THE ENGLISH LAW OF PRIVACY - AN EVOLVING HUMAN RIGHT

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The cases of *Wainwright v Home Office*[1] and *Campbell v MGN Ltd*[2] are reported in close proximity in the same volume of the English Law Reports. The contrast between the two cases could hardly be greater. *Wainwright* was a claim against the state by two citizens with no social or financial advantages. Mrs Mary Wainwright and her son Alan were humiliatingly strip-searched when visiting her other son in prison. They eventually obtained public funding to bring a claim just before the expiration of the limitation period. They had suffered their humiliation in 1997, before the coming into force of the Human Rights Act 1998, and their claim was ultimately rejected by the House of Lords in October 2003.

Naomi Campbell, by contrast, was a celebrity super-model who issued a writ against the Daily Mirror newspaper on the very same day that it published an articled headlined "Naomi: I am a drug addict". That was in 2001, after the coming into force of the Human Rights Act. Her appeal to the House of Lords succeeded (though by the narrowest of margins) in 2004. She succeeded even though the newspaper publisher was not a public authority, and it might have been thought irrelevant whether the Human Rights Act was in force or not.

I have started with these two contrasting cases because their juxtaposition in the reports is a striking illustration of just how rapidly the English law of privacy has developed under the influence of the Human Rights Act 1998. One possible conclusion is that the tort of invasion of privacy was born in English law between

[1] [2004] 2 AC 406

October 2003 and May 2004 (though its conception might perhaps be claimed by the Court of Appeal in *Douglas v Hello*[3] in December 2000, or the differently constituted Court of Appeal in *A v B Plc*[4] in March 2002).

The Human Rights Act transposed into domestic law the United Kingdom's long-standing international obligations under the European Convention on Human Rights. Article 8 of the Convention declares (subject to qualifications that I will come back to) that:

> "Everyone has the right to respect for his private and family life, his home and his correspondence".

Under the Act[5] it is unlawful for a public authority to act in a way incompatible with a Convention right, unless statute compels it to do otherwise. The victim of a breach of this duty has a remedy (which may include damages) against the public authority[6]. The expression 'public authority' is defined as including the court. Under s 3 of the Act all courts must so far as possible interpret legislation in a way that is compatible with Convention rights. There is a question whether the court is also obliged, under its negative duty not to act incompatibly with Convention rights, to develop or even remould the common law so as to remedy any perceived defects in its protection for human rights.

This issue is often described as whether the Act had not only vertical effect (between the citizen and the state) but also horizontal effect (between one citizen

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[2] [2004] 2 AC 457
[3] [2001] QB 967, paras 128-130 (Sedley LJ), discussed by Lord Hoffmann in *Wainwright* at paras 28-32
[4] [2003] QB 195, paras 4-6
[5] s 6 (this summary skates over some complexities in s.6(2))
[6] s 7

and another – though that other might be a newspaper publisher). *Wainwright* gave no comfort to the horizontalists, but *Campbell* has given a very different message.

Lord Hoffmann was the only Law Lord who delivered a full opinion in both cases. His opinion in *Wainwright* recognised personal privacy as an underlying value but firmly rejected what he called the previously unknown tort of invasion of privacy. He described it as "an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle". He also regarded the coming into force of the Human Rights Act as weakening the argument for a general tort to fill gaps in the existing law.[7]

In *Campbell*, by contrast, without casting any doubt on the general conclusion in *Wainwright*, Lord Hoffmann attached great importance to the Human Rights Act, and saw its restriction to public authorities as anomalous:[8]

> "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 ...
> The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information ... Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control information about one's private life and the right to the esteem and respect of other people. These changes have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified".

[7] Footnote 1, paras 33-34
[8] Footnote 2, paras 50-52

Lord Hoffmann's reference to trade secrets is a reminder that this area of the law is a development of the law of confidence which equity fashioned in order to protect confidential information entrusted by one person to another. There was an important step forward thirty years ago in the *Spycatcher* case[9], a saga which led (among other things) to the British Cabinet Secretary being cross-examined in the Supreme Court of New South Wales. In the English part of that complex litigation the House of Lords extended the reach of the law of confidence to include not merely the original recipient, but anyone who had notice that the information in question was confidential. Subsequent case-law has extended the notion of what is confidential so as to include what is simply private. Article 8 of the European Convention, and decisions of the Court of Human Rights at Strasbourg, have had a strong influence on these developments[10].

Before looking at some of the English and European cases I want to draw your attention to two general points about them. The first concerns the court's approach to analysing the question. The second concerns the process by which the court answers the question.

I have quoted paragraph (1) of Article 8 and I must now add the important qualifications in paragraph (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 interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,

[9] *Attorney General v Guardian Newspapers Limited* [1990] 1 AC 109
[10] There is a helpful summary in *McKennitt v Ash* [2008] QB 73, paras 8-10 (Buxton LJ)

> for the protection of health or morals, or for the protection of the rights and freedoms of others."

The rights and freedoms of others include freedom of expression, which is protected by Article 10. The textbook approach to Article 8 and other qualified Convention rights is to ask two questions. Is the right interfered with? If so, is the interference justified? If the answer to the first question is yes and to the second no, there is a breach of the right[11].

In practice, it is sometimes difficult, and it may not always seem worth the bother, to separate out the two questions. For instance in *Campbell* Lady Hale considered the case of a photograph of a celebrity doing nothing in particular in a public place[12]:

> "She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it."

In the last sentence Lady Hale is of course referring to interference with the Article 10 right of freedom of expression. As regards Article 8, is that non-interference or justification? I am not sure. Does it matter? I'm not sure about that either. In principle courts should go through the discipline of analysing an issue correctly. But the more arguable or peripheral the degree of interference, the less will be

[11] Footnote 2, paras 20-21; footnote 10, para 11
[12] Footnote 2, para 154

required by way of justification in order to avoid a breach. So sometimes the two questions do tend to get elided.

The second general point is the way in which the court (which means, apart from wholly exceptional cases, a judge sitting without a civil jury) is to perform the balancing exercise. Judges (*unelected* judges, as the media are happy to remind us) have had the task of human rights adjudication put on them by Parliament. We must adjudicate, and we must give reasons. Where the issue concerns social and cultural values (rather than, for instance, fair trial) judges can bring to the task no specialised qualifications: only an open mind, a respect for both privacy and free speech, and a willingness to listen to both sides. At present, as the law develops, the favoured approach is for the judge to enquire carefully into the facts, and to make a decision based on evaluation of the particular facts.

This approach was set out by Lord Steyn in *Re* S[13] in four propositions:

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

The second and third of these steps are sometimes referred to as parallel analysis – analysis, that is, by reference to the two competing interests of privacy and free speech.

[13] *Re S (A Child)(Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17; see also *Re W* [2006] 1 FLR 1, para 53

Re S was a case in which the trial judge was asked in the interests of a five year old boy to ban normal reporting of the trial of his mother for the murder of his nine year old brother. The judge declined to do so. This awful situation was going to be known to the boy's neighbours and schoolfellows in any event, and he would need special care and support regardless of any media ban. Against that there is a strong public interest in the openness of the criminal justice system. The Court of Appeal and House of Lords upheld the trial judge's decision.

English courts[14] have followed Strasbourg[15] in holding that an individual's Article 8 right to respect for his or her privacy is engaged whenever the circumstances are such as to give rise to a reasonable expectation of privacy. That is a wider and less demanding test than the formula (proposed by Gleeson CJ in *Lenah Game Meats*[16] and adopted by the Court of Appeal of New Zealand in *Hosking v Runting*[17]) of disclosure of what would be highly offensive to a reasonable person of ordinary sensibilities. The English test is indeed so wide that it may be thought to rephrase the question rather than to answer it.

So at present the English approach is highly fact-sensitive, but as the volume of case-law increases patterns of facts and practice are starting to emerge. Some of the questions to which the courts have begun to give answers are the following. What difference does it make if the claimant is a celebrity; or the minor child of a celebrity; or a celebrity role-model who has been behaving in a way that is not expected of a role-model? What difference does it make if the

[14] Footnote 2, para 21
[15] *Halford v UK* (1997) 24 EHRR 523
[16] *ABC v Lenah Game Meats* (2001) 208 CLR 199
[17] [2005] 1 NZLR 1

information is conveyed to the public not only in written or spoken words but also in photographs or videos? Does it make a difference if information is obtained by deception, or if photographs are taken covertly or in circumstances that amount to harassment? What about photographs taken in the street, or some other public place?

There is no doubt that in privacy law those who are expected to have the thickest skins are politicians (who are likely, in most democracies, to hold elected office, though in the UK we have not yet completed the reform of our upper house). In democracies those who put themselves forward for public office must expect, and accept, that they are exposed to public scrutiny and criticism, and that the criticism will often be intemperate and unfair. The leading cases include the two *Lange* cases in Australia and New Zealand,[18] *Sullivan* in the United States[19], *Lingens* at Strasbourg[20], and *Reynolds* in the UK.[21] In the important recent case of *Von Hannover v Germany*[22] (concerned with the unremitting pursuit by paparazzi of Princess Caroline of Monaco) the Strasbourg court underlined the point:

> "A fundamental distinction needs to be drawn between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "imparting information and ideas on matters of public interest" it does not do so in the latter case."

[18] *Lange v ABC* (1997) 189 CLR 520; *Lange v Atkinson* [2000] 3 NZLR 385
[19] *New York Times v Sullivan* (1964) 376 US 254
[20] *Lingens v Austria* (1986) 8 EHRR 103
[21] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127
[22] (2004) 40 EHRR 1, para 63

The Strasbourg Court[23] has even upheld publication of information about the health of the former French president, M. Mitterand, on the ground that public concern about the health of the head of state outweighed the serious breach of professional confidence.

The same sort of approach has been taken towards chief executives of multinationals who wield great economic power. The Strasbourg Court[24] upheld the right of a French magazine, Le Canard Enchainé, to publish the tax return of the chief executive of Renault (at a time when it was making many of its workers redundant) and the English court[25] has recently upheld the right of the Daily Mail to publish allegations that the former chief executive of BP had misused corporate resources to enable his live-in partner to be set up in business.

Then there is a wider and vaguer class of persons who (in Lord Woolf's words)[26] "hold a position where higher standards of conduct can be rightly expected by the public". Buxton LJ[27] commented drily on this formula –

> "that is no doubt the preserve of headmasters and clergymen, who according to taste may be joined by politicians, senior civil servants, surgeons and journalists."

No doubt there is a good reason why the Lord Justice did not add judges and lawyers to those of whom higher standards of conduct can be expected. This is where the element of hypocrisy comes in – the unattractive spectacle of claiming,

[23] *Plon (Societe) v France* 18 May 2004
[24] *Fressoz & Poire v France* (2001) 31 EHRR 28
[25] *Lord Brown of Madingley v Associated Newspapers Ltd* [2008] QB 103
[26] *A v B plc* [2003] QB 195, para 11

or pretending, to be better than you really are. One of the justifications relied on by the Daily Mirror in the *Campbell* case was that Naomi Campbell had not merely denied taking drugs, but had gone out of her way to emphasise that in this respect she was better than other models.[28] Indeed the three-two split in the House of Lords was in large part a difference of opinion as to whether the newspaper's justified publication of the fact of Ms Campbell's addiction had been flawed by over-intrusive journalistic embroidery, especially the large photograph of her leaving a meeting of Narcotics Anonymous, and whether the Court of Appeal had been right to depart from the trial judge's evaluation of that issue.

Ms Campbell is a world-famous celebrity, and it is celebrities with whom the media have a particularly close and symbiotic relationship: film stars, pop stars, models, footballers, and transient beings who (for fifteen minutes at least) are "famous for being famous". Lord Hoffmann's view[29] was that being a celebrity

> "...would not in itself justify publication. A person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters."

The double meaning of "public interest" is an important point which has often been made, for instance by Lady Hale in *Jameel*[30]

> "There must be a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information that interests the public – the most vapid tittle-tattle about the activities of footballers' wives and girl friends interests large sections of the public but no-one could claim any real public interest in our being told all about."

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[27] Footnote 8, para 65
[28] Footnote 2, para 24
[29] footnote 2 para 57

In the same case Lord Bingham put the point very briefly[31], "it has been repeatedly and rightly said that what engages the interest of the public may not be material that engages the public interest".

As the law of privacy develops its origin in the law of confidence will become a historical curiosity, and invasion of personal privacy will be recognised as a separate tort. Indeed I think we have probably reached that point already. Another necessary exercise in taxonomy is to recognise that while article 8 protects the individual both (by the law of defamation) against false publications which damage his reputation and (by the new tort) against true publications which are unjustifiable intrusions into his privacy, the Court's longstanding reluctance to impose prior restraint on free speech (known to English lawyers as the rule in *Bonnard v Perryman*[32]) ought to be confined to libel; and, arguably, should even with libel yield where necessary to "parallel analysis" to determine what proportionality requires.[33] This topic was fully discussed by the High Court of Australia in the remarkable *O'Neill* case.[34]

Muck-raking is a long-standing and salutary function of the press. But once the exposure of bad behaviour moves out of the sphere of political and public life it is no longer possible (if it ever was) to justify every or any invasion of privacy by invoking the well-known saying that "there is no confidence in iniquity".[35] The exposure of iniquity may be in the public interest, but the

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[30] *Jameel v Wall Street Journal Europe Sparl* [2007] 1 AC 359 para 147
[31] para 31
[32] [1891] 2 Ch 269
[33] Clayton & Tomlinson, the Law of Human Rights, 2nd ed. (2009) para 15.26, criticising *Greene v Associated Newspapers Ltd* [2005] QB 972
[34] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57
[35] See for instance *Lion Laboratories Ltd v Evans* [1985] QB 527

sensational disclosure of aberrant sexual conduct, especially if accompanied by prurient details and photographs, may not deserve the protection of the public interest defence.

In *A v B plc*[36] the Court of Appeal, presided over by Lord Woolf CJ, refused to ban publication of "kiss and tell" stories by two women with whom a married professional footballer had had casual sexual relations. Lord Woolf attached weight to the notion that the footballer was, whether he liked it or not, a role model for the young. When the *Campbell* case was before the Court of Appeal[37] Lord Phillips doubted this:

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

The House of Lords took much the same view.

A similar approach can be seen in the *Mosley*[38] case. Mr Max Mosley was president of the international motor-racing federation. Video film was taken (by a camera concealed in the jacket of woman E, as she was known) of activities at what the claimant called a party and the defendant called a sadomasochistic Nazi orgy. The News of the World published a sensational story illustrated by stills from the video. Woman E, who was to have been the defendant's star witness, failed to attend court to give evidence, and the public interest defence failed on the judge's crucial finding of fact that the activities did not have the theme of a Nazi

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[36] Footnote 24
[37] [2003] QB 633 para 41
[38] *Mosley v News Group Newspapers Ltd* [2008] EMLR 20

concentration camp. Mr Mosely was awarded £60,000 damages. The judge's long and dispassionate judgment attracted strong press criticism for "moral relativism" and worse, but it has not been appealed, and it seems likely to have a lasting effect, for better or worse, on this sort of investigative journalism.

However the movement is not uniformly in favour of privacy. Another famous footballer who had been playing away from home obtained an ex parte injunction but then had it discharged, partly because he appeared to be principally concerned in preserving his reputation for commercial reasons, that is so as not to lose lucrative sponsorship contracts.[39]

There is undoubtedly a great deal of anxiety in the media about the chilling effect of recent developments. Against that the decisions of the House of Lords in *Reynolds*[40] and *Jameel*[41] do clearly recognize the importance of the public interest defence, not only in privacy but also in defamation claims, where responsible journalism seeks to expose corruption, hypocrisy or incompetence in public life. But one area in which the media do have real cause for concern and complaint is in the cost of defending claims, and in particular the very high costs that may be awarded against them if their defence fails. Successive British governments have made huge cuts in the civil legal aid budget. The new policy is that most civil claimants should finance their litigation by conditional fee agreements with their lawyers. These agreements provide for success fees that may be included in costs awarded against the defendant.

[39] *Terry v Persons Unknown* [2006] EWHC 119 (QB)
[40] Footnote 21

Coming back to *Campbell*, I have to tell you (with a heavy heart) that at first instance she was awarded modest damages of £3,500; she lost them under a unanimous decision of the Court of Appeal; and had them restored, by a 3-2 majority, in the Lords. That hair's-breadth success in obtaining modest damages resulted in the newspaper having to pay her costs of over £1m, including a percentage success fee, as well as its own costs. The costs award was unsuccessfully challenged by a separate petition[42] asserting that it was so disproportionate as to infringe the newspaper's article 10 right of free expression.

I have made several references to the significance of photographs and I must try to pull those threads together. Courts in England and elsewhere have frequently commented on the power and immediacy of the impact that a photograph can have. In *Campbell* several of the Law Lords referred to the old saying that a picture is worth a thousand words. It is particularly true of photographs of the human face: the photograph is a permanent record, easily disseminated by modern technology, of how a person looked when he or she was injured or distressed, or confronted by some unexpected shock or embarrassment.

This is mainly a problem for celebrities, since nonentities are generally of little interest to the freelance photographers who service the media's needs. But if anyone (whether celebrity or nonentity) is faced with public distress or humiliation he or she is entitled to be protected from wider publicity for the incident. An example of this is the disturbed man who tried to kill himself in a shopping centre,

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[41] Footnote 30

[42] *Campbell v MGN Ltd (No 2)* [2005] 1 WLR 3394; compare *Tolstoy v United Kingdom* (1995) 20 EHRR 442.

and later had the embarrassment of video film of the incident (recorded by CCTV) being broadcast to a wide audience.[43]

Children have a particularly strong claim to protection from media intrusion. In *Re S*,[44] the sad case about the mother accused of murdering her elder son, there was no question of the younger son himself being photographed or made the subject of any publicity; the issue was whether he could be protected from publicity about his mother. More recently in *Murray*[45] the Court of Appeal reversed the striking-out of a claim for invasion of privacy made on behalf of a child suing by his parents, Doctor and Mrs Murray (the latter being much better known as J K Rowling, the author of the *Harry Potter* books). The child (then eighteen months old) had been photographed in the street in Edinburgh while being pushed in a buggy by his parents, and the photograph had been published in the press. The judge had wrongly supposed that the claim was only nominally brought by the child, and was in substance for the protection of his parents' privacy. But the Court of Appeal recognised that the parents' attitude was an important practical consideration:[46]

> "If the parents of a child courted publicity by procuring the publication of photographs of the child in order to promote their own interest, the position would or might be different."

In striking out the claim Patten J[47] had expressed doubts about the unfettered application of the Strasbourg Court's decision in *Von Hannover*:

[43] *Peck v United Kingdom* (2003) 36 EHRR 31.
[44] Footnote 13.
[45] *Murray v Express Newspapers Plc* [2009] Ch 481
[46] Para 38.

> "If the law is such as to give every adult or child a legitimate expectation of not being photographed without consent on any occasion on which they are not, so to speak, on public business then it will have created a right for most people to the protection of their image. If a simple walk down the street qualifies for protection then it is difficult to see what would not."

The Court of Appeal took a rather different view but did not wholly disagree[48]:

> "The focus should not be on the taking of a photograph in the street, but on its publication. In the absence of distress or the like caused when the photograph was taken, the mere taking of a photograph in the street may well be entirely unobjectionable. We do not therefore accept . . . that if the claimant succeeds in this action the Courts will have created an image right.
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> We recognise that there may well be circumstances in which there will be no reasonable expectation of privacy, even after *von Hannover v Germany*. However, as we see it all will, as ever, depend upon the facts of the particular case."

The judgment of the Strasbourg court in *von Hannover* refers to public figures being harassed by photographers and to photographs of Princess Caroline having been taken secretly. It is not clear whether some notion of *nec vi nec clam* influenced the decision in that case. But since the wrong complained of is the offensive intrusion into private life I see no reason why the court should not take account of the circumstances in which pictures are taken, as well as how they are published. If the circumstances of intrusion involve some other civil wrong, such as deceit or trespass, the victim may have a separate cause of action, even including the economic tort of causing loss by unlawful means, as in the curious and difficult case about the authorized and unauthorized pictures of the wedding in New York of Michael Douglas and Catherine Zeta-Jones.[49]

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[47] [2007] EMLR 22, para 65.
[48] Paras 54-55
[49] *Douglas v Hello! Ltd* reported with *OBG Ltd v Allan* [2008] 1 AC 1

That is all I have to say about our developing law of privacy as against the media. It will be obvious to you that its development is far from complete. I want to add two footnotes, one about the position in Australia and New Zealand, and the other about governmental intrusion into privacy in the United Kingdom.

I am here to talk about English law, not the law of Australia or New Zealand, and it would be most unwise to pontificate on those topics. But perhaps I may mention that English courts are familiar with the interesting and important decisions of the High Court of Australia in *ABC v Lenah Game Meats,*[50] and Court of Appeal of New Zealand in *Hosking v Runting*[51], both of which I have already mentioned briefly. The first is the case about covert filming in a Tasmanian abattoir where possums were killed and processed. The activities at the abattoir were not trade secrets but the Court recognised that broadcasting the film might damage the claimant company's commercial interests. As Gleeson CJ drily put it:[52]

> "A film of a vertically integrated process of production of pork sausages, or chicken pies, would be unlikely to be used for sales promotion."

The High Court held that an injunction restraining broadcasting should not have been granted, because of the high value to be placed on free speech on matters of public and political concern, including animal welfare. But the judgments (which discuss a number of overseas authorities and refer to the influence of the European Convention) give some encouragement to the development of an Australian law of

[50] (2001) 208 CLR 199.
[51] [2005] 1 NZLR 1
[52] Para 25.

privacy, though only for natural persons. Gummow and Hayne JJ stated at the end of their joint judgment:[53]

> "Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the Restatement, 'free from the prying eyes, ears and publications of others.'"

The Court of Appeal of New South Wales has recently declined to recognise a common law tort of invasion of privacy[54] and the Australian Law Reform Commission has recently put forward proposals for legislation in this area.[55]

The facts in *Hosking v Runting* were very similar to those of the J K Rowling case: celebrity parents had been photographed in the street with their two-year-old twins in a buggy, and the claim was brought (in substance though not in form) to protect the children. The Court of Appeal of New Zealand was unanimous in dismissing their appeal but split 3-2 on the general issue of the existence of a tort of invasion of privacy. The majority held that it did exist, favouring the "highly offensive to a reasonable person" test adopted in *Lenah Game Meats*. The judgments contain a full discussion of English, Australian and American as well as New Zealand authority.

The other footnote, as I come to a close, is concerned with official intrusions into privacy by central government, local government, and other public bodies with statutory powers. They are in many ways an even more worrying

[53] Para 132.
[54] *John Fairfax Pty Ltd v Hitchcock* [2007] NSW CA 364.

development than the risk of proper investigative journalism being chilled. But this is at present more of a political than a legal issue, at any rate as regards decided cases in England.

I began this talk by referring to *Wainwright v Home Office*, the case of the mother and son who were humiliated when visiting a prison. They eventually succeeded in a claim to the Strasbourg Court.[56] They would now have a domestic remedy under the Human Rights Act. But apart from *Wainwright*, and the case about the attempted suicide caught on CCTV installed by a local authority, all the defendants in the English cases that I mentioned have been private-sector media entities. That is quite surprising, as the Human Rights Act is primarily concerned with the duties of public authorities, and public-sector bodies, starting with the intelligence services and the police intrude more and more into our private lives. They do so not in order to publish or broadcast the information which they have gathered, but to store it for possible use for their own purposes.

There is constant surveillance of public places by CCTV cameras, and the police regularly film those who attend demonstrations, even if the demonstrations are peaceful and properly organised. Last year a peaceful demonstrator against the arms trade, with no criminal record, succeeded in the Court of Appeal in a claim for invasion of privacy after he had been photographed by the police.[57] The House of Lords rejected[58], but the Strasbourg Court has upheld[59] a complaint about the police use of stop and search powers (exercisable regardless of reasonable grounds

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[55] For Your Information: Australian Privacy Law and Practice (Report No. 108, May 2008).
[56] *Wainwright v United Kingdom* (2007) 44 EHRR 40.
[57] *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123
[58] *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307

for suspicion) against observers at an arms trade exhibition. The routine interception of telephone calls to and from overseas (where statutory safeguards for confidentiality are less demanding than for internal calls) has been held by the Strasbourg Court to infringe Article 8 rights.[60] So has the retention of DNA samples taken under statutory powers from persons who are later acquitted (or not charged).[61] A full account of those issues would take much more time than we have available. But it seems inevitable that in due course there will be a good deal more case law on this aspect of privacy also.

[59] *Gillian and Quinton v United Kingdom* (2010) 50 EHRR 1105
[60] *Liberty v United Kingdom* (2009) 48 EHRR 1.
[61] *S & Marper v United Kingdom* 4 December 2008.