Diritto comparato della privacy

Lezione 10 - Privacy in the laws of the UK

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“(I)n English law **there is no right to privacy**, and accordingly there is no right of action for breach of a person’s privacy” (Kaye (Gordon) v Robertson [1991] FSR 62 at 66 (Glidewell LJ))
Overview

• Breach of confidence
• The right to privacy (or lack thereof) in common law
• The European Convention on Human Rights (ECHR) and the Human Rights Act 1998 (HRA)
• Academic commentary: is the current level of protection sufficient?
• When is information private? (*Campbell*)
• Balancing freedom of expression and privacy (*Douglas, Beckham, Campbell*)
• ECHR v UK
The 2 branches of confidentiality

• Breach of confidence is a cause of action, a common law right, not an IP right (but remedies are very similar)

  • Why do we need it? When patents are not available/the best option, employer/employee exception, to ensure novelty

• Misuse of private information, originated from BoC, now standalone tort (PJS v News Group Newspaper [2016] UKSC 26) some – ‘kiss and tell’ VIP stories

• Trade Secrets EU Directive implemented on 9 June 2018
Three requirements in *Coco v Clark*

The plaintiff (P) designed a moped engine and sought the co-operation of the defendants (D) in the manufacture. After P had disclosed the details to D the parties fell out, and the D manufactured a moped which closely resembled the P's in design. P sought an interlocutory injunction to restrain the D from misusing confidential information that had been passed solely for the purposes of the joint venture. D denied that any confidential information had been supplied to or used by them.

Often in (employment) contracts, but sometimes not in contract, or not enforceable:

1. **Information is capable of being protected**
2. **D owes C an obligation to keep the information confidential** – *information imparted in circumstances importing an obligation of confidence*
3. **Unauthorised use** of the information [to the **detriment** of the C]
An occasional light

• In Trailfinders Ltd v Travel Counsellors Ltd [2020] EWHC 591 (IPEC), the High Court made a first judicial reference to the Trade Secrets Directive shedding some light on its interplay with the common law of confidence.

• It acknowledged that the substantive principles governing the protection of confidential information under English law, including that afforded by equitable obligations of confidence, were unaffected by the Trade Secrets Directive stating that "the Directive shines an occasional light on those principles"([9]).

• The case concerned events before the Trade Secrets Regulations or Directive applied and in further non-binding remarks (obiter dicta), the trial judge said the definition of "trade secret" in Article 2(1) of the Trade Secrets Directive is now the "best guide" to what information is confidential and what is not [29].

• In January 2021, the Court of Appeal upheld this decision but said nothing about the Trade Secrets Directive, only that it did not apply to the dispute (Travel Counsellors Ltd v Trailfinders Ltd [2021] EWCA Civ 38 [6]).
At the origins of the misuse of private information

• One of the first legal cases involving a breach of confidential information and the Royal Household was *Albert (Prince) v Strange* [1849] 1 Macnaghten & Gordon 25 (1849) 41 ER 1171

• V&A made drawings and etchings not for publication, kept under lock and key by Queen Victoria

• Unauthorised copies exhibited at private gallery collection + catalogue

• Lord Chancellor injunctioned not to publish, ordered delivery up, costs

• Set the precedent for confidentiality in relation to private material, kept under lock and key

• Cf. *HRH Prince of Wales v Associated Newspapers* [2006] EWHC 522 (Ch)
‘Kiss and tell’

• ‘(W)hen people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement’ (Barrymore v Newsgroup Newspapers Ltd and Another [1997] FSR 600, 602 per Jacobs J)

• Argyll v Argyll and Others [1967] Ch 301. The Duchess granted injunction not to publish sexually explicit polaroids.
  • Similar claims often fail e.g. Lennon v News Group Newspapers [1978] FSR 573

• **Sexual activities confidential** if unconscionable to disclose them ≠ gross sexual immorality (Stephens v Avery [1988] 1 Ch 449)

• Disclosure may be in the **public interest** (Theakston (Jamie) v MGN [2002] EWHC 137 (QB))
Close relationships

• Unmarried couples and same-sex relationships: covered, if express confidence (*Stephens v Avery*)

• The Sun outed Michael Barrymore thanks to information leaked by lover Paul Wincott

• Granted injunction for breach of ‘Trust and Confidence Agreement’ made by deed (no damages)

• Law of confidence available to people in ‘close relationships’
No right to privacy in the UK?

• ‘(I)n English law there is no right to privacy, and accordingly there is no right of action for breach of a person’s privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals’ (Kaye (Gordon) v Robertson [1991] FSR 62 at 66 (Glidewell LJ))
  • Any article which conveyed the meaning that the plaintiff had given informed consent to the interview would amount to malicious falsehood. Hospital beds out of bounds for the media

• Before the HRA, the law of equity included the protection of personal information with the remedy for breach of confidence

• Out of this doctrine and of the case law of the ECtHR, privacy’s cause of action was born

• In Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22, House of Lords confirmed for the first time that the HRA, and in particular the need to give effect to Article 8, had led to the establishment of a new cause of action that they described as "wrongful disclosure of private information" or "misuse of private information"
  • Still no general tort of invasion of privacy in E&W (Wainwright v Home Office [2003] 3 WLR 1137), but no need for a separate "invasion of privacy" tort as a right to privacy has long been recognised and protected
Beyond the breach of confidence

• The Court of Appeal has now recognised misuse of private information as a tort (*Vidal-Hall v Google Inc* [2015] EWCA Civ 311; Supreme Court refused Google permission to appeal this point)

• MoPI now covers two aspects of the right to privacy:
  • actual misuse (e.g., publication) of private information
  • Preventing intrusion into an individual's right to privacy. As Eady J said in *CTB v News Group Newspapers Ltd and Imogen Thomas* [2011] EWHC 1326 (QB): “The modern law of privacy is not concerned solely with information or 'secrets': it is also concerned importantly with intrusion”

• The correctness of the approach taken in *CTB* was confirmed by the Supreme Court in *PJS v News Group Newspapers Ltd* [2016] UKSC 26
  • *Spycatcher* [1990] 1 A.C. 109: confidentiality only applies to information to the extent that it is confidential
  • *PJS*: there may still, in appropriate cases, be a reasonable expectation of privacy in respect of information that is in the public domain to some extent.
From the European Convention on Human Rights to the Human Rights Act

• ECHR – international treaty signed by the UK in 1950, commitment to uphold fundamental rights. Affected by Brexit?

• HRA enables people to file claims in UK courts to uphold their ECHR rights
  • Conservatives: we will repeal and replace HRA (2010), we will not replace or repeal the HRA (2017); we will update the HRA to ensure a proper balance between the rights of individuals, our vital national security and effective government (2019); overhaul “nonsensical” HRA and “restore common sense” (2021)
    • Independent Human Rights Act Review launched a call for evidence in January 2021 and will deliver its Report to the Lord Chancellor by the end of October 2021
European Convention on Human Rights (ECHR)

Article 8 – Right to respect for private and family life:

‘1. Everyone has the right to respect for his **private and family life**, his **home** and his **correspondence**.

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

- Not absolute, qualified
- HRA s 3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights
ECHR, art 8: an open-ended provision

• *S and Marper v United Kingdom* [2008] ECHR 1581 — **Retention of DNA sample** of persons arrested but not convicted of an offence held to breach of Article 8.

• *The Northern Ireland Human Rights Commission's Application* [2015] NIQB 96 — NI’s **criminalisation of abortion** in the areas of significant abnormality, rape or incest are incompatible with Article 8.
Privacy in the literature

• No ‘Privacy Act’ = insufficient legal remedies (Witzleb)

• Courts’ flexibility in interpreting breach of confidence and assess breach of privacy on a case-by-case basis (Bennett)

• Moore’s 4 types of privacy:
  • **Information** p. involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records;
  • **Bodily** p. concerns the protection of people’s physical selves against invasive procedures such as drug testing;
  • P. of **communications** covers the security and privacy of mail, telephones, email and other forms of communication;
  • **Territorial** p. concerns the setting of limits on intrusion into the domestic environment such as the workplace or public sphere; to control the channels through which one’s image is distributed


• Colin J Bennett, *The privacy advocates: Resisting the spread of surveillance* (MIT Press 2010)

Campbell (Naomi) v Mirror Group Newspapers
[2004] 2 AC 457 (HL)

• Daily Mirror published stolen photographs of Naomi Cambell arriving and leaving Narcotics Anonymous to show she lied

• **Rehabilitative treatment** is private information amounting to duty of confidence

• **Privacy is essential** to rehabilitation

• Privacy and **freedom of expression** must be balanced

• **VIPs’ privacy is curtailed** but certain private information protected through confidentiality and privacy
Is the information private?
The threshold test

‘[T]he touchstone of private life is whether in respect of the disclosed facts the person in question had a **reasonable expectation of privacy**’

(*Campbell [21]*)

- **How was the info obtained?** Surreptitiously, covertly, without consent, private place, etc.

- **What’s the harm** produced by the disclosure? E.g. chances of success of the rehabilitation decrease

- Does the **public interest in open media reporting prevail** on the privacy one is entitled to? Is the limitation **proportionate** to the need to the countervailing right?
Reasonable expectation of privacy?

Relevant factors

*Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446) ≠ highly offensive/objectionable (*Campbell*)

1. What a **reasonable person of ordinary sensibilities would feel**...
2. ...if placed in the **same situation** as the subject of disclosure (not its recipient)...
3. ...and faced with the **same publicity**

Objective question, takes account of all the circumstances of the case, including

- C’s attributes;
- Nature of the latter’s activity;
- Place where it was happening;
- Nature and purpose of the intrusion + circumstances / purposes for which the information came into the hands of the publisher.
- Consent (was its absence known or could be inferred); and
- Effect on the C

If there was a reasonable expectation of privacy, the second question is **how the balance** should be struck as between the claimant's right to privacy and the publisher's right to publish.
Defences

• Freedom of expression (ECHR, art 10)

• Other public interest (e.g. national security)
  • provisions of ECHR art.8(2) and art.10 wide enough to cover the parameters of the public interest ‘iniquity’ defence as understood in relation to claims in breach of confidence (Brake v Guy [2021] EWHC 670 (Ch) (25 March 2021))

• Public domain (test for private information)

• Protection of journalistic sources (Contempt of Court Act 1981, s 10; Richard v British Broadcasting Corporation [2017] EWHC 1291 (Ch))
'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

• If there is reasonable expectation of privacy, 2\textsuperscript{nd} question: how the balance should be struck between the C's right to privacy and the publisher's right to publish? *(Murray)*

• Freedom of expression is a public interest that often overrides the claimant’s argument for privacy

• But confidence often overrides the defendant’s argument for freedom of expression

• ... and (theoretically speaking) *ad infinitum*

• **Neither right takes automatic precedence** over the other (context-dependent)

• Case-by-case analysis
**Douglas v Hello! Ltd [2001] EMLR 563 (QB).**

- ‘(Y)ou cannot have particular regard to Article 10 without having **equally particular regard** at the very least to Article 8’ [138]
- **OK** had exclusive license to publish Douglasses’ wedding photos at Plaza Hotel
- **Hello!** Published them on the same day
- ‘**The law recognises (...) a right of personal privacy**’ [115]
  - Equity and common law must adapt to age of surveillance capitalism
  - Required by HRA, but still grounded in breach of confidence
- A wedding is a public affair + Douglasses’ lives in public domain + sold their photos = freedom of expression prevails
Beckham v Mirror Group Newspapers Ltd [2001] All ER (D) 307

• Despite the Beckhams’ best efforts, paparazzi obtained photos of interior of their new house and sold them to The Mirror

• Stopped negotiations for exclusive publication of photos for security and privacy reasons

• Interim injunction [interdict in Scots law] on condition not to publish them meanwhile

• Unwarranted intrusion of privacy: upheld

• A week after, Posh Spice virtual tour of ‘Beckingham Palace’
How are Douglas and Beckham different?
Privacy and the media

• Arts 8 and 10 particularly relevant for tabloid media
  • William Randolph Hearst: news is ‘what someone, somewhere doesn’t want you to print’
• Most common remedy – injunction
• Occasionally, damages
• The centre of gravity – protection against state intervention (negative right)
• But now also protection expanded to private actions (positive right)
• When reporting delicate story, should personal details be removed?
  • Often no, because media need context (otherwise the story is meaningless)
In his judgment, Lord Justice Warby found for Meghan in her claim for MoPI against Associated Newspapers, publishers of the Mail on Sunday (MoS) and Mail Online, over five articles in February 2019 that included extracts of a handwritten letter to her estranged father.

[76] “This was not a business letter, or one advancing a complaint to a politician about their public conduct or functions. It was a communication between family members with a single addressee. Precautions were taken to ensure that it was delivered only to him. It was, in short, a personal and private letter. The majority of what was published was about the claimant's own behaviour, her feelings of anguish about her father's behaviour and the resulting rift”

Information was intrinsically private and imparted in circumstances that gave rise to a reasonable expectation of privacy.
Right to tell one’s own story

• Mr Markle's right to tell his own life story is qualified and does not override the claimant's right to keep the contents of her letter private.

• Respect for claimant’s privacy does not significantly impinge on Mr Markle's entitlement to give his own account of events in his own life. It only restricts his right to use the contents of the unpublished letter as a means of doing so.

• Applied legal principle in McKennitt v Ash [2005] EWHC 3003 (QB) [2006] EMLR 10 [77]: “if a person wishes to reveal publicly information about aspects of his or her relations with other people, which would attract the prima facie protection of privacy rights, any such revelation should be crafted, so far as possible, to protect the other person's privacy.... It does not follow, because one can reveal one's own private life, that one can also expose confidential matters in respect of which others are entitled to protection if their consent is not forthcoming”.
Necessary and proportionate interference with FoE

- [128] “The claimant had a **reasonable expectation that the contents of the Letter would remain private**. The Mail Articles interfered with that reasonable expectation. The only tenable justification for any such interference was to **correct some inaccuracies** about the Letter contained in the People Article. On an objective review of the Articles in the light of the surrounding circumstances, the inescapable conclusion is that, save to the very limited extent I have identified, **the disclosures made were not a necessary or proportionate means of serving that purpose**. For the most part they did not serve that purpose at all. Taken as a whole the disclosures were manifestly **excessive and hence unlawful** (...) The interference with freedom of expression which those conclusions represent is a necessary and proportionate means of pursuing the legitimate aim of protecting the claimant's privacy.“

- Associated Newspapers was granted permission to appeal Warby J's decision in June 2021
Essential elements in a MoPI claim

• Under Practice Direction 53B, * para. 8.1, in a claim for MoPI, the C must specify in the particulars of claim (in a confidential schedule if necessary to preserve privacy)—

(1) the information as to which the C claims to have (or to have had) a reasonable expectation of privacy;

(2) the facts and matters upon which the C relies in support of the contention that they had (or have) such a reasonable expectation;

(3) the use (or threatened use) of the information by the D which the C claims was (or would be) a misuse; and

(4) any facts and matters upon which the C relies in support of their contention that their rights not to have the specified information used by the D in the way alleged outweighed (or outweigh) any rights of the D to use the information in that manner.

*The practice directions to the Civil Procedure Rules apply to civil litigation in the Queen's Bench Division and the Chancery Division of the High Court and to litigation in the county courts other than family proceedings. Where relevant they also apply to appeals to the Civil Division of the Court of Appeal. The power to make practice directions for the civil courts falls to the Lord Chief Justice; he nominated the Master of the Rolls to make such practice directions.
Misuse requires positive action

• For there to be a "misuse" of information, case law indicates that there must be a positive action

• In *Warren v DSG Retail Ltd [2021] EWHC 2168 (QB) (30 July 2021)* the High Court considered whether MoPI could be cited as causes of action in a claim for compensation for distress relating to a cyber-security breach

• While "misuse" of private information could include unintentional use, it still required "use", that is, a positive action. There had to be an "interference" by the defendant, which fell to be justified. The defendant's failure to provide sufficient security for the claimant's data was not sufficient to amount to misuse.
ECHR v UK

Privacy in public places UK vs. ECHR. Different accents:

• Naomi Campbell [2004] If she is in public places – it is very difficult to justify her right to privacy (UK)

• Von Hannover v Germany [2004] EMLR 379 – in her public capacity of Princess Caroline can be filmed, but when she is with friends/family – paparazzi have to respect standards of privacy.

• Murray - JK Rowling took her child to McDonalds restaurant in Edinburgh. Pictures were made and published.
  • Parents were arguing for their child right to privacy, but the court applied Campbell: no privacy in public places for celebrities
  • On appeal however the court differentiated parents rights and child’s rights. The former has been rejected, but the latter confirmed ([2008] EWCA Civ 446)
Big Brother Watch v UK (May 2021)

• Three applications were lodged after Edward Snowden, a former US National Security Agency (NSA) contractor, revealed the existence of surveillance and intelligence sharing programmes operated by the intelligence services of US and UK.

• The applicants believed that the nature of their activities meant that their electronic communications and/or communications data were likely to have been intercepted by the UK intelligence services or obtained by them from either communications service providers or foreign intelligence agencies such as the NSA.

• The case concerned complaints by journalists and human-rights organisations in regard to three different surveillance regimes: (1) the bulk interception of communications; (2) the receipt of intercept material from foreign governments and intelligence agencies; (3) the obtaining of communications data from communication service providers.
Bulk interception is OK (kinda)

• Owing to the multitude of threats States face in modern society – networks of international actors, who use the Internet for communication and who often avoided detection through the use of sophisticated technology – Court wide discretion in deciding whether bulk interception necessary to protect national security (‘margin of appreciation’)

• Operating a bulk interception regime (Regulation of Investigatory Powers Act 2000 or RIPA) does not in and of itself violate the Convention.

• However, such a regime had to be subject to “end-to-end safeguards”, meaning that

  1. At the domestic level, an assessment should be made at each stage of the process of the necessity and proportionality of the measures being taken

  2. Bulk interception should be subject to independent authorisation at the outset, when the object and scope of the operation were being defined

  3. Operation should be subject to supervision and independent ex post facto review
Flaws in the bulk interception regime

• Bulk interception had been **authorised by the Secretary of State**, and not by a body independent of the executive

• **Categories of search terms** defining the kinds of communications that would become liable for examination (‘selectors’) had **not been included in the application for a warrant**

• **Search terms linked to an individual** (that is to say specific identifiers such as an email address) had not been subject to **prior internal authorization**

• Insufficient protections for **confidential journalistic material**

• Bulk interception regime **incapable of keeping the “interference” with citizens’ private life rights to what is “necessary in a democratic society”** → art 8 violation
Criticisms - Accessing data no longer constitutes ‘a separate and further interference’ with the right to respect for private life and correspondence under Article 8(1)

- Grand Chamber considers how an interference with Art 8 takes place over what it identifies as the four stages of data processing within a bulk interception system [325]
  - initial retention
  - application of selectors
  - examination of selected content/communications data by analysts
  - subsequent data retention and use/data sharing of the ‘final product’ para

- ‘(D)egree of interference with privacy rights will increase as the process moves through the different stages’ and that the need for safeguards will be at its highest at the examination stage involving an analyst (paras 330-331).

- Departs dramatically from long-established ECtHR caselaw which provides that the operation of a bulk interception system involves not one but a series of interferences with individuals’ rights under Article 8 → accessing data acquired from a bulk interception system constitutes ‘a further separate interference’ with the rights under Article 8 ECHR (see Weber and Saravia v Germany)
Criticisms by judges of the ECtHR itself and scholars of the first instance judgment for the distinct lack of engagement by the ECtHR in general regarding how digitalised our lives have become and how this ‘sea change’ has made the power of bulk interception to look into our private lives so much greater.

Given the novel and far-reaching scope of these modern and highly sophisticated regimes, it is a cause for concern that the Grand Chamber omits this factor in its Article 8(1) assessment of the degree of interference posed by the operation of bulk interception regimes to the rights to private life (Ni Loideain 2021).
Tutto cambia perché nulla cambia?

• In 2016, safeguards needed ‘to be enhanced’ in light of the capacity of State surveillance to now acquire detailed profiles of the ‘most intimate aspects of individuals’ private lives’ (Szabó and Vissy v Hungary)

• The Grand Chamber instead concludes that adapting the ‘six minimum safeguards’ developed from its caselaw dealing with the tapping of landline phones decades ago will suffice.

• They are not even minimum standards to be met for bulk interception to be ECHR-compliant: mere best practice, principles considered by courts in a “global assessment” of the regime [360]
Requests to foreign authorities

- The Court concluded that UK law had set out clear, detailed rules governing when intelligence services had been authorised to request intercept material from foreign intelligence agencies and how, once received, the material requested should be examined, used and stored.

- Interception of Communications Commissioner (official charged with providing independent oversight of intelligence service activities) + Investigatory Powers Tribunal (judicial body set up to hear allegations from citizens that their communications had been wrongfully interfered with) = adequate supervision and effective ex post facto review of activities.

- Sufficient safeguards had been in place to protect against abuse and to ensure that UK authorities had not used requests for intercept material from foreign intelligence partners as a means of circumventing their duties under domestic law and the Convention → no art 8 violation.
Acquisition of data from communications service providers

• The court noted that the applicants in the second of the joined cases had complained that the regime for the acquisition of communications data under Chapter II of RIPA had been incompatible with their rights under Article 8 of the Convention. The Court agreed with the Chamber’s findings, which the government had not contested, that there had been a violation of Article 8 of the Convention on account of the fact that the operation of the regime had not been “in accordance with the law”.

• Regime basis in both section 22 of RIPA and the Acquisition and Disclosure of Communications Data Code of Practice. However, as a (then) Member State of the EU, EU law prevails (Digital Rights Ireland v Minister for Communications - Cases C-293/12 and C-594/12; Secretary of State for the Home Department v Watson - C-698/15)

• Domestic law incompatible with EU law because access to retained data was not limited to the purpose of combating “serious crime”; and access to retained data was not subject to prior review by a court or an independent administrative body
Equitable remedies for breach of confidence / misuse of private information

• Injunctions
• Compensatory damages
• Exemplary damages
• Account of profits
• Delivery-up
• Proportion of costs

• Usually injunction and account of profits; ‘where there is no breach of contract or other orthodox foundation for damages at common law, it seems doubtful whether there is any right to damages’ (Malone v Metropolitan Police Commissioner [1979] 1 Ch 344 (Sir Robert Megarry VC)
Further readings

• The human rights implications of Brexit, Joint Committee on Human Rights

• Test for private information applies also to children’s privacy (In the matter of an application by JR38 for Judicial Review (Northern Ireland) [2015] UKSC 42)

• Successful blockage of publication and serialisation of memoirs by Rosalind Marks, Cherie and Tony Blair’s former nanny (Blair v Associated Newspapers Plc [2000] 11 WLUK 348)

• 2013-2017 – Kate Middleton, Duchess of Cambridge – publication of topless pictures (injunction in France [not Italy and RI] + damages) Cour d’Appel de Versailles, 19 September 2017

• IPSO and OFCOM have in their codes of practice requirements for protecting privacy, particularly in delicate cases (children, harassment, hospitals, reporting of crime, people in distress, emergency etc.)
  • Very difficult to achieve, particularly for live events