold exclusive photographic rights of the event to a British magazine, *OK!*, although only after receiving offers from both *OK!* and a similar British publication, *Hello!*. The rationale behind this exclusive arrangement, according to Douglas and Zeta-Jones, was not to make money, but to protect their privacy.[61] Or, as Lindsay J. described it at first instance, the intention was to use "an exclusive contract as a means of reducing the risk of intrusion by unauthorised members of the media and hence of preserving the privacy of a celebrity occasion."[62] Douglas and Zeta-Jones also retained control over the selection of the photographs to be published. They had had hired their own photographer, and guests were required to pass through a checkpoint to ensure that they did not have any audio or video recording devices.

Unknown to the couple or their guests, an intruder, a "papparazzo" photographer named Rupert Thorpe, had eluded security and surreptitiously took photographs of the event, including of Douglas and Zeta-Jones. Thorpe then sold the exclusive U.K., French and Spanish publication rights in respect of those photographs to *Hello!* for £125,000. The

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60 *Ibid.* at para. 50.

61 *Douglas* (C.A.), *supra* note 10 at para. 4. Zeta-Jones' affidavit, which was cited by Lindsay J. at the Chancery Division, had deposed (*Douglas* (Ch.), *supra* note 10 at para. 48):

> We decided that, with a view to reducing the media frenzy for photographs of the wedding and protecting our wedding day from the inevitable media intrusion, we would reach an agreement with a magazine which we would allow to publish a limited number of our wedding photographs. We hoped that once the rest of the media found out that we had entered into such an arrangement they would be less interested in trying to infiltrate our wedding.... Both Michael and I also accept that as celebrities we have an obligation not to ignore those people who make us celebrities, the people who pay money to watch our movies. One of the reasons that we decided to reach a deal with a magazine was to make contact with our fans and to avoid the accusation that we had shunned them or were too aloof. We wanted to do so in a context where the choice was ours as to what was and was not published about our wedding, not left to a media free-for-all.

Douglas similarly deposed (at para. 49):

> Eventually, we decided that the best way to control the media and to protect our privacy would be to reach an agreement with a single magazine or newspaper who would have the rights to publish photographs ... and to syndicate the photographs and text to specified and pre-agreed publications around the world.

62 *Douglas* (Ch.), *ibid.* at para. 52. This was also the opinion of Sedley L.J. (at the interlocutory injunction stage) who held that Douglas and Zeta-Jones "were careful by their contract to retain a right of veto over publication of *OK!*'s photographs.... This element of privacy remained theirs and *Hello!*'s photographs violated it" (*Douglas v. Hello!*, [2001] 2 All E.R. 289].

Master of the Rolls Phillips for the Court of Appeal agreed that the arrangement for publication of authorized photographs did not provide a defence to a claim for breach of confidence. He also observed, however, (at *Douglas* (C.A.), *ibid.* at para. 107) that "[t]o the extent that an individual authorises photographs taken on a private occasion to be made public, the potential for distress at the publication of other, unauthorised, photographs, taken on the same occasion, will be reduced. This will be very relevant when considering the amount of any damages." That said, Phillips M.R. left Lindsay J.'s damage award to Douglas and Zeta-Jones intact.

photographs were published in the 24 November 2000 edition of *Hello!*, the same day on which the first of two *OK!* editions containing the authorized photographs was issued.[63] By that time, *OK!*, Douglas and Zeta-Jones had already sued *Hello!* among other defendants.[64]

I do not propose in this article to canvass the adjudication of *OK!*'s claims against *Hello!* or any of the other defendants,[65] but rather to focus exclusively upon Douglas' and Zeta-Jones' claim relating to privacy. In essence, they alleged that their confidence (in its privacy sense) had been breached, because the subject matter of the photographs — their wedding — was private.

The matter came for hearing before Lindsay J. in February and March 2003. He found, first of all, that the event was private, "[t]o the extent that privacy consists of the inclusion only of the invited and the exclusion of all others."[66] As such, Thorpe had taken the unauthorized photographs in private circumstances — that is, in circumstances in which he and *Hello!*'s representatives knew or ought to have known that his presence was unwelcome and constituted a trespass.[67] Consequently, Lindsay J. found that Douglas and Zeta-Jones

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63 The timing was not coincidental, and was the result of frenzied activity, particularly on the part of *OK!* and of Douglas and Zeta-Jones. In the course of *Hello!*'s staff preparing for release of the photographs which *Hello!* had acquired from Thorpe, *OK!* learned that unauthorized photographs had been taken and were available on the market. On 20 November 2000, Douglas, Zeta-Jones and *OK!* applied for and obtained, on an *ex parte* basis, an interlocutory injunction from Buckley J. restraining *Hello!* from publishing such unauthorized photographs. *Hello!* appealed and, on 23 November 2000, the Court of Appeal (Brooke, Sedley and Keene L.JJ.) allowed the appeal and set aside the injunction, on the basis that damages would be an adequate remedy and that accordingly the balance of convenience came down against prior restraint (reasons were given on 21 December 2000 — see [2001] Q.B. 967). In the interim, *OK!*, which had originally intended to publish the authorized photographs over two editions (being issued 30 November and 6 December 2000, respectively) decided to bring the publication forward. In the result, after a hasty selection by Douglas and Zeta-Jones of appropriate authorized photographs for publication, the first installment of the authorized photographs were included in the *OK!* edition issued 24 November 2000 — the day after the Court of Appeal set aside Buckley J.'s injunction — but which edition actually bore the date of 1 December 2000. The proceedings then continued, Douglas and Zeta-Jones seeking damages in light of the discharge of the interlocutory injunction.

64 I canvass the procedural history *ibid.* The other defendants included *Hello!*'s parent company, its editor and controlling shareholder, and several individuals who, it was alleged, were instrumental in the agreement reached between Thorpe and *Hello!*.

65 In brief, Lindsay J. at the Chancery Division found that *OK!* was entitled to damages from *Hello!* on the grounds that the publication of the unauthorized photographs in the United Kingdom by *Hello!* constituted a breach of confidence in a trade secret (*Douglas* (Ch.), *supra* note 10). The Court of Appeal allowed *Hello!*'s appeal against the judgment in favour of *OK!*, on the reasoning that the grant to *OK!* by Douglas and Zeta-Jones of the right to use authorized photographs was no more than a licence (albeit an exclusive licence) to commercially exploit those photographs, and did not carry with it any right to claim the benefit of "confidential information" (*Douglas* (C.A.), *supra* note 10 at para. 134).

66 *Douglas* (Ch.), *ibid.* at para. 66.

67 A significant factor in this case, both before Lindsay J. at the Chancery Division and Phillips M.R. at the Court of Appeal, was whether the fact that the wedding took place in New York, and not in the U.K., would alter their respective conclusions regarding Douglas' and Zeta-Jones' claim in respect of privacy. Justice Lindsay (at *Douglas* (Ch.), *ibid.* at para. 211) relied on a finding that Thorpe must have at least been a trespasser under the law of New York, and that *Hello!*'s conscience was tainted in this respect because it knew of the security precautions that had been taken to prevent unauthorized photography, of *OK!*'s exclusive contract, and that Thorpe's photographs must have entailed trespass on his part. Master of the Rolls Phillips (at *Douglas* (C.A.), *supra* note 10 at para. 100), concluded that the law of New York had no direct application to the case, the cause of action being based on publication in the U.K., although he cautioned that where events to which the information relates take place outside the U.K., the law of such a place may be relevant to the question of whether there is a reasonable expectation that events will remain private. Here, however, Phillips M.R. observed (at para. 101) that

were entitled to damages and to a perpetual injunction against *Hello!* because its publication of the unauthorized photographs constituted a breach of confidence.

At the Court of Appeal, where Lindsay J.'s verdict as to privacy was affirmed,[68] Phillips M.R. adopted a fundamental approach that stressed "the nature of the rights enjoyed by [Douglas and Zeta-Jones]":[69]

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

There is a paradoxical quality to this reasoning. On one hand, Phillips M.R. found that the interest at stake is not proprietary. That said, the third party's conscience was nonetheless bound because, Phillips M.R. later explained, publishing the unauthorized photographs had "invaded the area of privacy which [Douglas and Zeta-Jones] had chosen to retain."[71] While therefore the basis for Douglas' and Zeta-Jones' right is ostensibly non-proprietary, it does imply, as I will elucidate below, a shared normative quality with property.

The second incident which ultimately contributed to post-*Guardian* and post-*Convention* recognition in England of a legally protected interest in privacy involved another celebrity, model Naomi Campbell. Her suit for breach of confidence arose from an article in the British tabloid newspaper *The Mirror* which disclosed, in text and by reference to photographs, that she was a drug addict who had been regularly attending Narcotics Anonymous counselling sessions for three months. Several of the photographs showed her on the doorstep of a building where one of the sessions had just occurred, embracing two other people whose faces had been pixilated.

Campbell's counsel conceded in the course of argument that the fact of her drug addiction was open to public comment in view of her having gone on record in the past as saying that she did not use drugs. As such, disclosure of that fact was not in itself intrusive. Her complaint, however, was that *The Mirror*'s publication of the nature and frequency of the treatment — particularly when accompanied by a covertly taken photograph depicting her as she was leaving such treatment — fell within a realm of "privacy" in respect of which she was entitled to an enforceable obligation of confidence.[72] Before Morland J., Campbell succeeded, obtaining an award of £3,500 for breach of confidence,[73] but saw that award

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the law of New York did not provide that "a member of the public had a right to be present at a wedding taking place in a hotel and to take and publish photographs of that wedding."

68 The Court of Appeal allowed the appeal of *OK!*'s judgment against *Hello!* for breach of confidence (in the tort's commercial form).

69 *Douglas* (C.A.), *supra* note 10 at para. 126.

70 *Ibid.*

71 *Ibid.* at para. 136.

72 *Campbell* (H.L.), *supra* note 10 at para. 95.

73 *Campbell* (Q.B.), *supra* note 10. The defendant, Mirror Group Newspapers, was also found liable for breach of the *Data Protection Act 1998*.

overturned by Phillips M.R. for the Court of Appeal.[74] The information which *The Mirror* had published, he ruled, was part of (albeit peripheral to) the principal story which was that Campbell was a drug addict who was seeking treatment. As such, it was not "private" information.[75] A majority at the House of Lords, however, disagreed. While Campbell had voluntarily raised in public discourse the question of whether she was a recovering drug addict (by denying it), that referred only to the general fact of her addiction and, therefore, only that general fact was now open to media dissemination. The details of her treatment such as information about its nature and frequency remained distinct from that general fact on the basis that "disclosure of the details would be liable to disrupt her treatment."[76]

Mitigating the privacy right for the House of Lords was the *Convention*'s art. 10 guarantee of freedom of expression and of the right to "impart information ... without interference by [a] public authority."[77] This required a balancing exercise, in respect of which Hope L.J. considered whether the restriction on the art. 10 right posed by Campbell's art. 8 right to privacy was "sufficiently important to justify limiting the fundamental right to freedom of expression which the press assert on behalf of the public."[78] Such balancing was particularly necessary, he concluded, where the photographs had been taken in a public place — a risk which reasonable people would doubtless conclude is one of the ordinary incidents of a free society.[79]

For those seeking express justification for the result of such a balancing exercise, Lord Hope's reasons will disappoint. "The real issue," Lord Hope stated, upon which this balance was to be determined was "whether publicising the content of the photographs would be offensive."[80] Ultimately, he determined that it was, owing to the "distress" which anyone in Campbell's position would have felt — such distress arising from the conclusion that the details to which Ms. Campbell had objected were "obviously private."[81] As Hope L.J. explained:

> Any person in Miss Campbell's position, assuming her to be of ordinary sensibilities but assuming also that she had been photographed surreptitiously outside the place where she had been receiving therapy for drug addiction, would have known what they were and would have been distressed on seeing the photographs. She would have seen their publication, in conjunction with the article which revealed what she had been doing when she was photographed and other details about her engagement in the therapy, as a gross interference with her right to respect for her private life. In my opinion this additional element in the publication is more than enough to outweigh the right to freedom of expression which the defendants are asserting in this case.[82]

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74 *Campbell* (C.A.), *supra*, note 10.

75 *Ibid.* at para. 53. Master of the Rolls Phillips said: "Given that it was legitimate for the appellants to publish the fact that Miss Campbell was a drug addict and that she was receiving treatment, it does not seem to us that it was particularly significant to add the fact that the treatment consisted of attendance at meetings of Narcotics Anonymous."

76 *Campbell* (H.L.), *supra* note 10 at para. 98.

77 *Convention*, *supra* note 53 at art. 10(1).

78 *Campbell* (H.L.), *supra* note 10 at para. 115.

79 *Ibid.* at para. 122.

80 *Ibid.*

81 *Ibid.* at paras. 96-98.

82 *Ibid.* at para. 124.

Lord Carswell agreed with Hope L.J.'s assessment.[83] Baroness Hale came to the same conclusion on the balance to be drawn between art. 10 and art. 8, although where dealing with cases where the information is not "obviously private,"[84] she emphasized the risk to Campbell's therapy, as opposed to any "offence" others might feel:

> It was not necessary for those purposes to publish any further information, especially if this might jeopardise the continued success of that treatment.... This all contributed to the sense of betrayal by someone close to her of which she spoke and which destroyed the value of Narcotics Anonymous as a safe haven for her.[85]

Thresholds such as "offence" or "obviousness" are, however, question-begging. The point of reference by which we are to judge what is "offensive" or "obviously" private and therefore to be accorded legal protection was not offered. Lord Hope articulated no meaningful norm other than a proscription against causing "distress." Lord Carswell employed similarly peremptory reasoning, stating that "the nature of the material" demonstrated that it was "private information which attracted the duty of observing the confidence in which it was imparted to the respondents."[86] Baroness Hale's speech, however, went further. Significantly, in the course of offering instances of "obviously private" information,[87] she articulated a threshold which, I will demonstrate, holds promise in a justificatory sense. Dismissing the test of "offence," she stated that "[a]n objective reasonable expectation test is much simpler and clearer."[88]

Dissenting Lords Hoffmann and Nicholls also employed Baroness Hale's "reasonable expectation of privacy" threshold, although they came to a different conclusion. The difference of opinion centered on the narrow point of whether *The Mirror* went too far in publishing certain details about Campbell's treatment. Whereas the majority concluded it had, Hoffmann and Nicholls L.JJ. thought no reasonable expectation of privacy attached in these circumstances to those details. Because Campbell had raised the issue of addiction, thus giving wide publicity to the question of whether she took drugs, "she [could not] insist upon too great a nicety of judgment in the circumstantial detail with which the story is presented."[89]

Having discerned in Baroness Hale's "reasonable expectation" threshold an expressed rationale for a protected interest in privacy, I now turn to consider whether an account of that rationale can be constructed which would allow us to acknowledge the underlying interest's enforcement as juridical. To do so, I must reconcile a "reasonable expectation of privacy" with the norms that underlie the juridical conception of right. The supposedly "reasonable" quality of Campbell's expectation of privacy is therefore worth reflecting upon. Why did

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83 *Ibid.* at para. 169.

84 *Ibid.* at para. 135.

85 *Ibid.* at paras. 152-53.

86 *Ibid.* at para. 166.

87 *Ibid.* at para. 135. Relying on *Lenah*, *supra* note 11, Baroness Hale cited information about health, personal relationships or finance.

88 *Campbell* (H.L.), *ibid.*

89 *Ibid.* at para. 66, Hoffmann L.J. Lord Nicholls, citing "the touchstone" of "reasonable expectation of privacy" (at para. 21) also relied upon Campbell's voluntary public statements that she did not take drugs. Continuing, he added (at para. 24): "By repeatedly making these assertions in public, [Campbell] could no longer have a reasonable expectation that this aspect of her life should be private."

Baroness Hale think Campbell had a reasonable expectation of privacy? Because it was information going to her treatment for ill health[90] and, her general public commentary notwithstanding, that aspect of her life was something over which Campbell had chosen to maintain exclusivity. Why did Lords Hoffmann and Nicholls conclude she did not have a reasonable expectation of privacy? Because she had not made that necessary choice and had instead chosen to forfeit that exclusivity by inviting the public into that aspect of her life. Similarly, recall Lindsay J.'s finding in *Douglas* that the wedding was private "to the extent that privacy consists of the inclusion only of the invited and the exclusion of all others"[91] and Phillips M.R.'s finding that Douglas and Zeta-Jones had "chosen to retain" a measure of control over the aspect of their lives depicted by the unauthorized photographs. In both *Campbell* and *Douglas*, the courts are presupposing prior exclusion and consequently the judicial inquiry is narrowed to the factual issue of whether such exclusivity subsists in the light of the plaintiff's subsequent conduct.

I do not propose to comment on the specific merits of the results reached in any of those pronouncements, but rather to emphasize that they articulate a common norm which we can now assess for fidelity to my privileged juridical reference point.[92] That is, in seeking to ground a privacy interest in one of tort law's imperatives of proprietary protection or bodily integrity, exclusivity may provide a meaningful device which also has the advantage of being a coherent and widely shared understanding of private law's underpinnings, and a basic feature of our conception of the law of torts.

B. EXCLUSIVITY AND THE JUSTIFICATORY INQUIRY

Justification is a necessarily fundamental exercise, and accordingly my justificatory inquiry begins at tort law's fundamental concern with the plaintiff's "loss" and the defendant's "gain."[93] The "loss" lies in the plaintiff being materially worse off than before, and also worse off than he or she should be, assuming a normative proscription against injuring others.[94] Conversely, the defendant is seen as having more, to a degree equal to the plaintiff's loss, than he or she should have, as a result of having breached the norm against

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

[91] *Douglas* (Ch.), *supra* note 10 at para. 66.

[92] Just how common this norm is can be understood from its prevalence in the instrumentalist understanding of tort law advanced by Richard Posner in his discussion of privacy, and particularly in a statement that comes very close to anticipating the Law Lords' debate in *Campbell* arising from Campbell's prior public utterance:

> [A] prima facie case for assigning the ... right in a secret that is a byproduct of socially productive activity to the individual if its compelled disclosure would impair the incentives to engage in that activity; but there is a prima facie case for assigning the ... right away from the individual where secrecy would reduce the social product by misleading the people with whom he deals.

See Posner, "Right of Privacy," *supra* note 20 at 403.

[93] This is drawn from Aristotle's *Nicomachean Ethics*, but is canvassed by James Gordley in "Tort Law in the Aristotelian Tradition" in David Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 131 at 137-40. I have also elaborated on the implications of this Aristotelian understanding of tort law in Russell Brown, "Still Crazy after All These Years: *Anns*, *Cooper v. Hobart* and Pure Economic Loss" (2003) 36 U.B.C. L. Rev. 159 at 167-69.

[94] See Ernest J. Weinrib, "The Gains and Losses of Corrective Justice" (1994) 44 Duke L.J. 277 at 282-83.

injuring others. A defendant's "gain," then, is derived from having expropriated the plaintiff's resources. That is, by harming the plaintiff — even inadvertently — a defendant is taken as having fulfilled his or her will with the plaintiff's resources by using them.[95]

The critical point here is that the defendant's use of the plaintiff's resource is viewed in tort law as representing the nature of the interest that has been injured. As a result, we must account for that nature in determining whether, and to what extent, a specific interest — such as a right to privacy — ought to be protected by the law. Take for example, the paradigm, in fact the very instantiation of a rights violation which Thomas Aquinas employed to elucidate the Aristotelian basis for what we now understand as a private law duty — a person "striking or killing" is seen as having fulfilled his will by harming another's resources for his or her own end.[96] Bodily integrity, therefore, is a resource that the plaintiff owns, and in respect of which the plaintiff can, as an incident of ownership, assert a right of use, exclusive to the plaintiff, as against the defendant.[97] In this sense, bodily integrity assumes a proprietary aspect inasmuch as property references a juridically recognized right to exclude others from things.[98] As an exclusive "resource," it represents an interest which the law will protect.

In this sense, "exclusivity" embraces both juridically privileged interests of bodily integrity and property. The most important incident of having control of property or of one's own body is the ability to exclude others from access to, or use of, that resource.[99] This presumptive power to exclude is a foundational principle of the common law's treatment of private relations. Two essential attributes of all property rights are that they relate to specific things external to the rights holder, and that they are enforceable generally against the world. Similarly, while a right to one's bodily integrity is personal and is therefore different from a property right in the sense that it does not relate to something external to the rights holder, it is also enforceable generally against the world. Interference with the reputation, bodily integrity or property rights of others can be seen as wrong, therefore, because the world is impressed with a duty to refrain from interfering with those rights.[100] The adjudicative question therefore becomes a relatively straightforward one, as it was in *Campbell*: did (or did not) Naomi Campbell waive her entitlement to exclude others from knowing and telling of the details of her treatment for a drug addiction by previously and voluntarily putting the general matter of drug use before the public?

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95 This is drawn from the insights of Thomas Aquinas. See Gordley, *supra* note 93 at 137 and Brown, *supra* note 93 at 168.

96 Gordley, *ibid.* at 138.

97 Such an affinity between bodily integrity and property is reflected, for example, in judicial awards in personal injury cases for damages representing the diminished capital asset of income-earning ability. See for example *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.).

98 Felix S. Cohen, "Dialogue on Private Property" (1954) 9 Rutgers L. Rev. 357 at 374: "Private property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out that decision."

99 Here I am agreeing with David Lametti, "The Concept of Property: Relations *Through* Objects of Social Wealth" (2003) 53 U.T.L.J. 325 at 335.

100 This demonstrates the exigeability of assets, even when they have passed into the hands of another. See Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 49-50.

This still leaves us, of course, with the question of characterization of the right. Is the protected interest in privacy derived from the right to bodily integrity, or is it an incident of our right to acquire and hold property? On one hand, the interest at stake has a proprietary logic to it. Property rights are used by those who want to keep control over things by withholding them from others.[101] Moreover, there is a distinctly proprietary characteristic of transferability present in these cases — Thorpe, for example, sold his rights in the unauthorized photographs to *Hello!*. Conversely, there is a strong notion of bodily integrity at work here, particularly in the confined sense in which I am considering privacy. Photographs or video recordings in particular can depict or even distort human bodies in ways that are humiliating and subjective of ridicule. Privacy in this sense has affinities with a person's interest in his or her reputation, which was originally understood as an incident of one's interest in bodily integrity[102] but which we now view as a discrete protected interest.

Because, however, exclusivity furnishes its own justification, it ultimately does not matter whether we characterize a protected interest in "privacy" as deriving from a right to one's bodily integrity or a right to acquire and maintain property.[103] The juridical quality of a privacy interest is sufficiently demonstrated by the exclusivity that is being asserted — the only essential feature common to both a right in property and a right in bodily integrity. Exclusivity's normative force is not in its association with one form of juridical right or the other, but rather in its constitutive role in both forms. As such, the presence or absence of a protected legal interest in privacy is determined irrespective of bodily or proprietary ascriptions, but nonetheless in a manner such that the furnishing of a legal remedy is consistent with our intuitions. We understand it to be wrong when, for example, someone takes a picture of a scene that we associate with private life — thereby recording an aspect of a person's life in which he or she has not invited the world to share — and publishes it in a newspaper or broadcasts it on the six o'clock news. When the depicted activity relates, for example, to one's familial or other intimate relationships, or to finance or health, widely shared community standards would generate intuitive responses that such activities ought to remain unrecorded and unbroadcast.

Being intuitive, an explicit rationale is elusive. That said, in contemplating the particular fact scenarios that might arise, one is struck by the problem of privacy in the sense that I have employed it — specifically, by the problem of the recording and broadcasting of images and activities in circumstances which do not come within extant nominate torts. Our intuitions for a compensatory or restraining device here are strong and explicable by understanding a visual or audio depiction as a representation of its subject. By maintaining exclusivity over an aspect of one's life, one can be seen as declining to make a representation

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101 Here I am agreeing with Rule, *supra* note 38 at 205.

102 Immanuel Kant appears to have viewed a right to one's reputation as being at least conceptually affiliated with a right in one's bodily integrity, inasmuch as he described one's reputation as an "innate external belonging ... which clings to the subject as a person." See Immanuel Kant, *The Metaphysics of Morals*, trans. by Mary Gregor (Cambridge: Cambridge University Press, 1996) at 76.

103 Indeed, an unnecessarily myopic nomenclature of rights, which focuses our attention on the body and on property, may explain why Commonwealth jurisdictions, which lack the century-old influence of the U.S. realist school, are only now coming to treat a privacy interest as incidental of a juridical right. Here I am drawing from the insight of Victor B. Flatt who suggests that the nomenclature of rights might in part underlie courts' failure to treat environmental entitlements as protected legal interests. See Victor B. Flatt, "This Land is Your Land (Our Right to the Environment)" (2004) 107 W. Va. L. Rev. 1 at 7.

about one's life and one's interaction with others. As James B. Rule puts it, privacy is "the effective exercise of an option to withhold information about oneself."[104] Thus to portray someone in "private" circumstances — for example, to publish a photograph of someone comforting or disciplining his or her child — amounts to forcing that person to make a representation that he or she may not have wanted to make. It puts words into the subject's mouth: "My child was hurt and I comforted her," or "my child misbehaved, and I disciplined her." It is wrong, therefore, to publish or broadcast such depictions because it is wrong to have a person *in*voluntarily representing something with respect to an aspect of their interaction with others.

It is worth emphasizing at this point that the facts of *Douglas* and *Campbell* may be exceptional in two respects. First, there was in each of those cases a serious factual issue of whether the plaintiff(s) had actually retained control over the subject matter of the publication. In *Douglas*, the claim rested on whether Douglas and Zeta-Jones could demonstrate that their having entered into an agreement with *OK!* to publish certain of their wedding photographs was consistent with maintaining exclusive control over that event's depiction. In *Campbell*, a principal concern for the House of Lords — and the issue on which the dissenting Law Lords broke away — was whether Campbell had by her earlier public utterance forfeited her claim to exclusivity over the depicted aspect of her life. In the result, both *Douglas* and *Campbell* confer on the exclusivity threshold a concreteness that, as I shall explain, is lacking in the competing justification of "dignity." Secondly, in neither case would an extant nominate tort have afforded a remedy. There was no trespass, for example, in *Campbell*. And, while there was a trespass in *Douglas*, it was not actionable by the plaintiffs who were mere licensees of the Plaza Hotel and who therefore only had *in personam* rights against the hotel (which in turn could have sued for trespass). The circumstances in which a privacy interest can be successfully invoked in a tort claim may therefore be limited, and indeed perhaps ought to be limited where claims may be channeled through other causes of action such as trespass or appropriation of personality. My objective here is not to enlarge tort law's realm, but to consider whether privacy can be seen as falling within our subsisting conception of juridical relation.

Moreover, while the reference point of "exclusivity" appears to furnish a convenient and normatively acceptable bright line between what is and is not private, that will not, on its own, resolve the judicial inquiry. There will remain the obvious problem of balancing privacy interests with the constitutionally entrenched right to free expression.[105] Judges will therefore be concerned to control the new tort's ambit in order to ensure that our usual and necessary quotidian social intercourse — particularly in the case of newsmedia — will not be called into question or form the basis of civil liability. The uncertainty inherent in this judicial balancing act between privacy and free expression is not, however, a reason to deny recognition to a tort of breach of privacy. Rather, it reinforces the need to adhere to the

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104 Rule, *supra* note 38 at 187.

105 As Baroness Hale cautioned in *Campbell* (H.L.), *supra* note 10 at para. 137:

> It should be emphasised that the "reasonable expectation of privacy" is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as "private" in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it.

community standards which are embodied in the conception of juridical relation and its associated norm of exclusivity.

Indeed, the judicial inquiry would be uncertain even without the countervailing concern for free expression. The very notion of "exclusivity," like the "reasonable person" test for standard of care or the "material contribution" test for causation, is uncertain, but only in a way that is intrinsic to the nature of many legal norms, whose texture cannot be refined to a categorical statement of what is required. As normative standards, they are inherently elastic.[106] Even accounting, therefore, for the narrow conception of privacy which I have framed, the outcome, as in every other tort case, will be largely context-dependent. In the case of privacy, for us to know whether a depiction of activity has resulted in injury to a right, we must first inquire into the source of the depiction, how it was used, and the basis for the parties' competing claims to appropriate or withhold the depicted activity. Moreover, questions of application will inevitably arise inasmuch as the governing principles may result in varying outcomes owing to divergent social practices across communities and jurisdictions.

Such uncertainty is not, in and of itself, a cause for concern. Jurists do not seek to achieve predictability in outcomes, but in reasoning. As Ernest J. Weinrib has observed, "[a] juridical concept does not carry with it instructions that allow it to be applied to any possible set of facts through the operation of deduction."[107] While tort law's fundamental underpinnings must be understood and shared to be truly normative, judicial treatment of particular claims in light of the basic tort law doctrines is not determinate. In other words, at stake here is not a specific adjudicative outcome, but rather the question of whether the underlying norm is commonly recognized as such and therefore immanent in public legal culture. Hence my attempt to demonstrate that exclusivity, as a justificatory threshold in determining what is "private," coherently explains in a widely understood and deeply intuitive way the juridical source of the right at stake.

Exclusivity is, however, only the first of two potential justifications that can be extracted from these recent Commonwealth pronouncements. A contrasting rationale for imposing tort liability in order to protect privacy interests has emerged from a significant concurring judgment in a recent pronouncement of the New Zealand Court of Appeal. As it happens, this judgment's divergence from the English authorities is not solely referable to justificatory reference points. A majority at the Court also adopted a contrasting taxonomical label in which the tort is to be framed — *not* as a breach of confidence, but as a tortious breach of privacy.

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[106] Here I am agreeing with Keith C. Culber, "Varieties of Vagueness" (2004) 54 U.T.L.J. 109 at 109-10. The danger, of course, is what Ronald Dworkin referred to as the "semantic sting" — that is, how the court confronts vague legal tests in borderline cases (Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986). The idea is that some judges will be unable to reconcile the rule of law with the existence of vague legal criteria. Dworkin's solution was to interpret law in its most morally acceptable light, thus determining cases in a manner that preserves the rule of law.

[107] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995) at 223.

IV. NEW ZEALAND — THE TORT OF BREACH OF PRIVACY

On a warm mid-December day in Auckland, Marie Hosking, recently separated from her nationally known broadcaster husband Michael Hosking, was pushing their year-old twin daughters in a stroller on a public street. Nearby, and without her knowledge, a professional photographer named Simon Runting took photographs of the children. Runting had been hired by *New Idea!* magazine to take these photographs in order to supplement an article *New Idea!* was running in its Christmas 2002 edition relating to "[Michael] Hosking's personal life, and the fact that he would be spending Christmas without the company of his children."[108] Informed of the fact of the photographs and of *New Idea!*'s planned article, both Hoskings sought an injunction restraining Runting and *New Idea!* from taking and publishing photographs of the children until they turn 18. Such photography and publication, the Hoskings argued, amounted to a breach of the children's privacy.

At first instance before Randerson J., the claim was framed in both breach of confidence and a supposed "breach of privacy." As to breach of confidence, he held that because the photographs were taken while the children were in a public place, the claim could not be sustained, the nature of such "information" not giving rise to an obligation of confidence as that tort had developed in England. Turning then to consider whether a discrete tort of breach of privacy exists in New Zealand (and whether it would furnish a remedy on these facts), he ultimately concluded that New Zealand courts should not recognize a privacy tort, and that any gaps in privacy law should be filled by the legislature, not the courts.[109] In any event, he added, the public disclosure of photographs of children taken in a public place would not fall within the scope of such a tort.[110]

The Hoskings appealed, their primary position resting on the existence of a "tort of privacy" in New Zealand. While the photographs may have been taken in a public setting, they emphasized certain "private facts," including the circumstances in which the photographs were taken,[111] and the absence of parental consent. Such circumstances, they argued, outweighed any countervailing arguments (such as freedom of speech) raised by the defendants. The appeal was heard by a full bench of five justices, who unanimously dismissed the Hoskings' appeal on the facts. The photographs were, the Court observed, taken from a public place, depicting the children in a public place, and in circumstances which, unlike *Campbell*, did not have the effect of exposing confidential information. Three

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108 *Hosking* (C.A.), *supra* note 12 at 7.

109 In fact, possible legislative reform was contemporaneously under consideration by the New Zealand Law Commission, which later in 2004 published Study Paper 15, *Intimate Covert Filming* (Wellington: New Zealand Law Commission, 2004), online: <www.lawcom.govt.nz/UploadFiles/Publications/Publication_105_265_SP15.pdf>. The Commission found that existing law did not respond adequately to the problem of covert filming, although it did acknowledge the advance in tort law represented by *Hosking*. Ultimately, and with respect to the recording and broadcasting of images "of a very intimate nature" (at 30), the Commission's principal recommendation was the creation of a criminal offence with penalties of three years' imprisonment for making a recording and one year's imprisonment for possessing it.

110 *Hosking* (H.C.), *supra* note 12 at para. 183: "[T]he law in New Zealand does not recognise a tortious cause of action in privacy based on the publication of photographs taken in a public place."

111 Those "private facts" were said to include the children's youth, and the surreptitious "stalking" of the children by a professional photographer hired by a magazine with a view to commercial exploitation.

of the justices, however, recognized the existence in New Zealand of an independent tort of breach of privacy.[112]

The lead judgment was delivered by Gault J. (as he then was) and was joined by Blanchard J. in recognizing a common law cause of action protecting privacy. In leaving its development to future courts on a case-by-case basis, he identified "two fundamental requirements for a successful claim":[113]

> 1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
> 2. Publicity given to those private facts would be considered highly offensive to an objective reasonable person.[114]

As to a justificatory basis for a protected interest in privacy, Gault J.'s contribution echoes both Baroness Hale's threshold of "reasonable expectation of privacy" and Hope L.J.'s "offence" threshold in *Campbell*. Interestingly, however, given the result in *Campbell*, Gault J. proceeded to stipulate that two additional considerations ought to be borne in mind. First, the fact that a person is a celebrity will not automatically strip him or her of a right to privacy. Rather, such an individual should recognize that his or her public position will inevitably accompany greater media scrutiny.[115] A celebrity's expectation of privacy in relation to many areas of life would, therefore, be reduced as public status increases, and as there consequently arises a legitimate public concern in the "information." This also applies to a degree to *in*voluntary public figures, although not ordinarily to the extent of those who willingly put themselves in the spotlight.[116]

Conversely, however, Gault J. also discussed "the importance of the value of the freedom of expression." Such importance, we are told, is related to the extent of legitimate public concern in the information published.[117] Courts must, Gault J. stated, draw a line between the giving of information to which the public is entitled on one hand, and "morbid and sensational prying into private lives for its own sake"[118] on the other. As to the threshold dividing these two extremes, Gault J. stated it in the terms of the *Second Restatement*:

> [C]ommon decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.[119]

These comments suggest that willing public figures will be unable to demonstrate having excluded others from the pertinent aspect of his or her life unless the breach of privacy is particularly flagrant. The comments, however, on restricting freedom of expression where the reporter is merely prying into someone's life, rather than producing information to which

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112 Those same three justices — Gault, Blanchard and Tipping JJ. — now form the majority at the newly established Supreme Court of New Zealand.

113 *Hosking* (C.A.), *supra* note 12 at para. 117.

114 *Ibid.*

115 Here he was relying on the U.S. tort of privacy, as derived from the *Second Restatement*, *supra* note 29.

116 *Hosking* (C.A.), *supra* note 12 at paras. 120-21.

117 *Ibid.* at para. 132.

118 *Second Restatement*, *supra* note 29 at 391.

119 *Hosking* (C.A.), *supra* note 12 at para. 135, citing *Second Restatement*, *ibid.*

the public is "entitled," also indicate an intention on Gault J.'s part to curb publication of such material. What Gault J. does not do is explain how these two considerations are to be reconciled. Notwithstanding his desire for a case-by-case development of the newly recognized discrete tort and the unavoidable uncertainty to which I have already referred, one might have expected some guidance on this point. On the facts of *Hosking*, there was no particularly obvious result, based upon these considerations. On one hand, the children's father was a willing celebrity, and on the evidence the same could probably have been said of their mother.[120] But it was not the parents' privacy that was at issue here, but the children's. And, as Gault J. pointed out, past New Zealand decisions had emphasized the need to "accommodate the special vulnerability of children" in the context of protection of privacy.[121] Moreover, inasmuch as the article was purported to be about Mr. Hosking's Christmas plans and how they would not include his children, it was also about *his children's* Christmas plans — in respect of which the existence of a "legitimate public interest" would appear to have been, at the very least, debatable. So understood, on these facts the precise location of a line between disseminating truly "public" information on one hand, and prying for the sake of prying on the other is not evident.[122]

The generally concurring judgment delivered by Tipping J. is notable for two contributions: a defence of privacy as a protected legal interest generally, and a defence of its protection by way of a new, discrete tort as opposed to reliance on breach of confidence. As to the former, privacy, he said, represents a "value" that embodies "the essence of the dignity and personal autonomy and wellbeing of all human beings."[123] Turning to the matter of labelling the tort, Tipping J. based his preference on the view that breach of confidence is an equitable tort based on unconscionable behaviour as opposed to a wrong. By recognizing breach of privacy as a common law wrong, we would be accounting for the harm that has been done. At the very least, he added, a discrete tort was preferable on the pragmatic basis of clarity:

> I consider it legally preferable and better for society's understanding of what the Courts are doing to achieve the appropriate substantive outcome under a self contained and stand-alone common law cause of action to be known as invasion of privacy.[124]

As to the nomenclature, Tipping J.'s argument seems sensible, and not only because a common law tort is a better conceptual fit (than an equitable breach) with a wrong.

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120 Mrs. Hosking had given interviews to several magazines about how her pregnancy had involved *in vitro* fertilization. That said, following the birth of the children, both parents declined to give interviews about them, or allow their photographs to be taken.

121 *Hosking* (C.A.), *supra* note 12 at para. 145. As to the past New Zealand decisions, see in particular *Re an Unborn Child*, [2003] 1 N.Z.L.R. 115 (H.C.), where Heath J. referred to the United Nations *Convention on the Rights of the Child*, GA Res. 25, UN GAOR, 44th Sess., Supp. No. 21, UN Doc. A/44/49 (20 November 1980) art. 16(1) of which states: "No child shall be subjected to arbitrary or unlawful interference with his or her *privacy*, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation" [emphasis added].

122 This amplifies my earlier point about the unusual characteristic common to *Douglas* and *Campbell* (inasmuch as "exclusion" posed a live factual issue) and about how, generally, the protection afforded by tort law to an interest in privacy will necessarily have a limited scope.

123 *Hosking* (C.A.), *supra* note 12 at para. 239.

124 *Ibid.* at para. 246. He went on to express a preference for "invasion" over "breach" of privacy, the former word "more aptly describ[ing] the essence of the wrong than the word 'breach', the connotations of which are less flexible."

Fundamentally, protection of an interest in privacy by way of breach of confidence is premised upon the fiction of a confidential relationship — a fiction that was expressly acknowledged in *Guardian Newspapers*[125] and by Carswell L.J. in *Campbell*.[126] It was also recognized as a fiction by Phillips M.R. in *Douglas* by his very attempt to reconcile the two branches of breach of confidence and therefore to rescue the coherence of that cause of action as a vehicle for protecting privacy. If we are to extend tort law's protective force to privacy interests, why do so by distorting an extant cause of action? This development in English law is particularly curious given that there is no obvious reason why breach of confidence ought to be the chosen cause of action. One might just as well distort the tort of defamation, for example.

At one level, very little depends on whether we call the tort "breach of confidence" or "breach of privacy." If the content of the underlying right to which legal protection is being extended remains essentially the same irrespective of its institutional positive form, the form itself is insignificant.[127] This, however, assumes that we have identified that right. Here I return to the first aspect of Tipping J.'s reasons, which sought to justify extending legal protection to privacy by associating it with right to "dignity." There is an intuitive appeal to extending legal protection on such a basis. A plaintiff might object that he or she has an interest which has been injured by a defendant's conduct in recording, for example, an intimate exchange, intended by its participants to be solely between and for themselves, and broadcasting it to non-participants or, as listeners or viewers, unintended participants. This amounts, a plaintiff might allege, to a denial of his or her intrinsic worth, and a manifestation of the defendant's contempt for his or her interests. The affront to his or her dignity is thus engendered by the defendant's antisocial, voyeuristic tendencies and commercially exploitative greed.

Intuitive appeal notwithstanding, it is inadequate, as a justificatory exercise, to stake a juridical right on an interest in "dignity." While "dignity" is the basis of much of our contemporary understanding of rights — Lorraine E. Weinrib and Ernest J. Weinrib have, for example, described "rights" as "the juridical embodiments of the dignity inherent in self-determining agency"[128] — it is rarely conceptualized with any specificity and, without elaboration or context, is as amorphous as the term "privacy" itself[129] (this distinguishes it from "exclusivity" which, as I have already observed, is given tangible meaning by the facts of *Douglas* and *Campbell*). Moreover, "dignity" is uniquely susceptible, in the societal pluralism that characterizes most Anglo-American common law jurisdictions, to arguments

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125 *Guardian Newspapers*, *supra* note 47.

126 *Campbell* (H.L.), *supra* note 10.

127 Here I am drawing from Michael Oakeshott's account of the administration of justice. See "The Rule of Law" in Michael Oakeshott, *On History and Other Essays* (Indianapolis: Liberty Fund, 1999), 129.

128 Lorraine E. Weinrib & Ernest J. Weinrib, "Constitutional Values and Private Law in Canada," in Daniel Friedmann & Daphne Barak-Erez, eds., *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) 43 at 47. The implication here is that, without privacy, we would be deprived of our dignity by being constantly observed, or listened to, as in a totalitarian state. See on this point Eric Barendt, "Privacy as a Constitutional Right and Value," in Birks, *Privacy and Loyalty*, *supra* note 40, 1 at 7.

129 This is a particular problem in issues of medical ethics, and particularly in "frontier science," in respect of which "dignity" has been employed in constructing ethical justifications for restrictive cloning laws. See Timothy Caulfield, "Human Cloning Laws, Human Dignity and the Poverty of the Policy-Making Dialogue" (2003) 4:3 BMC Medical Ethics 1.

of custom. Thus world views, religious values and cultural understandings inform and shape the meaning of "dignity," thereby adding to the uncertainty.

"Dignity" then, lacking concrete meaning, cannot be the basis of a widely shared understanding of the right that is being advanced by extending legal protection to privacy. A juridical conception of right requires more than an elucidation of tort law in terms reflective of its inherent normative idiom, as expressed in tort law's doctrines and principles that specify the terms for private interaction. It also requires that such elucidation meet the criteria of public acceptance and understanding. In this respect, the limitations of dignity as a justificatory device — in contrast with "exclusivity," for which I have claimed wide public appreciation — may be understood by considering the juridical right in a plaintiff to bodily integrity. This is something that can be injured by a defendant at his or her discretion, which injury we might understand as an infringement of the plaintiff's "dignity." As such, dignity would represent the source of a legally protected interest. If, however, we were to speak merely of the "dignity" of the plaintiff's human body, then dignity would have no legal significance, because it is not referable to a right. That is, in the context of the dignity of the human body, "dignity" must be synonymous with, derivative from or otherwise referable to the right which grants the plaintiff just possession of his or her body.[130] Dignity *qua* dignity is not an independent resource which can be stripped from the plaintiff and appropriated to the plaintiff's use. This does not mean that we *must* treat "dignity" as carrying no legal significance as a normative concept, but that we can only ascribe such significance by associating it with a device that itself carries a generally understood and legally significant meaning. That is, dignity must be understood in the light of the juridical conception of private relation.

The particular and concrete meaning of dignity, like the meaning of the underlying right, will depend on the specific context. In cases raising issues about the human body, therefore, the outcome will depend on whether the interest at stake which we are describing as "dignity" is synonymous with, derivative from or otherwise referable to the plaintiff's right in his or her own bodily integrity, and on whether the defendant interfered with that right. Conversely, if the allegation of impugned dignity arises from interference with the enjoyment of property, we must be able to associate it with a person's right to assert and maintain an interest in those external things over which he or she has asserted autonomy. A "dignity" argument might arise, for example, where a plaintiff is sought to be excluded, based upon an irrelevant consideration such as race or religion, from that entitlement. Such a restriction violates a juridical right that the plaintiff has, inasmuch as he or she is thereby unable to exercise rights in property. Dignity in that sense is simply a synonym for tort law's presupposed juridical conception of relation, which in such circumstances will apolitically evoke widely shared community norms in order to confound the advancement of immoral purposes that might injure the rights of persons in society. It is not, however, an independent "right" or a threshold to a right in the sense that we have a first order or primary right to physical integrity or property, although it can be used in a manner that is referable to rights. As such, unless persons in society agree *ex ante* upon a confined understanding of dignity — that is, a *conception* of dignity — it cannot represent a normative threshold for the invocation of tort law in respect of a privacy interest.

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[130] Here, I am agreeing with Benson, *supra* note 27.

V. CONCLUSION

In making a rights-oriented inquiry, my approach runs counter to the current governing orthodoxy at the Supreme Court of Canada. Should the Court follow its Commonwealth counterparts and recognize a protected legal interest in privacy, it will almost certainly do so on the basis of the "proximity" and "policy" considerations given to novel claims, as directed in *Cooper v. Hobart*.[131] While historically these considerations have been employed to expand liability,[132] they are now more typically being cited to contract it.[133] As a result, judicial recognition in Canada of a tort of breach of privacy would seem, at least in the near future, unlikely.

My objective here has not been to implicate those considerations, but rather to elucidate a different — and, I suggest, more conceptually satisfying — method of considering privacy and its compatibility with tort law's protections over the realm of private relation. Specifically, I have illustrated, with reference to cases in which plaintiffs have alleged interference with a protected interest in privacy, that tort law provides a framework within which protection of privacy can be justified in a way that coheres to what Jules L. Coleman has called the "structure" of tort law.[134] By considering privacy from this fundamental perspective, I have also attempted to revive and enrich appreciation for the significance within that structure of the juridical conception which underpins tort law. That is, by asking whether an interest in privacy can be conceptually united with widely accepted and understood norms granting rights in property and bodily integrity, my analysis invokes and instantiates the view that tort law's "special morality"[135] embodies societal values that allow persons to co-exist in communities while maintaining their own autonomy and respecting the autonomy of others.

Ultimately, by eschewing confused and confusingly broad claims on privacy's meaning and by identifying a legally significant normative quality in "exclusivity," I have also sought to discipline both our conception of privacy and the operative scope of a new tort of breach of privacy. While this confines privacy, both in its meaning and in the range of factual scenarios that will lead to recovery for its breach, it also takes privacy seriously. Privacy — or any other protected legal interest — is best understood and most helpfully invoked not as an ideological slogan, but as a representation of an interest that can be intelligently conceptualized and whose normative proscriptions can be rationally applied to a particular and concrete set of facts. Inasmuch, then, as we accept a narrow and narrowly protected conception of privacy as a norm which entitles a person generally to withhold rights of access to and broadcast of aspects of his or her life, privacy acquires both juridical form and function.

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131 *Supra* note 1.

132 *Kamloops v. Neilsen*, *supra* note 1; and *Canadian National Railway v. Norsk Pacific Steamship*, *supra* note 3.

133 *Hercules Management v. Ernst & Young*, [1997] 2 S.C.R. 165; *Dobson v. Dobson*, [1999] 2 S.C.R. 753; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; and *Cooper v. Hobart*, *supra* note 1.

134 Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992) at 374.

135 Ernest Weinrib, "The Special Morality of Tort Law" (1989) 34 McGill L.J. 403.